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**IN THE COMPETITION**

**APPEAL TRIBUNAL**

Case No. 1188/1/1/11

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

1 May 2012

Before:

LORD CARLILE OF BERRIEW CBE QC  
MARGOT DALY  
CLARE POTTER

Sitting as a Tribunal in England and Wales

**BETWEEN:**

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

Appellants

– v –

**OFFICE OF FAIR TRADING**

Respondent

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**HEARING (DAY 3)**

## APPEARANCES

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

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

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1 Tuesday, 1 May 2012

2 (10.00 am)

3 Procedural discussion

4 **LORD CARLILE:** Mr Morris, Miss Rose, to quote the West Wing,  
5 we have a situation and it's a very unfortunate  
6 situation. We have obviously been discussing it and it  
7 might be helpful if I give you our thoughts on the  
8 situation provisionally.

9 We feel a real sense of concern for Ms Oldershaw.  
10 She has had to rush back to New Zealand, her husband is  
11 plainly very seriously ill. He's facing a major  
12 operation on Monday, as we understand it, and she has  
13 a small child. She is a key witness in this case, and  
14 this is far from a criticism, Mr Morris, you will use  
15 your usual skills in an attempt to undermine certain  
16 aspects of her credibility, and that is going to be  
17 a stressful experience for her. We as a Tribunal feel  
18 that it would be quite wrong to place her under undue  
19 pressure. She cannot be expected to give evidence until  
20 she is ready to do so, hopefully sooner rather than  
21 later, but there has to be an objective assessment made  
22 of her situation and her ability to give evidence.

23 There's a practical issue about her giving evidence.  
24 She's in New Zealand. I believe New Zealand is 11 hours  
25 ahead of us. Now, if she-is to return to give evidence,

1           that's fine, we don't have a problem.  If she's to give  
2           evidence by video link, the simple part is that the  
3           documents have to be placed beside her in exactly the  
4           same form as we have them.  That can be done very easily  
5           either by courier or maybe using the cloud system which  
6           is now available, or some other electronic means, but it  
7           would not be sensible for her to give evidence without  
8           the documents in front of her in the same form as they  
9           are in front of the Tribunal and counsel.

10           There is a question of, if it's video link, when we  
11           do it, the time.  I suggested with some trepidation to  
12           my colleagues and to the Tribunal that we could, for  
13           example, sit what I will call Maxwell hours from, say,  
14           7.00 in the morning until 1.30, but I am conscious of  
15           the problems facing counsel and solicitors and we're not  
16           going to ruin people's family lives by sitting at 7.00  
17           in the morning, I wouldn't be very popular anyway, but  
18           we'll do it if necessary.

19           But it occurred to me that probably the best time to  
20           do it would be early in the morning until late  
21           lunchtime.  Evenings are extremely difficult for me, for  
22           reasons which you'll readily understand, because I have  
23           responsibilities elsewhere which arise in the afternoon  
24           and evening.

25           If she is to give evidence by video link, there is

1 a question of where. The Tribunal is not paying for it,  
2 it has no budget for this. It occurs to me that there  
3 are two possibilities, one is court 38 in the RCJ. In  
4 the Enron case, evidence was taken by video link to  
5 Singapore and it worked fine from court 38.

6 The other immediate possibility that occurs to me,  
7 and I have done this as counsel myself, is at the Bar  
8 Council's facilities in Holborn where there is a very  
9 adequate video link facility; I cross-examined  
10 Mr Jonathan Caplan QC over that video link when he was  
11 unsurprisingly gainfully employed in Hong Kong at the  
12 time, and that worked fine, and the room will hold about  
13 20 people. It is I think more in a boardroom type  
14 setting but it works very well. So that is another  
15 possibility.

16 **MR MORRIS:** We had thought of other possibilities.

17 **LORD CARLILE:** There must be loads of other possibilities.

18 **MISS ROSE:** Sir, can I first perhaps update everybody as to  
19 what the current situation is. We have a written  
20 communication from a doctor at the hospital which  
21 I think we ought to hand up. We were asked by the OFT  
22 to provide it and we have done so.

23 (Handed)

24 **LORD CARLILE:** So far as it takes us.

25 **MISS ROSE:** Yes, so far as it takes us.

1           As we understand it, the precise date of the  
2           operation is slightly uncertain because the surgeon in  
3           question has to fly in from America to do the  
4           operation --

5           **LORD CARLILE:** No wonder it's so expensive.

6           **MISS ROSE:** -- in New Zealand. Yes, it's obviously a very  
7           different situation from London. I understand he is  
8           a New Zealand surgeon but that he practises partly in  
9           the United States as well as in New Zealand. So that's  
10          the situation.

11          So far as the timing of her evidence is concerned,  
12          of course, everything depends on what happens next  
13          Monday. If all goes well, Ms Oldershaw's current  
14          position is that she considers that she would be able  
15          and willing to give evidence between the 16th and 18th  
16          of this month, which had been the dates that originally  
17          had been set aside for Mr Scouler, so that was the basis  
18          for swapping them round. Of course we can't say  
19          100 per cent until the operation is completed, but if  
20          all goes well, that seems to us to be the most efficient  
21          way forward.

22          **LORD CARLILE:** Would her current intention be to come back?

23          **MISS ROSE:** We have been very careful in not increasing the  
24          stress on her. I saw her yesterday and I'm sure you can  
25          imagine the state that she's in with her very small

1 child and so on. We did not want to put any pressure on  
2 her. She made it clear that she remains willing to give  
3 evidence and that she will certainly give evidence by  
4 video link.

5 I don't think it's appropriate to explore the  
6 possibility of her coming back until after the  
7 operation --

8 **LORD CARLILE:** I agree.

9 **MISS ROSE:** -- because I would have imagined that her views  
10 on that are going to depend very much on the recovery  
11 process and I would be very uncomfortable in even asking  
12 that question.

13 **LORD CARLILE:** I think we have to assume that she's going to  
14 give evidence by video.

15 **MISS ROSE:** I think that would be safe.

16 **LORD CARLILE:** It's the only safe assumption.

17 **MISS ROSE:** We thought you probably wouldn't have to start  
18 quite as early as 7.00, that you could do 8.00 until  
19 1.30. And we wouldn't need a full lunch hour in that  
20 period, we could simply have short breaks; short breaks  
21 obviously for the shorthand writers and perhaps one  
22 slightly longer coffee break, but that would give you  
23 a reasonable period of time every day without having an  
24 insanely early start.

25 She appreciates that it would mean that she would

1           have to stay up quite late and she's prepared to do  
2           that.

3           **LORD CARLILE:** As a broad principle of how we deal with  
4           this, I'm sure my colleagues would agree that that would  
5           be a sensible way of approaching it.

6           **MISS ROSE:** We will obviously explore what is the best  
7           option on venue. Some of it depends on what technology  
8           is available because obviously we want to get the best  
9           resolution that we can. It enhances everybody's ability  
10          to see the witness.

11          **LORD CARLILE:** Yes.

12          **MISS ROSE:** The other issue that's separating us and the OFT  
13          is the question of timetabling.

14          **LORD CARLILE:** Let me tell you what we're going to do about  
15          tomorrow. Tomorrow, not at 9.00 but at 10.30, and we've  
16          asked the OFT to disseminate this information to those  
17          who are interested in confidentiality issues, we will  
18          deal with confidentiality issues at 10.30 tomorrow and  
19          any other housekeeping matters, otherwise we will  
20          adjourn tomorrow. We will not sit beyond housekeeping  
21          tomorrow.

22                 We've read the correspondence that has been passing  
23                 hither and thither. Despite some strictures, Miss Rose,  
24                 I have some sympathy for the OFT's position in this  
25                 because, as I see it, much will have been predicated on

1 Mrs Oldershaw giving evidence first. So I think it's  
2 perfectly reasonable to continue on Thursday morning.

3 **MISS ROSE:** So we will continue with Mr Scouler on Thursday?

4 **LORD CARLILE:** We've seen an indicative timetable which I  
5 think has Mr -- I've left it in the room.

6 **MR MORRIS:** Sir, we've also provided one as well.

7 **LORD CARLILE:** No, there are two timetables, one had  
8 Mr Scouler on Thursday. The OFT have provided  
9 a timetable which has Mr Reeves, Mr Ferguson, Mr Irvine,  
10 then Mr Scouler.

11 **MISS ROSE:** Yes, that timetable isn't going to work for  
12 reasons I'll explain. Can I explain why it won't work?

13 The first reason it won't work is we've checked with  
14 Mr Ferguson's solicitors and he is not available this  
15 week, so he is only available on the dates that he was  
16 originally intending to give evidence. So he can't come  
17 this week. That would mean the only witness that can be  
18 taken this week would be Mr Reeves. Now, sir, I'm sure  
19 you've had a look at his witness statement and have seen  
20 it is pretty short. It seems to me that his  
21 cross-examination is unlikely to take more than an hour  
22 or two. It always surprised me that the OFT thought it  
23 would take a day.

24 **LORD CARLILE:** I'm sure Mr Morris could string it out if he  
25 wanted to.

1                   How long is it going to take, Mr Morris?

2           **MISS ROSE:** The problem is more profound than that. The  
3           problem is what happens at the other end, because what  
4           the OFT is suggesting is, because of the delay, that  
5           Ms Oldershaw's evidence should then be taken on the 21st  
6           and 22nd, which were supposed to be days set aside for  
7           closing submissions, and then they propose that all the  
8           closing submissions should be heard between 23 and  
9           25 May.

10                   We understand the Tribunal can't sit for more than  
11           two hours on 25 May.

12           **LORD CARLILE:** Yes.

13           **MISS ROSE:** Which means there would effectively be only one  
14           day each to close plus two hours for me to reply.

15                   That is really not going to work for us. As you  
16           know, we had originally intended a longer opening where  
17           I would have developed the law in more detail. Because  
18           of your unavoidable commitment, sir, we changed plans on  
19           that and I simply indicated some of the legal issues,  
20           without going into them in any detail, on the basis that  
21           it was agreed I would have two days to close the case.

22                   Because what I need to do in closing is, first of  
23           all, to deal with the legal issues, which are not just  
24           on the substance but also some quite complicated legal  
25           questions on inferences to be drawn from admissions or

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1 from the failure of a party to call evidence, which is  
2 obviously central to the case. I will then need to take  
3 the Tribunal through each of the strands and to consider  
4 the evidential position in relation to each strand after  
5 the Tribunal has heard the evidence, and there are 15  
6 strands. So I simply can't do that in a day, and it is  
7 of course my appeal.

8 There is another objection to the proposal that the  
9 OFT makes which is that it means that my case has to be  
10 undertaken without us calling any Tesco witness until  
11 right at the end of the witnesses. It would mean  
12 calling Mr Reeves, Mr Ferguson and Mr Irvine before  
13 either of the Tesco witnesses.

14 Now, I have to say that we would consider that to be  
15 highly unsatisfactory and prejudicial to our position  
16 because it would prevent us essentially from putting  
17 forward Tesco's position which is at the heart of this  
18 appeal. Ultimately, of course, it is for the appellant  
19 to present their case on the appeal and these are my  
20 witnesses.

21 I understand what is said by the OFT, that they say  
22 they weren't expecting Mr Scouler to come next week.  
23 Sir, if I can just show you Mr Scouler's witness  
24 statement, it's in bundle 2A of the appeal bundle. It's  
25 at tab H {Magnum}.

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1           The OFT have had this document since October of last  
2           year when it was served with our notice of appeal. If  
3           you look at it, you will see that the principal topics  
4           it deals with are the Dairy Supply Group meeting and the  
5           6 October 2003 meeting with some other pretty general  
6           high level elements, so effectively those two incidents.

7           Of course, there are only two lever arch files of  
8           documents in this case and the documents that deal with  
9           those incidents are very few in number.

10          Now, what you've just proposed would mean that the  
11          OFT, who of course have a large team and they're not all  
12          here today, they have counsel back at base who are able  
13          to prepare cross-examination all day today, and then  
14          they have virtually the whole of tomorrow as well to  
15          prepare cross-examination of Mr Scouler.

16          In my submission, that really ought to be enough,  
17          given the length of time that they've had this material,  
18          given the fact that there are only two files of  
19          documents in this case and that this evidence deals with  
20          relatively limited issues. One of the things that  
21          happens at the Bar is unexpected events occur in the  
22          middle of trials and things don't happen in the order  
23          you expect, and barristers then have to inconvenience  
24          themselves, they stay up late, they get up early in the  
25          morning and they prepare their case.

1           Now, in my submission, it's not ideal but it's  
2           preferable to what the OFT are suggesting, because what  
3           the OFT are suggesting will result first of all in Tesco  
4           having to present its appeal without being able to call  
5           either of its witnesses until the very end of its appeal  
6           and, secondly, and perhaps even more importantly, will  
7           result in me having what, with respect, is an inadequate  
8           time to close my case, and also means that we're going  
9           to waste a lot of time this week because effectively --

10       **LORD CARLILE:** Forgive me for interrupting you, but is there  
11           any possibility of two extremely experienced leaders,  
12           together with extremely competent juniors, sitting down  
13           together and sorting out this timetable without the  
14           Tribunal having to adjudicate?

15       **MISS ROSE:** Sir, I wish that were possible and, as you will  
16           have seen, we made great efforts to communicate with the  
17           OFT over the weekend and yesterday. We sent them our  
18           proposal, we invited their comment on it. The next we  
19           heard was that they did not respond to --

20       **LORD CARLILE:** I was thinking of people sitting in the same  
21           room for a few minutes.

22       **MISS ROSE:** Sir, I entirely agree, but unfortunately our  
23           experience of this case in recent weeks has been that it  
24           is extremely difficult to get any constructive dialogue  
25           with the OFT --

1       **LORD CARLILE:** Mr Morris is going apoplectic.

2       **MR MORRIS:** I am.

3       **LORD CARLILE:** I think we'd better let him let off some  
4       steam for a moment.

5       **MR MORRIS:** This really is a gross misrepresentation. This  
6       really is.

7               We hear this news on Sunday at midday. We are  
8       preparing cross-examination for Lisa Oldershaw flat out.  
9       If you've read the correspondence and the OFT's  
10      response, you will see that it was (a) sympathetic and  
11      (b) constructive. We have been constructive throughout.

12             The suggestion that Mr Scouler should be called  
13      first was not -- nobody rang us up and said, "How would  
14      that work for you?" It was said, "We have made  
15      arrangements, we are going to substitute". We were not  
16      consulted on that. This is a misrepresentation. I am  
17      more than happy to sit down with Miss Rose and anybody  
18      else and try and thrash this out but I do say, and I do  
19      say this very firmly, I am not ready to cross-examine  
20      Mr Scouler and I will not be ready adequately to  
21      cross-examine him this week.

22             We submit very, very firmly that this is a wholly  
23      unnecessary measure to take. We say it's unnecessary  
24      for this reason. At the moment, as you rightly pointed  
25      out at the outset, sir, first and foremost we simply do

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1 not know the position with Ms Oldershaw. The whole  
2 basis of the proposition that Mr Scouler should be  
3 substituted is based on the assumption that she will be  
4 free to give evidence on the 16th to the 18th.

5 We had been told first of all that the operation was  
6 going to be in the week of 7 May, we don't even know  
7 what date the operation is going to be now. I would  
8 respectfully suggest that at the moment it is -- I was  
9 going to say far from certain, it is wholly unclear  
10 whether she will be available on those dates, 16 to  
11 18 May. If that is right, that it's unclear, then we  
12 are being squeezed into a timetable, for Mr Scouler,  
13 into a timetable which no one knows whether it's going  
14 to happen at all.

15 Now, we came back with what we consider to be  
16 reasonable and fair proposals. If I may point out, we  
17 were prepared for cross-examination for Ms Oldershaw and  
18 Mr Reeves this week, and then there was going to be  
19 a nine-day break and then cross-examination of three  
20 other witnesses. We have come forward with a proposal  
21 which, in any event, inconveniences us because we have  
22 offered to bring Mr Ferguson forward this week. We are  
23 told that he is not available by his solicitors. No  
24 reasons are given, and there are powers for this  
25 Tribunal to make further enquiry to find out whether it

1 is possible for him to come this week.

2 The current position is I have not prepared any  
3 cross-examination for Mr Scouler. The second point is  
4 that Mr Scouler, his witness statement runs to  
5 93 paragraphs. Yes, in terms of specific instances that  
6 he addresses there are only two, but he is involved in  
7 these events throughout, particularly in 2002, and it  
8 certainly does not follow that our cross-examination  
9 would be confined to the Tesco Dairy Supply Group  
10 meeting and the 6 October meeting in 2003.

11 We would urge upon the Tribunal that this is  
12 a situation of nobody's making, but it is a situation  
13 where the solution that should be found should be one  
14 which is first of convenience to the Tribunal and,  
15 second, one which does not work any unfairness on either  
16 of the parties. And in our submission, the proposition  
17 that Mr Scouler could be called to give evidence this  
18 week would work substantial unfairness on the Office of  
19 Fair Trading.

20 **LORD CARLILE:** What I want to happen now, please, is we're  
21 going to adjourn for half an hour. In that half hour  
22 I would like counsel to get together, and we do have  
23 keys with which we can lock you into a room if  
24 necessary, but we would like counsel to get together and  
25 discuss this. Before counsel discuss this, we need to

1 know the real reasons why Mr Ferguson says he cannot be  
2 here this week. It may be inconvenient for him, but the  
3 Tribunal has powers to make him attend this week if  
4 necessary.

5 I am sure I and my colleagues will be very  
6 disappointed if counsel cannot between them come up with  
7 a solution to this timetabling issue, particularly when  
8 you discuss it face to face.

9 **MISS ROSE:** Sir, can I point out that the attendance of  
10 Mr Ferguson this week will not solve the problem that  
11 I've identified about inadequate time for closing  
12 submissions, and neither will it solve the problem --

13 **LORD CARLILE:** I was just going to add something, Miss Rose.  
14 I was going to say that if there is inadequate time for  
15 closing submissions then we will provide additional  
16 hearing time on some occasion in the not too distant  
17 future for closing submissions. We can add days.  
18 I mean, they may not be consecutive days, and we will of  
19 course seek to meet the convenience of counsel so far as  
20 possible.

21 **MR MORRIS:** Sir, my other question was whether there was  
22 a possibility of sitting beyond but you've answered  
23 that, thank you.

24 **MISS ROSE:** Sir, I don't know what the availability of the  
25 Tribunal is in the week following, and perhaps it would

1 be helpful to know what the various parties --

2 **LORD CARLILE:** Which week are we talking about now?

3 **MISS ROSE:** 28 May. It also doesn't meet the point that, in  
4 my submission, it is unfair to Tesco to require Tesco to  
5 open its appeal with the evidence of three witnesses who  
6 are not and never have been Tesco employees. It is  
7 effectively requiring us to open our (inaudible).

8 **LORD CARLILE:** The week of 28 May, I haven't consulted my  
9 colleagues and they may well have engagements but, so  
10 far as I am concerned, although it would involve  
11 cancelling something extremely interesting, it's  
12 possible to achieve that, from my point of view. My  
13 colleagues will look at their diaries when we retire.

14 Let's have half an hour to take stock but sit again  
15 at 11 o'clock. Hopefully we will have some clearer  
16 indications. But there is time available if we need  
17 extra days. We do completely understand what you're  
18 saying about needing time for closing submissions.

19 **MR MORRIS:** We too feel that, and we're grateful for the  
20 indication that the Tribunal has given that there may be  
21 extra time.

22 **LORD CARLILE:** I understand that we have a group of students  
23 visiting from the University of Newcastle. You're all  
24 very welcome, but I'm afraid we're about to adjourn for  
25 half an hour so it may be an early trip to Starbucks or

1           wherever you prefer to buy your coffee. We will sit  
2           again at 11 o'clock and shortly thereafter Mr Morris  
3           will continue with his opening. That's Mr Morris  
4           standing up, the distinctive looking gentleman.

5           **MR MORRIS:** And distinguished.

6           **LORD CARLILE:** And distinguished, of course. Mr Morris will  
7           continue his very interesting opening statement in this  
8           case.

9                     If it's of any help, Mr Hiendl, one of the  
10           referendaires, I'm sure would give you a short briefing  
11           about the case.

12                    Right, okay, we'll adjourn for half an hour.

13           (10.28 am)

14                               (A short break)

15           (11.15 am)

16           **MISS ROSE:** I'm happy to tell you peace has broken out.

17                     Here is the proposal which both sides are content  
18           with, subject to you also being content. Can I first of  
19           all say how grateful we are to you offering us some  
20           extra days which was critical in breaking the impasse.

21                     First of all, the proposal is that after the OFT's  
22           opening we have the housekeeping matters tomorrow, we  
23           then adjourn until the 14th.

24           **LORD CARLILE:** So let me just write this down. Tomorrow  
25           housekeeping, and then we adjourn until the 14th.

1       **MISS ROSE:** Monday the 14th.

2       **LORD CARLILE:** We weren't sitting next week anyway.

3       **MISS ROSE:** No, we weren't sitting next week anyway.

4               We would like to start at 10.00 am on that day and  
5       that will be Mr Reeves. We're not sitting on the 15th,  
6       so on the 16th, Mr Ferguson.

7       **LORD CARLILE:** 10 o'clock?

8       **MR MORRIS:** Yes, please.

9       **MISS ROSE:** On the 17th, Mr Irvine.

10               We then propose to have Mrs Oldershaw commence her  
11       evidence on Friday, the 18th, she would continue on  
12       Monday, the 21st.

13       **LORD CARLILE:** I am just looking at my diary as we go along  
14       so I can just be sure there are no errors. Yes, the  
15       21st?

16       **MISS ROSE:** And the 22nd, finishing at lunchtime that day.

17               We then start Mr Scouler on the afternoon of the  
18       22nd.

19       **LORD CARLILE:** Ah, there may be a problem about the  
20       afternoon of the 22nd. I will tell you what the problem  
21       is. I am a member of the QC appointments board and  
22       there is a meeting scheduled for the afternoon of the  
23       22nd, it involves a lot of people. Let's just leave the  
24       afternoon of the 22nd.

25       **MISS ROSE:** Okay. Then he can also be heard on Wednesday,

1           the 23rd. I would then make my closing submissions on  
2           the 24th and 25th.

3       **LORD CARLILE:** Now, on the 25th, we will have to sit  
4           a little late.

5       **MISS ROSE:** Yes, is it right that you're not available on  
6           the morning of the 25th?

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

8       **MISS ROSE:** But we can sit late?

9       **LORD CARLILE:** I have a professional engagement which is  
10           fixed on the 25th, a court engagement in the morning.  
11           We sit at 9.00 at Southwark so I will be, even allowing  
12           a margin of error, my junior is a silk, so I can be here  
13           for 1.30.

14       **MISS ROSE:** Until about, what, 5 o'clock or 5.30? If we  
15           could sit until 5.30, and on the assumption that  
16           everybody had lunch -- if we did 1.30 to 5.30.

17       **LORD CARLILE:** Yes, subject to my colleagues' availability.  
18           Yes.

19       **MISS ROSE:** Mr Morris' closing submissions on 28th and 29th.

20       **LORD CARLILE:** That's fine, yes.

21       **MISS ROSE:** And my reply on the 31st, because we understand  
22           you can't sit on the Wednesday.

23       **LORD CARLILE:** Bear with me for a moment.

24           I think that in the light of our sitting on the  
25           Tuesday, I could sit on the Wednesday --

1       **MS POTTER:** I can't I'm afraid.

2       **LORD CARLILE:** Ms Potter can't, and Ms Daly needs to check.

3       **MS DALY:** The 31st is a Thursday?

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

5       **LORD CARLILE:** Shall we just check on the 30th and -- the

6             31st doesn't present problems for either of my

7             colleagues?

8       **MS DALY:** No, I have to check.

9       **MS POTTER:** The 31st I can do.

10       **LORD CARLILE:** The 31st, we couldn't start until 10.30

11            because I have an eye screening examination that

12            morning.

13       **MISS ROSE:** That would be fine. I wouldn't expect it to be

14            more than a half day.

15       **LORD CARLILE:** Shall we just check on the 31st and sort that

16            out this afternoon?

17       **MISS ROSE:** Yes.

18            The final point -- yes, we'd like a 10 o'clock start

19            on the 24th for the beginning of our closing.

20            The final point is this, can we ask that the OFT

21            should be ready to take Mr Scouler before Mrs Oldershaw

22            if necessary because --

23       **LORD CARLILE:** They're nodding.

24       **MISS ROSE:** At the moment we're proposing that she should go

25            first, starting on Friday the 18th, but we would ask

1           them to be ready to cross-examine him on that date.

2       **LORD CARLILE:** Fine, yes. Is that it on the timetable?

3       **MISS ROSE:** The other issue is the start time and the  
4           location for the video link. Can I ask that we shelve  
5           that for the moment. We would like to talk to  
6           Mrs Oldershaw about the timing that would suit her. We  
7           appreciate very much you offering 7.00 am and we will  
8           investigate with her what is the best timing. Our  
9           previous experience of her is that she does get tired,  
10          not surprisingly, late in the evening, so we will  
11          investigate and come back with a proposal, and also in  
12          relation to the venue.

13       **LORD CARLILE:** Yes. Obviously a venue near here would be an  
14          advantage.

15       **MISS ROSE:** Yes, of course.

16       **LORD CARLILE:** There's plenty of them.

17       **MISS ROSE:** There are, yes. We're simply trying to find  
18          which has the best technology in terms of the best  
19          resolution. Apparently there's a system called  
20          Telepresence which is very good and we're going to see  
21          where we can locate that.

22       **LORD CARLILE:** So the expectation should be for evidence on  
23          video link.

24       **MISS ROSE:** As I said before, we just haven't explored the  
25          idea of her coming back because of the current

1           situation. If she can come back it's preferable for  
2           everybody that she should, but we can't really press  
3           that point at the moment.

4       **LORD CARLILE:** No. Okay.

5       **MS POTTER:** The only thing I'm conscious of is Wednesday,  
6           the 23rd. Ideally I wouldn't do a 7.00 am start because  
7           I have another engagement at 8.00 am, that would be if  
8           we had to switch round. But having said that, if  
9           necessary, we can see that nearer the time.

10       **MISS ROSE:** I'm sure we can accommodate all of these issues,  
11           but that gives us at least a route map going forward.

12       **LORD CARLILE:** Just out of an abundance of caution,  
13           I presume that steps are being taken to ensure that  
14           a bundle or whatever of documents is sent to New Zealand  
15           as soon as possible.

16       **MISS ROSE:** Yes.

17       **LORD CARLILE:** In common form to the form that we will be  
18           given.

19       **MISS ROSE:** Yes.

20       **LORD CARLILE:** Thank you, I'm very grateful to both counsel.

21       **MR MORRIS:** We're grateful too, sir, to the Tribunal for its  
22           suggestion and approach.

23       **LORD CARLILE:** So we're going to go back to where we were  
24           now.

25           What's happening with those students, because if

1           they're going to come in I would rather they came in now  
2           rather than in the middle of a piece of purple prose  
3           falling from your lips, Mr Morris.

4                    Whilst we're waiting, in relation to any  
5           confidentiality issues that are raised tomorrow morning,  
6           what we had in mind was having -- obviously with both  
7           parties present -- the possibility of hearings in  
8           chambers involving serially each of those who wishes to  
9           make representations so that we can determine the  
10          issues.

11                   What I had in mind is we simply ask them to point to  
12          what they would wish to have excluded. There may be  
13          issues about finding that material.

14          **MISS ROSE:** Would those hearings include the Tesco legal  
15          team?

16          **LORD CARLILE:** Yes, they'll have to. Certainly the Tesco  
17          legal team, the confidentiality ring team, yes, of  
18          course. Hopefully we can deal with them well within the  
19          morning. Again, if leading counsel felt that they could  
20          take anybody who turns up, and I believe leading counsel  
21          may be involved with at least one party, into one of  
22          those nice closed rooms and talk to them before we sit,  
23          it might help to resolve the issues.

24          **MISS ROSE:** I have to say we don't know what the issues are.  
25          We didn't know anyone was coming tomorrow.

1       **LORD CARLILE:** Maybe Mr Morris can help with the closed room  
2               scenario, with all your distinction, seniority,  
3               distinctiveness and authority, please, Mr Morris.

4       **MR MORRIS:** And purpleness.

5       **LORD CARLILE:** Yes, all of those rolled up.

6               Opening submissions by MR MORRIS (continued)

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

8       **MR MORRIS:** Yes, thank you, sir.

9               When we left off on Friday, I was dealing with the  
10              Tesco Dairy Supply Group meeting and I had taken you to  
11              the detail of some of the notes and, in particular, the  
12              passage in the Express note at tab 14 {Magnum} about  
13              value and value lines.

14             What I would like you to do now, can I invite you to  
15             take up paragraph 33 of our skeleton argument {Magnum}.  
16             There we set out what we say the notes establish, and  
17             they establish three things. First that increases in  
18             retail prices for cheese were discussed as part of  
19             a discussion of prices for cheese; secondly, that Tesco  
20             disclosed to the array of gathered processors that it  
21             was contemplating increasing its own retail prices for  
22             cheese; and, thirdly, that Tesco also disclosed that it  
23             would increase those prices on condition that other  
24             competitor retailers also increased their cheese retail  
25             prices. This is the first of Tesco's statements of

1           conditionality.

2           Just for your note, those series of propositions are  
3           to be found perhaps in a slightly more expanded form at  
4           paragraph 117 of our defence, which is now our amended  
5           defence {Magnum}.

6           Of those three points, the first two points, namely  
7           that retail prices were discussed and that Tesco  
8           disclosed that it was contemplating increasing its own  
9           prices, we say are established by the passages which  
10          I took you to on Friday. I don't propose taking you  
11          back to those. We also say that those propositions are  
12          also established by other passages in the notes, most  
13          particularly I would point to the reference to customers  
14          having to pay. You will recall that there is reference  
15          in the Arla note at tab 13 {Magnum}, you will see in the  
16          second part of the Arla note:

17                 "Ask the customers to pay for it."

18          I'm in document bundle 1, where I will be I suspect  
19          for the rest of the morning. The three main notes, and  
20          the fourth one, are 12, 13 and 14. The middle one is  
21          Arla's note, which is the shortest note, and you will  
22          see there, halfway down the second section of that note,  
23          under "Discussion", the words:

24                 "Ask the customers to pay for it."

25          That, we say, is supported by a further note, to

---

1           which there is dispute as to the writing, but I just ask  
2           you to turn it up and note in your notebook. If you go  
3           back to the Dairy Crest note, the manuscript, on the  
4           first page {Magnum}, you will see in the section  
5           three-quarters of the way down:

6                     "Ultimately consumer ..."

7                     Then we've got whether it's "pays" or "pref" or  
8           whatever, but we say that that word, in the "Ultimately  
9           consumer", matches the "Ask the consumers to pay" on  
10          page (sic) 13 {Magnum}.

11                    We would submit that if you match the wording, we  
12          submit that the passage that is in the manuscript note  
13          which starts "Mood to see prices going up" and the  
14          "Ultimately consumer [ambiguous]" -- "pref", we say it's  
15          obviously "pays" -- those words are Mr Hirst's words  
16          because they match the notes back on the Express note on  
17          the third page which we were looking at just before the  
18          adjournment on Friday. You will see there the "mood to  
19          move" words come in there, and we submit that those  
20          words are Mr Hirst's words.

21                    Now, as to the third point, which is Tesco  
22          disclosing that any retail price made would be  
23          conditional on other competitors increasing their retail  
24          prices, we say that you can see that from two  
25          references. First, going back to the Express note,

---

1 page 3 {Magnum}, Mr Hirst near the bottom, the passage  
2 we've been through before, where he says:

3 "Very difficult to move out of line with other  
4 competitors."

5 We say that is indicating that: we can move retail  
6 forward, but the problem will be because we can't move  
7 out of line with our competitors, but it nevertheless  
8 senses there is a mood to move these prices forward.  
9 That's the first passage upon which we rely to support  
10 the proposition that the indication that was given was  
11 that: will go up if others do.

12 Then on the next page, you see Mr Scouler's -- third  
13 from the bottom, "J Scouler":

14 "At the end of the day -- "

15 I'm in the Express note now on page 4 {Magnum}, at  
16 the bottom, "J Scouler":

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

21 We say that that is also confirming the problem or  
22 the difficulty of going up, which is they'd have to  
23 watch what Asda did. So that is where we say you get  
24 the indication of the conditionality of the statement.

25 Two more points on Tesco Dairy Supply Group meeting

1 and I shall be ready to move on.

2 The first is we would ask you to note the references  
3 in -- and I now -- yes, Express note, Mr Scouler, last  
4 page {Magnum}, I would say two-thirds of the way down  
5 rather than three quarters of the way down here,  
6 probably in between:

7 "J Scouler - two routes --"

8 Last page of the Express note, two thirds of the way  
9 down, just below the "[Mr] Hirst - ... 8p on a pack  
10 ...", the next one:

11 "J Scouler - two routes; either market meltdown and  
12 farmers go out or some form of market management."

13 That is in itself mirrored in the Arla -- I think  
14 it's actually in the Dairy Crest note at --

15 **LORD CARLILE:** Manuscript?

16 **MR MORRIS:** Manuscript. On the second page {Magnum}, two  
17 thirds of the way down:

18 "Need some form of market management."

19 We would suggest that would be Mr Scouler again.

20 Then there's the unclarity of the -- it looks as  
21 though there's the word "competition" in there.

22 "Anticompetitive" possibly, "need government  
23 intervention [and] support".

24 But the proposition is that, unless the market is  
25 managed, there would be a melt down, they were

1           discussing some form of market management. In other  
2           words, the market is not going to be left to operate in  
3           its own way.

4           Then the final point to make is that each of the  
5           notes records the fact that Tesco issued a challenge to  
6           the processors, or the phrase "challenge to processors"  
7           was used.

8           Express note, page 2 {Magnum}, it comes in two  
9           places. This is Mr Hirst halfway down:

10           "Challenge to processors was that Tesco wanted to  
11           see a better return to farmers..."

12           Then further down:

13           "The challenge to processors was to put 2ppl on all  
14           milk but recognising that supermarket milk is only  
15           25 per cent of total."

16           Then at the Arla note, tab 13 {Magnum}, you have  
17           again under the heading "Tesco", and that's a very close  
18           match it seems to us, halfway down the "Tesco" section,  
19           13:

20           "Challenge to processors to return a better price to  
21           farmers."

22           Then you will also see, whilst we're there:

23           "Tesco expects processors to report [on] how they  
24           are going to achieve this."

25           Then finally in the Dairy Crest note, working my way

---

1 backwards, on the first page you'll see the word  
2 "Challenge" actually as a heading. Manuscript. First  
3 page of the Dairy Crest note, tab 12 {Magnum}:  
4 "Challenge processors to put back at least 2p"  
5 And then there's the bit looking at other sections.  
6 But the point there, and the point I conclude on, is  
7 there's the challenge that Tesco state for the  
8 processors, and now what I'm going to do is I'm going to  
9 take you to see what Dairy Crest do next in response to  
10 that challenge, and they do it right at the beginning of  
11 the very next week.  
12 13 September was a Friday, and what we say the  
13 documents will now show is that actually Dairy Crest  
14 picked up the baton, and within days they had put  
15 together a proposal.  
16 We go first to a document to which you have not yet  
17 been taken, which is an important document, document 16  
18 {Magnum}. We're now at 17 September, which is  
19 the Tuesday, I think. What we have here is a slide  
20 presentation made by Asda -- made by Dairy Crest to Asda  
21 on 17 September. And just so I don't have to go to it  
22 again, if you turn to the next tab, 17 {Magnum}, you  
23 will see a very similar document. The same presentation  
24 was made by Dairy Crest to Marks & Spencer and that's  
25 also dated the 17th.

---

1           But let's concentrate for a moment on the  
2           presentation made by Dairy Crest to Asda on  
3           17 September. On the first page, you will see that it's  
4           made to Penny Coates and Harvey Bennett, and then over  
5           the page -- so this is one of four I've got, or 1/4 --  
6           the heading "Elements Leading to Current Situation".

7           You will see:

8           "Oversupplied market.

9           "Surpluses flowed into commodities.

10          "Demand for commodities internationally weak.

11          "Prices low.

12          "Despite all signals production remains high."

13          Then we have "Options", and the first option is:

14          "Do nothing.

15          "Result.

16          "Unrest/disruption."

17          Second option:

18          "Leave market increase on liquid [that is liquid  
19          milk and we know that has already happened] as  
20          a standalone solution.

21          "Result.

22          "Only half the market is moved."

23          Third option:

24          "Move the whole market forward.

25          "An increase between 1.5 and 2 [pence per litre]

---

1 "Does not address longer term issues."

2 And there you'll see that the third option is  
3 getting up towards, moving towards the 2 pence per  
4 litre.

5 You then have a series of graphs about currency  
6 movement, wholesale milk production and the like. If  
7 you turn over {Magnum}, you'll see a graph about the  
8 cheese market, this is bulk cheddar, and you will see,  
9 and I'm assuming these are wholesale prices, you will  
10 see there's a graph showing the decline in the prices  
11 from June 2001, and the summary:

12 "Current situation.

13 "Mild [that's mild cheese] prices stable, at low  
14 level; mature prices edging down.

15 "Stocks very high."

16 Then if you go over some more pages you then get to  
17 a heading "What does 2ppl on retails mean?" The heading  
18 means what does 2ppl on retail liquid milk mean?

19 Income 2 pence per litre. Retail milk sales are  
20 only 51 per cent of total liquid intake net of wastage,  
21 therefore 1.2p. 75 per cent of direct supplies go to  
22 liquid, therefore the increase means -- 2p per litre on  
23 retail means 0.77p for the farmer.

24 "Any cash received up to 1st October will be paid as  
25 a lump sum."

---

1           Then we go to the next slide {Magnum} which is  
2           "Proposals". The first proposal is:  
3           "Move cheese prices at retail up by £200 per tonne."  
4           I obviously emphasise the word "retail", and we  
5           submit that is one of a series of references that you  
6           will see which indicate that Dairy Crest's proposal was  
7           not just for a cost price increase but it was for  
8           a retail price increase too.  
9           Then you'll see they run down butter as well,  
10          yoghurt and desert.  
11          "Ensure that competitive set versus imports does not  
12          change".  
13          Then 7:  
14          "Ask NFU/FFA in return for agreed cessation of  
15          hostilities and commitment to dialogue before action."  
16          Then we go to 17 {Magnum} which I've just told you  
17          is the same presentation made to Marks & Spencer. Then  
18          what happens -- it's two days later and I'll give you  
19          the narrative and then we'll go to the document. Two  
20          days later, we see the first appearance of the  
21          Dairy Crest briefing document. That first appeared, as  
22          far as we can see, is that Dairy Crest met with  
23          Sainsbury's on the 19th and handed them a copy of the  
24          Dairy Crest briefing document on that day. You can see  
25          that from tab 24 {Magnum}, which is the letter which is

1 on the 23rd, which is the following -- no, it's the end  
2 of the week, isn't it? Monday, the 23rd. This is  
3 a letter from David Flower of Dairy Crest to John Arnold  
4 of Sainsbury's:

5 "As discussed last week [so they had a meeting],  
6 Dairy Crest intend to lead a manufactured dairy product  
7 price increase..."

8 I think from my note this may be a document which  
9 you haven't yet seen either. Then I won't read the rest  
10 of the documents at the moment because there are similar  
11 letters, but what you get from the penultimate paragraph  
12 is:

13 "I attach a briefing document which we handed to  
14 Finn [that's Finn Cottle of Sainsbury's] on Thursday,  
15 which provides more information on our proposals."

16 So on the 19th we can see that the Dairy Crest  
17 briefing document was handed to Sainsbury's. Then on  
18 the next day, the 20th, the Friday, that document is  
19 sent to Asda and to Safeway.

20 Can we just look at Asda first at document 118.  
21 Sorry, it's the same -- it's document 18, I use it 1/18  
22 and 2/18 because of my note. I'm in the same bundle.  
23 So document 18 {Magnum}, I'm going back from 24 to 18.

24 Here you have an email from Dairy Crest, Kenton  
25 Robbins, to Penny Coates and Harvey Bennett at Asda:

1 "Dear All

2 "Please find attached, further to the meeting on  
3 Tuesday 17th September [and that's the meeting I've just  
4 shown you at effectively tab 16] with Penny, Harvey and  
5 Bill Haywood, details of the industry initiative that  
6 Dairy Crest is proposing to lead."

7 What that attachment was was the Dairy Crest  
8 briefing document -- before I take you to the document,  
9 I'm taking you to who it was sent to when.

10 You will also see, attached in the same tab -- if  
11 you go over the page {Magnum}, you will see that they  
12 attach a series -- the email attachment is on the second  
13 page, you'll see a briefing document and then you'll see  
14 four letters referred to: increase letter to Storey,  
15 Watson, Greenwood and Moore. In fact those letters,  
16 which were sent to various different people at Asda,  
17 were in the same form as the letter at tab 21 {Magnum}  
18 to which I'm now going to take you.

19 This is the form of the letter which was sent to all  
20 these people. This was also sent to Mr Moore at Asda  
21 and we say this is a very important document. Now, this  
22 is a document, from recollection, to which Ms Potter  
23 drew attention on Friday. We say that it is clear from  
24 this letter that the industry action that Dairy Crest  
25 was proposing to everyone at the same time was an

1 increase in cost and in retail prices.

2 If you go to paragraph 1 of that letter, this is  
3 a passage to which we haven't been before:

4 "As I'm sure you will now be aware Penny, Harvey and  
5 Bill Haywood had a meeting on Tuesday [that's the 17th]  
6 to discuss the proposed industry action that Dairy Crest  
7 are intending to lead as a result of the intensive  
8 action from the farmers and the industry. The current  
9 raw milk market is unsustainable as it stands. As  
10 discussed at the meeting, we are proposing an increase  
11 of £200 per metric tonne on cheese and a 10% increase on  
12 cream in cost prices [and the next words] and an  
13 equivalent increase in retails based on cash margin  
14 maintenance."

15 We say it is absolutely plain there that what this  
16 proposal is is both an increase in cost and an increase  
17 in retails, and an increase in retails based on cash  
18 margin maintenance.

19 "As a result of these proposed increases Dairy Crest  
20 will guarantee that any cost benefits will be passed  
21 back to the Farmers supplying Dairy Crest in full; this  
22 value will be shown as a market price supplement to our  
23 monthly milk price."

24 Then we have the next paragraph which I believe we  
25 did go to:

---

1            "We would ideally like the change in cost prices to  
2            be effective for all deliveries... but various [own  
3            label] cheese lines still have preprice printed labels  
4            and the time lines would need to be reviewed to reflect  
5            what's involved in having the prices removed."

6            We say of course that the reference to preprice  
7            printed labels is a reference to the stock and the delay  
8            issue.

9            "The rationale to move swiftly on all lines to have  
10           an immediate positive effect on the farming industry and  
11           we would in conjunction with this initiative like to  
12           jointly agree on a PR campaign to effectively  
13           communicate the benefits that this action will have on  
14           British farming.

15           "I attach a briefing document to this letter giving  
16           more information on our proposals."

17           And I say "our proposals" is obviously a reference  
18           back to the summary of what the proposal is in the first  
19           paragraph.

20           The Dairy Crest briefing document is also sent to  
21           Safeway and I'll come back to that in a moment.

22           We then go to the Dairy Crest briefing document and  
23           I'm slightly struggling in my notes to find which  
24           version you were taken to at the time. It may have been  
25           in 24 or 25.

1           It was 25 {Magnum}, but it appears in several  
2           places.

3           Our submission is, in addition to the points I've  
4           just made to you -- our submission is the proposal was  
5           a proposal for an increase in cost and for retail, and  
6           we also say it's apparent from the terms of the  
7           document, and we say it for the following reasons.

8           First, there is the reference to "cash margin  
9           maintenance" rather than percentage margin. However one  
10          looks at that, and however you categorise it as  
11          a recommendation, suggestion, however, it is plainly  
12          a proposal for an increase in retail price. Cash margin  
13          maintenance and percentage margin maintenance refer to  
14          a retail price.

15          Secondly, the word "Transparency" -- the "cash  
16          margin maintenance" point appears in the right-hand  
17          side, the second page of the Dairy Crest briefing  
18          document --

19       **MS DALY:** Are you in tab 24 or 25?

20       **MR MORRIS:** I'm in 25, I apologise. I'm probably going too  
21          fast. I'm working off the version that I believe  
22          Miss Rose took you to so that we're all marking up or  
23          looking at the same version. She took you through it,  
24          I wasn't proposing to read it all again, I was just  
25          trying to pick out the really significant points, we

1 say.

2 The first point we say is that it refers to "cash  
3 margin maintenance", that is on the second page under  
4 the second heading. That is the subject matter of that  
5 bullet point.

6 The second point is that the actual heading of that  
7 bullet point, "Transparency", we say is highly  
8 significant. The topic being discussed here is the  
9 visibility of the price increase proposal, and we say  
10 that the only way the increase can be visible is through  
11 a retail price increase. And you will see that the  
12 concern is that the supermarket should not be seen to be  
13 profiting or profiteering -- I put it more neutrally but  
14 it's expressed as profiteering -- by raising it more  
15 than the farmers were getting.

16 Thirdly, we say that the two references in this  
17 document to the concept of the market moving is also  
18 a reference to retail prices. If you -- those two  
19 references are to be found first at the top of the  
20 second page:

21 "If we are successful in persuading the market to  
22 move the resultant revenue gained will enable us to  
23 increase raw milk prices in total between 1.0 and  
24 1.5..."

25 Then if you go down to the heading "Timing" you will

1 see:

2 "We have promised to pay our farmers all revenue  
3 recovered from the market from the date RSPs [retail  
4 selling prices] and costs have moved."

5 So plainly, in the second of those references, the  
6 market move is a reference to a move in retail and cost,  
7 or cost and retail. We submit that, similarly, the  
8 concept of the market moving, at the top of the page, is  
9 also a reference to retail. There is no suggestion that  
10 only costs would move but an assumption that both retail  
11 and costs would move. And that concept of market  
12 moving, it comes up throughout the story, and it is our  
13 submission that that -- when they say that we're going  
14 to move or the market is going to move -- includes  
15 a reference, at least includes a reference to retail.

16 We know then that -- well, first of all, we know  
17 that this proposal was made to all retailers in the same  
18 terms at the same time. We also know that at least  
19 Tesco was aware of the fact that it had been sent to  
20 other retailers at the same time. We see in the same  
21 tab, at the beginning of 25, we see that the Dairy Crest  
22 document was, the briefing document was actually sent to  
23 Tesco in a number of places. We see it at the beginning  
24 of this tab, because that's 23 September when  
25 Mr Beaumont sends it to Mr Hirst.

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1           You will see also a reference at the beginning of  
2           that email -- I'm now at the beginning of tab 25 -- to  
3           the words "Following our conversation on Friday", Friday  
4           was 20 September, and so from this document we can see  
5           that Mr Hirst -- and as you'll recall, Mr Hirst is sort  
6           of between Ms Oldershaw and Mr Scouler in the Tesco  
7           hierarchy. There's a conversation where, at the least,  
8           it appears that he informed -- Dairy Crest informed  
9           Mr Hirst about the increase in prices, and then he sends  
10          this document on the Monday, and then he says:

11                 "I will contact you tomorrow (Tuesday) to discuss  
12                 any questions which you may have."

13                 So a further conversation envisaged the next day, on  
14                 the 24th.

15                 We also see at document 26 {Magnum} that this  
16                 document was sent to Mr Rigby and this time by  
17                 Mr Arthey. Mr Arthey is I think lower down in the  
18                 hierarchy at Dairy Crest and he is sending it to his  
19                 opposite number, Mr Rigby, who was concerned with  
20                 spreads principally, at Tesco on the 23rd. Again he  
21                 says in that covering letter, I'm at tab 26 now, he says  
22                 that:

23                 "Following our earlier conversation about the recent  
24                 moves in liquid milk, I can confirm we are committed to  
25                 passing the increases received back to farmers."

---

1           Then you see:

2           "I have attached a supporting document."

3           And that's the Dairy Crest briefing document.

4           We are now at the 23rd, which I think is the Monday.

5           What then happens is that on the next day, Tuesday,  
6           the 24th, there is an internal meeting at Dairy Crest  
7           and that is to be found at document tab 28 {Magnum},  
8           which Miss Rose took you to on Friday.

9           Now, this is a very important document in the case  
10          because this is the document where the first mention of  
11          a proposal for what we have termed "waves of increases"  
12          over a number of weeks appears.

13          We say this document too plainly refers to a retail  
14          price increase.

15          First of all, you see that from paragraph 3:

16          "Commercial directors to clear with their senior  
17          contacts [that means their senior contacts at the  
18          retailers] by no later than 4 October Dairy Crest's  
19          intention of making a public statement to the effect  
20          that farmers could expect to see retail prices for  
21          cheese increasing from mid-October onwards.

22          "NB it would be helpful if some key individual  
23          account such as Tesco, Sainsbury's, Asda, Morrison, or  
24          Waitrose could endorse such a statement."

25          If I may just make this point, you will see in

1 a moment that -- you will see the action points,  
2 particularly I think numbers 3, 4 and 5, or perhaps 2, 3  
3 and 4, being carried out in subsequent documents. So  
4 you can match certainly number 2 and number 3 to events  
5 which happened afterwards.

6 **LORD CARLILE:** This is Dairy Crest?

7 **MR MORRIS:** This is a Dairy Crest internal meeting held at  
8 4.00 pm on the afternoon of Tuesday 24th where it was  
9 agreed that:

10 "It was agreed that we should set a cheese price  
11 implementation date... of 20th..."

12 That's the start date.

13 "Each account team to persuade their respective  
14 retailers to move a section."

15 Now, there is the word "move" again. We say  
16 "retailers to move a section" of their cheese category,  
17 in the whole context of everything else you will see,  
18 means a retail move as well as a cost price move.

19 In fact I should have taken you to paragraph 2 first  
20 because here you see the wave idea.

21 "... to move a section... on the 20th [a section of  
22 the category]."

23 And we'll come in a moment to why there was waves  
24 because of the complexity of cheese, and you will see as  
25 we get there that the first wave or the first move is in

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1 fixed weight, and that's because you don't have the  
2 delay problem with labelling with fixed weight.

3 Then it says:

4 "... a section... on 20th October followed by  
5 a three week programme during which the remainder of the  
6 cheese category moves."

7 That is, we say, the first indication of this idea  
8 of it being taken in waves. In fact, if you look at  
9 that, it looks like there's four waves, and in fact when  
10 you see what happens it does turn out to be four waves  
11 because Sainsbury's moves around the 20th on the first  
12 thing, which is actually on the 22nd. And then you have  
13 broadly the waves, Monday the 4th, Monday the 11th and  
14 Monday the 18th as the plan.

15 That's the first mention of waves.

16 Then you have, as I've read out already, the  
17 contact:

18 "Please contact senior contacts.

19 "Commercial directors to clear with their senior  
20 contacts..."

21 Then item 4 is:

22 "Each account manager to present a matrix showing  
23 cheese price implementation plans effective  
24 20th October. These matrices to be presented to cheese  
25 price increase meeting number 3 held on Tuesday

1 4th October..."

2 So there was going to be a meeting, was that two  
3 weeks -- does that work out? It doesn't really, does  
4 it? Ten days. They can't both be Tuesdays, anyway. It  
5 must in fact -- anyway, that's by the by, we'll work  
6 that one out if there's any issue.

7 Then item 5 is the plan about how it's going to be  
8 invoiced, and it's not going to be invoiced at this  
9 point on individual lines but there's going to be  
10 a monthly supplement on the total tonnage summary. So  
11 at that stage the idea is not to move individual cost  
12 prices on individual cheese lines but to have  
13 a supplement.

14 You can see that these steps were communicated at  
15 least to Safeway, see how they were communicated, if you  
16 go back to document 19 {Magnum}.

17 Oddly I'm going back in time in a way because this  
18 letter is 20 September, and this is the letter that  
19 Dairy Crest sent to Safeway enclosing the Dairy Crest  
20 briefing document. As you see, it's called in the  
21 letter "dairy product price increase rationale".

22 Now, this document is a document that was produced  
23 by Safeway during the course of the investigation and on  
24 it you can see some manuscript notes which we submit  
25 must have been made by Safeway. The interest in this is

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1           that, if you look at those notes, they mirror the action  
2           points 3, 4 and 5 that appear at tab 28 {Magnum}.

3           So the first you see, "DC Position", is Dairy Crest  
4           position. The first one "4/10 statement", that is  
5           action point 3 because that is the paragraph of the  
6           action point at document 28 which refers to making  
7           a public statement by no later -- well, for it to be  
8           cleared by 4 October. Given that the commercial  
9           director was to clear with the senior contacts, that  
10          records that Dairy Crest has put that point to Safeway.

11          Then we have -- then you note, and I ask you to  
12          note, "JS lead by segment", so there you see the notion  
13          that Sainsbury's will lead. Then the next one "Matrix  
14          next week", and that mirrors paragraph 4 of document 28  
15          which refers to presenting a matrix. Then you'll see:

16                 "Proposal - invoice save

17                 "- Additional ..."

18          And I won't read out -- I don't know whether I can  
19          or I can't, but I won't read out the words after that.  
20          That reflects paragraph 5 of document 28 which talks  
21          about the invoices for individual lines remaining the  
22          same but that there would be an additional supplement  
23          which you will have seen at point 5.

24          As I said, the additional element is the fact that  
25          JS leads by segment. Sainsbury's are to go first and in

1 fact, as we shall see, that is what happens.

2 If I can take you back to document 28 finally --

3 **LORD CARLILE:** Just before we go back to document 28, there  
4 is some manuscript at the top of that document which you  
5 haven't just taken us to.

6 **MR MORRIS:** I haven't, no.

7 **LORD CARLILE:** I presume that the letters of the top are  
8 FFA, for further action or something of that kind.

9 **MR MORRIS:** Farmers for Action.

10 **LORD CARLILE:** Oh, of course it is. We've just seen that  
11 elsewhere.

12 **MR MORRIS:** Yes. I've looked at it, I didn't want to make  
13 particular submissions on it. Is the handwriting the  
14 same? What does it mean?

15 **LORD CARLILE:** It's just what it says, that's all.

16 **MR MORRIS:** Yes, it does say what it says, and it's not  
17 clear at what point in time that note was made.

18 **LORD CARLILE:** Okay, so I'll ignore that for the time being.

19 **MR MORRIS:** For the time being, yes.

20 **LORD CARLILE:** At the bottom of the page, the last entry but  
21 one, "Anti [something] for Tesco on RSP".

22 **MR MORRIS:** "Or RSP" maybe it's "on". I don't know.

23 **LORD CARLILE:** "Anti"?

24 **MR MORRIS:** It looks like "shaft".

25 **LORD CARLILE:** It looks like "shaft" to me as well. I just

1           wondered if we were to be addressed on that.

2       **MR MORRIS:** I had noticed it, marked it and didn't --

3       **LORD CARLILE:** It looks like:

4           "Antishaft for Tesco on RSP."

5       **MR MORRIS:** Yes, can I come back to you on that with such  
6           thoughts as I have. One is obviously...

7       **LORD CARLILE:** I've got a better copy here. Just going to  
8           the top of the page again, there appear to be two  
9           entries:

10           "What are Tesco doing?"

11           "Tesco lead, we follow."

12           Which I had observed earlier.

13       **MR MORRIS:** Yes, so had I.

14       **LORD CARLILE:** At the bottom, it looks like:

15           "Antishaft for Tesco over RSP", or "on RSP."

16           Anyway I had observed those and thought I should  
17           point them out. Thank you.

18           Are you going to take us back to 28?

19       **MR MORRIS:** Yes. Finally at 28, paragraph 6 {Magnum}:

20           "It was agreed that we would present to all major  
21           accounts the idea of applying a red tractor logo to all  
22           [own label] cheese. Colin Beaumont [that's of Dairy  
23           Crest] to test this proposal with Tesco during a meeting  
24           tomorrow Wednesday 25th September."

25           We rely on that passage to support our case that

1           there was a meeting between Tesco and Dairy Crest on  
2           25 September.

3           Can I then go to the next two tabs which are 29 and  
4           29A {Magnum}. Perhaps you could just have a quick look  
5           at them so you can see what they are without me going  
6           into the detail. They're two Powerpoint presentations,  
7           and these are Dairy Crest Powerpoint presentations  
8           prepared for an internal meeting on 24 September, so,  
9           I presume it's the meeting we've just been looking at.

10          You were taken to document 29A in opening but not  
11          document 29. Document 29 is a presentation by -- it is  
12          difficult to read, I notice, and we've struggled. It  
13          does actually help if you put some highlight over it, it  
14          brings out the words. I'm going to go through it very  
15          quickly anyway.

16          Document 29 is a presentation by Mr Reeves dealing  
17          very specifically with the staggering issue as opposed  
18          to waves and stages. This is what I call the staggering  
19          issue. This is the point that retailers were saying  
20          that the cost price increase for cheese shouldn't be  
21          paid until the cheese had matured, effectively. This is  
22          a presentation where Mr Reeves presents the arguments  
23          against a cost -- staggered cost price increase, that  
24          being to push back against the retailers who said there  
25          should be. You can see actually, in the second slide,

1 on the first page of 29 {Magnum}, that the actual  
2 periods are -- you see:

3 "The retailers agree a cost price increase in three  
4 months for mild, six months for medium and 15 months for  
5 extra mature."

6 So it takes these extended periods for each variety  
7 of cheese. I imagine there will be a period somewhere  
8 in between six and 15 months for ordinary mature rather  
9 than extra mature, but that is what this document is  
10 dealing with. And not surprisingly, Dairy Crest were  
11 arguing that the cheese cost price increase should be  
12 paid now, in other words at the same time as Dairy Crest  
13 would be paying the farmers the extra 2p per litre.

14 In this document, Mr Reeves identifies the risks for  
15 Dairy Crest if there was a staggered cost price  
16 increase. And, if you go over the page, you will see  
17 the first slide just says "Risk". The second slide at  
18 the bottom of the left-hand side, "Margins". And then  
19 "Summary":

20 "Price increase not justified by the market. It is  
21 desirable and may be possible to buck market for six  
22 months. Not possible or desirable for 15 months."

23 So he is concerned that you might be able to get  
24 this price through for a six month period but not for  
25 the 15 months that would account for the period for --

1           that would be the delayed payment by the retailers at  
2           least in respect of extra mature.

3           Then at 29A {Magnum} you have a presentation of  
4           a more general nature. And it is not clear on its face,  
5           although I suspect Mr Reeves will be able to clarify  
6           this, it is not clear on its face the date of this  
7           presentation. But you've seen this before, I think  
8           Miss Rose took you to the first slide. You will note  
9           "Retailer Action", and then she took you to the second  
10          one, "Need for Change", and I would just identify:

11                 "Current market is unsustainable.

12                 "Milk producers are making losses.

13                 "Processors are making losses."

14          Over the page, and I'm trying to take this  
15          relatively quickly, "Management of Change", first  
16          bullet:

17                 "Market driven change will not happen in the near  
18          future due to high stocks. DC unable to break market  
19          alone."

20          Then the third one, and this is back to the  
21          reference to the Tesco Dairy Supply Group meeting and  
22          the concept of active management:

23                 "The market must be actively managed to prevent  
24          short-term imbalances creating long-term distortions."

25          Fourth:

1 "Retailer action is needed to break vicious circle."

2 Then the next slide:

3 "Accept cost price increase £200 per tonne for 6  
4 months..."

5 You've seen the rest of that slide, and you've seen  
6 the rest of the next one, "Modus Operandi":

7 "Retailers to pay DC a cost price increase.

8 "... market supplement..."

9 "Use ... movement to generate positive PR..."

10 And then:

11 "Transparent flow through of the premium."

12 And there you've come back to the concept of  
13 transparency.

14 Then at the bottom "The Alternatives", and you will  
15 see there that this works in the staggering point in the  
16 third of the -- this middle one.

17 I would just draw your attention on the last slide  
18 to the last two -- I don't think they're bullets,  
19 I think they're dashes, aren't they? At the bottom in  
20 the middle one:

21 "Processors cannot afford the cash flow hit.

22 "Retailers must not be seen to be profiteering.

23 "Do nothing.

24 "Current scrutiny on milk prices paid to producers  
25 versus retail cheese prices will intensify."

1           So that's document 29A.

2           Document 30 {Magnum} is 25 September, so we're now,  
3 I think, the next day, and this is Dairy Crest to  
4 Sainsbury's and this is also, we submit, a very  
5 important document. This is the day after the action  
6 point meeting and this is Dairy Crest setting out its  
7 proposal to Sainsbury's. Again, we will see the clear  
8 and perhaps even clearer explanation of waves:

9           "Dear Finn,

10           "As previously discussed. [We are] seeking dairy  
11 product price increases...

12           "The current raw milk market pressures are well  
13 understood by both of us. Dairy Crest are proposing an  
14 increase of £200 per tonne on cheese and butter and  
15 a 10% increase on cream. As a result of these proposed  
16 increases Dairy Crest will guarantee that all benefits  
17 will be passed back...

18           "With regard to the UK sourced cheese category we  
19 are proposing to move some prices, effective from  
20 20 October 2002 [so the first wave]. Clearly we aim to  
21 move as swiftly as possible in order to have an  
22 immediate positive effect on the farming industry but  
23 importantly this date gives us the opportunity to manage  
24 current stock holdings and to maintain a consistent  
25 supply of correctly priced products to Sainsbury's.

1           "Therefore the proposed lines to move from the  
2           20th October 2002 are ... Cathedral City and own label  
3           medium."

4           "It is Dairy Crest's intention to make a public  
5           statement on the proposed increases and we would welcome  
6           Sainsbury's endorsement of such a statement."

7           That there matches or mirrors point 3 of document  
8           28.

9           In fact, the 20 October reference here of course  
10          matches points 1 and 2:

11          "Following the medium and Cathedral City there will  
12          be a three week programme during which the remainder of  
13          the cheese category will move. The proposal for  
14          Sainsbury's is as follows."

15          And then you'll see 27 October, 3 November, 10  
16          November. Those are all Sundays rather than Mondays.  
17          I won't run down the particular categories there but  
18          you'll see different categories of cheese lines.

19          "With regard to the financial management of these  
20          increases our recommendation is that Dairy Crest will  
21          not move individual cost prices on cheese lines but  
22          instead provide Sainsbury's on a [blank] basis a summary  
23          of all British cheese [supplied]..."

24          That of course is going back and that again mirrors  
25          pretty much verbatim point 5 of document 28. And

1           actually it looks as though very possibly, and I'm just  
2           guessing here, that the writer of this letter may well  
3           have used the action points as a sort of template.  
4           That's speculation on my part, but it certainly matches  
5           it.

6                     Then the next paragraph:

7                     "I would like to raise concern about the  
8           differentials that could occur post retail price  
9           increases, between UK sourced cheese and imports.  
10          I have no doubt that you will give this issue careful  
11          consideration."

12                    Then you'll see:

13                    "On a separate note... we believe that applying Red  
14          Tractor [will help]."

15                    That reflects item 6. That's Mr Feery, whose name  
16          will crop up again, who is the interface between  
17          Dairy Crest and Sainsbury's, writing to Finn Cottle.  
18          And actually, I'm sure you've already got it, but the  
19          two main contacts at Sainsbury's -- at Dairy Crest are  
20          Finn Cottle -- well, the two main contacts --  
21          Finn Cottle and Sarah Mackenzie are the two main people  
22          at Sainsbury's, and Feery is the Dairy Crest interface  
23          with Sainsbury's.

24                    Then we move to document 31 {Magnum}, we have not  
25          seen this document before. This is an internal document

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1           made by Glanbia, and I think this is probably one of the  
2           first or early occasions where Glanbia appear in the  
3           story.

4           We submit that this document and other Glanbia  
5           documents are extremely important for showing the full  
6           picture of what is going on at the time and, most  
7           significantly, that other processors, as well as  
8           Dairy Crest, were getting involved at this stage. This  
9           document I think is also dated 25 September. It's made  
10          by Colin Stump, who I believe was the managing director  
11          of Glanbia. And for your note, the document itself is  
12          addressed in the decision at paragraphs 5.19 to 5.209  
13          (sic) {Magnum}.

14          Before I take you to the document, let me just tell  
15          you in summary what it shows. First, it shows clearly  
16          that what is being discussed is retail cheese price  
17          increases. Secondly, it shows that an array of  
18          retailers had been contacting Glanbia to get them to  
19          participate and that that contact was happening between  
20          17 and 23 September, which is exactly the same timeframe  
21          as the Dairy Crest proposal was being circulated to the  
22          retailers. Thirdly, it records an understanding,  
23          Glanbia's understanding, of Tesco's position.

24          Now, if I just take you to the document, you will  
25          see first of all it says "Issue":

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1           "Farmers are seeking milk price increases from  
2           a move in retail cheese prices.

3           "Can this be achieved?

4           "Can we support it and manage it?"

5           So that's the first point, it's retail.

6           Then you see a heading "Developments", and you will  
7           see the first three entries indicate that  
8           Marks & Spencer, Sainsbury's and Asda, and in fact  
9           Somerfield, the first four, have been seeking Glanbia's  
10          views and you see the dates there.

11          You will be aware, of course, as I believe Miss Rose  
12          pointed out, that of course Glanbia was not a supplier  
13          to Tesco. Glanbia supplied to Sainsbury and to Asda and  
14          to M&S but it didn't supply to Tesco. The information  
15          that's recorded about Tesco there is:

16          "DFB" [that's Dairy Farmers for Britain] called to  
17          say Tesco would move if Asda moved."

18          We would suggest that, whereas in the case of the  
19          first four there's an indication of direct contact  
20          between the retailer and Glanbia, there appears not to  
21          have been direct contact between Tesco and Glanbia and,  
22          as I say, that's because it wasn't a supplier.

23          Now, the OFT submits that the "[Tesco (sic)] called  
24          to say Tesco would move if Asda moved" is the second of  
25          the statements of conditionality. That is an indication

1 received by Glanbia: Tesco would move retails if Asda  
2 moved. It is the OFT's case that that statement  
3 originated from Tesco.

4 Before leaving this document, it is also instructive  
5 to read Mr Stump's --

6 **MISS ROSE:** Can I just have some clarity on the OFT's case  
7 on this point; whom is it alleged Tesco made that  
8 statement to?

9 **MR MORRIS:** Can I come back on that? It's a matter that we  
10 have got an answer for but I would like to consider  
11 because it may be a matter that is something that we  
12 would wish to -- it's a matter for cross-examination.

13 **LORD CARLILE:** I see a post-it note approaching you as well.

14 **MISS ROSE:** I think we're entitled to know what their case  
15 is.

16 **MR MORRIS:** We say that it came from Dairy Farmers of  
17 Britain as a first contact and Dairy Farmers of Britain  
18 have received it from Tesco, either directly or  
19 indirectly.

20 **MISS ROSE:** Are they saying that Tesco spoke to Dairy  
21 Farmers of Britain or that Tesco spoke to someone else  
22 who spoke --

23 **LORD CARLILE:** I think you're asking us at this stage to  
24 draw an inference, aren't you?

25 **MR MORRIS:** Yes, and it's a matter that we will explore in

1 due course.

2 **LORD CARLILE:** It's a matter of evidence. I understand the  
3 point. We will deal with it as the evidence unfolds.

4 **MR MORRIS:** As I say, it is instructive to read Mr Stump's  
5 very careful pros and cons arguments, "Considerations",  
6 "Positive" and "Negative". On the first one:

7 "Farmers receive higher milk price: likely to  
8 continue in business."

9 Then there's a reference on the right-hand side:

10 "Our margins are depressed due to excessive industry  
11 stock position: agreeing to a 100% 'pass through' of  
12 a retail price increase locks this margin in."

13 No doubt he was thinking what was in issue was  
14 a retail price increase.

15 Left-hand side:

16 "Enables us to move towards [Dairy Crest] milk price  
17 already increased to reflect liquid movements now being  
18 orchestrated."

19 So he's talking in terms of an orchestration of the  
20 milk price movements.

21 Then the next one, "Positive PR potential" is a plus  
22 and the negative is:

23 "Orchestrating a retail increase could be seen as  
24 collaboration. Potential 'competition' law  
25 infringement?"

1           Then further down, you will see -- and you will see  
2 his concern about competition law crops up again. Of  
3 course it's his concern but it's interesting to note.

4           Then you go down three more and you'll see:

5           "If only certain retailers increase there is the  
6 issue appropriating the revenue back to the relevant  
7 milk suppliers on each location (or do we must average  
8 across the whole piece?)"

9           That's the pooling effect point, that he sees the  
10 problem: unless everybody moves, you're not going to get  
11 all the money back.

12           Then over the page, "So what are we going to do?" he  
13 says, and the fourth option is:

14           "Active role in forcing increase."

15           The positive "as above"; the negative:

16           "Locks in low margin. Probably won't cover food  
17 service/ingredient elements."

18           That, in fact, I think relates to a point Ms Potter  
19 made last week about cheese going into things other than  
20 supermarkets.

21           Ms Smith thinks it's a reference to milk going into  
22 the food service; I'm not so sure, it may be cheese.  
23 Anyway I'm probably getting ahead of myself and perhaps  
24 trying to cover a point too cleverly.

25           Then you'll see the last reference there in four:

1                   "Competition law precludes price fixing."

2                   Then we go to document 33 {Magnum}, which is another  
3                   Glanbia note and we're now approaching 27 September  
4                   which is Friday. This is a further Glanbia note made by  
5                   Colin Stump and, again, we submit that this gives a good  
6                   overview of what was going on at Sainsbury's, McLelland,  
7                   Asda and Dairy Crest. It records again that Glanbia is  
8                   in discussion with both retailers and other processors,  
9                   normally their competitors. The first paragraph is  
10                  a conversation with Sarah Mackenzie at Sainsbury's on  
11                  the 27th where he says:

12                  "I have spoken to Sarah Mackenzie ... and sought her  
13                  views regarding how long this initiative on raised  
14                  cheese prices with full remittal back to farmers is  
15                  likely to last. She gave a clear impression that JS had  
16                  not given this any thought ... I said this was a major  
17                  issue for the industry and at some stage we would need  
18                  to move back to normal market setting cheese prices in  
19                  relation to the usual influence of milk price and  
20                  butter/skim markets. I suggested that she might try and  
21                  canvass a few on the JS management team today and feed  
22                  back to me at the British cheese awards tonight. Any  
23                  response we get from her will come back into the system  
24                  from Mark Grahame."

25                  Mark Grahame is a Glanbia person.

1           Then the second paragraph records a discussion with  
2           Mr Irvine of McLelland:

3           "I had a further [so it looks as though there has  
4           been a previous one] lengthy discussion with  
5           Alistair Irvine on the same subject. He tells me that  
6           Tesco will go if one other major player moves."

7           Pausing there for a moment, that is another  
8           statement of conditionality upon which the OFT relies.  
9           We say that that is evidence that Tesco has indicated  
10          that it will go, ie up, if one other major player moves.  
11          That is obviously a disputed matter upon which Mr Irvine  
12          will give evidence. It is our submission that Mr Irvine  
13          got that information from Tesco, either directly from  
14          Tesco or indirectly but, nevertheless, we rely on it as  
15          evidence of a Tesco statement of conditionality and it's  
16          an issue which, obviously, will be explored further.

17          The next bit is -- and we rely on it to note that  
18          this statement has been made by this time, this is  
19          27 September.

20          The next bit is interesting in terms of the history  
21          because it carries on:

22          "He also told me [Mr Irvine] that DC [Dairy Crest]  
23          are seeing Asda this afternoon."

24          In a moment we will see that that's exactly what  
25          happened. That's the afternoon of the 27th.

---

1            "I have asked MG [Mark Grahame] to call Harvey  
2            Bennett [Asda] later this afternoon to elicit  
3            information on what Asda may now [be doing] on cheese  
4            pricing."

5            They are going to go to Asda to find out what Asda  
6            are going to do.

7            "MG will feed this back into the system once we have  
8            made contact."

9            Then he, Mr Irvine, tells Mr Stump the approach that  
10            McLelland are going to take. This is the third  
11            paragraph down, not the numbered "3" paragraph:

12            "Alistair Irvine believes that this will set the  
13            milk price now until next April ... We discussed  
14            whether this increase would be applicable in the food  
15            service and ingredients sectors."

16            That's the same point. Then the next sentence:

17            "His approach was to issue a letter to all customers  
18            in all sectors, indicating that there would be an  
19            increase in order to resolve the farmers' current  
20            problems and in his letter would hope that our customers  
21            would support this initiative. His letter is to go out  
22            next week [for your note, "next week" is the week  
23            commencing 30 September] and will be followed up by  
24            detailed one-to-one sessions with each customer in  
25            turn."

---

1           So that is an indication of McLelland's, I'm going  
2           to use the word "plan" because it's the one that jumps  
3           to mind but it's McLelland's plan of action. You will  
4           see in a moment, in fact over the next page at 1/34  
5           {Magnum}, if you just turn over, that is precisely what  
6           McLelland did on 1 October and that's the example to  
7           Sainsbury's.

8           They wrote a letter indicating there would be an  
9           increase:

10           "We intend to move the cost of all across the board.  
11           We will action this during October and will work on  
12           agreeing a date with you."

13           Then if you move down a bit, miss out 3 and go to 4,  
14           what Mr Stump then does is he then indicates what  
15           Glanbia are going to do:

16           "In summary I believe we should press ahead with  
17           a letter to our customer base outlining the fact that we  
18           are intending to increase cheese prices by £200 per  
19           tonne with the sole objective of passing all the benefit  
20           of that back to the farming community at 2ppl."

21           For your note, I have scribbled against that,  
22           "a letter to our customer base". If you go to 1/38  
23           {Magnum}, that is a Glanbia letter to one of its  
24           customer base, namely Sarah Mackenzie at Sainsbury's.  
25           I think we will come to that shortly but that just ties

1 in. He does carry out what he's envisaging there and he  
2 does that on 3 October.

3 Then he carries on, this is back at document 33, in  
4 the second paragraph of number 4 {Magnum}:

5 "We should also then allude to the fact that we will  
6 then follow this letter up with the individual customer  
7 concerned on a one-to-one basis, armed with their  
8 specific detail by SKU ..."

9 Somebody is going to tell me exactly what SKU --  
10 stock keeping unit. That's the individual number  
11 I think of the individual cheese line. As we'll see the  
12 case develop, there are over 200 cheese lines and by the  
13 end of the case I suspect we'll all be familiar with  
14 some of them, but that's what the reference to "specific  
15 detail" is.

16 "This letter should be checked legally as discussed  
17 already (Jim Cooney to deal with his competition law  
18 contact at Pinsent Curtis) and the letter should be  
19 shared with all members of the sales force for all  
20 sectors before issue."

21 Then at the end:

22 "I would suggest the letter goes out towards the end  
23 of next week [which would be the 4th] once individual  
24 major retailer positions become clearer, but if  
25 necessary could be delayed until my return to the

1 business on Monday 7 October."

2 So that sets out Glanbia's plan of action and we say  
3 that is very -- we're going to see a lot about McLelland  
4 and Dairy Crest but we see very clearly there, at the  
5 very same time, Glanbia's plan of action as to how  
6 they're going to take it forward.

7 Then we go back to document 32 {Magnum}, and this is  
8 a record of the meeting to which Colin Stump has just  
9 referred in the first paragraph of his notes. This is  
10 the meeting between Dairy Crest and Asda on  
11 27 September. This is a very important document and  
12 this document contains key evidence in relation to  
13 strand one, and I'll take you to that in a moment. This  
14 is the afternoon of 27 September. Here again we see  
15 Dairy Crest implementing the action plan or action  
16 points of 24 September and doing so this time with Asda.  
17 For your note, this document is addressed in the  
18 decision at paragraphs 5.169 to 5.192 {Magnum}.

19 I shall take you through the point. You've seen  
20 this document before, I want to point out one or two  
21 items. "Industry Pricing - Proposed Action Plan" at the  
22 top, "Industry Pricing", the attendees.

23 "Outline

24 "Recent retail price moves across milk of 2ppl.

25 "Multiple milk represents [I suspect "on" should be

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1 "only"] 25% of Dairy Crest sales.

2 "This translates into a blanket increase of 0.77..."

3 We've seen that, it's a recurring theme.

4 "Action proposed

5 "Move manufactured product prices forward during

6 October."

7 It is our submission that that is and includes

8 retail prices. You will, sir, note the reference to

9 "move" again.

10 "Cheese/Butters - circa £200 per metric tonne

11 proposed by 20th October.

12 "Tesco value butter now at 54p (from 45p)."

13 It is my understanding, and I stand to be corrected,

14 that that is a retail price that's being referred to.

15 "Cream-10% increase proposed by 14th October.

16 "JS [Sainsbury's] happy to lead on cream."

17 Then:

18 "Mechanics..."

19 "It is proposed that the cheese sector moves [again

20 market move, we say retails] on the 20th October."

21 Indeed that, of course, is the date that takes one

22 back to document 1/28, item 1.

23 "Catch will be needed in the 'middle ground'

24 accounts and the management of labels [and] stocks will

25 need closely monitoring."

---

1           "Management of labels [and] stocks" can only be  
2           referring to retail prices.

3           "Proposed that by early November all accounts would  
4           have followed the market moves.

5           "Asda

6           "Tesco

7           "Sainsbury

8           "Safeway

9           "Waitrose/M&S"

10          Then we have the sentence which is specifically  
11          relied on in relation to strand one:

12          "Latest position is that JS [Sainsbury's and] Tesco  
13          have agreed to move all sectors."

14          We say that that sentence is clear and direct  
15          evidence of the strand one transmission of information.  
16          It evidences two separate things. First, it evidences  
17          that Tesco has told Dairy Crest that it will move, that  
18          Tesco has agreed. That's the A to B on this strand.  
19          Secondly, of course it evidences, by the very fact of it  
20          being communicated to Asda, that that information was  
21          being passed on by Dairy Crest to Asda.

22          Then "Payments Mechanics/Thoughts":

23          "It is proposed that these increases would be  
24          retrospective, by period, this cash is then paid  
25          directly to the farming industry. This reduces the

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1 workload/admin although retails still require some  
2 work."

3 And a further reference to retail prices.

4 That's 27 September and then I think I then go to  
5 document 34 {Magnum} which actually you have already  
6 seen. We see this is the letter that -- actually you  
7 haven't seen this before, from me anyway. I'm not  
8 sure --

9 **LORD CARLILE:** We have seen it before.

10 **MR MORRIS:** No, because I took you to the -- this is  
11 McLelland to Mackenzie, not Glanbia to Mackenzie. Yes.  
12 That was my confusion -- that was my mistake I suspect.  
13 Yes, we have seen it. I did take you to it when I was  
14 looking at the Glanbia note because it indicated what  
15 Mr Irvine was going to do. Thank you.

16 Here we see the first direct contact between  
17 McLelland entering the picture, contacting Sainsbury's,  
18 writing a letter of the sort indicated. It is obvious  
19 from this letter that Mr Ferguson has already been in  
20 touch with Ms Mackenzie or at least with Sainsbury's  
21 because the initial -- the letter starts, "Following on  
22 from our discussions ..."

23 The attached price increases on cheese include  
24 proposed retail prices, as you can see if you turn over  
25 and I'll do that in a moment. If you go to the version

1 of this document which is not blanked out, I have it in  
2 pale green. I don't know if yours is still in pale  
3 green.

4 **MS DALY:** In the same tab?

5 **MR MORRIS:** Same tab, there's a version of the spreadsheet  
6 which is -- I have one with blanks in it.

7 **MISS ROSE:** I'm sorry, I only have one with blanks in it.

8 **MS POTTER:** We've only got it with blanks in it.

9 **LORD CARLILE:** Lots of blanks.

10 **MR MORRIS:** It's the unredacted version I want. I think you  
11 have that actually.

12 **MS POTTER:** No, I don't think we have.

13 **MR MORRIS:** I think you have, I think it's just the colour.  
14 Okay, all right.

15 I'm going to leave that. We'll have to see when we  
16 get to confidentiality but I will want to come back to  
17 it.

18 **MISS ROSE:** Sorry, I just want to clarify one thing. Is the  
19 OFT in fact seeking to rely on blanked-out parts of this  
20 as part of its case? I'm very troubled if that's what  
21 Mr Morris is suggesting because we have asked the OFT  
22 repeatedly to make sure that we had disclosed to us, if  
23 necessary within a confidentiality ring, any material on  
24 which the OFT was seeking to rely as part of its case,  
25 for very obvious reasons. If it's now being suggested

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1 by Mr Morris in opening that there may be material which  
2 has not been disclosed to me, my instructing solicitors  
3 or my clients, which the OFT wishes positively to rely  
4 on as part of its case, that is a matter of very grave  
5 concern at this stage of the proceedings.

6 **LORD CARLILE:** I've taken it that the summary is contained  
7 in the letter, if you look at the whole of the letter:

8 "I have attached the price increases on cheese that  
9 will result from the recent market movements on milk  
10 pricing."

11 I presume that the blanking out, the redactions,  
12 were for confidentiality reasons but simply illustrate  
13 what is said in the letter.

14 **MR MORRIS:** I actually now notice that I can make the point  
15 by looking even at the blanked-out version, so if I may.

16 The point I want to show is that the proposal  
17 included currently retail and proposed retail. If you  
18 go to the first page, if you go down halfway you will  
19 see pre-packed lines and you'll see two entries for  
20 Galloway, if you're with me. Then a whole series of  
21 entries below. Galloway is a McLelland branded, and you  
22 will see a figure for current retail. Then if you go  
23 over the page, this is the spreadsheet continuing, you  
24 will see a figure for proposed retail which matches  
25 across and I can read this out.

1           The first Galloway entry is 6.59 per kilo and the  
2           one over the page is 6.79 per kilo. What in fact has  
3           been blanked out is the costs by the looks of it.

4       **LORD CARLILE:** I see, these two pages are a spreadsheet, as  
5           it were.

6       **MR MORRIS:** Exactly. The next page is a single in landscape  
7           which I don't go to. This is the first of a series of  
8           documents that McLelland send with their matrix, their  
9           proposals.

10           So the first point I get out of that is here is  
11           a proposed by McLelland retail price increase, and the  
12           second point you get of that is you can see that the  
13           increase is 20p per kilo.

14       **LORD CARLILE:** We can follow this across with other cheeses  
15           for which we have prices on --

16       **MR MORRIS:** Yes, they're all 20p per kilo, and as of course  
17           we know by now 20p per kilo converts to £200 per tonne  
18           and also gives you the figure of 2p per litre. So, in  
19           fact, because I had got another version I had been  
20           looking at, but that's why I wanted to take you to that  
21           document.

22           Can I then take you to document 39 {Magnum}, which  
23           is Mr Ferguson. This is two days later. He's sending  
24           an email to Sarah Mackenzie and you've seen this  
25           document before:

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1            "Please find enclosed the details which will cover  
2            off the proposed £200 per tonne movement... our target  
3            date is the 20th... and we can work together to achieve  
4            this. With regard to new retail levels I have left this  
5            open for discussion and we can agree on this position as  
6            time develops. A movement of £200 per tonne on retail  
7            will protect your cash margin although % margin will  
8            [obviously] drop..."

9            A number of points. It refers to 20 October being  
10           the target date for Sainsbury's and, as you will see,  
11           that is what happens. Secondly, we would suggest the  
12           suggestion that they are going to agree on the position  
13           on retail might be regarded as somewhat unusual.  
14           Thirdly, he is suggesting cash margin increase and not  
15           percentage margin increase. He says:

16           "We can discuss this at our meeting on Friday this  
17           week."

18           It indicates that on Friday, 4 October, Mr Ferguson  
19           met with Ms Mackenzie.

20           If I can then take you back to document 38 {Magnum},  
21           which is a document you haven't seen before. Same day.  
22           This is Glanbia writing to Sarah Mackenzie with their  
23           proposal on the same day, all happening at the same  
24           time. It shows us what's going on with Glanbia at the  
25           same time. And in this document -- Glanbia just make no

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1 bones about it, this is a retail price increase  
2 proposal. 3 October, "Low Price Cheese Retails":

3 "Please find attached the new pricing details for  
4 the agreed £200 per tonne increase in retails for the  
5 low priced range.

6 "The packed and delivered costs have been increased  
7 by £200 per tonne for all three mild variants and for  
8 the two full flavour products as requested and the  
9 retail has been increased by 20p per kilogram in line  
10 with this increase.

11 "The new retail prices will be effective in store  
12 from 4th November and we will manage stocks internally  
13 to enable this change over."

14 So you've got the stock point and you've also got  
15 the cash margin maintenance.

16 I'm just checking on the position of  
17 confidentiality.

18 You'll then see a table and in the box there are  
19 some figures. You will see, in the non-boxed, you will  
20 see on the third column "New RSP", new retail price per  
21 kilogram for each of the products. Then you will see if  
22 you read it, and I'm not going to read aloud, but you  
23 will see that, as a result of there being only a cash  
24 margin increase, the new POR percentage is different  
25 from the old POR percentage.

1           I won't say any more than that in case I breach  
2           confidentiality, for the time being. But you will  
3           see... and that is showing what happens to percentage  
4           margin if you only increase by cash -- to maintain cash  
5           margin.

6           Then we go to document 41 {Magnum}, again a document  
7           to which I believe you haven't been taken before. For  
8           your note, this document is dealt with in  
9           paragraph 5.231 of the decision {Magnum}. This is  
10          a letter from Finn Cottle at Sainsbury's to  
11          David Handley at the FFA.

12          What it shows in the third paragraph:

13          "With regards to cheese we are still discussing the  
14          implementation of cost price increases with all our  
15          processors."

16          So that confirms what we've already seen in the  
17          picture, that Sainsbury's have been and are in  
18          discussion with all the processors. They've been  
19          talking to Dairy Crest, McLelland and Glanbia at least.

20          "It is intended that we will pass on an increase in  
21          our buying prices by £200 per tonne in approximately 3  
22          weeks [so passing on the increase in their buying prices  
23          means it is intended that we will crease our retail  
24          prices], for all of our standard cheese range, provided  
25          other retailers also accept this. I must stress that if

1 others do not generally support this initiative, I will  
2 have to withdraw my support for cheese, if I find I am  
3 uncompetitive in the wider market place."

4 Two points about this document. One, a plain  
5 statement of what Sainsbury's are going to do about  
6 retail prices, but, secondly, a statement by Sainsbury's  
7 of its conditionality: we will go up provided others do  
8 so.

9 And you will find an echo, and I'll put it no more  
10 than that; the words "uncompetitive in the wider market  
11 place" has an echo of the wording you saw right at the  
12 beginning in the letters in 2000, right at the beginning  
13 of my opening. Document I think 1A has -- it's not  
14 verbatim the same, but it's the same concept of  
15 finding -- yes, if you go back to 1A, this is the  
16 Waitrose letter, ensuring -- raising prices as long  
17 as -- it's worth looking, document 1A, Waitrose letter  
18 to the FFA, end of the second paragraph {Magnum}:

19 "We would accept a price as long as we find we would  
20 not be uncompetitive in the market place as a whole."

21 That's pretty close wording. It's the same concept  
22 that, essentially, everybody -- they will go up if  
23 others go up.

24 **MS DALY:** And this hand note from Ian is, we assume, Ian --

25 **MR MORRIS:** Yes.

1 "Finn, I am concerned about this wording."

2 Ian I presume is Ian Merton who is the CC at the  
3 bottom. I don't know but somebody will tell me who Ian  
4 Merton was.

5 Finn Cottle's immediate boss.

6 Just for your note, the OFT expressly relied upon  
7 this document in the decision at paragraph 5.236  
8 {Magnum}.

9 **MS POTTER:** Mr Morris, can I just check, you are saying this  
10 talks specifically about retail prices and I just  
11 wondered if you could take me to that.

12 **MR MORRIS:** The word isn't retail but I say it is what it is  
13 talking about. It's the words:

14 "Implementation of cost price increases with all our  
15 processors. It is intended that we will pass on an  
16 increase in our buying prices by £200 per tonne in... 3  
17 weeks..."

18 What I say is that the words "pass on"; we're going  
19 to have an increase, and then it's the words, "increase  
20 in our buying prices by £200 per tonne", that's the cost  
21 price increase and they're going to pass on the increase  
22 in three weeks.

23 **MS POTTER:** So pass it forward in terms of passing it on to  
24 customers, rather than passing it back.

25 **MR MORRIS:** Pass on to the customer in the retail price.

1 First of all, that's the natural -- well, that's what  
2 the words mean. Also it's the words "provided other  
3 retailers also accept this" and the words "I can't do it  
4 unless I'm competitive in the wider market place". That  
5 must be a reference to the retail market.

6 **MS POTTER:** Thank you.

7 **MR MORRIS:** Okay, so we then go --

8 **LORD CARLILE:** It's rather emphasised by the manuscript note  
9 on the left.

10 **MR MORRIS:** Indeed.

11 **LORD CARLILE:** Though I notice that wasn't referred to in  
12 the decision.

13 **MR MORRIS:** The manuscript note?

14 **LORD CARLILE:** No.

15 **MR MORRIS:** I shall have a word with those behind me.

16 The next two documents are 42 and 44, and these are  
17 letters, so now we're at 8 and 9 October, and this is  
18 again McLelland activity rather than -- I think the last  
19 activity before, it may have been McLelland as well.  
20 Anyway this is McLelland activity, and this is McLelland  
21 writing to Somerfield and to Asda in broadly similar  
22 terms.

23 If you go to 44 {Magnum}, this is McLelland to Asda.

24 You have seen this before:

25 "Dear David,

---

1 "Current situation...

2 "I am writing in light of a press release issued  
3 last week by the Scottish NFU... with regards to milk  
4 and cheese pricing.

5 "At McLelland's we have been aware of the  
6 difficulties many dairy farmers have been experiencing  
7 and the potentially grim outlook if the situation on  
8 milk pricing remained unchanged. We therefore welcome  
9 the recent market moves that have occurred in an attempt  
10 to address this."

11 And I would suggest they are the market moves in  
12 terms of liquid milk.

13 "In order for us to be able to pay 2p per litre more  
14 to farmers from October, we would need to get £200 per  
15 tonne more for our cheese. Clearly, any cheese that we  
16 do not get this rise for, we cannot pass back on milk  
17 price.

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

24 I think he gives the same letter to Mr Hibberd at  
25 Somerfield at tab 42 {Magnum}.

1           Then I believe we move forward about a week to  
2           15 October. We're now getting to the stage where the  
3           details of the proposal, of the waves, the precise  
4           details, start to be worked out between the retailers  
5           and the processors. In that week beginning 14 October  
6           we will see contact between, at the very least,  
7           Sainsbury's and Dairy Crest on the one hand and  
8           McLelland on the other, and also contact between Tesco  
9           and Dairy Crest and Tesco and McLelland.

10           So the first thing we go to is the exchanges between  
11           Dairy Crest and Sainsbury's, and we next see that there  
12           was a meeting between Dairy Crest and Sainsbury's on  
13           15 October. You get that from document 45 {Magnum}, and  
14           actually -- well, you see that from the date of the  
15           Sainsbury's briefing document, "Raw Milk Pricing",  
16           15 October, John Arnold. This is a presentation made by  
17           Dairy Crest to Sainsbury's at that meeting on  
18           15 October.

19           In fact if you go forward to document 1/48 {Magnum},  
20           which I'll come to in a little bit more detail in  
21           a moment but just ask you to note, in document 1/48, at  
22           the first sentence after the addressees of that document  
23           you will see:

24           "Following my meeting with Sainsbury's yesterday..."  
25           This document is dated 16 October, that refers to

1 a meeting on the 15th and that confirms this meeting  
2 that is -- at which the presentation at document 45  
3 {Magnum} is made.

4 I don't propose to take you in detail through this  
5 document because it is very similar, if not the same, to  
6 the presentation made to Asda on 17 September at  
7 document 1/16 {Magnum}.

8 **LORD CARLILE:** This is a Dairy Crest internal document?

9 **MR MORRIS:** Yes, but we believe it's more than an internal  
10 document. It's a presentation made to Sainsbury's at  
11 the meeting between Dairy Crest and Sainsbury's on  
12 15 October. You get that from the first page of this  
13 Powerpoint, left-hand side at the bottom, Jon Arnold who  
14 is Sainsbury's, 15 October, and they've put Sainsbury's  
15 on the bottom left. If you compare it with document 16,  
16 for example, it is worth just a quick comparison, the  
17 Powerpoint for document 16, you'll see that Dairy Crest  
18 changes the heading or the bottoming or the footer, by  
19 having Penny Coates on the 17th, Asda. They very  
20 politely use each of the company's own sort of logos and  
21 trademarks when they're referring to them.

22 That document is pretty much the same. If you go  
23 right to the end of it, just to remind you, the last  
24 slide of this document at tab 45 {Magnum}, "Proposals",  
25 the first heading:

---

1 "Move Cheese Prices at retail up by £200 per tonne."

2 We'll see in a moment what happens at that meeting  
3 on 15 October.

4 Before we do that, I'll just take you to document 46  
5 {Magnum}, which is a document which you've seen before  
6 and which Miss Rose took you to. This is an internal  
7 Dairy Crest document about how a £200 per tonne cost  
8 price increase will be treated internally within  
9 Dairy Crest in accounting terms. You've seen it before.  
10 We say that the fact that it deals with costs only does  
11 not, in any way, indicate that the initiative was  
12 concerned with cost prices only. Dairy Crest as  
13 a processor would not at all be interested in any  
14 accounting treatment of retail prices because they  
15 weren't their prices. So this is just an internal  
16 document which shows how they're going to deal with  
17 the -- how they're going to invoice the £200 per tonne.

18 Then we go to document 48 {Magnum}, and I probably  
19 use this phrase too often, but this is also a very  
20 important document. This is a document which I think  
21 Miss Rose did take you to but I'm not sure, I can't  
22 recall the detail, but it does pay detailed attention.  
23 It's an internal memo from David Flower to a variety of  
24 people including Mark Allen, Arthur Reeves, David  
25 Wagstaff, Kenton Robbins who is Asda, Colin Beaumont,

1 Neil Arthey who is Tesco, and it reads as follows --  
2 Paul Feery also with Sainsbury's.

3 "Following my meeting with Sainsbury's yesterday  
4 [15 October] and subsequent conversations this morning,  
5 I can confirm [clear evidence of a clear communication  
6 from Sainsbury's to Dairy Crest] that Sainsbury's will  
7 move their cheese prices in 3 waves, as follows:

8 "Wave 1

9 "Branded ... Cathedral City/ Seriously Strong/  
10 Pilgrims Choice ...

11 "Level - £200 per tonne ... 20p per kg. Timings ...  
12 21 [October]."

13 I just ask you to note that those products are fixed  
14 weight, branded.

15 "Wave 2

16 "Standard English lines - Economy/ Mild/ Medium/  
17 Mature/ Extra Mature/ All Stilton Lines."

18 Those are Sainsbury's own label, week commencing  
19 4 November.

20 "Wave 3

21 "Davidstow, All Territorials, Deli [worth noting  
22 "Deli], Grated, All Other Lines."

23 11 November, again 20p per kilogram.

24 Over the page, I would invite you to read the boxes  
25 under "Cash Versus Percentage Margin". Then:

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1           "Implementation

2           "Prices will be reflected in our standard cost  
3 prices and not as specific supplement."

4           There it appears that there's a change in the  
5 invoicing, they're going to actually reflect it in the  
6 cost prices.

7           "Other movements.

8           "As you are aware Sainsbury's moved their cream  
9 price up last week. However, the current prices are now  
10 above the competition and Sainsbury's are intending to  
11 reduce this price back to their original levels from the  
12 weekend."

13           So there you see Sainsbury's having led on cream but  
14 people haven't followed so they've come back down again.

15           "Next steps

16           "In terms of saying the final yes to changing the  
17 cheese RSP's [retail selling prices] I will issue  
18 specific instruction.

19           "If you have any queries please contact myself or  
20 Paul Feery."

21           Who was a Dairy Crest Sainsbury's man.

22           What we get from that document can be summarised as  
23 follows. First, Sainsbury's have said and have told  
24 Dairy Crest that they will move. Secondly, the  
25 movements will be in three waves as far as they're

1 concerned. This wave idea matches document 1/28  
2 {Magnum} which was the internal Dairy Crest meeting of  
3 4 October and document 1/30 {Magnum}. Thirdly, we say  
4 that you can see from that that it is plainly referring  
5 to cost and retail, and you get that in particular from  
6 the passages in the box.

7 **MS POTTER:** Just on that, because that was exactly, I'm  
8 afraid, my normal subject, retail versus cost. The  
9 wording in the first box versus the specific figures  
10 listed under the waves does seem to suggest the waves is  
11 talking about cost price.

12 **MR MORRIS:** Well, that may be the case but if you then --  
13 that may be the case but the -- it's very difficult  
14 without reading the --

15 **MS POTTER:** Of course, yes. So it's talking about -- the  
16 letter covers both but just so one is clear, I think  
17 that one would probably read it as saying there's  
18 waves -- yes.

19 **MR MORRIS:** Possibly. I'm not sure I would necessarily  
20 accept your interpretation because if you go back to  
21 "will move their cheese prices", I would say it's cost  
22 and retail and the waves refer to everything, because --

23 **MS POTTER:** Yes, that's true.

24 **MR MORRIS:** -- you then again have "will move their cheese  
25 prices" and then you have in the box dot dot dot, and no

1           doubt in due course I may be able to say or put  
2           something in writing on that.

3           **MS POTTER:** Yes.

4           **MR MORRIS:** We would say the boxes plainly support the  
5           proposition that what is -- for the variety of reasons  
6           that I've mentioned before, both on the cash margin  
7           maintenance issue and on the labelling issue and the  
8           stocks issue.

9           It also gives -- we say it gives the rationale for  
10          moving branded lines first, because they're going fixed  
11          weight first to test the market and the indication of  
12          them having come back down on cream is an indication of  
13          that.

14          The other point to note finally -- well, two more  
15          points. Firstly, this is circulated widely throughout  
16          Dairy Crest including Mr Arthey, who is the Tesco man at  
17          Dairy Crest, and Kenton Robbins, who is the Asda man at  
18          Dairy Crest. I would also point out to you this, there  
19          is no packing justification on Sainsbury's part for  
20          giving information about retail prices for fixed weight  
21          or for deli.

22          **MS POTTER:** Although, as we've indicated, they may or may  
23          not have given those prices.

24          **MR MORRIS:** Not the prices.

25          **MS POTTER:** But the intention to move.



1 more than an hour.

2 **LORD CARLILE:** Yes. Well, if we deal with the other matters  
3 first and then you can carry on.

4 **MR MORRIS:** Obviously, we lost a little bit of time this  
5 morning.

6 **LORD CARLILE:** Yes. Unfortunately we can't go on beyond --  
7 well, we can go on to, say, 4.20, 4.25, but not beyond  
8 that today.

9 **MR MORRIS:** I'm grateful.

10 **LORD CARLILE:** I'm sorry about that.

11 **MR MORRIS:** No, I don't mind either way.

12 **LORD CARLILE:** We all have things around the edges that we  
13 have to fit in.

14 **MR MORRIS:** That's fine.

15 **LORD CARLILE:** We don't have the advantage of many full-time  
16 judges in this Tribunal so we all have lives to lead.

17 **MR MORRIS:** Yes.

18 Can I go back to the documents. Just before the  
19 adjournment, we'd been looking at what was happening as  
20 between Sainsbury's and Dairy Crest around  
21 15/16 October. Now I want to turn to what was happening  
22 at the same time between Sainsbury's and McLelland. You  
23 will see an internal McLelland email of the same date,  
24 16 October, at document 47 {Magnum}. This document, in  
25 our submission, establishes the A to B for strand two.

1           This document shows Sainsbury's passing future  
2           retail pricing information to McLelland and is the  
3           important first step in strand two. For your note,  
4           we'll come to it in a moment, it matches the waves,  
5           broadly, the waves that appear at document 1/48 {Magnum}  
6           which we had just looked at. On 1/48 you see the three  
7           waves and then, if you go back to 1/47 {Magnum}, you  
8           will see this is Tom Ferguson writing internally to  
9           Jim McGregor:

10           "Sarah Mackenzie has now confirmed that the position  
11           moving forward will be as follows.

12           "Seriously Strong Pre-pack will move on costs and  
13           Retails from the 21st of October.

14           "Sainsbury own label and pre-pack Brands will move  
15           on the 4th of November, allowing for the proper market  
16           conditions...

17           "Deli and Taste The Difference will move on the 11th  
18           of November."

19           As I say, those waves broadly match -- more than  
20           broadly match -- waves 1, 2 and 3 in the next document.

21           **LORD CARLILE:** We have an interesting illustration here of  
22           how certain dates are the subject of confidentiality in  
23           one document but not in another.

24           **MR MORRIS:** Yes.

25           **LORD CARLILE:** However, that's besides the point.

1       **MR MORRIS:** It depends on the claim for confidentiality.

2               This document is dealt with at paragraphs 5.243 to  
3       5.250 of the decision {Magnum}. It carries on:

4               "Sainsbury would also like from us an official  
5       statement of our intentions or actions to ensure that  
6       this recovery on costs will be passed directly back  
7       through the Milk price to the Farmer. Can you advise on  
8       the content of such a statement."

9               You will note that this information includes  
10       information in relation to fixed weight and to deli at  
11       least, neither of which would relate to the issue of  
12       price labelling. That, of course, proposition, along  
13       with everything else, is relevant to the question of  
14       Sainsbury's knowledge and state of mind and why they're  
15       passing this information on.

16               We then go to document --

17       **MS POTTER:** Sorry, can I just -- Seriously Strong is  
18       a McLelland brand?

19       **MR MORRIS:** Seriously Strong is a McLelland brand.

20       **MS POTTER:** So in fact in 48 {Magnum} the reference to  
21       Seriously Strong, it's a Dairy Crest document, but it's  
22       to all brands including McLelland brands? Yes.

23       **MR MORRIS:** Yes. For your information, Pilgrims Choice is  
24       another brand of cheddar, and that's produced by  
25       North Downs who you will see shortly is one of the other

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1 processors that people were talking to at the time.  
2 You're right that the information as far as -- McLelland  
3 record the information on Seriously Strong only in their  
4 email, but Dairy Crest in their document record not only  
5 their own brand but other people's brands, branded.  
6 Seriously Strong is McLelland, Pilgrims Choice is  
7 North Downs.

8 Then we go to document 49 {Magnum} which is  
9 a Glanbia internal file note. I should say that it's  
10 possible that that may be slightly out of sequence  
11 because this, we believe, is likely to be some time just  
12 before 16 October, perhaps 15 October. It is a -- it  
13 records the intentions and stated position of retailers,  
14 this is Glanbia's understanding, including Tesco, and it  
15 also includes what appears to be matters of dispute  
16 going on between Tesco and Dairy Crest.

17 If I may just refer you to the relevant parts. I'm  
18 not sure it's -- we don't know if it's a Colin Stump  
19 document.

20 "File note, retailer cheese initiative update."

21 Then it records:

22 "Sainsbury's, Asda, Tesco, M&S and Somerfield.

23 First Sainsbury's:

24 "Moving brand pricing next week [next week being 21  
25 October].

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1 "Moving economy standard cheddars, including mild,  
2 medium, mature plus stilton forward to November.

3 "Moving pukka tier (TTD [being Taste the  
4 Difference]/Deli/Special Reserve) to 11 November."

5 So we submit that that is recording Glanbia's  
6 understanding of Sainsbury's position which is  
7 consistent with the waves we have just seen in relation  
8 to both Dairy Crest -- that Dairy Crest know about and  
9 that McLelland know about.

10 Then we have Asda:

11 "Formal advice on plan still unknown due to  
12 unavailability of senior team... expect final view  
13 Monday 21 October."

14 "Tesco.

15 "Apparently DC have argued strongly that all cheese  
16 prices move simultaneously so they can repatriate  
17 revenues direct to farmers on all cheeses."

18 That we say is a reference to the concern about the  
19 difference -- about the staggering point.

20 Then it says:

21 "To be finally confirmed Wednesday 16 October and  
22 communicated to CRS [I think that may be Colin Stump]  
23 Thursday 17 October."

24 This document records Sainsbury's position matching  
25 exactly what is in document 49 {Magnum}, and it is

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1 reporting document 49 and -- yes, 49, which is  
2 Dairy Crest -- and it is reporting a debate between  
3 Dairy Crest and Tesco about staggering, and it refers to  
4 the fact that the position is expected to be confirmed  
5 by 16 October, which would indicate why we think this  
6 document is before 16 October.

7 We would suggest and submit that that entry for  
8 Tesco indicates that Dairy Crest had been reporting to  
9 Glanbia what Tesco had been saying to them.

10 Then we go to document 50 {Magnum} which is  
11 16 October. This is a document that you have not seen  
12 before and this is Glanbia to Sainsbury's, also on the  
13 16th. The 16th was a Wednesday. We say this is very  
14 instructive:

15 "Louise Walters --"

16 "Dear Sarah [that's Sarah Mackenzie]

17 "Louise Walters [of Glanbia] has asked me to confirm  
18 the details of your agreement to increase the retail  
19 selling prices & buying cost prices for the stilton  
20 range. The increases will be effective from  
21 4th November 2002. Please find attached a letter of  
22 confirmation that the RSP's will increase by 20p per  
23 kilogram [pausing there for a moment, cash margin  
24 maintenance] and the buying price by £200 per tonne."

25 So you will see that when you talk about retails,

1           they're talking about pence per kilogram, and when  
2           you're talking about cost, by pounds per tonne.

3           "This benefit will then be passed back to our milk  
4           supplying farmers. The details of this mechanism will  
5           be confirmed by shortly."

6           Now, this is dealt with at paragraph 5.276 of the  
7           decision {Magnum}, and this itself is found in the  
8           decision to be part of an A-B-C infringement but one of  
9           the infringements not involving Tesco. This is found by  
10          the Office of Fair Trading to be a relevant concerted  
11          practice between Sainsbury's, Glanbia and Safeway  
12          because there's a pass-on in due course to Safeway.

13          The amount and the timing of the increases; the  
14          amount, by which I mean the 20p per kilogram, not the  
15          specific price, but the amount and the timing is wholly  
16          consistent and -- consistent is the wrong word. It is  
17          part of the overall scheme. Same date, cash margin  
18          maintenance.

19          We then go to document 51A {Magnum} which is an  
20          internal McLelland document dating from some time  
21          between 16 and 21 October. It is headed "Price Move  
22          Update". This is one of the additional documents for  
23          which permission was granted to be adduced, and it is  
24          a summary of where, from McLelland's point of view,  
25          things had got to by that time in respect of the £200

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1 per tonne price increase, and it records the position of  
2 the main supermarkets.

3 What is recorded here is crucial background  
4 generally and background -- crucial background to what  
5 McLelland passes on to Tesco both in that week and on  
6 21 October. If you go to the document, you will see  
7 first Sainsbury's, and you will see that that wording  
8 there matches practically completely the wording in  
9 document 47 {Magnum}. I say practically because there  
10 are two further pieces of information where, if you  
11 compare -- the first is that this document records the  
12 fact that Sainsbury's are going to move not just on  
13 Seriously Strong but also Cathedral City and  
14 Pilgrims Choice, which marries the point that was raised  
15 a few moments ago, the discrepancy or difference between  
16 the Dairy Crest and the McLelland document. The second  
17 point, which is important, is that it records  
18 Sainsbury's intention to maintain cash margin. That, in  
19 turn, becomes important when we get to document 52 in  
20 a moment.

21 We then have, recording McLelland's understanding of  
22 what Tesco will do:

23 "Will probably commence moves from [a particular  
24 date] staggered across Brand/Own label.

25 "Want to maintain percentage margin."

1           Then we get Asda:

2           "Moving across the board on 4th November (tbc). No  
3 info on margin position, but will probably maintain cash  
4 position."

5           Safeway:

6           "Commence 4th November.

7           "Moving across the board. [Again] Intention is to  
8 maintain cash margin."

9           We would submit that the first section on  
10 Sainsbury's corroborates very strongly or supports what  
11 had been received from Sainsbury's, and the second  
12 aspect, Tesco, is a strong indication that McLelland had  
13 been speaking to Tesco and records McLelland's view that  
14 Tesco would probably commence on the [REDACTED].

15           If you then go over the page, in a passage, the  
16 second paragraph over the page:

17           "This move has been led by retailers and farmers.  
18 If the farmers are to get this increase of 2ppl  
19 immediately, we have no option but to pass on the  
20 increase only when we get it. We do not have the margin  
21 to borrow against a move further on in the year."

22           But it's the sentence, the reference to "led by  
23 retailers and farmers". And the reference to not able  
24 to borrow, that goes to the staggering point.

25           Also this document establishes that Asda will move,

1 to be confirmed, and Safeway are going to commence on  
2 the 4th.

3 Next --

4 **MISS ROSE:** Before we leave this document, can I just flag  
5 up that there is a passage redacted under the heading  
6 "Stock Profit" and it would appear to be important to  
7 see the whole of this document, so we would particularly  
8 request that that should be unredacted.

9 **MR MORRIS:** We will check whose redaction it was and  
10 we'll --

11 **LORD CARLILE:** Ms Smith is being very helpful and no doubt  
12 we'll be told something later.

13 **MR MORRIS:** We don't know. We'll check whose redaction it  
14 is.

15 Document 51 {Magnum}, going back slightly. As  
16 I said a moment ago, I said that that document is  
17 a strong indication that McLelland had been speaking to  
18 Tesco. And at document 50 {Magnum}, we see evidence of  
19 what was going on between Tesco and Dairy Crest during  
20 that week. We have an email on 18 October which is the  
21 Friday.

22 **MS DALY:** Sorry, are we on 51 or 50?

23 **MR MORRIS:** We're on 51. I was on 51A and I've gone back a  
24 tab. And I was told over the adjournment I was not  
25 necessarily being entirely clear which document I'm in

1           when I'm going through.

2           **LORD CARLILE:** I think that's quite an unfair criticism, if  
3           I may say so. I've understood.

4           **MR MORRIS:** I'm very glad to hear it. But anyway, I'm  
5           trying to keep everybody following as we go along.

6           At 51 {Magnum}, we're back now between what's going  
7           on between Tesco and Dairy Crest. Neil Arthey,  
8           18 October to Lisa -- I'm going to say Lisa Oldershaw  
9           throughout just to make it easier for all of us:

10           "Lisa.

11           "I have put the attached spreadsheet together to  
12           outline the [that zero is obviously used by people quite  
13           a lot as a pound sign on emails, you see it quite a lot]  
14           £200 per tonne cost price increase across our cheese  
15           lines sold to you.

16           "I have calculated some possible rsp's based both on  
17           20p per kilogram increases and the increase required to  
18           maintain your current POR [that's percentage margin,  
19           percentage on return -- no, percentage on retail I think  
20           it means, POR]... some of the price points are not that  
21           sexy and no doubt you may look at changing these.

22           "I will try and give you a call later/Monday."

23           Later being the Friday, the 18th, Monday being the  
24           21st.

25           You will see what this shows is, as well as the

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1 cost, he is showing suggested prices for retail, for  
2 cash margin maintenance and percentage. If you look  
3 over the page you will see a list, there are three  
4 pages, and those are a list of Dairy Crest cheese  
5 products supplied to Tesco. The first two pages show  
6 the option with a cash margin maintenance and the third  
7 page shows the option of a percentage margin  
8 maintenance.

9 For example, you will see that the first line of the  
10 first page, middle column, "RSP kilo", this is CF465,  
11 which I think is a Welsh cheddar, Afon Clwyd Cheddar,  
12 I presume extra mature. You will see "RSP kilo", £7.49,  
13 and over the page you'll see "New RSP kilo", £7.69, so  
14 that's your 20p per kilogram.

15 On the second page, next to that, you see £2.31,  
16 which is the new per pack, based on 20p per kilo. And  
17 then you'll see the new POR and the old POR, and you  
18 will see the decline between 46.12 old POR in the  
19 right-hand column of the first page at the top with  
20 44.92 being the new POR which shows the POR declining if  
21 you only go up by cash margin.

22 Then if you go over the page, you'll see the same  
23 product and you'll see there that the new -- for that  
24 first product, the new retail selling price per kilo,  
25 which is in the third column in from the right, is 7.86

1 as opposed to 7.69 on the second page.

2 I don't know whether that was too fast or...

3 Then I follow this little chain of correspondence  
4 through.

5 At tab 53 {Magnum}, on the Monday, Lisa Oldershaw  
6 replies to Neil Arthey saying:

7 "Thank you and can I have deli as well, please."

8 Then if you go to 55 {Magnum}, again you've seen  
9 these before, you then see him replying the next day,  
10 the 22nd, which is the Tuesday, at about midday:

11 "Updated spreadsheet which includes deli lines.

12 "I will try and call you later [so this is the 22nd]  
13 to discuss price increase in general."

14 We would ask you to note that it looks as though  
15 there is a discussion that day on the phone between  
16 Lisa Oldershaw and Neil Arthey about the price --

17 **LORD CARLILE:** Am I right that all the information in these  
18 spreadsheets would have been known to the producer  
19 anyway? They don't require to be given new information  
20 by the supermarket?

21 **MR MORRIS:** This is information about the lines of cheese  
22 that Dairy Crest, not anybody else, Dairy Crest supply  
23 to Tesco. I would imagine that they know internally  
24 what lines they're selling. And what they are doing,  
25 what he is doing is he is giving -- he is making

1 suggestions to Lisa: this is going to be the cost price  
2 with the £200 per tonne increase, and here are, for your  
3 information, benefit, or whatever -- and the extent to  
4 which that was usual or normal is something which we  
5 might have to explore.

6 **LORD CARLILE:** So it's a bit of arithmetic really?

7 **MR MORRIS:** Yes. Whether that was something that was  
8 normally done or not, I don't think we would necessarily  
9 accept. But what he is doing is he is giving suggested  
10 retail prices for Lisa to adopt, which were obviously  
11 Tesco, and he's giving the two options of cash and POR,  
12 and we would say the fact that he's giving her the  
13 option of cash is indicative of the fact that he has got  
14 the initiative, the overall Dairy Crest proposal in mind  
15 because of the unusual circumstance, we say, of this  
16 being -- of Tesco only going up by cash rather than  
17 percentage. Because he knows Dairy Crest's proposal  
18 internally is that we should keep it down to cash margin  
19 only because of all the issues about profiteering and  
20 transparency.

21 If you go over the page at 55 {Magnum}, just for  
22 your information, you will see, and again it's probably  
23 useful background, that he's added in at the top of the  
24 spreadsheet a whole section of eight cheeses, going from  
25 cheddar mature Wexford down to Tesco cheddar mature

1 organic. And those are deli prices, you can see that,  
2 I think, from the sizes, because you've got four times  
3 5 kilograms -- these are big lumps of cheese,  
4 2.5 kilograms. So these are deli prices.

5 Would you just bear with me a moment. (Pause)

6 Then we go back a bit to see -- meanwhile back at  
7 the ranch, sort of thing, we're now doing a split  
8 screen. Let's see what's going on between Tesco and  
9 McLelland at the same time, and we go to document 52  
10 {Magnum}. Document 52 is the document which completes  
11 or evidences the completion of strand two, document 47  
12 {Magnum} is the first part. This is a document which  
13 evidences McLelland passing on to Tesco the future  
14 retail pricing intentions of Sainsbury's and indeed  
15 other retailers. That is dealt with, for your note, at  
16 paragraphs 5.251 to 5.266 of the decision {Magnum}.

17 I'll read it first, if I may, and then I will  
18 summarise it. This is from Tom Ferguson to  
19 Lisa Rowbottom, 21 October:

20 "Hi Lisa,

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

1           And I pause there for a moment. The OFT's case is  
2           that that indicates that there was a discussion the  
3           previous week between Lisa Oldershaw and Tom Ferguson  
4           which we submit happened between 16 and 18 October.

5           "As we discussed last week, other parties are  
6           confirming that they will protect Cash Margin on this  
7           occasion but not % margin. We will need to discuss this  
8           as time develops this week and reach a conclusion. The  
9           time scales are as we proposed.

10           "Ie 4th of November for Pre-pack and the 11th  
11           of November for Deli. Sainsbury's are confirming [again  
12           the words "are confirming"] that the new retails on  
13           Branded pre-pack will be in place Tuesday this week."

14           Now, a number of points arise on that document.  
15           First of all we make this point, and as we will show in  
16           a moment when we look back to what's been going on, this  
17           is not speculation by Mr Ferguson. This is hard fact.  
18           He knows this. It's absolutely plain as a pikestaff  
19           that he knows it, because you look at document 47  
20           {Magnum} and you look at document 51A {Magnum}. The  
21           notion that this is sales hustle is, in our submission,  
22           not credible.

23           There are five pieces of information passed on in  
24           this email. The first is that it provides recommended  
25           retail prices for Tesco for lines supplied by McLelland

1 and, as in the case of Mr Arthey, as we have seen at  
2 document 51 {Magnum}, Mr Ferguson provides  
3 Lisa Oldershaw with alternatives for cash margin  
4 maintenance and percentage margin maintenance.

5 Secondly, as I've said, this document provides  
6 information that there had been a discussion between  
7 Mr Ferguson and Ms Oldershaw in the previous week.

8 Thirdly, it says that other parties, other retailers  
9 are confirming that they will go with cash margin  
10 maintenance and not percentage margin maintenance. That  
11 point is confirmed by document 51A {Magnum}, which  
12 I took you to a moment ago, which indicates that in two  
13 cases, clearly, two have said that they intend to  
14 maintain cash margin and one, Asda, will probably  
15 maintain cash margin.

16 Miss Rose quite rightly pointed out that the Asda  
17 bit was "will probably", we submit that in any event  
18 there are two clear cases where McLelland know before  
19 this that two, Sainsbury's and Safeway, have said that  
20 they intend to maintain cash margin.

21 Fourthly, it says that Sainsbury's new retails on  
22 branded pre-pack will be in place on the next day,  
23 22 October. This is Sainsbury's first wave on fixed  
24 weight as indicated in both documents 47 {Magnum} and  
25 I think 48 {Magnum}.

1           Fifthly, we say that it shows that the further  
2 waves, the time scales for the further waves will be  
3 4 November for pre-pack and 11 November for deli. We  
4 submit that those are dates for Sainsbury's and for  
5 other retailers.

6           This information provided very closely matches the  
7 information which we know Sainsbury's had given to  
8 Tom Ferguson on the 16th, document 1/47 {Magnum}, and it  
9 also ties in with document 1/51A {Magnum}, which is  
10 McLelland's general state of the position. For those  
11 reasons, the OFT's case is that these documents, 47  
12 {Magnum} and 51A {Magnum} and 52 {Magnum}, and the  
13 context of everything that is also going on with  
14 Dairy Crest at the same time, establish a clear passing  
15 on of future retail pricing information from Sainsbury's  
16 and other retailers, principally Sainsbury's, but other  
17 retailers as well, to McLelland and from McLelland to  
18 Tesco.

19           Interestingly, and again -- document 54 {Magnum} is  
20 the next document I would like to take you to. This is  
21 a document I believe you haven't looked at before. What  
22 in fact we find is that the information which Tom  
23 McLelland (sic) has given Lisa Oldershaw on the previous  
24 day turns out to be wholly accurate and Sainsbury's act  
25 as he indicated they would act, because what this shows

1 is that Sainsbury's did move:

2 "Hi Sarah,

3 "I can confirm --"

4 Sorry, this is from Ferguson to Sainsbury's.

5 "I can confirm your retail movement on

6 Seriously Strong today after visiting the Darnley store  
7 in Glasgow.

8 "250 grammes has moved... to £1.85... 500 grammes  
9 pack has moved to £3.59... I will need the detail  
10 confirming your new retails on Sainsbury's brand ASAP,  
11 we will be packing product for supply week commencing  
12 the 4th of November on Monday next week."

13 That has two important and wholly consistent pieces  
14 of information. First, Sainsbury's do in fact move  
15 Seriously Strong fixed weight on 22 October as they said  
16 they would; and, secondly, it is asking Sainsbury's to  
17 confirm retail prices for Sainsbury's own brand -- so  
18 it's not branded, it's own brand -- for the next wave  
19 which is due to happen on 4 November and, of course,  
20 here we are 13 days away from that and, in respect of  
21 that, that would be random weight and they need that  
22 information to label so as to be able to move the next  
23 wave in time.

24 That was on the 22nd, which was the Tuesday. On the  
25 Wednesday, document 57 {Magnum}, this is Mr Meikle.

1 I should say that over the adjournment we were  
2 having a debate about pronunciation of Mr Meikle but I'm  
3 going to follow Miss Rose's example on the basis she  
4 might know better than I do. I don't know whether it's  
5 "Mykle" or "Meekle" but --

6 **LORD CARLILE:** It's a Scots name, isn't it?

7 **MR MORRIS:** I'm not sure. Maybe it is a Scots name.

8 **LORD CARLILE:** I can do the Welsh but not the Scots.

9 **MR MORRIS:** I will stick with "Meekle". If I revert to  
10 "Mykle" it's only because that's my instinct.

11 Anyway, it's from Mr Meikle to Asda on the 23rd:

12 "David,

13 "The attached file lists our new supply prices to  
14 Asda... current cost per case and per tonne, new cost  
15 per case and per tonne.

16 "As discussed we will move prices for pre-pack  
17 cheese and butter from 4th November 2002 and deli cheese  
18 from 11th November 2002. Can you please send me  
19 confirmation on these dates?"

20 What he attaches is suggested cost prices. First of  
21 all, note in particular that the moves, the dates of the  
22 moves are the same waves, pre-pack cheese on the 4th,  
23 deli cheese on the 11th, again in line with the waves as  
24 indicated at document 52 {Magnum}.

25 Then document 58 {Magnum}, which is a document of

1 the same date, and is also a document you have not seen  
2 before. This is an internal Dairy Crest email from  
3 David Wagstaff to various people within Dairy Crest with  
4 an update on the cheese price increases. The heading is  
5 "Cheese Price Increase Actions":

6 "Guys, actions as follows please.

7 "1. WWFH Asda Safeway JS/Tesco, all costs and rsp's  
8 to move on the 11th November plus 20p [per] kilo.  
9 Somerfield, Co-op. Propose that we stop deliveries of  
10 old price stock on Friday the 8th and the new stock on  
11 the 11th -- confirm this is okay please.

12 "Asda.

13 "Plain labels are in of Friday the 25th Nov.

14 "Packing from Sat the 26th.

15 "Need to confirm new retails & date we pack from  
16 given that we have circa 2 weeks stock in system."

17 4:

18 "Agree invoice price changes as each customer  
19 changes shelve edge [prices]."

20 7:

21 "Push branded increases through as JS have now gone  
22 on C City - Safeway should go next, Matt can you talk to  
23 Safeway."

24 We believe that "WWFH" is a reference to  
25 WeightWatchers and we think the "FH" means Farm House.

1 That is a random weight product and it records an  
2 indication that Sainsbury's, Safeway, Asda, Tesco are  
3 all going to move costs and RSPs on the 11th. Again we  
4 have the point about stock running through.

5 The plain labels point is an indication that in  
6 certain circumstances they would pack in plain labels so  
7 that the price can be then labelled; if it's random  
8 weight, you pack in a plain label and -- I think this is  
9 right, somebody will correct me -- that would be a means  
10 of enabling it to be priced in the supermarket by the  
11 retailer rather than having the price printed on it by  
12 the processor.

13 The other point I would make, of course, is back on  
14 58 {Magnum}. Item 7 is further confirmation that  
15 Sainsbury's have done what they said they would do and  
16 they have gone on Cathedral City fixed weight branded as  
17 per the first Sainsbury's wave.

18 We then go to 60 {Magnum} which is a document you  
19 have seen before. This is 24 October, a Dairy Crest  
20 internal email from Richard Wilkinson. I'll read it to  
21 you first and then I'll tell you what we say -- what you  
22 get from it:

23 "After raising RSP's on [Cathedral] City,  
24 Sainsbury's have now stated they want to wait to raise  
25 the prices on the own label products ..."

1           Pausing there for a moment, we know that the own  
2 label is supposed to come on 4 November.

3           "... until they have evidence that Asda and Tesco  
4 are moving. Arthur Reeves is in [Sainsbury's] tomorrow  
5 and will push for them to continue on track rather than  
6 wait [and I put a line after "rather than wait"] based  
7 on intelligence that he has on Tesco and Asda."

8           And we'll come back to that in a moment.

9           "We are now packing blank labels for Asda [that's  
10 Dairy Crest] and packing the new priced packs for M&S so  
11 the movements are in the pipeline. This needs to be  
12 communicated so that the lag created by everyone waiting  
13 for each other to move in store can be reduced."

14           This document shows the following. It is further  
15 confirmation that Sainsbury's have gone up on Cathedral  
16 City, as they said they would. But what it shows,  
17 I think it's a point I made on Friday, is it shows that  
18 Sainsbury's are concerned that others might not follow  
19 and do as Sainsbury's believes they're going to do.  
20 Remember Sainsbury's had gone first, so they're getting  
21 cold feet about the next wave, and the next wave for  
22 Sainsbury's is Sainsbury's own label.

23           It then shows that Dairy Crest are going to go back  
24 to Sainsbury's to give Sainsbury's confidence that Tesco  
25 and Asda will be moving or are moving. And the question

1 arises, well, how are they going to do this? They're  
2 going to do this by virtue of the intelligence that  
3 Mr Reeves already has.

4 So the important sentence in this email is -- or  
5 part of a sentence, is the "based on intelligence that  
6 he has on Tesco and Asda". That intelligence, we  
7 submit, is intelligence as to their future conduct. It  
8 again refers to the packing blank labels in relation to  
9 Asda is indicative of a prompt move from Asda going  
10 forward. And, finally, it indicates that there is going  
11 to be a meeting between Mr Reeves at Sainsbury's the  
12 next day which is 25 October.

13 **LORD CARLILE:** Just pause for a moment. "Based on  
14 intelligence" is a slightly odd phrase. It doesn't say  
15 based on an agreement.

16 **MR MORRIS:** It wouldn't be an agreement. At no stage are we  
17 alleging it's an agreement. Based on information.

18 **LORD CARLILE:** It doesn't say based on an understanding.

19 **MR MORRIS:** No, it doesn't have to be an understanding  
20 either. The case is not that agreements are being made.  
21 The case is that information as to intention is being  
22 communicated through the processors, and we would say  
23 that this means based on information he has about what  
24 Tesco and Asda are going to do.

25 Our case is not that each of these A-B-Cs, each

1 individual strand is an agreement. That is the essence  
2 of the concerted practice and the essence of the A-B-C  
3 test, which is you are passing information as to your  
4 future pricing intentions, not your decisions  
5 necessarily and not your -- what's already in store.  
6 You're not necessarily agreeing with the processor that  
7 you're doing it, you're passing the information, and  
8 you're passing the information in such a way that it's  
9 going to reach your competitor. That is the reduction  
10 of uncertainty.

11 **LORD CARLILE:** I happened to notice the document which is at  
12 tab 59 {Magnum}, and I just wondered if that was an  
13 actual press release issued by Dairy Crest or a draft  
14 press release not issued by Dairy Crest. Do we know?  
15 Because the first sentence to that gives the flavour of  
16 agreement.

17 **MR MORRIS:** Yes. I don't know the answer to that question.  
18 I don't know whether it was published or not. Whether  
19 they're saying -- well, have decided -- I mean, if, for  
20 example, Sainsbury's -- well, we know Sainsbury's have  
21 decided. We know from document -- I can't remember the  
22 number now -- we know that they have decided, I'm  
23 thinking of 48 {Magnum}:

24 "I can confirm that Sainsbury's will move."

25 They've taken a decision, but taking a decision to

1 move is not the same as agreeing with somebody. I mean  
2 it may be that the processor goes to the retailer and  
3 says, "We want a cost price increase and here's some  
4 suggested retail prices for the future", the retailer  
5 comes back and says, "We're going to move to those  
6 prices", it's not the same necessarily as an agreement  
7 between the two of them, it's just information that they  
8 have decided.

9 The essence of -- the whole essence of the  
10 distinction in a way between the concerted practice and  
11 the agreement is that there is a passing of information  
12 as to your future conduct in the market. The OFT's case  
13 is that that is sufficient.

14 **LORD CARLILE:** I'm sorry, I didn't mean to interrupt you.  
15 It's just that I was slightly struck by the language of  
16 the first and the fifth paragraphs of that press  
17 release, that's all:

18 "Dairy Crest welcomes the initiatives taken by  
19 retailers..."

20 Anyway, there we are. If anything turns on that  
21 we'll be told about it.

22 **MR MORRIS:** Yes.

23 **MS DALY:** May I ask you a question about tab 60 {Magnum}.

24 I know you were talking in waves and Tesco's has broken  
25 it more into strands, but are we between strand two and

1 three?

2 **MR MORRIS:** No, it's not -- this is the difference between  
3 a wave and a strand. They are different concepts. The  
4 strands don't match the waves. The waves are times.  
5 Let's assume there are four waves. The waves are  
6 increases in prices, and I use that word neutrally at  
7 the moment just so I can explain, they are increases in  
8 prices, cheese prices, at different periods of time.

9 You have four waves starting on 20/21/22 October and  
10 then you have 4th, 11th and the 18th. They are just the  
11 stages of the increases and within each wave different  
12 cheeses are being moved. The strands are merely the  
13 short-hand devised by Tesco for the purposes of this  
14 appeal in order to simplify the explanations of the  
15 various transmissions, infringing transmissions, which  
16 are found in the decision. The strands do not marry in  
17 any way, or maybe they do, I may have to come back and  
18 tell you, but they don't necessarily marry the waves.

19 So strand two, for example, we say involves  
20 information about all three waves. Asda, strand three,  
21 and we'll see that in a moment.

22 **MS DALY:** Thank you.

23 **MR MORRIS:** Could I ask you to actually quickly take up  
24 document bundle 2, this is really to complete the  
25 chronological picture.

1           If you go to tab 76 {Magnum}, tab 76 is an email  
2           which starts as a email dated 7 November. You've been  
3           to it before, but you'll see in fact it's a reverse  
4           chain of emails. Right at the bottom, at the end of it,  
5           you will see the first in the chain is 25 October, and  
6           I just wanted you to note in terms of chronological  
7           order that we have there, and this is the day after the  
8           document at document 60 {Magnum}, we have Mr Ferguson  
9           sending to Sarah Mackenzie at Sainsbury's his  
10          spreadsheet of prices including retail prices for  
11          products in one of the particular waves.

12                 So that is continuing the picture of what's going on  
13                 on the 25th, which is in -- so we've previously been  
14                 looking at Dairy Crest, what Dairy Crest is doing on the  
15                 24th, and this is an indication of activity by  
16                 McLelland's with a spreadsheet.

17                 I also just ask you to note that he's sending  
18                 a spreadsheet, and both Mr Ferguson and Mr Arthey are in  
19                 this period, which is the key period leading up -- the  
20                 period from about 14 October to the end of October is  
21                 the key period really in the cheese 2002 case, that they  
22                 are sending to their opposite numbers at the retailers  
23                 spreadsheets which have prices in them for all their  
24                 particular lines.

25                 We then get to the week commencing 28 October and,

1 as I just indicated and as I indicate again, this week  
2 is at the heart of the issues for the 2002 initiative  
3 because this is the week in which Tesco decides, in  
4 principle, to accept cost and retail price increases in  
5 waves and, further, proceeds to tell its processors of  
6 that fact.

7 Document 61 {Magnum}, which is at the beginning of  
8 that week, on the Monday, is an email from Neil Arthey  
9 at Dairy Crest to Lisa Oldershaw at Tesco which -- and  
10 it's worth making a note here: see also 1/51 {Magnum},  
11 1/53 {Magnum} and 1/55 {Magnum}. This is where he gives  
12 a final polish to his spreadsheet for recommended Tesco  
13 prices. The email reads, the bottom half of the  
14 email -- the top half of the email is being forward to  
15 Mr Guilpain, maybe Monsieur Guilpain, but to  
16 Alain Guilpain. But the bottom three-quarters of the  
17 email is:

18 "Lisa,

19 "I have added TPNB's to the spreadsheet, there are  
20 a few gaps which we are still working on getting."

21 That document is very similar to the document at  
22 1/55 {Magnum}, but if you go over the page at 1/61  
23 {Magnum} and you look at the spreadsheet, you will see  
24 down the left-hand column something called TPNB, which  
25 is the Tesco product number which, I understand, is

1 Tesco's own internal product number for each particular  
2 cheese line. I think, although I haven't checked, that  
3 you will also see that he again, first two pages, cash  
4 margin maintain, third page, percentage margin maintain.

5 On the next day, on the 29th, at the top of document  
6 61, you see Lisa Rowbottom forwarding that on the 29th  
7 to Alain Guilpain who I understand to have been a buyer  
8 in the continental cheese department at Tesco. As  
9 I understand the position, Tesco had a sort of main  
10 cheese department, buying department, and then it had  
11 a continental cheese department. I'm not sure, and  
12 somebody will correct me, whether the continental meats  
13 and cheese were together, or continental cheese was  
14 separate from continental meats. But in any event, the  
15 continental cheese department was separate from the main  
16 cheese buying department which Lisa Oldershaw, by that  
17 time, was the senior buyer for.

18 We then go to document 62A {Magnum}, and we're still  
19 on the 28th, the Monday.

20 **LORD CARLILE:** The 28th is a Tuesday.

21 **MR MORRIS:** I think the 28th was a Monday of October. Yes.

22 **LORD CARLILE:** It is a Monday.

23 **MR MORRIS:** Sorry, the email -- 28 October -- if you look  
24 at -- the email at 62 {Magnum} is dated the 29th, that's  
25 the Tuesday, but the document is dated -- bears the date

1           28 October.

2           If you go over the page --

3       **LORD CARLILE:** I don't want to be pedantic but -- or perhaps  
4       I do want to be pedantic, at document 60A {Magnum} there  
5       is a Dairy Crest meeting headed "Monday 27th October",  
6       so somebody has got a day wrong.

7       **MR MORRIS:** Yes, I've got the answer to that one. That  
8       document is a 2003 document, it is one of the two or  
9       three documents in this case which appear in the wrong  
10      place in the bundle.

11      **LORD CARLILE:** Ah, thank you.

12      **MR MORRIS:** At one stage we were going to suggest that they  
13      should be moved around but then we thought better of it  
14      and we thought we would just tell you when we got to it.

15      **LORD CARLILE:** Thank you for that because I was puzzling  
16      over that document on the basis that it occurred on  
17      a Monday in October 2002.

18      **MR MORRIS:** I think there is at least one other example of  
19      that happening. Documents 5 {Magnum} and 8 {Magnum} are  
20      also 2003, I'm told.

21            So this document at 62A {Magnum} is a McLelland  
22      document entitled "Price Move Matrix". The document  
23      itself has the date 28 October on it, and it is  
24      a McLelland internal summary of the position as at  
25      28 October showing all the main and other retailers and

1           their positions on the various waves. And actually  
2           having now looked at it, it seems to me to be the  
3           clearest explanation of the waves, because each column  
4           is a wave and under each column you see the different  
5           types of cheese.

6           It shows three main waves, 4th, 11th and 18th,  
7           running down vertically, but you notice that on the 21st  
8           there is one wave out of line, which is the Sainsbury's  
9           wave, and that is the Seriously Strong Cathedral City  
10          wave which we've already heard about and which has  
11          already happened and which we know, first, that  
12          Sainsbury's informed McLelland and Dairy Crest was going  
13          to happen and, second, did happen, and third, caused  
14          a little bit of consternation between the two waves for  
15          Sainsbury's because they were worried that other people  
16          weren't going to go.

17          As for Tesco, we can see here three waves of 4, 11  
18          and 18 November. We see Tesco, Sainsbury's, Asda,  
19          Safeway, Somerfield, and then you see in fact other  
20          smaller retailers being listed as well.

21          We then go to document 62 {Magnum} and this is also  
22          a core document. This shows -- it's the second half of  
23          this email which is the important one, and I'll read it  
24          to you. From Lisa Rowbottom/Oldershaw, 29 October, 3.10  
25          pm, to -- and then it identifies six different

---

1 processors. So this isn't just to Mr Arthey or  
2 Mr Ferguson as we've seen so far. This is a round robin  
3 circular email to six of Tesco's suppliers of cheese,  
4 including Butlers, Heler, North Downs, which we  
5 mentioned earlier which is Pilgrims Choice, Kerrygold  
6 and McLelland and Dairy Crest.

7 "Subject: Cost Price Increases.

8 "Hi

9 "I will call you all tomorrow [that's the 30th] with  
10 confirmation of cost price changes and retails where  
11 relevant.

12 "At the moment the plan is for the following to be  
13 changed from Sunday 3rd November (we have to change  
14 costs on a Sunday, please note that you must change on  
15 a Sunday also).

16 "3rd November.

17 "Brands.

18 "Regionals.

19 "Stilton.

20 "Speak tomorrow.

21 "Cheers Lisa."

22 This is where Lisa Oldershaw informs all her  
23 processors at the same time that Tesco is accepting the  
24 proposal, and at the very least, and I emphasise "at the  
25 very least", accepting the cost price increase.

1           The OFT's case is that she is also effectively  
2           telling them that Tesco will be raising its retail  
3           prices. We say that it is clear that by this time,  
4           internally, Tesco -- by this time at the latest, Tesco  
5           had agreed to accept the cost price increase.

6           She says she's going to call them all the next day,  
7           and in this email she gives them details of the first  
8           Tesco wave and she tells them what products the first  
9           Tesco wave will cover and they cover brands, regionals  
10          and stilton. As you will see in a moment, those three  
11          categories for the first wave mirror her own internal  
12          document that she had herself in her possession at the  
13          time.

14       **MS POTTER:** Sorry, Mr Morris, can I just be clear. So the  
15          OFT case is that, as of the 29th, it is clear that Tesco  
16          is accepting that it is moving cost prices and retail  
17          prices.

18       **MR MORRIS:** We say it's absolutely clear that they made the  
19          internal decision to do it, accept cost. We also say it  
20          is clear that she is telling them that bit. We say that  
21          when you put everything else together it is also  
22          indicative -- they've plainly made the decision to  
23          accept the retail as well, and that actually, when you  
24          add it all together, she is also telling them here, and  
25          she tells them the next day as well.

1       **MS POTTER:** Yes. Because we've had various dates, earlier  
2       dates, where we've talked about intelligence from Tesco  
3       which would seem to be suggesting that the OFT case is  
4       that there were earlier communications whereas this  
5       is --

6       **MR MORRIS:** Yes. There were certainly communications, I did  
7       say -- maybe I should say "at the latest by". There is  
8       evidence from Lisa Oldershaw on this which will be  
9       explored in cross-examination. I don't particularly  
10      want to go to the evidence in detail at the moment.

11             We would say, I think, that at the latest by this  
12      date they have -- I mean there -- we certainly say there  
13      were earlier indications saying "We're on board and  
14      we're going to go with this and we have agreed in  
15      general", but here what is clear is that by this time  
16      they had accepted (a) the principle, and (b) the waves,  
17      the categories of cheese at particular times. You'll  
18      see that from the next document.

19             It might have been earlier but it's certainly by  
20      this time at the latest. The suggestion, which I think  
21      is made, is that they haven't decided anything until  
22      later and they've waited to see what happened in store.  
23      The OFT does not accept that suggestion, and whatever  
24      happened afterwards, it may have been about particular  
25      price points for particular lines but, in principle,

1           they had accepted that they were on board with the waves  
2           and they informed the processors that.

3                     If I can go to 64 {Magnum}, this is an internal  
4           document produced by Lisa Oldershaw. It is her own  
5           plan -- I will just summarise what we say. It is her  
6           own plan for cost and retail price increases over the  
7           three waves. It is a very important piece in the  
8           jigsaw.

9                     What you see is a covering email which she sent to  
10          her husband's email address, and she explains that she  
11          was effectively sending it to herself at home, which is  
12          something -- I don't know, something perhaps we all do  
13          from time to time. It is from Lisa to her husband,  
14          "Just in case".

15                    Then you will see on that first page of this  
16          document that there are two attachments to it. There is  
17          a Word attachment entitled "Cheese price changes", I'm  
18          not looking at the documents, I'm just describing the  
19          frontispiece of the email. Then there is "Cheese price  
20          o200T", which I think is £200 per tonne, "xls", that's  
21          a spreadsheet.

22                    The first attachment {Magnum}, if you turn the page,  
23          this is the Word attachment, and this describes in  
24          summary Tesco's waves. What you have is it's entitled:  
25                    "Cheese £200 [per tonne] plan.

1 "Cost and retail moves."

2 Then you see the three dates of the waves, and here  
3 you've got 3rd, 10th and 17th as opposed to 4th, 11th  
4 and 18th because that's the Sunday and the Monday of the  
5 change. We say actually you have to change the retail  
6 on the Sunday. But what you see is different categories  
7 of cheese, and the first wave is:

8 "Standard Regionals.

9 "Brands.

10 "Stilton."

11 The second wave:

12 "Cheese with Bits.

13 "All finest/Butlers Regionals.

14 "All British speciality.

15 "Cottage Cheese."

16 And then the third wave, the first one, two, three,  
17 four, five are Tesco standard own label cheddars.

18 "H/E [healthy eating].

19 "Sliced and Grated.

20 "Organics.

21 "Deli."

22 If you for a moment turn back to 62 {Magnum}, you  
23 will see that the information on the 3rd November wave,  
24 the first wave, practically matches the information held  
25 on her internal plan for cost and retails. When I say

1           practically, there's a distinction between there's  
2           standard regionals as opposed to regionals. My  
3           understanding is that the distinction is between  
4           standard and Butlers Regionals, and Butlers Regionals  
5           are actually within, or may well be within, the Finest  
6           category.

7           **MISS ROSE:** Sorry, that's not correct, because you'll see  
8           that deli is given as 4 November at document 62  
9           {Magnum}, and 17 November on --

10          **MR MORRIS:** Sorry, I'm comparing 62 and 64 {Magnum} at the  
11          moment. Is deli referred to in --

12          **MISS ROSE:** 62A {Magnum}.

13          **MR MORRIS:** Yes, 62A we were comparing.

14                 We've moved on a bit, we're now at 29th/30th. It is  
15                 right that deli is given -- oh, I don't know even on  
16                 62A -- anyway, at the moment, if I may, I'm comparing,  
17                 and this is why I said when Ms Potter asked me the  
18                 question about the 29th, about cost and retail, you see  
19                 the very close match between the first wave -- I mean,  
20                 the 29th, she gives them the first wave, and you can see  
21                 that from document 64 {Magnum}. I was just explaining  
22                 what I understood to be the difference between regionals  
23                 and standard regionals. And we'll see, no doubt  
24                 Ms Oldershaw will explain why.

25                 Then back at 64, the second part of 64 is a whole

1 series of spreadsheets of which there are lots of pages.  
2 Can I just invite you to go to the first page of the  
3 portrait spreadsheet {Magnum}. You've got some  
4 landscape, you've got seven landscape pages and then you  
5 have a portrait page. Essentially what you have there  
6 is each Tesco cheese line for all the suppliers, not  
7 just -- so now we don't have a spreadsheet which is just  
8 Dairy Crest Tesco cheeses or McLelland Tesco cheeses, we  
9 have her spreadsheet for all Tesco cheeses.

10 That lists the supplier and two alternative prices.  
11 If you look at the top, the two alternative prices, £200  
12 per tonne or percentage maintained. And then you see  
13 a column "RSP", and we say that RSP column represents  
14 the choice that she has made in relation to each of  
15 those cheese lines, and that she's made that choice  
16 by -- that's a retail price, and she'd made that choice  
17 by the 30th at the latest.

18 **LORD CARLILE:** We'll give the LiveNote team a break in  
19 a moment.

20 **MR MORRIS:** I can stop there.

21 **LORD CARLILE:** Okay. We'll break until just after quarter  
22 past, just to give them a short break.

23 (3.08 pm)

24 (A short break)

25 (3.22 pm)

1       **MR MORRIS:** We're at 30 October, a very important date in  
2       the case. What we see next happens, we've seen the  
3       internal document, but on 30 October -- you remember on  
4       the 29th, in the email at 62 {Magnum}, she tells the six  
5       processors that she will call them all tomorrow and she  
6       does that. She speaks to Neil Arthey at Dairy Crest and  
7       she speaks to other processors.

8               Document 63 {Magnum}, which is between the two that  
9       I've just taken you to, is Neil Arthey's report of her  
10      conversation late in the afternoon of the 30th.

11             This document is the document which evidences the A  
12      to B of strand three of cheese 2002. That sounds very  
13      codified but I think you know what I mean. This  
14      document evidences the passing by Tesco to Dairy Crest  
15      of future retail pricing intentions of Tesco and that is  
16      the first part of strand three in the cheese 2002 story.

17             Before I read it, it records the dates of the waves,  
18      Tesco's waves for different categories of cheese. And  
19      the OFT's case is that all the price moves here referred  
20      to are retail price increases, not just the  
21      WeightWatchers. We will see that in a moment.

22             If I can just read it through, this is an email from  
23      Mr Arthey circulated very widely within Dairy Crest, and  
24      I can't begin for the moment to tell you who all these  
25      people are, but amongst them are relevant people in the

1 Dairy Crest teams for the different retailers. So  
2 you'll see Kenton Robbins in the middle, he was Asda.  
3 About two to three lines up, above the cc, you'll see  
4 Paul Feery, Paul Feery was the Sainsbury's account  
5 person at Dairy Crest. It is also cc-ed to more senior  
6 people, Bill Haywood, Colin Beaumont, David Wagstaff,  
7 Arthur Reeves. I'm sure somebody will tell me in some  
8 detail about who some of the other people are.

9 It reads as follows:

10 "Following a conversation late this afternoon Tesco  
11 have confirmed that all branded PrePack cheese will go  
12 up as of Monday 4th November.

13 "The only exception is [Cathedral] City 400g due to  
14 promotional activity -- this line will move on 15  
15 [December]. Their regional cheeses and stilton are also  
16 due to increase at this time."

17 "At this time" means 4 November. That is the first  
18 wave.

19 "They have confirmed the price for WeightWatchers  
20 [Mature] at £8.19 per kilo targeted to move on 11  
21 [November]

22 "Finest, speciality lines and cottage cheese will  
23 move on 11 [November].

24 "They have now informed me that they intend to move  
25 all the other own label lines [that's Tesco own label]

1 on 18 [November] [so this is the third wave] ie mild,  
2 medium, mature, extra [mature] and farm house, sliced  
3 and grated and healthy eating.

4 "This is a 1 week delay on mild and medium.

5 "Deli lines are also due to move on 18 [November]

6 "Regards.

7 "Neil."

8 So in summary, what you have is as follows. Wave  
9 one, 4 November, branded pre-pack, regional and stilton.  
10 Wave two, 11 November, Finest, speciality, cottage and  
11 WeightWatchers. Wave three, 18 November, all other  
12 Tesco own label and deli.

13 I will explain in a moment the point about mild and  
14 medium being put back by a week.

15 This matches page 2 of document 64 {Magnum} almost  
16 precisely. I say almost, because there's references to  
17 cheese with bits and the like. But that summary I have  
18 just given you matches the three waves of the cost and  
19 retail moves which Lisa describes on the Word document  
20 at tab 64.

21 Now, the one-week delay on mild and medium arises in  
22 the following circumstances. If you go back to document  
23 62, you will see in that document -- I'm sorry, 62A  
24 {Magnum}. In that document Tesco's middle wave,  
25 11 November, has got mild and medium on 11 November, but

1           mature and extra mature -- both those are Tesco own  
2           label -- is on the 18th. It appears that at some stage  
3           between the receipt of the information in 62A and the  
4           30th there was a moving back of the mild and medium into  
5           wave three. So that if you go forward to 63 {Magnum},  
6           you will see the words "This is a delay on mild and  
7           medium", you can tell from the previous sentence that  
8           mild and medium are included within the 18 November  
9           wave.

10           This document, the OFT says, records retail price  
11           moves, not just cost price moves, and it tells -- well,  
12           it indicates that Lisa Oldershaw has told Neil Arthey of  
13           the dates of the waves. It doesn't give the precise  
14           prices for each line of cheese, apart from in relation  
15           to WeightWatchers, which I can broadly explain as being  
16           there because that was the only one that needed to be  
17           packed in time for labelling purposes, but it gives the  
18           dates, and it gives what lines are going to move on what  
19           date, and that, in the OFT's submission, is the passing  
20           of intention as to the future pricing behaviour of  
21           Tesco, and it was key information that Dairy Crest was  
22           wanting to know and that went to fit in to what had been  
23           going on before to fit into the overall price move  
24           matrix.

25           Now, document 67 {Magnum} is the completion of the

1 infringement, because document 67 {Magnum} is the B to  
2 C. What then happens is the very next morning, this  
3 email is at 6 o'clock in the evening, Mr Feery has  
4 received it at 6.11 or whenever he opened his emails,  
5 and at 8.55 the next morning Mr Feery passes this  
6 information on to Miss or Mrs Mackenzie at Sainsbury's.  
7 So here you have B, Dairy Crest, passing on to C,  
8 Sarah Mackenzie, the future retail pricing intentions of  
9 A, Tesco. It reads:

10 "Sarah.

11 "Please find below the latest information from Tesco  
12 on their price increases."

13 Then I'm not going to read out 1 to 5 because they  
14 are, again, practically verbatim, almost possibly a cut  
15 and paste from the email at 63 {Magnum}, save that the  
16 sentence:

17 "This is a 1 week delay on mild and medium."

18 Is not included.

19 At the end of the email Mr Feery says:

20 "I'll call you tomorrow when you're back in the  
21 office to discuss further."

22 You will also note that the information is marked:

23 "Subject: Tesco Price Increases.

24 "Importance: High."

25 In our submission, this is plainly communicating

1 retail price increases. Sainsbury's would not be  
2 interested in cost price increases alone.

3 Can you just give me one moment?

4 **LORD CARLILE:** Yes. (Pause)

5 **MR MORRIS:** Could you then -- I'm just following the  
6 chronology. If you would pick up again volume 2. It is  
7 slightly unfortunate, this document 76, which has  
8 a series of emails in it.

9 I should say that it is our case that on the same  
10 day, on the 30th, Lisa Oldershaw spoke to the other  
11 processors, as she said she would in the email of the  
12 29th. Here you have an email, this is now the document  
13 at tab 76 {Magnum} on the -- I always put lines across  
14 to divide emails up because I find reading them in  
15 reverse counterintuitive and difficult. There's an  
16 email there of 31 October which is from Tom Ferguson of  
17 McLelland to Sainsbury's Sarah Mackenzie. So this is  
18 now McLelland emailing Sainsbury's as well as Paul Feery  
19 having emailed Sainsbury's.

20 Tom Ferguson writes:

21 "Details enclosed confirming the changes across the  
22 Branded area..."

23 Then the next sentence:

24 "This will be in line with the rest of the Market.  
25 With regard to your movement on Deli and own label..."

1 can you please confirm your [increases] by...

2 I currently have packed stock at the current retails..."

3 What I rely on is that this will be in line with the  
4 rest of the market. He is indicating that he has heard  
5 that others are going to go in the way suggested there.  
6 We'll come back to the last bit of 76 in a moment.

7 **MISS ROSE:** Can I just raise a point on that document. It  
8 says "Details enclosed" but we don't seem to have an  
9 enclosure. Can we ask the OFT to disclose the enclosure  
10 immediately, please.

11 **MS SMITH:** We have no enclosure. We've asked on a number of  
12 occasions both of Tesco, they have no enclosure, and of  
13 the other parties. We don't have an enclosure.

14 **MISS ROSE:** I don't see how Tesco could have it since this  
15 is a communication between McLelland and Sainsbury's.

16 **MS SMITH:** We've asked the relevant parties and we don't  
17 have that enclosure.

18 **MISS ROSE:** I don't understand whether it's now being  
19 alleged that this is an additional strand because this  
20 was not relied on in the OFT decision as a strand. But  
21 from the submission that was just being made it sounded  
22 as if it was being put that way. If it was then we  
23 would ask for disclosure of that document.

24 **MR MORRIS:** No, we are not alleging it is a strand or a  
25 fresh infringement. It is part of the evidential

1 picture that has been there and has been there all  
2 along. We do say that as a matter of fact there were at  
3 the same time communications between Mr Ferguson and  
4 Lisa Oldershaw.

5 On document 66 {Magnum}, you then see the second  
6 email in this case where Lisa Oldershaw is sending  
7 a circular email to all her processors. This is on the  
8 31st at 4 o'clock so this is, I think, now the Thursday.  
9 I think it's the same people she sent the email at 62  
10 {Magnum} but I haven't quite checked it's exactly the  
11 same. I'm almost certain it will be. Brian Butlers  
12 Cheeses, Rob Evans I'm not sure about. Kerrygold,  
13 Heler, Dairy Crest, McLelland, Butlers. I'm not sure  
14 that North Downs are included but anyway.

15 She's confirming to all of them at the same time  
16 that the £200 per tonne increase is happening:

17 "As you can see from my hiding away and changing all  
18 the figures this week, the £200 per tonne price increase  
19 is happening. What I would like from you now is to  
20 outline.

21 "(a) how you are proposing to get this money back to  
22 the farmers...

23 "(b) how you/we address the issue of Tesco for x  
24 number of months (depending on the cheese maturity)  
25 paying a £200 per tonne inflated price for cheese made

1 with milk £200 per tonne cheaper than on the new cost  
2 implementation date.

3 "I look forward to your outlines."

4 That's the staggering point. But it absolutely  
5 confirms at the very least that Tesco has plainly made  
6 its decision to accept the cost price increase, at the  
7 very least.

8 Then 68 {Magnum}, 1 November, the next day, so  
9 that's the end of the week. A Glanbia internal  
10 memorandum, not looked at before, addressed in the  
11 decision at paragraphs 5.322 to 5.331 {Magnum}. This  
12 document is a status of the discussions going on from  
13 Glanbia's point of view and summarises the position  
14 between Glanbia and its retail customers.

15 On the first page you will see, left-hand side:

16 "Split of Glanbia UK Manufactured Cheese.

17 "Non 2p customers.

18 "Retail confirmed.

19 "Retail outstanding."

20 And it lists that Sainsbury, Asda and M&S confirmed.

21 If you go over the page, there's a calculation showing  
22 how much would be going back to the milk, presumably,  
23 the 0.9p.

24 Then over the page:

25 "2p per litre summary."

1           Then it lists the customer: Asda, JS, M&S,  
2           Somerfield and the like. It does then also list Tesco  
3           at the bottom.

4           What it says about Asda in the "Comment" column is:  
5           "SP to move by 20p per kilogram. All FW being  
6           produced with no RSP's on label currently."

7           I think SP is Smart Price. You've probably picked  
8           this up by now, but the equivalent of Tesco Value  
9           products for Asda is Asda Smart Price:

10           "Asda SP to move by 20p per kilogram. All fixed  
11           weight being produced with no retail sale prices on  
12           label currently.

13           "JS.

14           "Rolling change from 4/11, see separate sheet.

15           "Subject to other retailers following suit."

16           Safeway, all products 18 November.

17           Then Tesco:

18           "4/11... for brands. 11/11 farm house & mainstream  
19           cheddar and territorials, 18/11 organic, sub-brand  
20           cheddar, deli, sliced & grated."

21           I would point out there that the waves recorded for  
22           Tesco there, the dates are the same but the particular  
23           products allocated to the dates are slightly different  
24           from what we see in the 30 October Arthey email. From  
25           what we have seen, it is very likely that Glanbia are

1 not speaking directly to Tesco. This information may  
2 have been -- it's obviously information they've received  
3 from somewhere, we suggest they're not making it up. It  
4 may be out of date. I've already explained to you that  
5 on the 28th, McLelland were recording the waves slightly  
6 differently.

7 That, again, is consistent with -- this is Glanbia  
8 recording the waves.

9 So that takes us to the end of the week of  
10 28 October and we then come to the week commencing  
11 4 November. What we now see from here onwards, we have  
12 got strands one, two and three. What we see from now  
13 onwards is the wave plan being implemented, and we see  
14 it clearly being implemented in some cases, and we see  
15 that in other cases the waves get put back, there are  
16 delays, people have cold feet. But in the end, although  
17 ultimately the dates get moved back, the broad plan is  
18 respected.

19 The first document we see is document 69. Document  
20 69 you've been to before, this is 4 November, middle of  
21 the day, from Neil Arthey to Lisa Oldershaw, copied to  
22 Mr Rider and Mr Beaumont in Dairy Crest:

23 "Lisa.

24 "I have attached a spreadsheet which shows the  
25 suggested rsp's of cheese lines that we supply Asda

1 following the price increase."

2 Then the next sentence is the very important  
3 sentence:

4 "My understanding is ["my understanding is"] that  
5 Asda will be applying £200 per tonne ie 20p per kilo to  
6 rsps of Smart Price Mild & Mature."

7 So the first half, this is to do with Asda's retail  
8 price. And in the second half he says:

9 "Please could you confirm the rsp's that you wish me  
10 to pack Tesco lines with for deliveries targeted [week  
11 commencing 10 November] following the cost price  
12 increase in Tesco. (Not actually implemented until [the  
13 17th] asap or to Chris if later in the week."

14 This document relates to strand five as far as the  
15 infringement is concerned, so I've jumped a bit ahead,  
16 and this document evidences a passing of information  
17 from Asda as A to Dairy Crest as B and on to Tesco as C.

18 It is the OFT's case that the understanding, "my  
19 understanding", is an understanding gained by Mr Arthey  
20 from Asda, the fact that it is (a) the reference to "my  
21 understanding", and, secondly, this is not speculation.  
22 This is not saying, "I think Asda may be applying"; they  
23 may be, they may not be. This is "will be", this is  
24 a definitive statement of what Asda is going to do.

25 If we go then to document 70, this is

---

1           4 November 2002. You've been here before. There's bits  
2           I would like to -- extra bits I would like to take you  
3           to anyway. This is Mr Meikle of McLelland, so we're now  
4           back at McLelland rather than Dairy Crest, and he's  
5           writing to the Co-op, another retailer. He says:

6                 "As per our conversation I have detailed below what  
7           I believe is happening with retail prices over the next  
8           2 weeks."

9                 So the first sentence is about the future. The  
10          second sentence:

11                 "Seriously Strong retails have already moved in some  
12          cases. We will be checking stores all this week and  
13          I will keep you updated on anything that filters through  
14          over the next few days.

15                 "I would like to raise your costs... and have  
16          attached a file detailing the new costs by line. We  
17          will be raising the retail prices on the McLelland  
18          random weight brands by 20p per kilo to allow for cash  
19          margin to be maintained. Detail on these new retails  
20          are also attached. Can you confirm that you are OK with  
21          these retails or let me know if you want to use  
22          different retails?"

23                 The next passage is important as to what has  
24          happened. This is existing -- the bit beginning  
25          "Seriously Strong prices checked today", that is in

1 store. This isn't future, this is what has happened.

2 "Seriously Strong prices checked today..."

3 You remember Seriously Strong is a McLelland fixed  
4 brand, fixed weight brand.

5 "Asda, Tesco and JS have all moved their retails on  
6 [Seriously] Strong as of today; Asda..."

7 And then it gives all the prices. The significance  
8 of that is that they have all moved today -- I should  
9 point out this is the 4th, not the 5th. They have all  
10 complied with the first wave as they had indicated they  
11 were going to. The prediction of what was going to  
12 happen has happened.

13 I think it's pointed out that their prices are all  
14 different. That is, in our submission, completely  
15 irrelevant. What is relevant is that they have all  
16 moved on the same date, and what is also relevant is  
17 that the planned wave has happened.

18 Then we have:

19 "... and indicates that Tesco itself has plainly  
20 complied with what it had told all its processors on  
21 29 October."

22 Because you see the fact that Tesco have moved on  
23 Seriously Strong.

24 He then goes on to give a detailed picture of future  
25 pricing intentions in relation to the second and third

1 waves for all the retailers. That you can see from the  
2 passage beginning "What I believe will happen elsewhere  
3 is", and he lists Asda and Tesco and Sainsbury's and  
4 Morrisons and Safeways.

5 Now, I'll concentrate for a moment on the Tesco bit.  
6 He indicates that Tesco will move on random weight  
7 McLelland retails on 11 November. Now, random weight  
8 McLelland retails are McLelland branded cheese but  
9 random weight rather than fixed weight. So we're not  
10 talking about Seriously Strong, we're talking about  
11 other McLelland brands -- somebody will tell me, I think  
12 Galloway is one example and there are others -- which  
13 haven't been moved in the first wave but are going to  
14 move in the second wave. Then 18 November, all own  
15 label lines, and that is entirely consistent with the  
16 waves which Lisa Oldershaw told Neil Arthey about on the  
17 30th, it matches precisely.

18 This is referred to colloquially as strand six. It  
19 is accepted that this does not evidence a complete  
20 infringement because, I think this is right, there's B  
21 to C tail to it. But it is important evidence for the  
22 other strands about what is going on at the same time.

23 Can I just ask you to note that the paragraph -- the  
24 sentence above, the Asda sentence, is relevant to strand  
25 eight and relates to document 2/79 {Magnum} because that

1 indicates the passing of information from Asda to  
2 McLelland on or before 4 November. When we come to  
3 strand eight in a moment, to the later document, that is  
4 the relevant passing of information from Asda to  
5 McLelland.

6 I misdescribed the reason why this strand is not  
7 a complete infringement. This is a B to C but I think  
8 the answer is that there's no evidence, or the OFT had  
9 no evidence of a relevant state of mind on the part of  
10 Co-op and no case was brought against Co-op. That is  
11 why the B to C is not complete. The A to B is Tesco to  
12 McLelland, Asda to McLelland, or would have been, but  
13 the B to C is not a complete B to C.

14 We then go to document -- I think we might be into  
15 the next file. I think we are. 73, volume 2 {Magnum}.  
16 I'm just trying to get the order right here, if I may.

17 If we go to tab 73, this is a internal email of  
18 5 November, you've been to it before. This is an  
19 internal Safeway email. It is evidence of strand four  
20 and it is dealt with in the decision at paragraphs 5.383  
21 to 5.395 {Magnum}. The email is addressed to Tim and  
22 Matthew:

23 "Need your advice -- we are about to execute  
24 a market wide [retail price] increase on the full range  
25 of UK cheeses. This is linked to supporting Farmers to

1 the tune of 2p per litre...

2 "We will be having to make changes to the range on  
3 the 11th and 18th of November of an average of 10p per  
4 500g piece and 5p per 250g [that's another calculation  
5 of the £200 per tonne in a different way], to show our  
6 support."

7 So they're conscious of a need to show their support  
8 for the farmers.

9 "Can you let me know what impacts this will have..."  
10 And notice this is retail price increase.

11 Bottom paragraph:

12 "Our indices will remain the same, as all players  
13 will be moving by the same amount on the same day but  
14 prices will go up from current levels in Commando and  
15 I don't want to be the 1st challenge."

16 The OFT submits that this indicates all players, in  
17 our submission, includes Tesco. Of course, in many of  
18 these subsequent emails, Miss Rose is going to say it's  
19 a very general statement, how can you possibly infer  
20 it's Tesco? This is the most general of statements,  
21 it's a massive ask to build a whole case on a few  
22 oblique references like that.

23 That point might have some force if you were looking  
24 at this document in isolation, if you were looking at  
25 one sentence in the decision. But that's not what we're

1           doing. We're now a day and a half into my opening and,  
2           in our submission, it is perfectly plain what has been  
3           going on. We have got the whole background of what's  
4           been going on, the contacts between all the retailers  
5           and the three main processors and, in those  
6           circumstances, we say it is an obvious inference that  
7           the "all players moving" includes Tesco. And in our  
8           submission, and that is why in this case, it's not just  
9           a matter of inference, this case, it's a matter of  
10          context and circumstance. This is why, at the outset,  
11          I urged upon you not to take too much of a strand  
12          approach because you don't see the whole fabric.

13                 We've now been through a lot of documents and we say  
14                 it is obvious that this is a reference to Tesco and that  
15                 Safeway have got this information. They have received  
16                 the pricing -- future pricing intentions information:

17                 "... as all players will be moving by the same  
18                 amount..."

19                 Not "have moved", "will be moving", and that "all  
20                 players" includes Tesco.

21                 We then go to the next day -- no, it's the same day,  
22                 the 5th, and we're going back now to communications  
23                 between McLelland and Sainsbury's, 5 November, tab 71  
24                 {Magnum}. I don't think I gave you the tab actually.  
25                 This is strand seven and it is addressed in paragraphs

1 5.374 to 5.383 of the decision {Magnum}.

2 This, we say, evidences McLelland passing to  
3 Sainsbury's Tesco's future pricing intentions about  
4 Tesco Value products. The email reads:

5 "Hi Sarah,

6 "Completed details for [period] seven enclosed, we  
7 have slipped against the plan... Our forward plan from  
8 January onwards should still ensure that we hit the  
9 annual targets.

10 "A quick update on the generic cheddar area, Asda  
11 have moved [not future but "have"] all sizes of  
12 Smart Price mild cheddar to £2.69 per kilo and  
13 Smart Price mature cheddar to £3.69 per kilo. This will  
14 be matched by Tesco."

15 A clear statement, not speculative, not sales  
16 hustle, "This will be matched by Tesco". In our  
17 submission, this is a statement by Mr Ferguson and, in  
18 our submission, by this time he knows that that is the  
19 case.

20 74 {Magnum}, 6 November, the next day. I'm just  
21 going to make a passing comment on this. You were,  
22 I think, taken to it by Miss Rose. Just to say that  
23 this is Dairy Crest to Sainsbury's expressing a concern  
24 not about the retailers participating but whether the  
25 other processors were participating and the threat by

1 Dairy Crest to withdraw.

2 76 we've been to before, we come back to 76  
3 {Magnum}. We've seen the three emails below but now we  
4 see 76 in its proper place, 7 November. This is  
5 McLelland to Sainsbury's, Ferguson to Mackenzie:

6 "Busy times. I have updated the spreadsheet with  
7 the proposed new retails covering the straight £200 per  
8 tonne movement. Can you please sign this off by  
9 lunchtime today and I will complete the planning  
10 process. With the timings you have submitted we would  
11 plan to deliver at the new costs and retails in the  
12 following way."

13 And there you see dates of 18 November for all  
14 Sainsbury's own label and 25 November for deli. At this  
15 point we see that in some instances the 18 November wave  
16 has been complied with. We see that the later waves  
17 start shifting back by a week, 18 November and  
18 25 November.

19 Then at document 78 {Magnum}, I think -- is it the  
20 same date? Yes, same date, same point about retails for  
21 packing on the 17th, own label. This is the packing of  
22 the own label -- Tesco own label brands for the wave of  
23 the 17th:

24 "We need to confirm the new retails for packing on  
25 Monday the 11th for supply from the 17th. Can you

1 please either send the information to Jim McGregor by  
2 completing the initial spreadsheet..."

3 Then we go to 79 {Magnum}, and 79 records, and  
4 you've been taken to this, the fact that Lisa Oldershaw  
5 on the 8th -- this is, we say, the hesitation and the  
6 lack of confidence:

7 "Lisa called to state Tesco will not commit to  
8 moving Own Brand [that's own brand in the 17th] until  
9 they see that Asda have moved and therefore will not  
10 give us their rsps. While they are relatively confident  
11 that everything is in place with Asda, they are taking a  
12 'we won't believe it until we see it' stance."

13 The OFT's case, and this is why, if you remember,  
14 I asked -- in document 1/71 {Magnum} I identified the A  
15 to B. Document 1/71, in relation to Asda, indicates  
16 that McLelland has got information by 4 November about  
17 what Asda is going to do, and OFT's case, this is strand  
18 eight, is that that information was passed on by  
19 McLelland to Tesco in the course of that conversation:

20 "While they are relatively confident that everything  
21 is in place with Asda..."

22 And that is the strand eight infringement.

23 She puts the brakes on it until she sees and, in our  
24 submission, she's then told that Asda are going to move  
25 and that that information was transmitted.

1           We then go to document, I think, 79A {Magnum}. This  
2           is Mr Meikle to Asda, McLelland to Asda on the 8th,  
3           confirming that Morrisons won't move on Seriously Strong  
4           until they've finished promotion. Thereafter they will  
5           implement a rise versus their current retail.

6           Then at 80 {Magnum}, this is again the -- this is  
7           internal to McLelland:

8           "Dialogue is still continuing with Tesco regarding  
9           the market movement... As of today, Tesco have not  
10          confirmed any movement on retails and the likely outcome  
11          of this is that we could have the confirmation by the  
12          end of the week."

13          This is a dialogue. They are seeking to persuade  
14          Tesco to go up, after Tesco has expressed its concerns  
15          about Asda at document 79 {Magnum}.

16          I should point out, importantly, that it is not the  
17          case that Tesco have not confirmed any movements on  
18          retails because we know that, by this time, a week  
19          earlier, they had already moved on the first wave. So  
20          this is talking about hesitation or concerns that people  
21          are not complying in respect of I think the third wave,  
22          effectively, of the -- of whether Asda is going to move  
23          or not. But one shouldn't be misled by this document to  
24          see that, in fact, this is an indication that no  
25          decision had been taken on retails, because a decision

1 had been taken in principle and it had been implemented  
2 on the first wave at least by this date. And I believe,  
3 although I'll have to come back on this, that there are  
4 other movements that had happened.

5 Then we go to 81 {Magnum}, you see -- there you'll  
6 see that's borne out by the price check made by  
7 McLelland on the 13th:

8 "I've attached an updated price & promotion check  
9 for [the main five] Asda, Morrisons, Tesco, JS and  
10 Safeway ... All price changes and new lines that  
11 I picked up have been highlighted in bold.

12 "Key points are

13 "Asda, Tesco, JS, Safeway all have new retails for  
14 Seriously Strong on display.

15 "Tesco and Asda have new retails on Cathedral City."

16 Both of those wave one, branded fixed weight.

17 "No product on display in JS, Safeway price ...", et  
18 cetera.

19 So that document confirms the proposition which I  
20 just gave to you that that had already happened and this  
21 hesitation was not a hesitation in respect of all the  
22 waves.

23 Then if we go to 83 -- yes, actually, just bear with  
24 me. 82 {Magnum} is also relevant because 82 actually  
25 shows that not only have they moved on Seriously Strong

1 and Cathedral City, but they had also moved, by then, in  
2 relation to McLelland random weight brands in Tesco,  
3 Safeway and Sainsbury's. So showing not only that fixed  
4 weight branded had gone up but random weight branded had  
5 also gone up by then. 11th was the second wave, this is  
6 the 13th.

7 Then 83 {Magnum} is the strand nine issue and this  
8 is the issue with stilton which you get -- this is an  
9 internal Asda audit of what is going on and reports  
10 Asda's knowledge, we say, of what Tesco will do if Asda  
11 does not go up on stilton. At the bottom of that  
12 page -- again, you see the confirmation. This is the  
13 13th. Before we get to the passage specifically  
14 relevant to the strand, if I could invite your attention  
15 to the Smart Price, Tesco have moved in line with Asda  
16 on all packs, so by that time Tesco Value had gone up on  
17 the 11th.

18 Then we go:

19 "On own label packs -- Tesco... have commenced  
20 phasing in..."

21 Then at the bottom, stilton:

22 "Asda haven't yet moved. All have moved up except  
23 Kwik Save..."

24 And I would submit that the words "all have moved  
25 up" in the context of the rest of that email must

1 include Tesco since, if you look at the two previous  
2 categories, Smart Price and own labels, they're looking  
3 at Tesco, Asda, Morrisons, and then the next one, Tesco,  
4 Sainsbury's, Safeway, Kwik Save, Morrisons. Then  
5 stilton, you've got:

6 "Asda, no.

7 "Kwik Save, submit approval.

8 "All have moved up except ..."

9 That, in our submission, again -- I mean, as  
10 a matter of language it includes Tesco given what is in  
11 the rest of the email, but also as a matter of context.

12 You then go over the page:

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

15 We submit that that is an indication that Tesco is  
16 indicating its future retail price intentions, ie they  
17 will go down unless Asda move up.

18 Again, the same point arises on the wording here.  
19 This is the last strand of cheese 2002 as far as the  
20 infringements are concerned. It's a pretty general  
21 statement on its own but, in our submission, it's not to  
22 be read on its own. It's at the end of the story and,  
23 in our submission, both in the context of this  
24 particular email and in general, this is information  
25 that Asda has received about Tesco. That's the first

1 point.

2 The second point is where have they got it from? We  
3 say in the context of everything that has been going on  
4 before, all the communications you see between the  
5 retailers and the processors and McLelland and  
6 Dairy Crest, that we submit it is a proper and fair  
7 inference that it has come through McLelland or  
8 Dairy Crest or both, given what has been going on.

9 That is document 83. I think there may be two or  
10 three more documents I need to just run through and that  
11 will be the end of cheese 2002 and it may be that I'll  
12 stop there.

13 Document 84 {Magnum} you were taken to before. This  
14 is an internal email, 14 November, concerning  
15 a Somerfield press release, and they set out the press  
16 release:

17 "Here is the gist of the Press Release issued by  
18 Somerfields.

19 "Somerfield... have struck a deal to pay an extra  
20 £200 [and the like].

21 "We can say, [this is we, McLelland can say] that  
22 this deal concludes a series of negotiations between  
23 McLellands and all the major supermarket groups,  
24 including Asda, Safeway, Sainsbury and Tesco, to obtain  
25 a price increase sufficient to allow us to pay an extra

1           2p per litre to the dairy farmers supplying our  
2           creameries at ..."

3           McLelland had I think, as I understand it, five  
4           creameries in Scotland, and in our submission this is  
5           the final piece as far as they're concerned, Somerfield  
6           are on board, and they are in a position to say that  
7           we've now got everybody lined up.

8           Then 87 {Magnum}, there is an email in which -- it's  
9           87 and 88 in which -- in fact, if you go to 88 {Magnum}  
10          we see the two emails together I think. You first of  
11          all see an email from Tom Ferguson, this time to  
12          Rob Hirst, cc Lisa Oldershaw:

13                 "Please find enclosed my completed control document  
14                 which will cover our complete range."

15                 This is 88, middle of the page.

16                 "... cover our complete range. I will therefore  
17                 plan to increase costs on the Tesco own label Range from  
18                 the 1st of December and also move the Deli range from  
19                 the same date."

20                 Now, that is a shift back by two weeks in the final  
21                 wave but this is -- end of the story:

22                 "As agreed I will start packing the Tesco named  
23                 creamery range at the new retails protecting your  
24                 existing margin and I would plan to deliver the new  
25                 retails from the 1st of December. On the Scottish mild

1           and medium pre-packs I have included suggested retails  
2           on the control document, we can agree on your new retail  
3           position on these lines by Wednesday next week and then  
4           pack for delivery on the 1..."

5           Notice again the time lag needed to pack and to get  
6           them --

7           "This completed movement will allow us as a business  
8           to confidently commit to our 2p per litre increase on  
9           milk from the 1st of December.

10          "If you require any further information please do  
11          not hesitate to contact me.

12          "Cheers Tom."

13          Finalising the position between McLelland and Tesco  
14          after a period of reluctance on the part of Tesco in  
15          relation to the own label strand, and Tom -- what then  
16          happens is Tom writes to Lisa on the 27th, not really  
17          forwarding but -- I suppose forwarding that email, the  
18          email below:

19          "Good morning Lisa.

20          "I will contact you this morning to confirm the  
21          retails on mild, medium and generic mature. I have  
22          updated the control document with the named creamery  
23          retails... we have started to pack at these retails in  
24          preparation for delivery from the 1st of December.

25          "Cheese Tom (put your feet up now and relax)."

1                   That, sir, is the run-through for cheese 2002.

2       **LORD CARLILE:** Shall we pause there?

3       **MR MORRIS:** I think so. Actually I'm probably further or as  
4                   far as I had hoped to be by now, and I would hope I can  
5                   do cheese 2003 relatively quickly tomorrow morning.  
6                   I am presently assuming that you will wish to do that  
7                   after we deal with the other matters.

8       **LORD CARLILE:** Yes.

9       **MISS ROSE:** Can I just ask, I'm not sure if we are fully  
10                  informed as to exactly who is coming tomorrow.

11       **LORD CARLILE:** That's why I asked Mr Bailey the very same  
12                  question now.

13       **MISS ROSE:** I see.

14       **LORD CARLILE:** As of the mid-afternoon break we knew of two  
15                  parties, or two nonparties, who had representations to  
16                  make. I believe that Mr Rhodri Thompson may be  
17                  appearing for one of them.

18       **MISS ROSE:** Do we know which?

19       **LORD CARLILE:** Why don't you hang on for a few moments and  
20                  the referendaires will give you the necessary  
21                  information.

22       **MISS ROSE:** Also I just want to alert the OFT to some points  
23                  that we may wish to explore tomorrow. The first is that  
24                  it's been a theme of the submissions that have been made  
25                  by Mr Morris that he says these are redactions that were

1           made by the parties, they're not the OFT's redactions.

2       **LORD CARLILE:** Is it necessary to do this through the  
3           Tribunal?

4       **MISS ROSE:** Sir, I just want to raise it so everybody knows  
5           where we're coming from.

6           The first point is that it's our understanding that,  
7           in fact, parties made proposals to the OFT for  
8           redactions that they wish on grounds of confidentiality,  
9           and the OFT took a decision as to which of those it  
10          considered to be justified on grounds of commercial  
11          confidentiality or damage to the public interest.  
12          I would just like confirmation of that.

13          The second is that I understand it would appear that  
14          Mr Morris has a number of green pages, and we've seen  
15          quite a lot of green pages in his files, which we don't  
16          have access to. We would like urgent confirmation as to  
17          whether the OFT is intending to rely on any material we  
18          haven't seen and, if so, we would like that to be  
19          immediately disclosed.

20       **LORD CARLILE:** Well, there you are, Mr Morris. The Tribunal  
21          is merely acting as the satellite dish for Miss Rose's  
22          messages. You will take them on board and no doubt  
23          comment later but not now.

24       **MR MORRIS:** In this instance I'm on receive mode.

25       **LORD CARLILE:** Thank you.

1                   Right, we'll adjourn until, we said 10.30 tomorrow  
2                   morning. Thank you all very much.

3                   (4.15 pm)

4                                   (The hearing adjourned until  
5                                   Wednesday, 2 May 2012 at 10.30 am)

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