

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

**IN THE COMPETITION**

**APPEAL TRIBUNAL**

Case No. 1188/1/1/11

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

14 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

—————  
*Transcribed by Opus 2 International*  
*1 Bell Yard, London, WC2A 2JR*  
*Tel: +44 (0)20 3008 5900*  
[info@opus2international.com](mailto:info@opus2international.com)

—————  
**HEARING (DAY 5)**

## APPEARANCES

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

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

---

1 Monday, 14 May 2012

2 (9.50 am)

3 **LORD CARLILE:** Good morning. Somebody has a mobile phone  
4 near a microphone. Would they please remove it from the  
5 proximity to the microphone.

6 Right. Whom can we help first this morning?

7 **MISS ROSE:** Sir, first of all, there's the question of the  
8 video link. I understand that there was a visit to the  
9 facility on Friday. We were grateful to receive the  
10 Tribunal's letter confirming the arrangements including  
11 the timetabling, and we hope that we will be proceeding  
12 on that basis and we will let you know if there is  
13 something that would preclude it. But that's our  
14 current --

15 **LORD CARLILE:** The Tribunal has got its head around getting  
16 up at that time of the morning, to sit at 7.00 in the  
17 morning. I gather the facilities at the International  
18 Dispute Resolution Centre are very good.

19 **MISS ROSE:** They are very good.

20 **LORD CARLILE:** Yes, that's fine.

21 Application by MISS ROSE

22 **MISS ROSE:** We're very grateful to the Tribunal for  
23 accommodating us. So that's that issue.

24 The next issue is the vexed question of  
25 confidentiality markings which I think we'd all hoped

1 after last week might have been resolved. The problem  
2 that then arose, I hope the Tribunal received our letter  
3 of Friday attaching two other letters. If I can just  
4 take you through --

5 **LORD CARLILE:** Yes. They're three identical letters?

6 **MISS ROSE:** No, first of all, there's a letter of 8 May 2012  
7 from Freshfields. I hope we attached these to our  
8 letter that we sent on Friday.

9 **LORD CARLILE:** I have letters dated 11 May 2012.

10 **MISS ROSE:** Do they not attach letters of 8 and 9 May?

11 **LORD CARLILE:** No, but we've probably seen them before.

12 I have it here.

13 **MISS ROSE:** This is a letter from Freshfields of 8 May 2012  
14 to the OFT where we were seeking to make contact with  
15 them following the view that you, sir, had expressed on  
16 Day 4 which was that, if the OFT wanted to put to  
17 witnesses any material that was in documents that either  
18 had a red box or black box marking, or indeed a blue box  
19 marking, that that should be provided in advance in  
20 a clip so that the Tribunal could review it and consider  
21 the extent to which the requirements of fairness  
22 required confidentiality to be waived. Of course, that  
23 applies to blue box as well as red box markings because  
24 a witness may be inhibited if asked a question about the  
25 document when they're not able to respond by referring

1 to materials in a blue box.

2 We were writing simply to seek to organise the  
3 mechanics of that and to ask the OFT to provide the  
4 clips of the documents for the witnesses. If I can just  
5 invite you to read that letter, you'll see what we were  
6 proposing. (Pause)

7 **LORD CARLILE:** Yes.

8 **MISS ROSE:** We then received a reply. It's dated 9 May but  
9 in fact was not received until late at night on 9 May,  
10 so effectively on the morning of 10 May. Can I just  
11 invite to you read the whole of this letter of 9 May and  
12 then I'm going to take you to some particular parts of  
13 it.

14 **LORD CARLILE:** Do you want to sit down whilst we read it?

15 **MISS ROSE:** Yes. (Pause)

16 **LORD CARLILE:** Yes, okay, thank you.

17 **MISS ROSE:** It would be fair to say that this letter came as  
18 something of a shock to Tesco's legal team. The first  
19 point to make is that we were not suggesting that the  
20 Tribunal had made a direction. As you will see, our  
21 letter of 8 May refers to the view that was expressed by  
22 the Tribunal, and we were hoping to approach the matter  
23 in the spirit of cooperation, to balance the  
24 requirements of confidentiality against the needs of  
25 a fair hearing, including the need for witnesses to have

1 fair sight of material that was going to be put in the  
2 cross-examination.

3 The first point then is that we were surprised at  
4 the resistance that the OFT were putting up to that  
5 proposal and what seems to us to be a very rigid and  
6 technical approach. But there was something of even  
7 greater concern in this letter and that is at page 3.

8 What they say on page 3 starting just opposite the  
9 first hole-punch is this:

10 "... nor is the OFT obliged to inform Tesco of the  
11 steps it is taking towards other parties in respect of  
12 the confidentiality status of documents unless and until  
13 any amendment to the confidentiality order is sought.  
14 Nevertheless, the OFT has no objection at the present  
15 time to keeping Tesco informed at an appropriate level  
16 of detail [whatever that means] of the steps it is  
17 presently taking in respect of red box material. In  
18 that regard, the OFT has so far identified and has put  
19 to the relevant parties asserting confidentiality the  
20 following documents which contain red material that it  
21 would wish to be free to put to witnesses if it so  
22 desired, and in this respect it therefore seeks to  
23 downgrade the confidentiality status of the red material  
24 in [various identified documents]."

25 That statement is a very troubling one because, as

---

1 the Tribunal knows, and I don't need to say it again,  
2 the OFT has early resolution agreements with all of  
3 these parties which oblige them to cooperate fully with  
4 the OFT, including in relation to preparation of the  
5 appeal. The OFT is therefore in a position of very  
6 considerable power when cooperating with those parties  
7 in relation to this issue, as in relation to any other  
8 issue concerning the appeal.

9 What it now appeared that the OFT had done was not  
10 to seek to ask those parties to waive confidentiality on  
11 all relevant material but only to ask them to waive  
12 confidentiality on documents or parts of documents that  
13 the OFT wanted to rely on when cross-examining the  
14 witnesses. That, with respect, is a wholly  
15 inappropriate course for a public authority to take, and  
16 particularly a public authority with the two features  
17 that the OFT has in this case, firstly that it is in  
18 a quasi-prosecutorial mode, and, secondly, that it has  
19 in place these very powerful early resolution agreements  
20 that give it the ability to exercise substantial control  
21 over the actions of third parties.

22 In that situation, we submit, it was unfair and  
23 entirely wrong in principle for the OFT to seek to  
24 approach those parties only to waive confidentiality in  
25 material that the OFT wanted to rely on to assist its

1 case.

2 The position that the OFT took at the last hearing  
3 before this Tribunal was that it was broadly neutral on  
4 confidentiality, which was a matter for the third  
5 parties, but, it said, it considered that the red box  
6 material was legitimately confidential because it  
7 protected commercial interests of competitors, and I can  
8 show you the place where they said that in the  
9 transcript if you would like to see it.

10 If you can take the transcript from Day 4, if you go  
11 to page 16 of the transcript, Ms Smith --

12 **LORD CARLILE:** Page 16, line 4?

13 **MISS ROSE:** Yes. She says:

14 "Sir, we absolutely accept that and it is primarily  
15 for the third parties to make submissions on this. But  
16 if I may, there are two points that the OFT would like  
17 to make, and first of all that is that we note that what  
18 the parties say in their submissions now and what  
19 they've previously said is that the Tribunal should be  
20 mindful of the nature of what information is sought.

21 "Here we're looking really at red boxes and black  
22 boxes ... That information that remains in red boxes  
23 and black boxes is not just about old prices, it's about  
24 commercial strategy and it's about relationships with  
25 individuals. The commercial strategy, as I understand

---

1           it, and this will no doubt be developed by the third  
2           parties, commercial strategy remains an issue and in  
3           a number of cases the individuals with whom one is  
4           negotiating are still the same individuals about which  
5           comments were made ten years ago.

6           "So particularly as regards commercial strategy, we  
7           say that one needs to be careful about facilitating  
8           collusion between what are competitors ..."

9           Then they say:

10          "And the OFT is very alive to the fact that if  
11          parties perceive that there's a risk that material which  
12          they consider to be of commercial sensitivity ... is not  
13          to be treated as confidential if there is an appeal of  
14          the OFT's decision, then that could deter parties from  
15          providing full cooperation with the OFT ..."

16          So they were broadly supporting the claims of  
17          continued confidentiality that were being made over the  
18          red box material. But what then seems to have happened  
19          is that unilaterally, without reference to Tesco, they  
20          have gone to two of those parties and sought the lifting  
21          of confidentiality over particular documents that the  
22          OFT wanted to rely on. We say that that approach was  
23          wholly unfair and wrong in principle. Either the OFT  
24          could take the approach that it was a matter for third  
25          parties to make claims for confidentiality and that

---

1           where those claims had not been overborne they would be  
2           respected. Or if the OFT considered that the claims for  
3           confidentiality were not valid, that the appropriate  
4           approach for the OFT to take would be to seek to  
5           persuade those parties to waive all the claims for  
6           confidentiality over material where the OFT didn't  
7           consider it to be valid.

8                   What is not permissible, with respect, is for the  
9           OFT to say, "Well, we're happy for the red boxes to stay  
10          so that Tesco can't see them and so that the witnesses  
11          who are being cross-examined can't see them where it's  
12          not material we want to rely on. But where we want to  
13          put something to your witness, because we think it will  
14          help our case, then we want the confidentiality lifted  
15          so we can do that".

16                   We're now in a situation where witnesses are going  
17          to be available today to give evidence who have only  
18          been able to see the documents in their redacted form  
19          with the red boxes, ie they can't see the material  
20          that's in the red boxes, but where the OFT is now going  
21          to say, "Okay, we're going to lift the red boxes in  
22          relation to some of the material but only where we think  
23          it suits us".

24                   That was the reason why we wrote the letter that we  
25          did on Friday making the application that we did. If

1 I can just turn to that letter, you will see the way we  
2 put it. There are two issues here, the first is this  
3 issue I've just outlined, and the second is a separate  
4 issue I'm going to come to in a minute about three  
5 particular documents that we think we need to refer to  
6 in open court but I'll come back to that in a minute.

7 So dealing with the issue of conversion of red box  
8 material to blue box material --

9 **LORD CARLILE:** It looked to us like an application to  
10 convert it to, what we've been calling in our retirement  
11 room, blue box plus.

12 **MISS ROSE:** If you can tell me the definition of blue box  
13 plus --

14 **LORD CARLILE:** Blue box plus is blue box but limited to the  
15 lawyers.

16 **MISS ROSE:** Well, no, because it would also have to be seen  
17 by the witnesses.

18 **LORD CARLILE:** I'm looking at the "Dear Ros" letter of  
19 11 May. These letters are all the same anyway, but if  
20 you look at the last paragraph on the first page:

21 "We would be happy to make the appropriate  
22 arrangements, such as the proposed disclosure of red box  
23 material to Tesco in-house lawyers under blue box  
24 conditions ..."

25 Now, blue box conditions are broader than what

1 follows in this sentence, back to the sentence:

2 "... is made to named individuals within the Tesco  
3 legal team who are practising solicitors regulated by  
4 the Solicitors Regulation Authority".

5 **MISS ROSE:** Yes, sir.

6 **LORD CARLILE:** That is not blue box.

7 **MISS ROSE:** No, you're right. You will see in the first  
8 paragraph that it's also to be put to witnesses:

9 "... such that it can be seen by Tesco in-house  
10 lawyers and be put to witnesses but will not be publicly  
11 referred to."

12 So we're saying we accept it wouldn't be seen  
13 indiscriminately by commercial people within Tesco but  
14 that it should be available to the witnesses.

15 Now, that of course includes one person who is still  
16 employed by Tesco, namely Mr Scouler. But Mr Scouler is  
17 the only person who is giving evidence who still works  
18 for Tesco.

19 We currently have a very strange position where  
20 there's actually material in red boxes where it's  
21 material that was originally sent to one of the  
22 witnesses who is giving evidence.

23 **LORD CARLILE:** Sorry, forgive me for interrupting you,  
24 Miss Rose, but if the first substantive paragraph means  
25 what it says, what does the paragraph I've just read out

1 mean, if anything?

2 **MISS ROSE:** I think it means only that we would be seeking  
3 for that material not to be made available generally  
4 within Tesco but only to the named in-house solicitors  
5 for Tesco.

6 **LORD CARLILE:** Yes, but earlier on, as you've just pointed  
7 out to us, there is the parenthesis:

8 "... such that it can be seen by Tesco in-house  
9 lawyers and be put to witnesses ..."

10 **MISS ROSE:** That's right.

11 **LORD CARLILE:** Which is right, but they're incompatible  
12 sentences.

13 **MISS ROSE:** Sir, they're not, because blue box without  
14 a plus would be seen by everybody but not referred to in  
15 open court. What we're suggesting is more protection  
16 than that, which is seen by Tesco in-house lawyers and  
17 witnesses.

18 **LORD CARLILE:** Tesco in-house lawyers.

19 **MISS ROSE:** That was the proposal.

20 We're currently in a very strange situation where  
21 red box claims are being maintained in a situation where  
22 those who are giving evidence include those to whom the  
23 original documents were actually sent.

24 If I can give you an example of that, document 51A  
25 [Magnum], if we just turn it up, you recall that was the

---

1 document that had a black box on it which has now been  
2 upgraded to a red box. But the most obvious person to  
3 ask questions about that is Mr Ferguson who works for  
4 McLelland, and that's a McLelland internal document, so  
5 it's very difficult to see what the purpose is of  
6 maintaining a red box confidentiality marking against  
7 him is.

8 **LORD CARLILE:** Just bear with me whilst I find the  
9 unredacted version.

10 **MISS ROSE:** I don't know if you've got the updated position  
11 of McLelland which we received.

12 **LORD CARLILE:** I have not got the unredacted version, I'm  
13 afraid, in my file.

14 (Handed)

15 Thank you very much. Right, sorry.

16 **MISS ROSE:** So you can see that. I don't know if you have  
17 seen, I hope you have, an email from Salans with their  
18 up-to-date position on this document which maintains --  
19 the one I have is redacted but it has a red box inserted  
20 on to the redaction. It's not that easy to tell, but it  
21 appears that they want to retain the red box only for  
22 the last line of the current box. That is, with  
23 respect, mystifying, given the nature of the information  
24 which is in the public domain in other parts of the  
25 document, and also given the fact that this is

1 a McLelland internal document and it's hard to see why  
2 Mr Ferguson shouldn't look at it.

3 That's an example, and we have a document of central  
4 relevance to the case.

5 **LORD CARLILE:** The information in the last sentence is all  
6 over the papers.

7 **MISS ROSE:** Absolutely, and one simply doesn't know why that  
8 claim is being maintained. So that's an example.

9 Another example is document 103, this is one of the  
10 documents that we are saying ought to be made completely  
11 open given its significance for the proceedings. It's  
12 certainly a document on which I'm going to want to make  
13 closing submissions.

14 But the current situation on red box markings, again  
15 if you look at the attachments to the Salans email, you  
16 will see where a red box claim is being maintained.  
17 Some of it is simply prices, where it's very difficult  
18 to see how they're confidential after ten years, but one  
19 is of some significance. If you look just below the  
20 second whole punch, the paragraph in the red box just  
21 underneath the words:

22 "If they apply a £200 increase to the retail price  
23 this will move the 250g pack to £1.68."

24 You will see there is half a sentence that is being  
25 maintained in red -- it's hard to see what it is on that

---

1 email because they've obliterated it but if you look in  
2 your bundle you can see what it is -- of some  
3 significance to this case, for reasons which I cannot  
4 now develop without being in breach of confidentiality.  
5 But we submit it's impossible to see what is a valid  
6 basis for maintaining an inhibition over the disclosure  
7 of this material that's in these red and blue boxes in  
8 this document, which is all centrally relevant to the  
9 case and which needs to be freely explored by the  
10 Tribunal and by counsel.

11 That's the unsatisfactory position that we're in,  
12 and I do apologise for the lateness of our application,  
13 but we were, I have to say, taken by surprise to be  
14 informed by the OFT that they felt it was appropriate  
15 only to ask the parties to waive confidence on material  
16 that they thought would support their case. I find that  
17 absolutely astonishing.

18 So that's why we're here, and we have suggested two  
19 alternatives. One alternative is that everything goes  
20 blue, everything that's red goes blue, so that everybody  
21 can see everything but it doesn't get referred to in  
22 open court. And the other alternative is nothing red  
23 gets put to the witnesses because of the potential  
24 prejudice if only material that favours the OFT's case  
25 can be put to the witnesses but not other red box

1 material. So I would, for example, not be able to  
2 re-examine on other red box material that hadn't been  
3 released.

4 Now, since we made that application we've had  
5 communications with a number of the parties, and I can  
6 tell you, and I hope and pray accurately, that this will  
7 be accurate. The first is Arla, and we understand that  
8 Arla are prepared to consent to our proposal that all of  
9 the Arla red box markings should be blue box plus; in  
10 other words, can be put to witnesses and can be seen by  
11 the named Tesco in-house counsel.

12 **LORD CARLILE:** Yes.

13 **MISS ROSE:** Glanbia have said that they don't consent, they  
14 have nothing to add to the submissions that they made  
15 last time and they're in the hands of the Tribunal. We  
16 would make the submission that, in relation to Arla  
17 (sic) they have not demonstrated a valid claim -- sorry,  
18 Glanbia, they have not demonstrated a valid claim for  
19 red box protection for any material given the passage of  
20 time, and that given the potential prejudice caused by  
21 partial disclosure that ought to be moved into blue box  
22 plus.

23 Dairy Crest are here by Mr Thompson, and we've had  
24 a conversation with them. Their red box material is of  
25 no relevance, it seems to us, to these proceedings, and

1 in those circumstances we don't pursue an application in  
2 relation to Dairy Crest.

3 McLelland are of significance. I've just shown you  
4 two of the key McLelland documents where they are  
5 maintaining claims to red box protection, and we submit  
6 that, in relation to those documents, those claims are  
7 not justified and the documents are relevant and require  
8 to be seen by the witnesses and may well require to be  
9 referred to in open court. We submit that there is no  
10 damage shown to McLelland's interest.

11 Can I just show you the email from McLelland, since  
12 they are not here, and see why they say that shouldn't  
13 happen. This is an email from Tatiana Kruse of Salans  
14 dated 13 May. Does everybody have that?

15 LORD CARLILE: No.

16 MR MORRIS: We don't either.

17 MISS ROSE: It's addressed to Mr Bailey. (Handed)

18 I think it was sent to Ms Exell at the OFT and also  
19 Ms Telford at the OFT, so the OFT do have copies of it.

20 MR MORRIS: But you will helpfully provide us with some.

21 Thank you very much. (Handed)

22 LORD CARLILE: It's actually dated --

23 MISS ROSE: Dated the 13th.

24 LORD CARLILE: Yesterday afternoon. I wasn't here yesterday  
25 afternoon.

---

1       **MISS ROSE:** The first point, they're referring to Ms Trapp's  
2           letter of 11 May --

3       **LORD CARLILE:** Sorry, my colleague is under a disadvantage  
4           because she can't see this. Is there any way a copy can  
5           be provided?

6       **MISS ROSE:** Here we are. (Handed)

7           So she says:

8           "As regards the second paragraph of that letter  
9           [she's talking about Ms Trapp's letter of 11 May,  
10          talking about red box going into blue box], I have  
11          informed Freshfields by earlier email that the OFT have  
12          confirmed to me that they do not object to our providing  
13          Tesco with the documents enclosed with our letter of  
14          9 May to the OFT in the red/blue form which she(?) sent  
15          to the OFT, provided Tesco agrees to abide by the  
16          confidentiality agreement relevant to red material and  
17          Tesco agrees to the conditions set out in our letter in  
18          respect of blue material."

19          One is immediately struck by the oddity of McLelland  
20          referring to the OFT not objecting. It is very hard to  
21          see how the OFT would be in a position to object to that  
22          since it is not the OFT's confidentiality that is in  
23          issue in any event.

24          Turning to the third paragraph of the Freshfields  
25          letter:

1 "Please be aware, we have sought to maintain the red  
2 boxes around a very limited amount of the previously  
3 redacted information on the above mentioned documents.  
4 I set out below McLelland's position on the documents  
5 specifically mentioned in (inaudible) letter. McLelland  
6 is not comfortable with the general release of  
7 previously redacted information. If further documents  
8 are concerned, our client would wish to be given the  
9 opportunity to make representations about those  
10 documents."

11 Of course today is their opportunity but they aren't  
12 here.

13 "As regards those documents --"

14 It's all very well for the OFT to laugh but they  
15 raised this on Thursday.

16 **LORD CARLILE:** Let's go one at a time.

17 **MR MORRIS:** Carry on, Miss Rose.

18 **LORD CARLILE:** Carry on, Miss Rose. Ignore Mr Morris'  
19 guffaws.

20 **MISS ROSE:** I generally do, sir.

21 "As regards those documents mentioned in the fourth  
22 paragraph of the Freshfields 11 May letter, we have  
23 considered them and our client will agree to most of the  
24 red box information being put into blue boxes as  
25 indicated in the attached versions. McLelland seeks to

---

1 retain red boxes for information which relates to its  
2 margins or pricing strategies. We do not consider  
3 information on such matters as margins and pricing  
4 strategies per se relevant to the hearing."

5 The first point is that it's quite a surprising  
6 statement that material relevant to margins and pricing  
7 strategies is not relevant to the hearing. I had  
8 understood those to be of central relevance to this  
9 hearing.

10 Secondly, we've just looked at some of the material  
11 on which they're seeking to retain red box markings and,  
12 with respect, it doesn't seem to relate to margins and  
13 pricing strategies and it is material that is relevant.  
14 That includes the extracts we just looked at from  
15 document 51A [Magnum] and document 103 [Magnum].

16 "As regards the documents to which Tesco's counsel  
17 wish to refer in open court, we would ask that any blue  
18 box information be referred to in general terms, such as  
19 specific details such as prices are not mentioned."

20 So that's McLelland's position.

21 We submit that is not sufficient to maintain their  
22 claim to red box protection in a situation in which the  
23 OFT has sought and obtained their consent to a partial  
24 waiver of red box protection only of documents that the  
25 OFT wants to rely on, and that the risk of prejudice and

1           unfairness to the appellant in that situation is such  
2           that either all the red box protection must go blue or  
3           no red box protection can be put to the witnesses,  
4           because otherwise there is a risk of unfairness.

5           **LORD CARLILE:** What would the position be, Miss Rose, if it  
6           were the view of the Tribunal -- I'm not saying it is  
7           because I haven't discussed this with my colleagues  
8           yet -- if it were the view of the Tribunal that the  
9           overriding objective can only be achieved if all the red  
10          box material is placed in blue boxes.

11                    There's confidentiality -- the reason I ask the  
12                    question is because of the issue of confidentiality.

13          **MISS ROSE:** Yes, so the answer is that it is absolutely  
14                    trite that confidentiality per se is not a reason to  
15                    object to disclosure. That takes you right back to the  
16                    Alfred Crompton Amusement Arcades case back in the  
17                    1970s, and that has long been the position.

18                    There are interesting general questions that are  
19                    raised by the way confidentiality has been dealt with in  
20                    these proceedings, and I'm sure you are as aware of them  
21                    as I am and now is probably not the time to raise them.  
22                    It may well be that the CAT needs to reconsider its  
23                    approach generally to confidentiality and that there may  
24                    need to be a practice direction. That's not our concern  
25                    at the moment, we're trying to just deal with the

1 situation as it is now.

2 My concern and my client's concern now is that  
3 we have got into a horrible mess where the OFT, and  
4 I don't suggest they've done it deliberately, but the  
5 effect of what they have done has been to manipulate the  
6 process of confidentiality in such a way that it has  
7 operated to enable them to rely on material whilst it  
8 being concealed from our lay client and witnesses, and  
9 we say that that cannot be a fair way to proceed. On  
10 that basis we would submit that the right course is for  
11 everything red to go blue.

12 But having said that, we don't pursue that in  
13 relation to Dairy Crest or -- the final one is Asda  
14 where, again, very limited red box claims are made  
15 which, again, are not relevant. So we don't pursue that  
16 in relation to Dairy Crest or Asda. Arla have consented  
17 in any event and we pursue the point in relation to  
18 Glanbia and McLelland. So that's the first aspect of  
19 our application.

20 The second aspect of our application is that there  
21 are three documents that we've identified which we think  
22 we need to refer to in open Tribunal. If you just take  
23 our letter again, we identify that they are 51A  
24 [Magnum], 103 [Magnum] and 112 [Magnum]. We've just  
25 looked at 51A, which was the internal McLelland

1 document.

2 If you just take up bundle 2, we can see what 112  
3 [Magnum] is. It's the Tesco briefing document that is  
4 absolutely central to the OFT's case on 2003 and which  
5 is, of course, a hotly disputed document. We submit  
6 that, again, the overriding objective requires that  
7 document to be open.

8 **LORD CARLILE:** This is Mr Meikle's document?

9 **MISS ROSE:** Mr Meikle's document, yes, where the contents  
10 are disputed by Ms Oldershaw in her witness statement.  
11 She needs to be in a position to comment freely in open  
12 court on the text of this document without being  
13 inhibited by blue boxes and we need to be able to make  
14 submissions on it in closing similarly without being  
15 inhibited by the box markings.

16 **LORD CARLILE:** I've marked my copy rather heavily. The blue  
17 boxes and the red box appear after the word "so", don't  
18 they? There's nothing above "so", is there?

19 **MISS ROSE:** There's one in the first paragraph, it's a date.  
20 It is really impossible to understand how that date can  
21 have any confidentiality --

22 **LORD CARLILE:** Yes, I have that. I'd obscured that myself.

23 **MISS ROSE:** It is impossible to see how any of this material  
24 has any genuine confidentiality at this date and this is  
25 a centrally relevant document.

1           We make the same submission about document 103  
2           [Magnum]. I know we've just looked at it, but if we  
3           just go back to it, this is a document where originally  
4           some parts were blacked out. There are now extensive  
5           passages in red. Again, a very important document which  
6           I will need to be able to make closing submissions on  
7           without inhibition, and particularly the passages  
8           opposite the second hole-punch and below the second  
9           hole-punch.

10       **LORD CARLILE:** Yes.

11       **MISS ROSE:** The third document was 51A [Magnum] that we also  
12           just looked at.

13           Sir, unless I can be of any further assistance,  
14           that's the reason why we're here, and again I reiterate  
15           my apology not only to the Tribunal but also to the  
16           third parties for the inconvenience of the lateness of  
17           the application.

18       **LORD CARLILE:** Don't worry about that.

19           Mr Morris, you have the floor without guffaws.

20       **MR MORRIS:** Good morning. I apologise for my guffaws.

21       **LORD CARLILE:** Don't worry.

22                           Submissions by MR MORRIS

23       **MR MORRIS:** If I may start by making some high-level  
24           observations. The first observation is that this  
25           application is, and was until I have just found out now,

---

1 an application for wholesale downgrading of all red box  
2 material to blue box light or full blue box, not blue  
3 box plus. That application was made extremely late in  
4 the day. That is paragraph 1(a) of the application.  
5 Paragraph 1(b) of the application relates to three  
6 specific documents to which we can return in a moment.  
7 The application is the 11 May letter, I believe sent  
8 about midday on Friday.

9 A wholesale application for everything red to go  
10 blue or the OFT can't rely on red boxed material in  
11 cross-examination. That's the basic application. That  
12 application was wholly unwarranted and was, as we now  
13 see, a sledgehammer to crack a nut.

14 We now see that what it comes down to, matters  
15 against -- and that application as made is an  
16 application in respect of Dairy Crest material, in  
17 respect of Asda material, in respect of all red box  
18 material.

19 That application, as we now understand it, has now  
20 been commuted first by the suggestion of a blue box plus  
21 regime, which is a different application from the  
22 application that was made and, secondly, by the  
23 application not being pursued in relation to Dairy Crest  
24 and Asda, in the face of letters of opposition received  
25 now at very short notice. And, as I understand it,

1 leaving to one side perhaps the position of Glanbia,  
2 which I'm not on top of the detail, it actually comes  
3 down to a number of McLelland documents. That's the  
4 first point.

5 My second point is this. It is and has been always  
6 a matter for Tesco to identify specific red box material  
7 which it wishes to have moved to the blue box. As  
8 I understand it now, the only documents that have been  
9 so identified, and I will get a yellow post-it if I've  
10 got it wrong, are documents 51A [Magnum], 103 [Magnum]  
11 and 112 [Magnum], which are the very documents which are  
12 the part -- which are the subject matter of part 1(b) of  
13 this application, to which we have little to say because  
14 that is a matter for the Tribunal. Those are documents  
15 which we have put to McLelland and put to them last  
16 week, and McLelland came back with their response to it.  
17 We have not -- there is nothing in those documents, red  
18 boxed, that we have not requested moving from red to  
19 blue already.

20 The third point. This issue, a general move from  
21 red to blue, could have been raised at or very shortly  
22 after the hearing on 2 May at the very latest.

23 Fourthly, the Office of Fair Trading has conducted  
24 itself in this regard in accordance with the Tribunal's  
25 wishes and has acted properly. Can I just develop that

1           very briefly. It is our submission that, in the light  
2           of what transpired at the last hearing, the OFT has done  
3           all that it could reasonably be expected to have done in  
4           the light of the Tribunal's observations in that  
5           hearing. What the Tribunal indicated was that the OFT  
6           should identify material in red boxes which it may wish  
7           to put to witnesses in cross-examination. The Office of  
8           Fair Trading has done that and it did that in its  
9           letter -- it notified Tesco of having done that in its  
10          letter of 9 May.

11                 The Office of Fair Trading was not asked by the  
12          Tribunal on 2 May, or any time since, to identify any  
13          red box material which Tesco might wish to put in  
14          re-examination or to refer to in its closing  
15          submissions. Nor was it asked by the Tribunal or by  
16          Tesco to contact third parties to do so. Indeed, with  
17          the greatest of respect, there is no reason why the OFT  
18          should have been so asked. In respect of such material  
19          that Tesco wishes to rely upon, that is something which  
20          Tesco has always been able to do and which it is now  
21          able to do. The notion that the OFT was cherry-picking  
22          is misconceived.

23          **LORD CARLILE:** Do we really need to spend a lot of time on  
24          what might be categorised as *amour propre*? I'm not  
25          really, and I'm sure my colleagues aren't, terribly

1           concerned about the feelings of either side. We have to  
2           dispose of the case justly. I do understand the  
3           feelings but they're not going to move the decision.

4           **MR MORRIS:** I'm grateful for your indication. There has  
5           been a certain degree of criticism of the Office of Fair  
6           Trading's conduct since the relevant date and I felt --

7           **LORD CARLILE:** It's part of the territory, isn't it?

8           **MR MORRIS:** Well, perhaps it is. But there is a lot of time  
9           being taken on this issue and let me move on.

10           Ultimately this is an issue -- the point I would  
11           make though is this, what is it that Miss Rose wants to  
12           go from red to blue that she wants to put in  
13           re-examination or closing submissions? That is the key  
14           question for you. She has identified three documents,  
15           we have nothing further to say on them because we have  
16           put those documents to McLelland and McLelland have  
17           responded in the way that they have responded.  
18           Ultimately, it's a matter for the Tribunal and I perhaps  
19           say no more on that. But that key question I do invite  
20           you to consider, what is it in addition, if anything,  
21           that needs to go from red to blue?

22           Sir, I don't need to remind you of the fact that, of  
23           course, as was pointed out at 2 May, there are public  
24           interest issues here about confidentiality. There are  
25           issues about the operation of the Office of Fair

1 Trading's functions as a public authority in conducting  
2 investigations and the ability of persons to be able to  
3 come forward to the Office of Fair Trading and disclose  
4 material safe in the knowledge that there are proper  
5 safeguards in relation to confidentiality.

6 I know that you've raised the question of the  
7 overriding objective and the like, and confidentiality,  
8 and of course Miss Rose is entirely correct that in  
9 terms of High Court litigation and disclosure issues,  
10 confidentiality is not a bar to disclosure. The High  
11 Court also has confidentiality rings put in place as  
12 a softening of that regime. But you will be only too  
13 aware of the fact that, first of all, these issues are  
14 of particular significance in the competition world  
15 because in these cases you end up always having  
16 competitors or suppliers in the same courtroom and that  
17 is a matter of great concern and, secondly, there are  
18 specific statutory provisions in the Enterprise Act  
19 where the Tribunal is under duty to consider the issue  
20 of commercial confidentiality. Paragraph 1.2(b) of  
21 schedule 4, I think, is the relevant provision. That  
22 makes this slightly different, or not slightly  
23 different, very different. This isn't straightforward  
24 High Court disclosure.

25 We do obviously -- it's a matter ultimately for the

1 Tribunal to rule, to consider the balance and to  
2 consider whether the third parties have had adequate  
3 opportunity to put forward their objections.

4 But the point that was made most cogently, if I may  
5 say so, by Mr Thompson at the last hearing is that there  
6 are genuine ongoing commercial relations and these  
7 things are or can be particularly sensitive.

8 Unless I can assist you any further, unless there is  
9 anything else, those are my brief submissions.

10 **LORD CARLILE:** Thank you. Do you want to reply?

11 Reply submissions by MISS ROSE

12 **MISS ROSE:** The problem with Mr Morris' approach is that he  
13 says that the onus is on Tesco to identify specific  
14 documents on which it may wish to re-examine before he  
15 has cross-examined. There are two obvious problems with  
16 that. The first is that we don't know what he's going  
17 to ask in cross-examination and, therefore, we're not in  
18 a position at the moment to identify what particular  
19 individual documents or parts of documents we may wish  
20 to put to witnesses in re-examination.

21 The second point is that we've been deprived of any  
22 opportunity to consider those parts of documents that  
23 are in red boxes with the witnesses who are going to  
24 give evidence and we, therefore, don't know what their  
25 position is in relation to any of the red box material.

1 That prejudices us when those witnesses give evidence  
2 because it means that we don't know whether we should be  
3 re-examining or not on a particular material.

4 The other point that Mr Morris made was he said  
5 confidentiality is particularly sensitive in  
6 Competition Act proceedings. As a general rule that is  
7 correct. Of course it's correct. If you have  
8 competitors in court able to examine each other's  
9 business plans, that's going to rather defeat the  
10 purpose of the Competition Appeal Tribunal. But that is  
11 a million miles away from this case where what we are  
12 dealing with is information, much of which has been  
13 inconsistently treated so that it is in the public  
14 domain in some parts of the bundle whilst  
15 confidentiality is maintained in other parts, and where  
16 all of the information is at least nine years old and in  
17 many cases ten years old. Frankly, it is impossible to  
18 understand how there could be an effect on competition  
19 from somebody knowing what Asda's price for a particular  
20 kind of cheese was in 2002. It's extraordinarily hard  
21 to see what that has to do with the price of cheese in  
22 2012. So that general concern, we submit, has no  
23 relevance to this case.

24 What is striking about Mr Morris' submission is that  
25 he doesn't advance any reason why confidentiality should

1 trump the overriding objective in this case, given what  
2 has happened and given the inconsistency with which  
3 matters have been treated so far in these proceedings.  
4 That, we submit, is the clinching point.

5 **LORD CARLILE:** Thank you. Well, we shall retire to consider  
6 this matter. I presume that Mr Reeves is here and ready  
7 to go when we're ready for him?

8 **MISS ROSE:** Yes.

9 **LORD CARLILE:** Thank you.  
10 (10.40 am)

11 (A short break)

12 (10.55 am)

13 RULING

14 **LORD CARLILE:** In relation to the application which has been  
15 made in writing over the weekend and this morning, we  
16 have considered the oral submissions and also the  
17 written submissions of McLelland. We have considered  
18 the provisions of schedule 4 of the Enterprise Act, we  
19 have considered too the application of the overriding  
20 objective to proceedings before this Tribunal.

21 It is our judgment that for the just disposal of the  
22 case, the documents numbered 51A [Magnum], 103 [Magnum]  
23 and 112 [Magnum] should be treated as blue box material.  
24 For the avoidance of doubt, that will include disclosure  
25 to the relevant witnesses. That is our ruling.

1 Bear with me whilst I find my Mr Reeves clip.

2 Yes.

3 **MISS ROSE:** Sir, we now call Arthur Reeves.

4 MR ARTHUR REEVES (affirmed)

5 **LORD CARLILE:** Now, Mr Reeves, we shall be kind to you. If  
6 you make yourself comfortable, speak up so that  
7 everybody can hear you, it's quite a large room, and  
8 answer the questions that are put to you and not any  
9 others. Right.

10 Examination-in-chief by MISS ROSE

11 **MISS ROSE:** Can I ask that Mr Reeves should be given appeal  
12 bundle 2B, please.

13 Mr Reeves, can you turn in that bundle towards the  
14 back to tab O, please. You'll see there are various  
15 numbered tabs but there are also some that have letters  
16 on them.

17 **LORD CARLILE:** Sorry. Forgive me for interrupting you,  
18 Miss Rose. You're looking at bundle 2B?

19 **MISS ROSE:** 2B of the appeal bundle.

20 **LORD CARLILE:** Thank you.

21 **MISS ROSE:** It's tab O [Magnum].

22 **LORD CARLILE:** That's the first statement?

23 **MISS ROSE:** Yes.

24 Do you have there a witness statement?

25 **A.** I do.

1 Q. That says "First Witness Statement of Arthur John  
2 Reeves"?

3 A. Hmm-hmm.

4 Q. At the end of that statement, is that your signature?

5 A. It is.

6 Q. Are the contents of this witness statement true?

7 A. They are.

8 Q. If you turn on in the bundle, do you have a tab that is  
9 labelled O/1 [Magnum]?

10 A. Yes.

11 Q. And a document headed "Arthur Reeves Witness Summary"?

12 A. Yes.

13 Q. That's not a signed document but have you had an  
14 opportunity to read that through carefully?

15 A. I have.

16 Q. Are you able to confirm whether the contents of that  
17 summary are true?

18 A. They are.

19 **MISS ROSE:** If you just wait there, please, Mr Morris will  
20 ask you some questions.

21 **MS SMITH:** Actually Ms Smith will be asking the questions.

22 **LORD CARLILE:** Ms Smith.

23 Cross-examination by MS SMITH

24 **MS SMITH:** Good morning, Mr Reeves. Could I ask you to keep  
25 open that bundle with your statements in it, and also

1           could I ask that you be handed the yellow bundle,  
2           bundle 1 of the documents bundle, DB1. I'm going to ask  
3           you to look at some documents in that as well but let's  
4           have them both in front of you before we start. Of  
5           course if you want to help yourself to some water,  
6           please do.

7           **A.** Thank you.

8           **Q.** I'm going to ask you questions about Dairy Crest, its  
9           relationship with Tesco and various other retailers and  
10          processors in 2002 and 2003.

11                     In that period, 2002 and 2003, you would agree that  
12          Dairy Crest was one of the three big milk processors,  
13          the other two being Wiseman and Express?

14          **A.** We were.

15          **Q.** But unlike Wiseman and Express, Dairy Crest was also  
16          a substantial cheese maker, cheese processor?

17          **A.** Yes.

18          **Q.** I would like you to open the bundle, DB1, the yellow  
19          bundle, at tab 55 [Magnum], please.

20                     If you have tab 55, I'll try to catch up with you,  
21          this is an email from Neil Arthey, a colleague of yours,  
22          to Lisa Rowbottom, Lisa Rowbottom now Lisa Oldershaw, of  
23          Tesco, 22 October 2002. I'm not going to ask you any  
24          questions about the email or the circumstances in which  
25          that was sent at the moment; I just want to look at it

1 for the purposes of determining what products  
2 Dairy Crest supplied to Tesco in 2002.

3 So if you can look at the spreadsheet attached to  
4 that email, the first spreadsheet, there are a number of  
5 spreadsheets, the first one has a heading "Cash Margin  
6 Maintenance", have you got that?

7 **A.** Yes.

8 **Q.** That, I think, sets out a full list of the products that  
9 Dairy Crest supplied to Tesco at the time. Can you  
10 agree with that?

11 **A.** Yes.

12 **Q.** The first eight entries we see at the top of the page in  
13 their own little box are deli cheeses, is that right?

14 **A.** Yes.

15 **Q.** So those cheeses were supplied by Dairy Crest to Tesco  
16 in large blocks and Tesco would then cut and price them  
17 in store?

18 **A.** Yes.

19 **Q.** So then we have, I think the next entry is in code but  
20 I think it's Tesco Afon Clwyd cheddar extra mature, is  
21 that right?

22 **A.** Yes.

23 **Q.** We have two of those, different sizes, then Tesco DW  
24 cheddar, which I think is Davidstow cheddar, is that  
25 right?

---

1       **A.** Yes.

2       **Q.** And we have those extra mature, two lines, sizes, and  
3       then mature, two sizes, do you see that?

4       **A.** Yes.

5       **Q.** Then we have a number of Cathedral City lines?

6       **A.** Yes.

7       **Q.** And then below that we have a number of lines, Tesco  
8       general cheddar mature or generic cheddar mature?

9       **A.** Generic, yes.

10      **Q.** Again an Afon Clwyd cheddar, and then Tesco cheddar  
11      medium, Welsh, Tesco cheddar mild, I think it's coloured  
12      and white, C and W, is that right?

13      **A.** Yes.

14      **Q.** Then Tesco Wexford cheddar, which I think is an Irish  
15      cheddar, is that right?

16      **A.** Yes.

17      **Q.** So the lines that we've looked at with Tesco at the  
18      beginning, so basically those entries excluding the  
19      Cathedral City lines, these are Tesco own label  
20      products, is that right?

21      **A.** They are.

22      **Q.** And they are random weight pre-packed products, is that  
23      correct?

24      **A.** Yes.

25      **Q.** So for those cheeses, the random weight pre-packed,

1 Dairy Crest would process the cheese, would produce the  
2 cheese, then pack it in their processing plant and print  
3 price labels for Tesco which would be stuck to the  
4 packets in the plant by Dairy Crest. Is that correct?

5 **A.** Yes.

6 **Q.** And the price labels would bear the retail price that  
7 you had been instructed to price at by Tesco?

8 **A.** Yes.

9 **Q.** And if you were instructed to change the retail price by  
10 Tesco, you had to print off new labels and pack cheese  
11 with those new labels, is that right?

12 **A.** Yes. As cheese went down the packing machine it would  
13 be weighed automatically and then labelled with that  
14 price, yes.

15 **Q.** Because the price that Tesco told you would have been  
16 a price per kilo?

17 **A.** That's right.

18 **Q.** And then you would work out the exact price to go on  
19 each pack by reference to the weight?

20 **A.** Yes.

21 **Q.** So if there is an instruction to change the price,  
22 retail price of those random weight cheeses, you may  
23 have stock that you had already packed and labelled?

24 **A.** Yes.

25 **Q.** That would be priced at the old prices, you would

---

1 continue supplying that to the supermarket --

2 A. Yes.

3 Q. -- for a period of time?

4 A. Yes.

5 Q. Unless you had been warned that a price change was  
6 coming?

7 A. That's right, yes.

8 Q. Similarly, if you had been instructed to change a retail  
9 price by Tesco, Tesco may also have some stock in its  
10 stores or in its depot that was at the old price and it  
11 would take some time for that stock to work through  
12 before the newly priced stock was on the shelves?

13 A. Yes. We would have some of the old price cheese in our  
14 depot, Tesco would have some in their regional  
15 distribution centres, there would probably be some in  
16 the store, yes.

17 Q. Ms Oldershaw for Tesco has estimated that it could take  
18 about -- between one to three weeks from the date of  
19 communicating the price change to Dairy Crest or another  
20 processor and that newly priced cheese getting on the  
21 shelf in the supermarket, do you think that's  
22 reasonable?

23 A. Yes, I would have said a fortnight, yes.

24 Q. Looking at this list, moving on to a slightly different  
25 point, looking at this list, you supplied a number of

1 Tesco own label cheeses as we've seen. Did you in 2002,  
2 2003, supply any Tesco Value own label cheeses?

3 **A.** I don't recall but I don't see them on this list.

4 **Q.** There's none on this list.

5 **A.** No.

6 **Q.** But Dairy Crest did supply on that basis -- Dairy Crest  
7 did supply, if you can remember, Asda's equivalent  
8 budget line, which I think was called Smart Price, up to  
9 2002 when I think Asda changed supplier, do you recall  
10 that?

11 **A.** Well, I know that we did for some time and that we lost  
12 that business and then regained that business.  
13 I wouldn't remember which dates we actually supplied.

14 **Q.** But if I suggest to you that Asda removed that -- or  
15 stopped Dairy Crest supplying, producing Smart Price  
16 cheese in about mid-2002, would that be consistent with  
17 what you can remember?

18 **A.** I can't remember.

19 **Q.** Can we go back to the list of prices at tab 55 [Magnum].  
20 We've seen the Cathedral City lines, a number of  
21 Cathedral City lines. Cathedral City was a Dairy Crest  
22 brand, is that correct?

23 **A.** Yes.

24 **Q.** And that was fixed weight pre-packed?

25 **A.** Yes.

---

1 Q. So they were produced in fixed weight packs of, we see,  
2 300 grammes, 500 grammes, 1 kilogram, and they were  
3 supplied to Tesco -- sorry, I was looking at the wrong  
4 weights. 200 grammes, 400 grammes. And they were  
5 supplied to Tesco without price labels on them, is that  
6 correct?

7 A. That's right.

8 Q. And it was for Tesco to price that cheese on its  
9 shelves?

10 A. Yes.

11 Q. So they would put a shelf edge label saying what the  
12 price of the cheese was and that was completely up to  
13 Tesco?

14 A. Yes.

15 Q. Then we see towards the bottom of the table at 55, there  
16 is one entry "WLSN Cheddar Extra Mature", which I think  
17 is Wilson cheddar?

18 A. Yes.

19 Q. That was another Dairy Crest brand, is that right?

20 A. That's right, yes.

21 Q. And that was also fixed weight pre-packed?

22 A. Yes.

23 Q. So would be priced by Tesco in the shop?

24 A. That's right, yes.

25 Q. Then at the bottom, the last three entries, we have

1 "Simpsons Cheese Sticks", which I assume is another  
2 branded product?

3 **A.** Yes.

4 **Q.** Then we have "HWW MA W", which I think is Heinz  
5 WeightWatchers mature cheddar, is that right?

6 **A.** Yes.

7 **Q.** Again a branded pre-packed fixed weight?

8 **A.** Yes.

9 **Q.** Then we have "Lil Moos Organic Cheddar", again  
10 a branded?

11 **A.** That's right, yes.

12 **Q.** Thank you. You can put that document away for the  
13 moment.

14 If we can go back to your statement, which I think  
15 you still have open, and just examine, if we may, what  
16 your role in Dairy Crest was in 2002. You were  
17 commercial director for Dairy Crest in 2002, is that  
18 right?

19 **A.** For the cheese business in Dairy Crest.

20 **Q.** You explain in your witness statement, paragraph 4  
21 [Magnum], that you weren't a member of the sales force.  
22 Is that right?

23 **A.** That's right.

24 **Q.** You didn't manage any customer accounts, any specific  
25 customer accounts?

1       **A.** No.

2       **Q.** The Tesco account, you tell us in paragraph 7 of your  
3       witness statement, was managed by Colin Beaumont and  
4       Neil Arthey, is that right?

5       **A.** That's it.

6       **Q.** And neither of those individuals reported to you at the  
7       time?

8       **A.** No.

9       **Q.** Who did they report to?

10      **A.** They reported to the group sales director, a chap called  
11      Bill Haywood.

12      **Q.** Bill Haywood, group sales director. And who did  
13      Bill Haywood report to?

14      **A.** He would --

15      **Q.** Was he equivalent to you in the hierarchy or was he...?

16      **A.** No, Bill would have been ahead of me in the hierarchy  
17      and I think he probably reported to the chief executive.

18      **Q.** Neil Arthey, I don't know if you recall this, left  
19      Dairy Crest in June 2004?

20      **A.** I don't recall the specific date but about then, yes.

21      **Q.** And Colin Beaumont also left Dairy Crest in 2004?

22      **A.** Again, yes, about that date, yes.

23      **Q.** I would like to ask you some questions about the  
24      negotiations with Tesco in 2002. In paragraph 4 of your  
25      statement you say that you were brought in on an ad hoc

1 basis to assist with difficult commercial negotiations  
2 with Dairy Crest's customers, is that right?

3 **A.** Yes.

4 **Q.** In paragraph 9 of your witness statement [Magnum], you  
5 say:

6 "I don't recall meeting any Tesco representatives in  
7 person during the period of the cost price increase  
8 in autumn 2002."

9 Is that right?

10 **A.** That's right.

11 **Q.** Do you recall speaking to any of them on the phone?

12 **A.** No, I don't.

13 **Q.** You didn't speak to Lisa Oldershaw?

14 **A.** No, not at that time. I did speak to Lisa later about  
15 a different subject but not in 2002.

16 **Q.** What was that different subject?

17 **A.** Tesco had Irish cheddar that we supplied, Wexford  
18 cheddar, and Tesco I think two or three years later from  
19 2002 changed to a different supplier of Irish cheddar  
20 and I went to see Lisa to make representations for her  
21 not to change.

22 **Q.** Do you recall speaking at all to Rob Hirst in the period  
23 in 2002?

24 **A.** I don't. I did speak to Rob occasionally, as I say in  
25 my statement, but I don't recall speaking to him during

1           this particular time.

2           **Q.** Or John Scouler?

3           **A.** No, I don't think I've ever spoken to John.

4           **Q.** At paragraph 14 of your statement [Magnum], you say that  
5           you do recall generally, about halfway through that  
6           paragraph, you do recall generally that getting  
7           retailers to accept cost price increases in this period  
8           was not plain sailing.

9           **A.** Yes. Not just in this period.

10          **Q.** At all.

11          **A.** At all.

12          **Q.** But the Tesco negotiations in autumn of 2002 were not  
13          escalated to you?

14          **A.** No, not directly. We at that time were meeting  
15          frequently within Dairy Crest with all our sales team  
16          and with me there representing the cheese business. So  
17          we were sending messages from my business, the cheese  
18          business, to customers but via the sales team rather  
19          than me doing it.

20          **Q.** So you weren't having direct contact with Tesco?

21          **A.** No.

22          **Q.** But in effect indirect via your sales team?

23          **A.** Yes, yes.

24          **Q.** So to set the scene and look in a little more detail at  
25          the situation in the summer of 2002, you've explained in

1           your statement that the farmers, in particular the NFU  
2           and a group called Farmers for Action, were seeking an  
3           increase in the farm gate price of milk by 2p per litre?

4           **A.** Yes.

5           **Q.** You say in paragraph 14 of your statement that Tesco  
6           gave "public support to this position", that is the  
7           lobbying for increased farm gate prices, in early  
8           September 2002?

9           **A.** Yes.

10          **Q.** Now, can I ask you to look in the documents bundle at  
11          tab 6 [Magnum]. You may have seen this either at the  
12          time or in preparation for this hearing. This is  
13          a Tesco press release of 3 September 2002, if you just  
14          want to have a quick scan of that.

15                   Have you seen that document before?

16          **A.** I don't recall. It's not been in the papers I've looked  
17          at in preparation.

18          **Q.** Do you recall whether you saw it at the time, back  
19          in September 2002?

20          **A.** I don't, no, but it's the sort of thing I would have  
21          seen.

22          **Q.** Take a moment just to scan that.

23                   (Pause)

24                   Can I also ask you to look at the following document  
25          at tab 7, a much shorter document, a quote from

1 John Gildersleeve of Tesco, a Tesco director, to the  
2 Press Association the following day, 4 September. Could  
3 you just have a quick look at that as well.

4 (Pause)

5 So when you say in your statement that Tesco  
6 publicly supported the farmers' demand for an increase  
7 in the farm gate price of milk, do you mean something  
8 along these statements?

9 **A.** Yes, this would be two examples of it, yes.

10 **Q.** So you see at tab 7 [Magnum] Mr Gildersleeve, would you  
11 agree, says that Tesco is specifically supporting the 2p  
12 per litre increase in the farm gate price for raw milk?  
13 That is the price charged by farmers for their raw milk  
14 being sold to processors.

15 **A.** Yes, the price that processors were paying for milk to  
16 farmers, yes.

17 **Q.** I don't know if you recall, but shortly after those  
18 statements, I think the following Monday, Tesco raised  
19 its retail prices for fresh liquid milk, that's the milk  
20 it was selling in supermarkets by 2p per litre, do you  
21 recall that?

22 **A.** I don't recall the specific date but I know they did  
23 increase their milk price then, yes.

24 **Q.** You can close that bundle just for the moment.

25 In paragraph 6 of your statement [Magnum], you say

1           that Dairy Crest only used a proportion of the raw milk  
2           that it bought from farmers to produce fresh liquid  
3           milk, a significant amount was used for cheese and  
4           spreads and other dairy products?

5           **A.** That's right.

6           **Q.** So, as you explain in paragraph 6, a 2p per litre  
7           increase in the cost price of fresh liquid milk would  
8           only allow, or only allowed in this case, Dairy Crest to  
9           pass back 0.77p per litre to farmers?

10          **A.** That's right.

11          **Q.** As you say in paragraph 6 [Magnum], in order to get  
12          close to the 2p per litre increase in the farm gate  
13          price for raw milk, Dairy Crest had to increase its cost  
14          price of its cheese, is that correct?

15          **A.** Yes.

16          **Q.** And 2p per litre equated to £200 a tonne on cheese?

17          **A.** Yes.

18          **Q.** And that in fact is the cost price increase that you  
19          asked for from retailers?

20          **A.** That's right.

21          **Q.** Let's see what you say about what happened generally  
22          with retailers in the autumn of 2002, and for that I'd  
23          like you to -- if I can get another bundle, appeal  
24          bundle 1. Can I ask you to turn in that to tab C/5  
25          [Magnum], about halfway through. The tabs are slightly

1           confusing, there are some letters and then behind those  
2           are numbers.

3           Now, this is a note of a discussion between  
4           Eversheds LLP and you on 27 September 2007?

5           **A.** That's right.

6           **Q.** At the time Eversheds were and still are acting for  
7           Dairy Crest, is that right?

8           **A.** Yes.

9           **Q.** This was a note that they took of a discussion they had  
10          with you during the course of the OFT's investigation,  
11          do you recall this?

12          **A.** I do recall it, yes.

13          **Q.** You had a discussion with Eversheds on 27 September or  
14          an interview with one of their solicitors, is that  
15          right?

16          **A.** Yes.

17          **Q.** And they showed you a note of that discussion, gave you  
18          a chance to make any changes to it?

19          **A.** Yes.

20          **Q.** And asked you in effect to approve it, is that right?

21          **A.** Yes.

22          **Q.** So in the summer of 2002, as we've already agreed, the  
23          farmers, led by an individual particularly called  
24          David Handley of Farmers for Action --

25          **A.** Yes.

1 Q. -- were pushing for this increase in the farm gate price  
2 of milk and were starting to picket processors' and  
3 retailers' depots, is that right?

4 A. Yes, they started off processing -- picketing  
5 processors' depots, our depots, and then moved on to  
6 stand outside retailers' depots.

7 Q. During the course of the summer, the action was getting  
8 more and more militant and more and more disruptive?

9 A. Yes.

10 Q. In paragraph 32 [Magnum], can I ask you to turn to  
11 paragraph 32 of your interview note, you say:

12 "Of the three processors ..."

13 By whom I assume you mean Wiseman, Dairy Crest and  
14 Express, is that right?

15 A. Yes.

16 Q. "... Dairy Crest was the only one making cheese in this  
17 country, so Handley [that's David Handley of Farmers for  
18 Action] looked to us to sort out cheese prices and take  
19 the lead on it."

20 A. Yes.

21 Q. So as we've discussed, you, Dairy Crest, decided to seek  
22 a cost price increase of £200 per tonne from each  
23 retailer, and then you explain in paragraph 33 [Magnum]  
24 of your interview:

25 "During the summer of 2002 we decided internally to

---

1 try and get the £200 a tonne for cheese. We asked the  
2 retailers and they said no. We told them that we  
3 thought they would continue to be picketed and  
4 eventually they said we might be able to give it to you  
5 but asked what everyone else was doing. We told them  
6 that we would increase the price to other retailers  
7 too."

8 So you asked the retailers for the £200 per tonne  
9 cost price increase and initially they said no. You're  
10 nodding?

11 **A.** That's what they do.

12 **Q.** And you told them that they would continue to be  
13 picketed, so eventually they said they might be able to  
14 give you a cost price increase but they wanted to know  
15 what everybody else was doing, is that right?

16 **A.** Yes. They wanted to make sure that we weren't asking  
17 a specific retailer for money and not asking the other  
18 retailers for money.

19 **Q.** And you explained to them, as you've said in this  
20 interview, that it wasn't just one, you would increase  
21 the price to other retailers too?

22 **A.** Yes.

23 **Q.** You say in paragraph 34:

24 "They then responded [that's the retailers] that  
25 they could not pay it unless there was an increase at

1 the tills as well. The only way they would pay it would  
2 be if they could increase the retail price. In the  
3 distant past, they may have done it through giving up  
4 some of their margin but they would not do this at this  
5 time."

6 So in effect what you're saying is the only way that  
7 retailers would pay an increased cost price was if they  
8 could increase their retail price. They weren't  
9 prepared to take a hit on their retail margins, is that  
10 right?

11 **A.** That's right.

12 **Q.** So you knew, and by you I mean Dairy Crest knew, that if  
13 you were going to get your increased cost price the  
14 retailers were going to have to put up their retail  
15 prices, that's correct?

16 **A.** Well, that's what retailers were saying to us. I think  
17 we didn't much care whether they put their retail prices  
18 up or not but that's what they were saying to us. And  
19 retailers have more power in negotiations, in price  
20 negotiations, than processors do.

21 **Q.** So you explain in paragraph 35 [Magnum] I think what  
22 you've just said:

23 "Dairy Crest had no power in this situation because  
24 we could not stop supplying the retailers with milk. It  
25 would have ruined Dairy Crest if we had done this. We

1           also could not afford to pay the increase out of our  
2           margin either."

3           **A.** That's right.

4           **Q.** So Dairy Crest couldn't take a hit on your cost price  
5           margin?

6           **A.** That's right. For us to pay the farmers more, we felt  
7           we had to get more for the cheese we were selling.

8           **Q.** And you say in paragraph 38 [Magnum]:

9                        "We knew that the retailers would have to put up  
10                       their retail prices for us to get the increase we  
11                       needed. For us this amounted to the same thing. We  
12                       talked to them in shorthand. Putting their retail  
13                       prices up means putting our price up. Before and since,  
14                       the retailers only ever pay at an increase if they can  
15                       put their retail price up."

16                       So it was absolutely clear in your view that  
17                       Dairy Crest would not get its cost price increase unless  
18                       the retailers could put up their retail prices?

19           **A.** That's what we thought at the time, yes.

20           **Q.** You explain in paragraph 39 [Magnum] that:

21                       "... things gathered momentum and we prepared  
22                       a presentation and went round the retailers. We went to  
23                       about five in the same week."

24                       Paragraph 40 [Magnum]:

25                       "They all knew we were doing the rounds. This was

1 an industry-wide thing. Cheese is a commodity and if  
2 the cheese prices are going up we have to talk to all  
3 our customers about it."

4 So let's examine, if we may, taking that starting  
5 point, what happened in detail during summer/early  
6 autumn of 2002. We've seen that Tesco issued their  
7 press releases on 3 and 4 September and, on  
8 13 September, that Tesco held a meeting for dairy  
9 processors which has become known in these proceedings  
10 as the Tesco Dairy Supply Group meeting. You mention  
11 that in your interview note.

12 Sorry, I put away your interview note but I still  
13 want to talk to you about it. You haven't put it away  
14 so that's helpful. If you go back to 24, paragraph 24  
15 [Magnum], you say:

16 "Retailers at this time were also under pressure  
17 from farmers and wanted to do something about it. Tesco  
18 started a forum for its suppliers. I did not attend  
19 this forum but many processors did attend.  
20 Colin Beaumont from Dairy Crest attended, he was the  
21 Tesco account manager. Other Dairy Crest people may  
22 also have attended."

23 I think there you're referring to this meeting of  
24 13 September, is that right?

25 **A.** Yes.

1 Q. As you confirm, you didn't go, but Colin Beaumont and in  
2 fact Stuart Marsden went?

3 A. Hmm-hmm.

4 Q. Yes?

5 A. Yes, sorry.

6 Q. Just for the transcript, it doesn't pick up the nodding.

7 A. Yes.

8 Q. You say in paragraph 26 [Magnum] of your interview note  
9 that you think about 70 people attended the Tesco forum?

10 A. I did, yes.

11 Q. And that was many more, you say, than the 19 listed in  
12 the statement of objections?

13 A. Yes.

14 Q. You also say in paragraph 30 [Magnum] that  
15 Stuart Marsden of Dairy Crest took a note of the  
16 meeting, that's right?

17 A. Yes.

18 Q. If I can ask you to put this bundle to one side, we  
19 might be coming back to it a bit later, but if you could  
20 open in the documents bundle, that's the yellow-spined  
21 bundle, if you go back into that and just look at the  
22 document at tab 12 [Magnum].

23 Can you confirm that's the note that Stuart Marsden  
24 made at the meeting?

25 A. Yes.

1 Q. Did you see it at the time, can you recall?

2 A. I don't recall.

3 Q. I'm not going to ask you any detailed questions about  
4 that meeting because you weren't there.

5 I'd like then to move on, if I can, to what's become  
6 known as the Dairy Crest briefing document. Everything  
7 has its own little name in these proceedings.

8 If you have your statement open still, in  
9 paragraph 11 of your statement [Magnum], this is where  
10 you deal with the document that I'll take you to in  
11 a moment, the Dairy Crest briefing document.

12 A. Yes. I'm sorry, I haven't got my statement open.

13 Q. Oh, right. It's at tab O.

14 A. Tab O, thanks.

15 Q. Yes, it's about two thirds of the way, three quarters of  
16 the way through that bundle.

17 A. Sorry, which paragraph?

18 Q. It's paragraph 11. Sorry, they're not page numbered.  
19 Paragraph 11.

20 A. I'm not in the right place. My paragraph 11 talks about  
21 a letter from Neil Arthey.

22 Q. Yes, it is. I'm sorry, that's the one I want you to  
23 look at.

24 A. Okay.

25 Q. It refers there to a document that you exhibit at tab 1

1 to your statement, if you just want to have a quick look  
2 at that. It's a letter from Neil Arthey of 23 September  
3 and attached to that letter is a document entitled  
4 "Dairy Product Price Increase" [Magnum].

5 **A.** Yes, I'm there.

6 **Q.** Which in our shorthand has become the Dairy Crest  
7 briefing document.

8 **A.** I'm there now.

9 **Q.** You say in your statement that you were also aware of  
10 a similar email, but I think it's a letter, which is at  
11 tab 2, exhibit 2 to your witness statement [Magnum].

12 **A.** Yes.

13 **Q.** From Dairy Crest to Sainsbury's of 23 September.

14 **A.** Yes.

15 **Q.** Attaching the same document.

16 **A.** Yes.

17 **Q.** Did you see these at the time they were sent?

18 **A.** I certainly saw the attachment to it, the attachment  
19 called "Dairy Product Price Increase". I don't believe  
20 I saw the specific letters.

21 **Q.** If you look first at the letter at exhibit 1, which is  
22 the letter of 23 September. Do you see there that the  
23 letter starts:

24 "Following our earlier conversation..."

25 **A.** Yes.

---

1 Q. And the letter at exhibit 2, the Sainsbury's letter,  
2 23 September, also starts:

3 "As discussed last week..."

4 A. Yes.

5 Q. It refers in the second to last paragraph:

6 "I attach a briefing document which we handed to  
7 Finn on Thursday."

8 So it appears there was a meeting on Thursday,  
9 19 September?

10 A. Yes.

11 Q. So the initial Dairy Crest contact with these retailers,  
12 Tesco and Sainsbury's, was by telephone call or meeting  
13 with the retailers, is that right?

14 A. It feels like it from the documents. I can't remember,  
15 but yes.

16 Q. I'll take you to some further documents as well.

17 Then it was followed up with letters, is that right?

18 A. Yes.

19 Q. Now, are you aware that Dairy Crest also sent this  
20 briefing document to Asda and to Marks & Spencer?

21 A. Yes.

22 Q. So just for the Tribunal's note, I should perhaps have  
23 referred Mr Reeves to these documents in the bundle, but  
24 exhibit 1 is document tab 26 [Magnum] and exhibit 2 is  
25 tab 24 [Magnum]. We'll go back to those.

1           Now, you've said that you're aware that Dairy Crest  
2           also sent the briefing document to Asda and  
3           Marks & Spencer, and Dairy Crest had previous meetings  
4           with those retailers as well, do you recall that?

5           **A.** I don't recall.

6           **Q.** Can I take you to, in the documents bundle, first of all  
7           tab 16 [Magnum]. You see at tab 16 some slides that  
8           appear to have been prepared by Dairy Crest for  
9           a meeting with Asda on 17 September 2002.

10          **A.** Yes.

11          **Q.** Do you recall seeing these slides at the time?

12          **A.** Well, I don't, but I've seen something in preparation  
13          for this, which is a document I had prepared at the  
14          time, and this looks like it's extracts from that.

15          **Q.** Right. These slides were 17 September.

16          **A.** Yes.

17          **Q.** I'm not sure whether you're referring to a document you  
18          produced perhaps a little later on 24 September, slides  
19          for an internal meeting. Is that what you're referring  
20          to?

21          **A.** I think there's various documents.

22          **Q.** Let's look at the slides. You would agree these are  
23          Dairy Crest produced slides?

24          **A.** Yes.

25          **Q.** And they're dated 17 September, Asda at tab 16?

---

1       **A.** Yes.

2       **Q.** Then there is a similar set of slides produced by  
3       Dairy Crest for Marks & Spencer on 17 September at  
4       tab 17 [Magnum]?

5       **A.** Yes.

6       **Q.** If we could look at the slides first for the Asda  
7       meeting. The slides for the M&S meeting are pretty much  
8       in the same terms, but let's look first at the Asda  
9       meeting slides. If you can look at what is marked as  
10       slide 1 of 5, it's actually the third slide.

11       **A.** Yes.

12       **Q.** At the top it says "Options".

13       **A.** Yes.

14       **Q.** It sets out "Action":

15                "Do nothing - maintain free market stance."

16                Then the last "Action" point:

17                "Move the whole market forward.

18                "Result.

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

20       Does not address longer term issues."

21                What this means, "Move the whole market forward", is  
22       that everyone needs to move not just on milk but also on  
23       cheese. Is that what you understand?

24       **A.** Yes.

25       **Q.** It was only then that Dairy Crest could achieve an

1 increase between 1.5 and 2p per litre?

2 **A.** Yes.

3 **Q.** And the whole market had to move forward, not just as  
4 regards the products, so it had to be milk and other  
5 dairy products including cheese?

6 **A.** Yes.

7 **Q.** But it also had to be an across industry move, it  
8 couldn't just be one retailer moving, it had to be all  
9 retailers moving or you couldn't pass through the full  
10 2p per litre?

11 **A.** It had to be all the retailers we supplied cheese to.

12 **Q.** If you can then look at slide 1/15 [Magnum], towards the  
13 end, we then have Dairy Crest's proposals, and proposal  
14 1 -- the proposals they put to Asda -- proposal 1:

15 "Move Cheese prices at retail [by up to] £200 per  
16 tonne."

17 So the proposal being made to Asda was an increase  
18 in cheese retail prices, is that right?

19 **A.** It gets back to a point you made earlier, that we knew  
20 we wanted to pay -- we needed to receive £200 per tonne  
21 for the cheese we were selling to Asda. At that time we  
22 assumed that they wouldn't pay us unless they moved  
23 their retail prices, so that's what that's asking them  
24 to do, yes.

25 **Q.** So it's asking them to move their retail prices?

1       **A.** Yes.

2       **Q.** Now, Dairy Crest said the same thing to Marks & Spencer  
3           on the same date actually, the same meeting date. If  
4           you could look at the slides behind tab 17. Just for  
5           your information they're in a slightly different order,  
6           3/12 is the "Options" slide [Magnum]?

7       **A.** Yes.

8       **Q.** We see the reference there again to "Move the whole  
9           market forward". Then at 3/13 [Magnum] we have the  
10          "Proposals" slide and the same proposal:

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

12               So in effect they're exactly the same proposals  
13           being made?

14       **A.** Yes.

15       **Q.** There are two elements to this proposal. First of all,  
16           as you've agreed, it's a proposal, you are saying to  
17           them you want them to move their retail prices, is that  
18           right?

19       **A.** Yes.

20       **Q.** And also it had to be a whole market move, that is, all  
21           retailers needed to move their prices, is that right?

22       **A.** For us, everyone we supplied needed to move their  
23           prices, yes.

24       **Q.** And from the presentation that you were making to these  
25           retailers at the time, you were making it clear that you

1           were seeking these price increases from all retailers,  
2           not just from them?

3           **A.** Yes.

4           **Q.** Are you aware whether a similar presentation was made to  
5           Tesco by Dairy Crest?

6           **A.** I'm not aware.

7           **Q.** But we have seen from the letter that was exhibited to  
8           your statement at exhibit 1, which is tab 26 of the  
9           documents bundle [Magnum], that there were discussions  
10          between Dairy Crest and Tesco before they were sent the  
11          briefing document on 23 September, is that right?

12          **A.** Yes.

13          **Q.** If I could ask you to keep in the documents bundle and  
14          look at tab 21, please [Magnum]. We've seen the meeting  
15          with Asda on 17 September. It appears that three days  
16          later, on 20 September, the meeting was followed up with  
17          a letter to Asda from Kenton Robbins, who was the  
18          account manager for Asda, is that right?

19          **A.** He was, yes.

20          **Q.** That refers, in the second line, first/second line, to  
21          a meeting on Tuesday, which must be the meeting of  
22          17 September? You're nodding.

23          **A.** Yes, yes.

24          **Q.** And that would be the meeting at which we've seen the  
25          slides were presented?

1       **A.** Yes.

2       **Q.** It says what was discussed at the meeting:

3               "... the proposed industry action that Dairy Crest  
4               are intending to lead as a result of the intensive  
5               action from the farmers and the industry."

6               So it's here again described as "industry action",  
7               we needed action across the industry or you needed  
8               action across the industry?

9       **A.** Yes.

10       **Q.** Then it says:

11               "The current raw milk market is unsustainable as it  
12               stands, as discussed at the meeting we are proposing an  
13               increase of £200 [per metric tonne] on cheese and a 10%  
14               increase on cream in cost prices and an equivalent  
15               increase in retails based on cash margin maintenance."

16       **A.** Yes.

17       **Q.** So, as you'd previously explained to me, in order to get  
18               their cost price increase, Dairy Crest needed an  
19               increase in retail prices because the retailers wouldn't  
20               take a hit on their margins?

21       **A.** That's right, that's what we thought at the time.

22       **Q.** And as the letter records, that was discussed at the  
23               meeting between Dairy Crest and Asda on 17 September?

24       **A.** Yes.

25       **Q.** It's likely, is it not, that much the same thing would

1 have been said at Dairy Crest's meetings with all the  
2 other retailers, Marks & Spencer, Sainsbury's and Tesco?

3 **A.** Yes. It's likely that similar things would have been  
4 said, but different account teams would have treated  
5 their customers slightly differently because there's  
6 different personalities involved and different customers  
7 have different ways of working, but it would be similar,  
8 yes.

9 **Q.** But you would agree, would you, that all the retailers  
10 with whom you had meetings at this time, and we've seen  
11 that there were meetings with Asda, M&S, Sainsbury's and  
12 Tesco, were told first that Dairy Crest was seeking  
13 a cost price increase?

14 **A.** Yes.

15 **Q.** And they were told that Dairy Crest was seeking an  
16 across industry cost price increase, it wasn't just  
17 them?

18 **A.** Yes.

19 **Q.** It was suggested to them that this needed an equivalent  
20 retail price increase on cheese?

21 **A.** Yes.

22 **Q.** So if we can go to the briefing document itself, perhaps  
23 one of the ones -- there are lots of them in the bundle,  
24 perhaps we can go to one of the ones sent to Tesco, as  
25 exhibited to your statement, so you will have seen it

1 before. It's at tab 26 [Magnum], we'll look at it in  
2 the document bundle if we may.

3 So we've seen this before, 23 September 2002, from  
4 Neil Arthey to Chris Rigby of Tesco. Attached to it is  
5 the "Dairy Product Price Increase" document, and you  
6 said in your statement that you think you were involved  
7 in drafting the paragraphs towards the bottom of the  
8 first page, under the title "Cheese" and under the title  
9 "UK Sourced Dairy Products versus imports"?

10 **A.** Yes.

11 **Q.** So in "Cheese":

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

16 So, as we've been discussing, a cost price increase  
17 to enable an increase to be passed on to the farmers of  
18 the farm gate price of milk?

19 **A.** Yes.

20 **Q.** Then you say under the heading "UK Sourced Dairy  
21 Products versus imports":

22 "We are seeking to address an immediate problem in  
23 farming today. If however we jointly change the  
24 competitive set of British dairy products versus  
25 imports, damage would be done to this initiative. We

1 ask that you bear this in mind when considering your  
2 retail pricing decisions."

3 So in effect you were asking the retailers here to  
4 restrain their retail price increases?

5 **A.** Not necessarily, no. We were asking them not to price  
6 British cheese uncompetitively. What we didn't want to  
7 happen was that all the retail prices of British cheese  
8 moved and the retail prices of Irish cheese didn't move  
9 and therefore consumers switched to cheaper Irish  
10 cheddar.

11 **Q.** So, on that note, in the heading "Transparency" on the  
12 second page, you say:

13 "It should be noted that in the current climate cash  
14 margin maintenance should, in our view, be the rule.  
15 Percentage margin maintenance will only create  
16 accusations of profiteering."

17 So you were suggesting, Dairy Crest was suggesting,  
18 that retailers should increase their retail prices by  
19 cash margin maintenance only. That is to put up their  
20 retail prices by the equivalent of £200 per tonne, 20p  
21 per kilo?

22 **A.** Yes.

23 **Q.** Because that would ensure transparency. Farmers could  
24 see that the prices were going up?

25 **A.** The farmers would see the change in retail price in

1 store. They would then get a schedule from us -- this  
2 is what we thought at the time -- showing that from  
3 customer A we've received £200 a tonne. I think if  
4 farmers saw that a retailer had put their prices up by  
5 £500 a tonne, and our schedule said £200 a tonne, they  
6 would have thought the retailer was making an extra £300  
7 a tonne for themselves which might not have ended the  
8 picketing.

9 **Q.** It's exactly what you say in the following sentence:

10 "Percentage margin maintenance will only create  
11 accusations of profiteering."

12 **A.** Yes.

13 **Q.** So if the retailers put up their prices by a percentage  
14 margin of more than 20p per kilo, £200 per tonne, there  
15 could be accusations of profiteering and that, as you  
16 say, might not stop the picketing?

17 **A.** That's right.

18 **Q.** You said in answer to that question that, at the time,  
19 Dairy Crest's intention was to produce a schedule?

20 **A.** Yes.

21 **Q.** Which was, as I understand it, a schedule or an invoice  
22 to the retailer invoicing them for £200 per tonne of  
23 cheese supplied as a separate invoice. Is that what  
24 you're describing?

25 **A.** Yes, as a supplementary invoice.

1 Q. As a supplementary invoice. But in the end what  
2 happens -- well, this did not actually happen.

3 A. I don't recall that.

4 Q. Dairy Crest increased its cost prices for the cheese by  
5 £200 per tonne rather than invoicing separately for  
6 a £200 per tonne supplement?

7 A. I don't recall that but, you know...

8 Q. Maybe we'll come back to that.

9 Now in your statement, which I think you still have  
10 open, paragraph 13 [Magnum], you are commenting on this  
11 document. You say that:

12 "The document does not specify what the specific  
13 impact on retail prices would be."

14 That's correct.

15 You say at paragraph 15 [Magnum], in the second  
16 line:

17 "The ultimate decision on retail prices belonged to  
18 the retailer."

19 A. Yes.

20 Q. That's also correct, but the document does, you would  
21 agree, recommend an increase in retail prices by cash  
22 margin, £200 per tonne, do you agree with that?

23 A. Yes.

24 Q. The same recommendation was made by Dairy Crest to all  
25 retailers as the briefing document was sent to all

1           retailers, you would agree with that?

2           **A.** Yes.

3           **Q.** As you say, as you explain fairly in paragraph 14 of  
4           your witness statement [Magnum]:

5                     "A cost price increase would have been easier for an  
6           individual retailer to accept if they were to increase  
7           their retail prices, as the retailer's retail margin  
8           would not then suffer."

9                     We've discussed that ad nauseam already this  
10          morning.

11                    You say in paragraph 13 of your statement [Magnum],  
12          the last sentence:

13                    "The main purpose of the document [that is the  
14          Dairy Crest briefing document] was to start negotiations  
15          on cost price increases for Dairy Crest in order that we  
16          could pay dairy farmers more for their milk."

17                    That may have been the main purpose because, as  
18          you've fairly indicated, Dairy Crest were most  
19          interested in their cost price increase, weren't they?

20          **A.** Yes.

21          **Q.** The other purpose, however, was to recommend a cash  
22          margin maintenance to the retailers or an equivalent  
23          increase in retail prices, would you agree with that?

24          **A.** Well, it was to do various things including balance UK  
25          sourced dairy products against Irish and to also set out

1           our media policy. It was to do all those things.

2           **Q.** And also to recommend cash margin maintenance?

3           **A.** It was.

4           **Q.** Your statement also says at paragraph 13 that the  
5           document does not recommend what dates any retail prices  
6           should take effect.

7                     But if you go back to the document at DB/26  
8           [Magnum], there's a heading there called "Timing":

9                     "We have promised to pay our farmers all revenue  
10           recovered from the market from the date RSPs [retail  
11           selling prices] ..."

12                    Is that right?

13           **A.** Yes.

14           **Q.** "... and costs have moved. Raw milk prices will alter  
15           from [a date is given] and the supplements will come  
16           into effect from then. All increases gained on milk  
17           before that date will be paid in lump sum to our farmers  
18           in October. We propose butter, cream and cheese price  
19           increases will move up on the same date."

20           **A.** Yes.

21           **Q.** So there are references to dates in the document for  
22           both costs and retail, that is retail selling prices,  
23           RSP price moves, is that correct?

24           **A.** Yes, there were hopeful requests.

25           **Q.** We'll see that those dates change, but dates were

1 recommended, you would agree with that?

2 A. Yes.

3 Q. And it was anticipated at that time that retail prices  
4 and cost prices would move at about the same time?

5 A. Yes.

6 Q. You've mentioned media policy, and we see at the last  
7 heading in that document, "media Policy":

8 "We have already made public statements about our  
9 intentions to review butter, cheese and cream pricing.  
10 Please note that we will never comment on any aspect of  
11 individual retailer business decisions, intentions or  
12 discussions."

13 You explain in paragraph 13 of your witness  
14 statement [Magnum] that Dairy Crest's intention to  
15 increase prices had already been made public, but you do  
16 not specifically recall any press announcement. Now,  
17 the paragraph headed "media Policy" in that document,  
18 can you confirm that it just related to public  
19 statements, that is press announcements, as you explain  
20 in your statement?

21 A. Yes. I think what it was trying to do was to say that  
22 we wouldn't talk to Farmers for Action specifically  
23 about which customers had given us increases and which  
24 hadn't.

25 Q. It wasn't about confidentiality of retailer information

1 generally?

2 **A.** No, it wasn't.

3 **Q.** On that, could I just take you back to paragraph 10 of  
4 your witness statement [Magnum] where you talk about  
5 confidentiality of customer information generally. You  
6 say:

7 "Dairy Crest would from time to time receive future  
8 retail price information from its customers, including  
9 Tesco, in the context of its supplier retail commercial  
10 dealings."

11 What you mean there is that because you were in the  
12 position of printing retail price labels for retailers  
13 such as Tesco, which you would have to have known before  
14 it went on shelves in order to print those labels, you  
15 sometimes had future retail price information, is that  
16 what you mean?

17 **A.** Yes, and about promotions and things like that, yes.

18 **Q.** You say, this is paragraph 10 of your statement:

19 "As regards Tesco, in ordinary circumstances I think  
20 they would have been upset that Dairy Crest was sharing  
21 this information but I do not know what Tesco would have  
22 thought during this initiative as it was very unusual.  
23 I do not know whether anyone at Tesco had said they were  
24 happy to share its information, I was not aware of the  
25 level of specifics."

1           So what you're saying there is normally Tesco would  
2           have been upset that Dairy Crest was sharing its future  
3           retail price information?

4       **A.** Yes.

5       **Q.** But the situation in 2002 was not normal, you describe  
6           it as very unusual because of the pressure that was  
7           coming from the farmers?

8       **A.** Yes.

9       **Q.** And because of the public statements that had already  
10          been made by Tesco supporting the farmers?

11      **A.** Yes.

12      **Q.** That made it unusual as well.

13                Okay, if we can then turn back to the documents  
14          bundle, if we may, tab 28, please.

15      **LORD CARLILE:** Ms Smith, I think we'll have to have a short  
16          break for the LiveNote team.

17      **MS SMITH:** That would be very welcome, sir. Thank you.

18      **LORD CARLILE:** We'll have ten minutes.

19      **MS SMITH:** Could Mr Reeves be given the usual warning, I'm  
20          sure he's already aware.

21      **LORD CARLILE:** Yes, thank you very much.

22                Mr Reeves, you're in the middle of your evidence so  
23          please don't discuss your evidence with anyone at all  
24          during any adjournment whilst you're in the witness box.

25      **A.** Yes.

1       **LORD CARLILE:** Okay.

2       (11.50 am)

3                               (A short break)

4       (12.00 pm)

5       **LORD CARLILE:** Yes, Ms Smith.

6       **MS SMITH:** Mr Reeves, I was going to ask you to turn up  
7       a new document, tab 28 of the documents bundle [Magnum].

8       That is a document entitled "Action Points From Cheese  
9       Price Increase Meeting" of 24 September.

10               Now, you confirm in your statement or your  
11       subsequent witness summary that you were present at that  
12       meeting, do you recall?

13       **A.** Yes.

14       **Q.** What I would like to do is look at the slides first,  
15       which are in the following two tabs, and then I'll come  
16       back to the note. You explain in your statement as well  
17       that at the meeting you presented two sets of slides,  
18       those at tab 29 [Magnum] and those at tab 29A [Magnum].

19               Is that correct?

20       **A.** Well, I think I certainly communicated -- presented  
21       tab 29A. I think I may have presented tab 29 earlier.

22       **Q.** Right. Let's talk about tab 29 just very briefly first,  
23       because I want to concentrate on 29A which you say you  
24       did present at the 24 September meeting, is that right?

25       **A.** No, I think I presented tab 29 at the September 24

---

1 meeting. I think 29A was earlier, I think I prepared  
2 that earlier in September, and that was used as a basis  
3 for the things we've just looked at, going out to  
4 Marks & Spencer and Asda.

5 **Q.** Right. Let's look at 29 first [Magnum]. That's a set  
6 of slides that says "Arguments against a staggered cost  
7 price increase".

8 That has your name on the slide, Arthur Reeves,  
9 24 September 2002.

10 **A.** Yes.

11 **Q.** I don't want to go through these in detail, but see if  
12 you agree with my summary of what's presented in those  
13 slides. It was a presentation that you made to the  
14 Dairy Crest sales team to address a point that was being  
15 made to Dairy Crest by retailers, and this point was  
16 essentially that the retailers should not pay an  
17 increased cost price for cheese where the milk that was  
18 being used to make that cheese now -- sorry, should not  
19 pay an increased cost price for cheese now because the  
20 milk that was used to make that cheese had been bought  
21 up to nine months, 15 months earlier, because of the  
22 maturation process of cheese, is that right?

23 **A.** Yes, that's a common debate we have with retailers.

24 **Q.** And that is what you mean when you're talking about  
25 staggered cost price increase in these slides?

1       **A.** Yes.

2       **Q.** They were saying, well, it takes about six months  
3       I think for mild cheddar to mature so we shouldn't have  
4       to pay a cost price increase for six months. It takes  
5       12 months for medium and 15 months for -- sorry, 12  
6       months for -- I'm going to get the months wrong, but it  
7       takes a number of months for the various different  
8       matured cheeses so we shouldn't pay an increased cost  
9       price for milk now because the milk was bought nine  
10      months ago, 12 months ago, 15 months ago?

11      **A.** Yes, they were saying to us, "You pay the farmers more,  
12      and when you start selling us that more expensive milk  
13      in the form of cheese we'll pay you more".

14      **Q.** Thank you. You summarised that much better than I did.

15      **LORD CARLILE:** It's a very good summary. We've all been  
16      struggling to find that summary.

17      **MS SMITH:** Thank you very much, a much better summary than  
18      mine.

19             It's a different point, I think, from a point we'll  
20      come back to which has now acquired the name in these  
21      proceedings of increases in waves. That is, different  
22      products moving their prices at different times. It's  
23      a different point from that.

24      **A.** That's a different point.

25      **Q.** Yes, and we'll come back to that.

1                   So the slides at 29A [Magnum], you've said you're  
2                   not entirely sure when you presented these slides, but  
3                   they are slides produced by you, is that right?

4           **A.** They are.

5           **Q.** And they were presented to the Dairy Crest sales team,  
6                   is that right?

7           **A.** Yes.

8           **Q.** It says "Cheese price increase September 2002" at the  
9                   top of the first slide?

10          **A.** Yes.

11          **Q.** So we know at the very least that they were presented  
12               during September 2002?

13          **A.** Yes.

14          **Q.** We see on the first slide the topics there summarised:

15                   "Need for change.

16                   "Management of change.

17                   "Retailer action.

18                   "Modus operandi.

19                   "The alternatives."

20                   On page 2, the first slide on page 2, "Management of  
21                   change":

22                   "Market driven change will not happen in the near  
23                   future, due to high stocks.

24                   "[Dairy Crest] unable to break market alone (despite  
25                   our efforts in [first half of] 2002).

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

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

4           Then we see on the second slide of that page it sets  
5           out what retailer actions are needed. The first is to:

6           "Accept cost price increase £200 per tonne for 6  
7           months minimum."

8           **A.** Yes.

9           **Q.** Do you see that? We've already discussed that. And  
10          second:

11          "Commit to buying British."

12          So is this the point about imports that you  
13          explained earlier?

14          **A.** Yes.

15          **Q.** And then we have, yes, in fact again at point 4:

16          "Resist switching to imports."

17          **A.** Yes.

18          **Q.** So on page 3, the third slide "Modus operandi", the  
19          first bullet:

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

21          "Dairy Crest pay a market supplement to our milk  
22          suppliers."

23          So there's the cost price increase followed by  
24          a farm gate price increase, correct?

25          **A.** Yes.

1 Q. Then it says:

2 "Use immediate movement to generate positive PR for  
3 retailers and their suppliers."

4 A. Yes.

5 Q. So it's positive PR for both retailers and suppliers?

6 A. Yes.

7 Q. That's right? And for retailers they can only get  
8 positive PR if they've been seen to be doing their bit,  
9 that is paying higher retail prices, would you agree?

10 A. No. No, I don't think that was anything to do with  
11 retail prices.

12 Q. Right.

13 A. That is the industry, so retailers and processors  
14 together had worked together to pay farmers more money  
15 and help them out of their predicament that they were in  
16 at that time.

17 Q. And that was to be presented by public statements by  
18 both retailers and suppliers, was it, at that time?

19 A. Yes. What we'd ideally have liked there would have been  
20 to see milk prices going up, milk prices we paid farmers  
21 going up from 1 October, with everyone saying, "Haven't  
22 we done well to help farmers?"

23 Q. And at this stage, as we see through the second bullet  
24 point, you are still thinking about paying a market  
25 supplement to milk suppliers, as we've described,

1 a separate invoice with a separate supplement?

2 **A.** No, there's different. There's two points here. The  
3 first is that we wanted to invoice retailers not  
4 specifically for each line of cheese, just to say "We've  
5 supplied you with 500 tonnes of British cheese this  
6 month, therefore you'll pay us [whatever]". The second  
7 was to say to farmers, "We have collected this much from  
8 retailers", again not specific, and that -- sorry,  
9 "We've collected a million pounds from our customers(?)  
10 this month, you've supplied us with a billion litres of  
11 milk, therefore you're getting a penny".

12 **Q.** If we look at the second slide on page 3, there are "The  
13 alternatives", first bullet point:

14 "Retailers just accept a liquid milk price  
15 increase."

16 The problem for that is that won't lead to  
17 a 2p per litre increase?

18 **A.** No.

19 **Q.** Second bullet point:

20 "Retailers stagger their cost price increases on  
21 mild... medium... mature etc."

22 **A.** Yes.

23 **Q.** That's the maturation point we've discussed?

24 **A.** Yes.

25 **Q.** The last indentation under that bullet point:

1 "Retailers must not be seen to be profiteering."

2 Is that related to the profiteering point that we've  
3 seen in other documents, that they should be maintaining  
4 cash margin maintenance rather than percentage margin  
5 maintenance?

6 **A.** Yes, or putting up their retail prices before giving us  
7 any money.

8 **Q.** That's how it ties into the maturation point?

9 **A.** That's right.

10 **Q.** Then we have the bullet point:

11 "Do nothing."

12 The result on that will be:

13 "Current scrutiny on milk prices paid to producers  
14 [that's the farm gate price] versus retail cheese prices  
15 will intensify."

16 **A.** Yes.

17 **Q.** So if you do nothing, farmers will continue to focus on  
18 the difference between the farm gate price for milk and  
19 the retail cheese prices, is that right?

20 **A.** Yes.

21 **Q.** So you need to see -- to ensure that the farmers  
22 basically get off your backs, you need to see an  
23 increase in retail prices for cheese, is that right?

24 **A.** No, we don't need to see an increase in retail prices,  
25 we need to see an increase in the price of milk. That's

1           what farmers wanted. They didn't much care what retail  
2           prices were, they didn't want retailers to be  
3           profiteering, but what they wanted was more for their  
4           milk.

5           **Q.** But their scrutiny was on retail cheese prices because  
6           those are the prices they can see?

7           **A.** Yes, they can see in a store that Tesco is charging £5  
8           a kilo, £5,000 a tonne for cheese, and we're paying them  
9           15p for their milk, which is £1,500 a kilo, and they  
10          were asking, "Who is making all the money out of this?"

11          **Q.** If they see that Tesco's prices go up from, say, £500  
12          a tonne for cheese to £700 a tonne, or whatever the  
13          equivalent is, they will see that there has been  
14          a margin increase of £200 a tonne which they will think,  
15          that's 2p per litre in the farm gate price so we can  
16          stop picketing. That's correct, isn't it?

17          **A.** Well, they would only stop picketing once we started  
18          paying them that money.

19          **Q.** But to ensure transparency they needed to see a retail  
20          price increase, that was what the transparent price was  
21          for the farmers?

22          **A.** No, that -- no. What they needed to see was milk prices  
23          going up. What they didn't need to see was cheese  
24          prices in store going up by more than they were getting  
25          paid.

1 Q. Thank you.

2 A. But this is a separate point. This wasn't about change,  
3 this was about a discrepancy or a big gap in the supply  
4 chain between what farmers were getting paid for their  
5 milk and what retailers were selling cheese for. A huge  
6 difference in amount.

7 This wasn't about change, this was about what the  
8 situation was at the time.

9 Q. If supermarkets put their prices up by above cash  
10 margin, I think you've agreed that there would be  
11 a danger that farmers would still picket because they  
12 would think the supermarkets were profiteering?

13 A. Yes.

14 Q. So let's go back to the notes of the meeting at tab 28.  
15 And you say in paragraph 19 of your statement, if you  
16 could have that open as well --

17 **LORD CARLILE:** Sorry, just so we're clear. As long as  
18 cheese retail prices did not go up disproportionately,  
19 you're saying farmers didn't care about cheese prices,  
20 all they cared about was getting their 2p per litre  
21 extra?

22 A. There were two things, sir. One was that farmers were  
23 saying -- ignoring an increase, they were saying "We're  
24 not getting paid much for our milk and retailers are  
25 selling cheese for an awful lot of money. Where's the

1 difference? Someone is making a lot of money out of our  
2 milk and it's not us".

3 Then, separately, they wanted an increase and they  
4 would have been upset had the retail price of cheese  
5 gone up more than the equivalent increase they were  
6 getting.

7 **LORD CARLILE:** Was this a sophisticated economic negotiation  
8 with the farmers, or was this a pretty -- and I use the  
9 word in its most literal term -- crude campaign by the  
10 farmers simply demanding an increase for farm gate?

11 **A.** It started off as a crude campaign, so they would say to  
12 us, as the people who bought their milk, "Please may we  
13 have some more money". We would say, "We can only get  
14 more money if we can sell the things we make with your  
15 milk for more". We would say at the time, "Retailers  
16 won't pay us more". And then you had statements like  
17 the ones we've seen earlier from retailers saying, "Of  
18 course we'll pay you more". Or "Of course we'll pay  
19 Dairy Crest more and they can pay you".

20 There was this mismatch between what retailers were  
21 saying at the time and what we were saying, because we  
22 were talking in actuals and retailers were talking in  
23 general.

24 Farmers did then get more specific about "When are  
25 you going to put your prices up?" And would say to

1           retailers "When are you going to pay Dairy Crest more  
2           money?" And they would have separate meetings.

3                        So there was a lot of confusion. But the only real  
4           facts farmers could see was what we paid them and what  
5           retailers sold cheese at.

6       **LORD CARLILE:** Thank you.

7       **MS SMITH:** Thank you, Mr Reeves.

8                        Looking at the action points from the meeting of  
9           24 September at tab 28 of the bundle, you say at  
10          paragraph 19 of your statement [Magnum] that you assumed  
11          the action points listed in this document arose from the  
12          meeting of 24 September at which you presented the  
13          slides.

14       **A.** Yes.

15       **Q.** And you'll see at paragraph 1 [Magnum], this was an  
16          internal Dairy Crest meeting, just to make the point?

17       **A.** Yes.

18       **Q.** Paragraph 1:

19                        "It was agreed that we should set a cheese price  
20          implementation date for retailers of 20th October 2002."

21                        Can you help us as to why that date has changed from  
22          the date we previously saw in the Dairy Crest briefing  
23          document?

24       **A.** Well, I think what had happened is that we had gone off  
25          and talked to retailers, as you've said, and then

1 written letters to them saying, "Can we have a price  
2 increase on █ October", which had been our initial  
3 ambition. And the feedback we were getting from  
4 retailers was, "No". So we started to realign our  
5 hopes, and the next date we set that we felt was  
6 realistic was 20 October.

7 **Q.** You started realigning your hopes. We also see from  
8 paragraph 2, you started to refine your proposals. It's  
9 a slightly different proposal here, it says:

10 "Each account team to persuade their respective  
11 retailers to move a section of their cheese category on  
12 the 20th October followed by a three week programme  
13 during which the remainder of the cheese category  
14 moves."

15 It's more of a -- I won't used the word "staggered"  
16 because you use that in a different context, it's the  
17 waves here?

18 **A.** Yes.

19 **Q.** The waves of price increases.

20 **A.** Yes. Can I explain what was behind that?

21 **Q.** Yes.

22 **A.** The feedback we were getting from retailers was they  
23 didn't want to be the only ones who gave us a price  
24 increase. That's what they were nervous about.

25 So we decided at that meeting, recorded in that

---

1 note 2, that we would ask them all to put some of their  
2 cheese prices up on 20 October. They could then see, we  
3 assumed that they would put their retail prices up, they  
4 could then see that different people -- everyone was  
5 taking part in this. Then we felt it would be easier to  
6 get them to put all their prices up.

7 Q. So it was sort of dipping their toe in the water, seeing  
8 everyone else had moved --

9 A. That's right.

10 Q. -- and then following?

11 A. Yes.

12 Q. Paragraph 3 says:

13 "Commercial Directors to clear with their senior  
14 contacts..."

15 I assume that's retailer contacts, is that right?

16 A. Yes.

17 Q. "... by no later than Friday 4th October, Dairy Crest's  
18 intention of making a public statement to the effect  
19 that farmers could expect to see retail prices for  
20 cheese increasing from mid- October onwards."

21 A. Yes.

22 Q. You wanted I think there the retailers to agree to your  
23 making a public statement about retail prices moving, is  
24 that correct?

25 A. Yes.

1 Q. So that farmers could expect to see these retail prices  
2 moving as we've discussed?

3 A. Yes. And stop picketing.

4 Q. And stop picketing, of course. That's the point of it  
5 all.

6 You say in your statement that you don't recall  
7 whether such a public statement was ever made?

8 A. I don't recall, no.

9 Q. That was the plan at the time. It says:

10 "NB It would be helpful if some key individual  
11 accounts such as Tesco, Sainsbury, Asda, Morrison, or  
12 Waitrose could endorse such a statement."

13 So obviously you wanted the big boys or your bigger  
14 accounts?

15 A. Yes.

16 Q. Then in paragraph 4, the plan was:

17 "Each Account Manager to present a matrix showing  
18 cheese price implementation plans effective  
19 20th October. These matrices to be presented to cheese  
20 price increase meeting No. 3 held on Tuesday  
21 4th October..."

22 So you were planning to have another meeting, is  
23 that right?

24 A. Yes.

25 Q. And it looks as though this was in fact the second of

1 your cheese price increase meetings?

2 A. Yes.

3 Q. And we don't have anything recording the first?

4 A. I don't think we have any minutes from the first, but  
5 I think that document that we've talked about at 29A was  
6 presented at the first rather than the second.

7 Q. You think the first may have taken place before the  
8 letters that we've seen of 20th and 23rd September were  
9 sent to retailers?

10 A. Very much so.

11 Q. Right. Paragraph 5 of the note, you talk about tonnage  
12 summaries and a £200 per tonne invoice charge. I think  
13 that's the supplement we've talked about, invoicing  
14 retailers for a £200 per tonne supplement?

15 A. Yes.

16 Q. Then at paragraph 6:

17 "It was agreed that we would present to all major  
18 accounts the idea of applying a red tractor logo to all  
19 [own label] cheese[s]."

20 The red tractor logo was effectively a quality mark,  
21 was it, for British cheese?

22 A. For British cheese, yes.

23 Q. For British cheese. Only for British cheese, is that  
24 right?

25 A. Well, in fact it can be put on imported cheese but the

1 public see it as a British cheese mark.

2 **Q.** And so the point of putting on a red tractor logo to own  
3 label cheese is to present it as a quality British  
4 product, is that right?

5 **A.** Yes.

6 **Q.** So this proposal was to counter the danger you saw of,  
7 if the prices on British cheese go up but not on Irish  
8 cheese or foreign cheese, there would be an increase in  
9 imports and a decrease in the volume of British cheese  
10 sold?

11 **A.** Yes.

12 **Q.** Then it says:

13 "Colin Beaumont [of Dairy Crest] to test this  
14 proposal with Tesco during a meeting tomorrow Wednesday  
15 25th September."

16 Now, do you recall Colin going to a meeting? Or did  
17 you go to a meeting with Tesco on that day?

18 **A.** I didn't go and I don't know if Colin did or not, but it  
19 does look like he was going.

20 **Q.** Now, there has been some confusion and some different  
21 suggestions during the course of the investigation as to  
22 whether or not the 25 September meeting took place  
23 between Dairy Crest and Tesco, and just to deal with  
24 that point, can I ask you to get the second document  
25 bundle, the second yellow-spined bundle, DB2. If you

1           could leave open -- sorry, you have about four bundles  
2           open now. Please go right to the back of that, tab 128A  
3           [Magnum].

4           Now, this is a letter you may or may not have seen  
5           before. It's 9 March 2005 from Dairy Crest,  
6           Roger Newton, the company secretary, you'll see at the  
7           top right-hand corner of the first page, to Ms Aspinall,  
8           principal case officer at the Office of Fair Trading.

9           So this was a letter that was written by Dairy Crest  
10          to the OFT during the course of the investigation in  
11          this case, and it was responding to various questions  
12          that the OFT put to Dairy Crest during the  
13          investigation. What I want to take you to -- there were  
14          lots of questions raised and answers given, but there  
15          are two particular questions. The first is question 23,  
16          which is on page 4 of the document, at the top middle of  
17          the document -- I'm sorry, it's a letter and then an  
18          appendix and it's page 4 of the appendix [Magnum].

19          At paragraph 23, a request has been made by the OFT,  
20          you'll see in the first sentence, for Dairy Crest to  
21          produce:

22                 "Any notes/minutes of meeting held at Tesco's  
23          Cheshunt premises on or around Wednesday [it says 2 but  
24          it should be 25 and that is borne out by the second  
25          question about this at 46 which I'll take you to in

1 a minute] September 2002."

2 The answer is given:

3 "Mark Allon [sic] confirmed he attended as the  
4 Executive Director responsible for Dairy Crest's cheese  
5 business. Mark believes he was accompanied by  
6 Colin Beaumont (Sales Director responsible for the Tesco  
7 account). He also confirmed no minutes were taken and  
8 no further documents have been traced."

9 If you look at question 46, which is on page 27  
10 [Magnum], the same point:

11 "Who attended Tesco's Cheshunt premises on or around  
12 Wednesday 25 September 2002? In what capacity did each  
13 of the participants attend?"

14 "Mark Allen confirmed he attended as the Executive  
15 Director responsible for Dairy Crest's cheese business.  
16 Mark believes he was accompanied by Colin Beaumont the  
17 Sales Director responsible for the account and met  
18 Rob Hirst and John Scouler of Tesco. See answer to  
19 question 23."

20 So it appears that there was a meeting on  
21 25 September at Cheshunt between Mark Allen and Colin  
22 Beaumont for Dairy Crest and Rob Hirst and John Scouler  
23 of Tesco?

24 **A.** Yes.

25 **Q.** There was some confusion in responses from Tesco to

1 questions from the OFT during the investigation as to  
2 whether this meeting took place or not, and I would just  
3 like to try and sort out that point, take you to another  
4 document, which is 128C, almost the very last document  
5 in the bundle [Magnum].

6 I think, as you can see, this is a letter from  
7 Tesco. The yellow markings -- a letter from Tesco,  
8 sorry, of 9 June 2005. The yellow markings are all  
9 confidential, I'm not going to take you to any of that.  
10 But after the letter, at the very last page of the tab  
11 there is a memo. Keep flicking through the whole tab,  
12 there's a little blue page dividing the tab, and on the  
13 very last page of the tab there's a memo entitled  
14 "Dairy Crest and Bradgate Bakery". We'll see that that,  
15 at the end of it, is signed by you or is produced by  
16 you, 23 September 2002. It's a memo, not the  
17 accompanying email. Sorry, if we can start with the  
18 memo which is the very, very last page of that tab.

19 **A.** Yes.

20 **Q.** You see Dairy Crest and Bradgate Bakery. You probably  
21 haven't seen this before, do you want to just refresh  
22 your memory by reading through that and then I'll ask  
23 you a question about it.

24 Well, you haven't seen it for a while, but it was  
25 authored by you back ten years ago.

1       **A.** Yes. (Pause)

2       **Q.** You've had a chance to remind yourself of that.

3               I will seek to summarise what's said in that  
4       document and you tell me if you agree. It appears to  
5       have been the following situation: Dairy Crest supplied  
6       cheese to Bradgate Bakery for inclusion in various dairy  
7       products which it then supplied to Tesco?

8       **A.** Cheese sandwiches.

9       **Q.** Cheese sandwiches, right. I was trying to work out what  
10      cakes it was, I assumed it was cakes but there we go.  
11      Cheese sandwiches.

12             Tesco found it could buy cheese cheaper than the  
13      price at which Dairy Crest was supplying the cheese to  
14      Bradgate?

15      **A.** Yes.

16      **Q.** That's right. So at a previous meeting on 23 August  
17      Tesco decided that Dairy Crest should stop making cheese  
18      for Bradgate, is that right?

19      **A.** Yes.

20      **Q.** A meeting of 23 September had been set up with Tesco,  
21      between Tesco and Dairy Crest, including yourself, to  
22      discuss with Tesco in particular what Dairy Crest should  
23      do with the 800 tonnes of maturing stock that it had  
24      made for Bradgate?

25      **A.** Yes.

1       **Q.** So although this was happening at about the same time,  
2           23 September 2002, this meeting was not about the £200  
3           per tonne price increase on cheese that Dairy Crest was  
4           pursuing?

5       **A.** No.

6       **Q.** So if we then look at the email of 23 September, 16.19,  
7           it's the second email and it's the email to which this  
8           memo was attached [Magnum]. It's an email from  
9           Colin Beaumont of Dairy Crest to Anna Clements(?) of  
10          Tesco.

11      **A.** Yes.

12      **Q.** At the end it says:

13                 "I look forward to seeing you tomorrow at 1.30 pm  
14                 with my colleague Arthur Reeves, commercial director  
15                 cheese."

16                 So it indicated that there was a meeting planned for  
17                 1.30 on 24 September, is that right?

18      **A.** Yes.

19      **Q.** While we're there, the memo also says:

20                 >Please note there is currently a major initiative  
21                 in the market [second to last paragraph] to increase  
22                 cheese prices by £200 a tonne with effect from 1 October  
23                 in order to pass back this increase in full to British  
24                 dairy farmers following a similar recent announcement by  
25                 Tesco on milk. You may want to check this out with

1 Rob Hirst."

2 But that was a different matter from what the  
3 meeting was about?

4 **A.** Yes, the meeting was about us being dropped by Bradgate  
5 Bakery.

6 **Q.** And the fact that you had a whole load of cheese in your  
7 plants that was earmarked for Bradgate?

8 **A.** Yes.

9 **Q.** We see at the top of that page, with the emails on it,  
10 an email back from Anna Clements to Colin Beaumont,  
11 23 September 2002, 6.21 in the evening. She says:

12 "Thank you for your note below. I've given the  
13 proposal and the structure of the meeting some thought  
14 and I want to cancel our meeting tomorrow."

15 She effectively says, "Well, it's up to Bradgate and  
16 you what happens with the cheese, it's nothing to do  
17 with us, I'm going to cancel the meeting"; is that  
18 correct?

19 **A.** That's what she said.

20 **Q.** That's what she said. And the meeting didn't go ahead?

21 **A.** No, the meeting didn't go ahead.

22 **Q.** If you could just close that bundle, I promise you won't  
23 be coming back to that for some while, that bundle. But  
24 to close off the point, if we could just go back to the  
25 first document bundle, tab 28 [Magnum], the note of the

---

1 meeting that we were looking at, in paragraph 6 of the  
2 note. So the meeting that's talked about in paragraph 6  
3 of the note, the meeting between Colin Beaumont and  
4 Tesco on 25 September was not the meeting about Bradgate  
5 Bakery, was it?

6 **A.** No.

7 **Q.** The Bradgate Bakery was scheduled for 24 September and  
8 this meeting took place on 25 September, that's right?

9 **A.** Well, if -- according to the notes it did, yes.

10 **Q.** But in any event we've already seen the Bradgate Bakery  
11 meeting was cancelled at 6.21 on the evening of  
12 23 September?

13 **A.** Yes.

14 **Q.** So the day before this meeting on 24 September took  
15 place?

16 **A.** Yes.

17 **Q.** At the meeting on 25 September, it says there it was set  
18 up to present the idea of applying a red tractor logo to  
19 the own label cheese. You helpfully explain that the  
20 red tractor label was to provide a quality mark for  
21 British cheese and that it was to discourage people  
22 moving, effectively, from British cheese if the price  
23 for British cheese went up; that's right, is it?

24 **A.** Yes, I think the farmers were looking for support from  
25 consumers to buy cheese made with their milk, and this

1           would have been an easy way for consumers to spot that  
2           the cheese was made with British farmers' milk.

3           **Q.** Now, the danger of imports being drawn in, I think  
4           you've indicated, was because if there was an increase  
5           on the retail prices for British cheese there might be  
6           a move to the cheaper priced Irish imports?

7           **A.** Yes.

8           **Q.** So all these concerns arise out of the fact that  
9           Dairy Crest knew that, in order to get its cost price  
10          increase, there would have to be an equivalent increase  
11          on retail prices?

12          **A.** That's what we thought, yes. I don't think we knew it  
13          but we thought it, yes.

14          **Q.** So the discussion of the red tractor logo was all about  
15          how to deal with any fall-out from these price  
16          increases, the cost price increase and the equivalent  
17          retail price increase?

18          **A.** Yes, and for our customers to demonstrate a commitment  
19          to British products.

20          **Q.** But that discussion clearly took place in the context of  
21          the £200 per tonne increase that you were seeking on  
22          cost prices, is that right?

23          **A.** Yes, and I think it had been raised at Tesco's farmer  
24          meeting, the meeting we talked about earlier. I think  
25          that or something like it had been raised at that

1 meeting.

2 **Q.** So that would not have been the only issue that was  
3 discussed at the 25 September meeting with Tesco; it was  
4 within the context of broader discussions about the cost  
5 price increase, the £200 per tonne price increase, is  
6 that correct?

7 **A.** I just don't know that.

8 **MISS ROSE:** I don't want to interrupt but there are  
9 obviously problems with asking a witness about a meeting  
10 that he didn't attend.

11 **MS SMITH:** I'm sure we'll put the points to Tesco's  
12 witnesses.

13 Okay, Mr Reeves, if we could then move on to another  
14 document, a document at tab 30, please, of the bundle  
15 [Magnum]. This is a letter from Paul Feery who was the  
16 Sainsbury's account manager at Dairy Crest, is that  
17 right?

18 **A.** Yes.

19 **Q.** To Finn Cottle, who was the Sainsbury's cheese buyer?

20 **A.** Yes.

21 **Q.** Paul Feery, I think -- was he one of the account  
22 managers who would have reported to Bill Haywood?

23 **A.** Yes.

24 **Q.** Would he have been at the internal meeting of  
25 24 September that we've just seen?

1       **A.** I don't know but he was likely to have been, yes. He  
2           was part of the -- he was a senior member of the sales  
3           team, yes.

4       **Q.** Because this letter appears quite directly to implement  
5           what was agreed on 28 September?

6       **A.** Yes.

7       **Q.** You would agree with that?

8       **A.** Yes, not -- yes.

9       **Q.** Let's go through it page by page perhaps or just as  
10           quickly as we can. On the first page, the third  
11           paragraph, the paragraph that starts:

12                    "With regard to the UK sourced cheese category we  
13                    are proposing to move some prices, effective from  
14                    20th October 2002."

15                    That reflects what was in the first paragraph of the  
16                    meeting note, the date of --

17       **A.** It does, yes.

18       **Q.** Then we see in the following paragraph that particular  
19           lines are identified for Sainsbury's to move from  
20           20 October, Cathedral City and Own Label Medium?

21       **A.** Yes.

22       **Q.** So they were going to start with moves on those prices?

23       **A.** Yes.

24       **Q.** Then on the following paragraph, which is the second to  
25           last paragraph on the first page:

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

4            That reflects what was in paragraph 3 of the meeting  
5            note, is that right?

6            **A.** Yes.

7            **Q.** As we've discussed, the public statement was about moves  
8            on retail prices and you wanted a retailer to endorse  
9            that statement, is that right?

10          **A.** Yes.

11          **Q.** Then the last paragraph on that page:

12            "Following the Medium and Cathedral City there will  
13            be a three week programme during which the remainder of  
14            the cheese category will move."

15            So again, as discussed in the meeting note, I think  
16            it was the second paragraph, there would be a three week  
17            rolling programme after the first move on 20 October?

18          **A.** Yes.

19          **Q.** Then we set out detailed proposals for Sainsbury's as to  
20            how the prices were to move during that three week  
21            period. We have the first wave on 27 October, the  
22            second wave on 3 November and the third wave on  
23            10 November, is that right?

24          **A.** Yes.

25          **Q.** Then under that little table, we have a paragraph

1 explaining the mechanics of the cost price increases,  
2 and that's the surcharge that we've discussed and that  
3 was reflected in paragraph 5 of the meeting note?

4 **A.** Yes.

5 **Q.** Then in the third paragraph on the second page [Magnum]:

6 "I would like to raise concern about the  
7 differentials that could occur post retail price  
8 increases, between UK sourced cheese and imports."

9 This is the point we've also discussed about the  
10 danger of British cheese prices, retail prices going up  
11 but Irish cheese retail prices not going up, is that  
12 right?

13 **A.** Yes.

14 **Q.** Then in the last paragraph you talk about the red  
15 tractor logo.

16 **A.** Yes.

17 **Q.** So that letter, I think you agreed, in effect implements  
18 what was decided in the meeting of 24 September with  
19 Sainsbury's?

20 **A.** Yes.

21 **Q.** So we've seen the letter to Sainsbury's, and during the  
22 next few days it's likely, would you agree, that the  
23 Dairy Crest sales team had similar discussions with  
24 other retailers implementing what had been decided in  
25 that meeting?

1       **A.** Yes.

2       **Q.** We know now that Dairy Crest had a meeting with Tesco on  
3           25 September, the following day, with Rob Hirst and  
4           John Scouler. Would you agree that, in light of your  
5           knowledge of what was going on at the time, it was very  
6           likely that there were discussions at that meeting which  
7           would also reflect what was --

8       **MISS ROSE:** I'm sorry, I've already made an objection. This  
9           is not an appropriate question for this witness.

10          John Scouler, who was at that meeting, is going to be  
11          giving evidence.

12       **MS SMITH:** He will obviously be asked about the meeting.  
13           I'm asking Mr Reeves, as he's proffered as a witness for  
14           Tesco, who had knowledge of what was going on at the  
15           time, and he is the witness for Dairy Crest who had  
16           knowledge of what was going on at the time.

17       **LORD CARLILE:** There are limitations to what he can say  
18           about meetings he was not present at, unless he has  
19           a note of the meeting that someone else gave him.

20       **MS SMITH:** Absolutely. And Mr Reeves has been quite fair  
21           and honest about answering those questions within the  
22           limit of what he knew at the time.

23           Mr Reeves, can I then take you to the document at  
24           tab 32, please [Magnum]. This is the note of a meeting  
25           between Dairy Crest and Asda of 27 September. It's

1 a meeting attended for Dairy Crest by David Wagstaff and  
2 Bill Haywood. Bill Haywood, I think you've already  
3 indicated, was the managing director for retail milk and  
4 juice, and you said he was probably a little more senior  
5 than you at the time?

6 **A.** Yes.

7 **Q.** And David Wagstaff was a commercial director who  
8 reported to you, is that right?

9 **A.** No, he would have reported to Bill. He was the  
10 equivalent of Paul Feery in Sainsbury's or Neil Arthey  
11 in Tesco.

12 **Q.** And he was the equivalent for Asda?

13 **A.** Yes.

14 **Q.** So you see there the outline of what was discussed:

15 "Recent retail price moves across milk of 2 [pence  
16 per litre]

17 "Multiple milk represents on 25% of Dairy Crest  
18 sales.

19 "This translates into a blanket increase of 0.77  
20 [pence per litre] (as announced).

21 "Action Proposed.

22 "Move manufactured product prices forward  
23 during October."

24 We've discussed that was the proposal that was being  
25 made by Dairy Crest at the time, is that correct?

1       **A.** Yes.

2       **Q.** "Cheese/butters -- circa £200 [per metric tonne]  
3       proposed by 20th October.

4               "Tesco Value butter now at 54p (from 45p)."

5               Do you recall at the time that that reference to 54p  
6       from 45p must have been a reference to the Tesco retail  
7       price for butter at the time?

8       **A.** Well, I don't know. You're asking me to speculate.

9       **Q.** So we see there:

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

11              "JS happy to lead on cream."

12              Then we see the mechanics of cheese set out as we've  
13       seen in the letter of Sainsbury's and the internal memo  
14       of the meeting of 24 September:

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

17              "Catch will be needed in the middle ground accounts  
18       and the management of labels/stocks will need closely  
19       monitoring."

20              Can you explain why the management of labels and  
21       stocks will need closely monitoring? Is that because  
22       you envisage -- Dairy Crest envisage retail price  
23       increases happening at the same time as the cost price  
24       increases?

25       **A.** I think so, yes. I think that will be to do with the

1 time lag that you talked about earlier, earlier this  
2 morning.

3 **Q.** Then it says it is:

4 "Proposed that by early November all accounts would  
5 have followed the market moves. Asda, Tesco, Sainsbury,  
6 Safeway, Waitrose ...

7 "Latest position is that JS/Tesco have agreed to  
8 move all sectors."

9 Would you agree that by this time it's likely that  
10 Sainsbury's had agreed what was set out in Paul Feery's  
11 letter to them of two days earlier?

12 **A.** No.

13 **Q.** Or were you aware of that at the time?

14 **A.** No, I'm not aware of it. It might mean that. It might  
15 mean that David and Bill are trying to persuade Asda to  
16 take a price increase without knowing what Sainsbury's  
17 had agreed.

18 **Q.** There's also reference there to Tesco having agreed to  
19 move all sectors. Do you think it's possible that, at  
20 the meeting of 25 September or at the meetings that took  
21 place before they were sent the Tesco Dairy Crest  
22 briefing document, Tesco would also have given an  
23 indication to Dairy Crest? Do you know whether or not  
24 they gave an indication to Dairy Crest that they too  
25 have agreed to move all sectors?

1       **A.** I don't know, no.

2       **Q.** As you've indicated, I think fairly, Dairy Crest would  
3       have passed this information on to Asda in order to  
4       encourage them to do the same, to move all sectors?

5       **A.** Yes, we were trying to move all the accounts at the  
6       time.

7       **Q.** But you've indicated that it might not have been that  
8       David Wagstaff and Bill Haywood had already -- they may  
9       not have actually -- this may not have been correct  
10      information?

11      **A.** It may not have been correct, no.

12      **Q.** So you're suggesting, are you, that one of your senior  
13      executives, the manager(?) for retail milk and juice,  
14      will have gone to one of your very important accounts,  
15      Asda, and given them incorrect information?

16      **A.** Yes, I am. I think I said in my notes with Eversheds  
17      back in 1997 -- 2007, that there was a game of bluff and  
18      double bluff and this is the sort of thing that would go  
19      on.

20      **Q.** The problem is, this game of bluff and double bluff,  
21      when it's talking about moving prices, which you've  
22      already agreed would be moving retail prices as well as  
23      cost prices, it's bluff and double bluff but will be  
24      discovered very quickly. If David Wagstaff and  
25      Bill Haywood go to Asda and say, "Tesco and Sainsbury's

1           have agreed to move all sectors", very soon it will  
2           become apparent to Asda that that's not the case and  
3           very soon they will be found out to have been lying?

4           **A.** Yes, I'm not sure "very soon" is right but eventually.  
5           You can only keep spinning that yarn for so long because  
6           Asda can go and look in other people's stores just as  
7           well as we can.

8           **Q.** Yes. So it's not feasible, is it, that in a situation  
9           where Dairy Crest was desperate to get -- not desperate  
10          but very keen to get a price increase from its  
11          retailers, in order to stop picketing, that they would  
12          go to those retailers and feed them incorrect  
13          information which could subsequently be found out, it  
14          just wasn't feasible that they would go and lie to them  
15          in that situation?

16          **A.** Well, I don't want to accuse my colleagues of lying but  
17          it is feasible that they could mislead Asda and then,  
18          you know, say in a fortnight's time, "Oh, Sainsbury's  
19          have changed their mind". It is feasible. I agree it's  
20          not something you can make a habit of doing.

21          **Q.** It's not actually something that happened in this case  
22          because the prices did go up, didn't they?

23          **A.** Well, prices did but certainly not around 27 September.

24          **Q.** Prices went up subsequently so there was no danger that  
25          your senior -- your executives, Wagstaff and Haywood,

1 would be seen to be providing incorrect information  
2 because they weren't providing incorrect information at  
3 this meeting, were they?

4 **A.** I just don't know.

5 **Q.** I'm saying to you that, in the circumstances that were  
6 live at the time, when Dairy Crest needed to get a cost  
7 price increase, was facing severe disruption to its  
8 business if it didn't get a cost price increase, I'm  
9 saying that it cannot be the case that your Dairy Crest  
10 people would have gone to Asda and would have misled  
11 them, as you say, when they would very shortly  
12 thereafter have been found out. The result of that is  
13 that Asda would say, "If you're going to mislead us,  
14 we're not going to give you that cost price increase"?

15 **A.** I think I want to stick to what I told Eversheds back in  
16 2007. There was a lot of bluff and double bluff going  
17 on.

18 **Q.** The problem is that bluff and double bluff isn't  
19 believable when you're dealing with a situation where it  
20 could be found out very quickly and that you were  
21 reliant on the retailers to give you the cost price  
22 increase that you needed?

23 **A.** Well, it is feasible because it's the sort of thing that  
24 happened.

25 **LORD CARLILE:** Is it more feasible than that the truth was

1 being told?

2 **A.** Well, I suspect it was a half truth, sir, that there  
3 were conversations going on with all the retailers and  
4 we were hopeful that some retailers at some point would  
5 agree to put up their retail prices, which is what  
6 happened. But it took a very long time.

7 **MS SMITH:** You say you were hopeful; that hope was based on  
8 the discussions that you'd been having with the  
9 retailers, wasn't it?

10 **A.** Well, no, the hope was based on the public announcement  
11 the retailers were making but the buyers in the  
12 retailers, whether it were Asda or Sainsbury's or Tesco,  
13 were proving pretty difficult. It wasn't  
14 a straightforward exercise.

15 **Q.** The reality is that Sainsbury's, as we will see, I'll  
16 come to the documents, Sainsbury's did in fact move up  
17 their Cathedral City product on 20 October, didn't they?  
18 22nd --

19 **A.** I don't know but I'm sure there's papers in here that  
20 confirm that, yes.

21 **Q.** As had been proposed to them in the letter from  
22 Paul Feery?

23 **A.** Yes.

24 **Q.** So that was more than a half truth; it was in fact  
25 a truth?

1       **A.** Yes.

2       **Q.** It's also likely or more feasible I say, in the  
3           circumstances at the time, where the proposals were  
4           being made to retailers, there was obviously some  
5           pushing back but they were generally being accepted by  
6           the retailers, it's more feasible that what was stated  
7           about Tesco was a truth than an untruth?

8       **A.** I just don't know that.

9       **Q.** Can you give me just a moment.

10                   (Pause)

11                   You have mentioned your interview with Eversheds and  
12                   you talked about telling them about bluff and double  
13                   bluff in that interview. Can I ask you to go back to  
14                   what you said in that interview. It's in appeal  
15                   bundle 1.

16       **A.** Yes, I have it here.

17       **Q.** You have it there open. If you could turn to  
18           paragraphs 59 through to 64, you describe how  
19           Dairy Crest got its price increase out of retailers at  
20           the time, starting in paragraph 59 [Magnum]:

21                   "The process was to pick off the retailers one by  
22                   one. We tried to persuade them to go first in order to  
23                   get the NFU and Farmers for Action off their backs. We  
24                   also knew that once you get one retailer to go, it makes  
25                   the next one easier. We would have started this process

1 in April 2002 with daily calls and meetings."

2 Do you think it's April or perhaps a little later,  
3 August or September?

4 **A.** It may have been later.

5 **Q.** "Once they gave an initial rejection we might let it go  
6 and then have another try with a meeting with farmers.  
7 The pressure would then build up and up and the  
8 frequency of the meetings would increase. This is all  
9 I did during this period as this was business critical  
10 for Dairy Crest. We were facing ongoing blockades and  
11 it was hugely important."

12 I think you would agree that Dairy Crest was under  
13 a huge amount of pressure at the time from the farmers?

14 **A.** We were.

15 **Q.** "I quite enjoyed getting the price increases out of the  
16 retailers. However junior salesmen were under huge  
17 pressure both from internal Dairy Crest people and from  
18 the retailers. If they came back to the office without  
19 having achieved a price increase, I would send them  
20 back, saying it was unacceptable. The junior sales team  
21 were not reporting to me, Bill Haywood was their boss.  
22 Bill and I fell out on a daily basis. At one point Bill  
23 picked me up by my shirt collar. He was angry at me for  
24 the pressure I was placing on his sales team. These  
25 were very fraught times and everyone felt under

1 pressure."

2 So I think you agreed with me that -- perhaps  
3 "desperate" is too strong a word but you were very keen  
4 to get the price increases out of the retailers, is that  
5 right?

6 **A.** Yes.

7 **Q.** Then you say in 62 [Magnum]:

8 "It is clear that we did share some information. We  
9 should not have shared supermarket retail prices with  
10 other supermarkets in advance. I do not think we talked  
11 specifically about actual retail prices other than on  
12 a very few brands. Senior people would not have dreamed  
13 of doing this but it is clear that the juniors either  
14 did not know not to or felt under so much pressure that  
15 they had to do that. In the context however it was  
16 absolutely clear that we could not get a price increase  
17 ourselves unless the supermarkets could put the retail  
18 prices up. Us getting our price increase became jumbled  
19 with the retail price. We know there is a huge  
20 difference but it is easily confused in people's minds  
21 and in their shorthand conversations, especially when  
22 under such pressure. On supermarket margins, we would  
23 never say to the retailer, 'This is the retail price you  
24 need to charge', what we say is that we want a price  
25 increase. There are three things they could do: they

1           could put up the retail price by the amount we had put  
2           up our cost price ..."

3           That's cost margin maintenance?

4       **A.** Yes.

5       **Q.** "... or they could maintain their percentage margin by  
6           putting a bigger increase through or they could choose  
7           not to move their retail price at all. This latter  
8           option just does not happen anymore. 2000 was the last  
9           time that happened. We just tell the retailers we want  
10          a £200 increase, we were not advising the retailers on  
11          their retail prices. Sometimes we talked about  
12          percentage or cash margin but we would not talk about  
13          specific retail prices."

14          So you would agree, I think, that Dairy Crest were  
15          under a huge amount of pressure during this period to  
16          get their cost price increases?

17       **A.** Yes.

18       **Q.** That they could pass through to the farmers?

19       **A.** Yes.

20       **Q.** And that although you say Dairy Crest did not talk  
21          specifically about actual retail prices other than on  
22          a very few brands, Dairy Crest was talking to the  
23          retailers about retail price increases. That was  
24          because you would not be able to get your cost price  
25          increase without a retail price increase, is that right?

1       **A.** That's what it felt like at the time, yes.

2       **Q.** If you could put that file away, I think we're probably  
3       done with that for a while.

4               Sir, I'm moving on to new documents and there's  
5       quite a lot of questions on that document. It might  
6       take more than five minutes. I don't know whether now  
7       would be a good time to --

8       **LORD CARLILE:** We can adjourn now if you like.

9       **MS SMITH:** I'm very happy to keep going until 1 o'clock.

10       **LORD CARLILE:** No, we'll adjourn now and come back at 1.55  
11       if that assists you. But Miss Rose has something to  
12       say.

13       **MISS ROSE:** It is just a question. Mr Ferguson, who is the  
14       next witness, is available this afternoon. Could we  
15       have an indication of whether it is likely that he will  
16       be required to attend this afternoon?

17       **MS SMITH:** Yes, it is. I think we made that clear in  
18       correspondence. I'm very confident we'll get on to  
19       Mr Ferguson this afternoon.

20       **MISS ROSE:** If we can give an indication, because he's not  
21       actually on the premises, if we can have an indication  
22       of when you would like him to attend?

23       **LORD CARLILE:** 3 o'clock or are you going quicker than that?

24       **MS SMITH:** If he could be here by 3.00, yes.

25       **MISS ROSE:** We can arrange that.

1 (12.55 pm)

2 (The short adjournment)

3 (2.00 pm)

4 **LORD CARLILE:** Yes, Ms Smith.

5 **MS SMITH:** Thank you.

6 Mr Reeves, could we move on in time, just under  
7 three weeks later, to 16 October, Wednesday, 16 October.  
8 If you can turn to tab 48 in the documents bundle  
9 [Magnum], that's a commercial sales group memo which you  
10 see was sent from David Flower to your boss, Mark Allen,  
11 and to you, Arthur Reeves, do you see that?

12 **A.** Yes.

13 **Q.** And also to the account manager for Asda,  
14 Kenton Robbins, and the account managers for Tesco,  
15 Colin Beaumont and Neil Arthey, do you see that?

16 **A.** Yes.

17 **Q.** It was copied to Bill Haywood and Paul Feery, who was  
18 the account manager for Sainsbury's?

19 **A.** Yes.

20 **Q.** The subject is "Sainsbury's Cheese Price Move". As  
21 we've said, it's dated 16 October which is getting close  
22 to the date of 20 October which is the date Dairy Crest  
23 had proposed for the first moves to be made on prices.  
24 That's right, isn't it?

25 **A.** Yes.

1       **Q.** It says:

2               "Following my meeting with Sainsbury's yesterday  
3               [that's Tuesday 15 October] and subsequent conversations  
4               this morning, I can confirm Sainsbury's will move their  
5               cheese prices in 3 waves, as follows.

6               "Wave 1.

7               "Branded cheese - Cathedral  
8               City/Seriously Strong/Pilgrims Choice..."

9               Do you see that?

10       **A.** Yes.

11       **Q.** Then we have the level:

12               "£200 per tonne [equals] 20p per kg. Timings [week  
13               commencing] 21.10.02."

14               So the first wave is the week commencing 21 October,  
15               do you see that?

16       **A.** Yes.

17       **Q.** The product on which Sainsbury's has confirmed they will  
18               move their prices on during that week is Cathedral City,  
19               and Cathedral City is the Dairy Crest brand?

20       **A.** Yes.

21       **Q.** Seriously Strong which is in fact a McLelland brand?

22       **A.** Yes.

23       **Q.** And Pilgrims Choice which I think at the time was  
24               produced by North Downs?

25       **A.** Yes.

1 Q. So David Flower is confirming that Sainsbury's is -- or  
2 is saying that Sainsbury's had confirmed to him that  
3 they would be moving their prices on these three  
4 cheeses, two of which were not Dairy Crest produced,  
5 supplied cheeses?

6 A. Yes.

7 Q. Now, "Wave 2", you record:

8 "Standard English lines - economy/mild/  
9 medium/mature/extra mature/all stilton lines."

10 Again we have the same levels on the price moves.

11 "Timings [week commencing 4 November]."

12 A. Yes.

13 Q. So that's the second wave, and stilton was not produced  
14 for Sainsbury's by Dairy Crest?

15 A. I don't know about that. We did supply Sainsbury's with  
16 stilton at some time. I don't know if we were then or  
17 not.

18 Q. Right. It's not listed on the document that we went to  
19 at the beginning of cross-examination at 55.

20 **MISS ROSE:** That was for Tesco.

21 **MS SMITH:** I'm sorry, that was Tesco. I'll check that out.

22 I think we're coming in fact to a document with  
23 Sainsbury's. We can check that.

24 So we see there "Wave 3":

25 "Davidstow, all territorials, deli, grated, all

1 other lines. Wexford not to be included as not a UK  
2 cheese. Separate discussions are being held on this  
3 subject."

4 Then we have the same level of price increases and  
5 the timings are the week of the 11 November, you see  
6 that for wave 3.

7 **A.** Yes.

8 **Q.** Do you recall whether Dairy Crest supplied Sainsbury's  
9 with all its territorials at this time?

10 **A.** I think we did but I can't be sure.

11 **Q.** And what about deli?

12 **A.** Well, we would have supplied most of Sainsbury's deli,  
13 if not all.

14 **Q.** We'll have a look at that as well then.

15 You have agreed, however, that at least with regard  
16 to wave 1, Sainsbury's appear to have told Dairy Crest  
17 about their intentions, pricing intentions on products  
18 not produced by Dairy Crest?

19 **A.** Yes.

20 **Q.** Would you agree, having seen this document at the time,  
21 the only reason that Sainsbury's would be passing that  
22 information to Dairy Crest was so that Dairy Crest could  
23 pass it to other retailers to encourage them also to  
24 move their prices?

25 **A.** I don't know that.

1       **Q.** When you received this document in 2002 and you saw  
2           clearly, very clearly, that there were products here  
3           that were clearly not Dairy Crest brands, first of all,  
4           this couldn't have been a reference to cost price  
5           increases, could it? It must have been retail price  
6           increases?

7       **A.** No, 20p per kilo suggests it's retail prices.

8       **Q.** When you saw what Sainsbury's were telling Dairy Crest  
9           about what they were doing on McLelland brands and  
10          North Downs brands, you must have thought, well, the  
11          only reason they could be sending this information to us  
12          was to ensure that we could use it when we talked to the  
13          other retailers, which we were doing at the time?

14      **A.** That's not certain but likely.

15      **Q.** It's likely. There's no other reason they would be  
16          telling you what they were doing on other brands?

17      **A.** Well, it's to reassure us that they're not going to  
18          price our brands out the market.

19      **Q.** So they're saying that we're moving on everything at the  
20          same amount at the same time?

21      **A.** Yes.

22      **Q.** Now, if we could look over the page, the second page of  
23          that document, under the heading "Cash Versus Percentage  
24          Margin", that blue box. I'm not going to read it out,  
25          I'm going to ask you to read the ... (sotto voce

1 exchange between counsel).

2 "Cash Versus Percentage Margin:

3 "At present Sainsbury's have indicated that prices  
4 will be increased to maintain cash margins and not  
5 percentage margin maintenance."

6 So Sainsbury's have clearly told Dairy Crest here  
7 their retail pricing intentions?

8 **A.** Yes.

9 **Q.** That's right. And this information, Sainsbury's retail  
10 pricing intentions, was being sent within Dairy Crest to  
11 the Asda account manager?

12 **A.** Yes.

13 **Q.** And to the Tesco account managers?

14 **A.** Yes.

15 **Q.** It was being sent to those account managers in order for  
16 them to pass it on to their retailers, to Tesco and to  
17 Asda?

18 **A.** Not definitely, but it could have been.

19 **Q.** It could have been. It was likely that that was the  
20 reason?

21 **A.** No, not even likely but it could have been.

22 **Q.** Again, this is a memo that was circulated within the  
23 sales group, in the context that you've agreed that you  
24 were putting to all retailers at the time, a cost price  
25 increase accompanied by a retail price increase, yes?

1       **A.** Yes.

2       **Q.** You've also told us that retailers didn't want to move  
3       unless they could be assured that others would move?

4       **A.** Yes.

5       **Q.** So in that context the most likely purpose of this email  
6       being sent by -- giving information about Sainsbury's to  
7       the Tesco account manager and the Asda account manager  
8       was so that they could then pass that information to  
9       Tesco and Asda?

10      **A.** Yes, either specifically or generally, yes.

11      **Q.** So if we look on page 2 [Magnum], under the heading  
12      "Rationale":

13                "1. Sainsbury's want to move branded lines as this  
14      will have the least impact and Sainsbury's will be able  
15      to measure the market's reaction before they move their  
16      Own Label lines. If there is no reaction then the Own  
17      Label moves will be delayed."

18      **A.** Yes.

19      **Q.** So what they're saying here, they can move branded  
20      lines, Cathedral City, Seriously Strong and  
21      Pilgrims Choice, because they don't have to change the  
22      labels for those lines, they just change the shelf edge  
23      markings in their shops?

24      **A.** Yes.

25      **Q.** So it can be done very quickly?

1       **A.** Yes.

2       **Q.** And Sainsbury's will then be able to measure the  
3       market's reaction, the other retailers' reaction to that  
4       retail price change?

5       **A.** Yes.

6       **Q.** And if there is no reaction, then they will delay the  
7       own label moves, is that correct?

8       **A.** Yes.

9       **Q.** Because the own label moves would take more time to go  
10       through the system because own label is random weight  
11       and the price will have to be changed by the processors,  
12       labels on the cheese?

13       **A.** Yes.

14       **Q.** By 16 October, what we've seen is that Sainsbury's have  
15       confirmed to Dairy Crest they would be moving their cost  
16       and retail prices, and you've agreed?

17       **A.** That they had a plan to, yes.

18       **Q.** And that this would be happening in three waves on  
19       21 October, 4 November and 11 November?

20       **A.** Yes.

21       **Q.** And that the reasons we've just discussed, because they  
22       could measure the market's reaction, they would first --  
23       the first wave would be branded lines?

24       **A.** Yes.

25       **Q.** Sainsbury's have given this information to Dairy Crest

1 for cheese lines not supplied to them by Dairy Crest?

2 **A.** Yes.

3 **Q.** And I say, in the circumstances that we've discussed,  
4 a reasonable inference, or in fact the only inference  
5 that can be taken from that document is that  
6 Dairy Crest -- is that Sainsbury's intended Dairy Crest  
7 to pass that information on to other retailers?

8 **MISS ROSE:** I'm sorry, that's clearly not something this  
9 witness can comment on --

10 **MS SMITH:** This witness received the document, sir, at the  
11 time. I've asked him what I understood at the time.

12 **MISS ROSE:** Sorry, I would like to just finish the sentence.

13 **LORD CARLILE:** You finish your sentence.

14 **MISS ROSE:** What I was going to say is that you cannot put  
15 to the Dairy Crest witness what is the appropriate  
16 inference to draw from the document about what  
17 Sainsbury's intent was at the time.

18 **MS SMITH:** I can, sir, and I do ask the witness what  
19 inference he drew as to what Sainsbury's intended at the  
20 time, having given that information to his colleague.

21 **MISS ROSE:** Sir, that issue is of no relevance to these  
22 proceedings.

23 **LORD CARLILE:** Right. It seems to me to be a proper  
24 question so carry on.

25 **MS SMITH:** Thank you, sir.

1           Mr Reeves, you received this document, as we've  
2           seen, on 16 October, containing information as to what  
3           Sainsbury's would do?

4           **A.** Yes.

5           **Q.** And, as we've discussed, containing information as to  
6           what Sainsbury's would do on products not supplied by  
7           Dairy Crest. I've put to you that the only inference  
8           you could have drawn at the time was that Sainsbury's  
9           was giving this information to Dairy Crest in order for  
10          Dairy Crest to pass that information on to other  
11          retailers?

12          **A.** Yes.

13          **Q.** If we then can move on in the story, that was  
14          16 October. I'm not going to take you through them in  
15          any detail because they weren't copied to you, but at  
16          tab 51 [Magnum], if you can just see, there was an email  
17          from Neil Arthey to Lisa Rowbottom, as she then was, on  
18          18 October. At tab 53 [Magnum], we may come back to  
19          some detail in this, but just to give you an overview of  
20          what was happening at the time, there was an email back  
21          from Lisa Rowbottom and Neil Arthey on 21 October, you  
22          see at tab 53?

23          **A.** Yes.

24          **Q.** Then there's an email back again from Neil Arthey to  
25          Lisa Rowbottom on 22 October. So there are various

1 emails going backwards and forwards between Neil Arthey  
2 and Lisa Rowbottom and attaching spreadsheets that we  
3 looked at at the very beginning of your questioning --

4 **A.** Yes.

5 **Q.** Setting out cheese cost and retail price increases. But  
6 you were aware at the time, were you, that discussions  
7 were going on between Dairy Crest and Tesco?

8 **A.** Yes.

9 **Q.** Can I take you to a document you were copied in on,  
10 tab 58 [Magnum]. This is an email from David Wagstaff,  
11 who I understand was Dairy Crest commercial director, is  
12 that right?

13 **A.** Yes.

14 **Q.** 23 October. He sent it to a number of people in  
15 Dairy Crest, including Kenton Robbins, again the Asda  
16 sales guy, Matthew Farebrother, who I think was the  
17 Safeway sales guy, can you remember that?

18 **A.** I don't recall that.

19 **Q.** It was copied to further individuals including you, you  
20 see it was copied?

21 **A.** Yes.

22 **Q.** It says:

23 "Guys actions as follows please.

24 "WWFH Asda Safeway JS/Tesco all costs and rsp's to  
25 move on the 11th November [plus] 20p kilo:

1           "Propose that we stop deliveries of old price stock  
2           on Friday the 8th and the new stock on the 11th -  
3           confirm this is ok please."

4           So just to ask you about this, WWFH, is that  
5           WeightWatchers farmhouse?

6       **A.** I don't think there was a WeightWatchers farmhouse. I'm  
7           trying to recall what WWFH stands for.

8           I'm pretty certain there wasn't a WeightWatchers  
9           farmhouse but I don't know, is the answer. Ah, sorry,  
10          I do know. WeightWatchers from Heinz.

11       **Q.** Thank you, that one has been puzzling us a bit as well.  
12          WeightWatchers from Heinz. Yes, it is shown on other  
13          documents as Heinz WeightWatchers.

14          So this appears to be showing that Asda, Safeway,  
15          Sainsbury's and Tesco have agreed that all costs and  
16          retail selling prices are to move on 11 November.  
17          Agreed?

18       **A.** Yes.

19       **Q.** David Wagstaff would have been sending this through, it  
20          appears from the document, to ensure that this is  
21          actioned in the plant.

22          I asked you -- actually I should correct  
23          a misunderstanding -- I asked you first thing this  
24          morning, earlier this morning, about WeightWatchers and  
25          I suggested to you that it was fixed weight. I think

1 I was wrong, I think it's random weight. Do you recall?

2 A. I don't recall, no.

3 Q. Well, it looks like:

4 "Propose that we stop deliveries of old price stock  
5 on Friday the 8th and the new stock on the 11th -  
6 confirm this is ok please."

7 Which suggests that this had to be labelled --

8 A. It does, yes.

9 Q. -- and that old price stock was to be worked through and  
10 new price stock... So you would agree it appears that  
11 WeightWatchers --

12 A. Yes, it was either fixed weight where the labels were  
13 printed or it was random weight where the labels were  
14 printed, yes.

15 Q. But in any case the labels were being printed by Dairy  
16 Crest?

17 A. Yes, that's what that looks like.

18 Q. It appears to show that the prices are to go up by 20p  
19 a kilo?

20 A. Yes.

21 Q. That must be the retail price for the labels, is that --

22 A. Yes.

23 Q. So if we flick back to tab 55 [Magnum], which is the  
24 email from Neil Arthey to Lisa Oldershaw as she now is,  
25 of 22 October at about midday the day before, it says:

- 
- 1 "Lisa
- 2 "Updated spreadsheet which includes deli lines.
- 3 "I will try and call you later to discuss price
- 4 increase in general."
- 5 Then if you look at the spreadsheet, which is what
- 6 we looked at first thing this morning, second to last
- 7 entry we have HWW, Heinz WeightWatchers mature, white,
- 8 3 per cent fat. You will see unit size by weight, cost
- 9 per tonne, cost per case, RSP per tonne, RSP per kilo,
- 10 RSP pack, old POR, which I think is percentage return.
- 11 Then over the page, sorry, it's been cut up but
- 12 we're still second from bottom, cost price per tonne
- 13 plus £200, new cost per case, new RSP per tonne plus
- 14 £200, new RSP per kilo.
- 15 So the new RSP per kilo is 8.19 which goes up from
- 16 7.99 RSP per kilo on the previous page.
- 17 **A.** Yes.
- 18 **Q.** So that suggested new retail selling price in this
- 19 document is a cash margin maintenance. You see at the
- 20 top it says "Cash Margin Maintenance"?
- 21 **A.** Yes.
- 22 **Q.** To be absolutely scrupulous, you'll see that other
- 23 attachments are attached to this email where Neil Arthey
- 24 sets out the figures for percentage margin maintenance?
- 25 **A.** Yes.

1 Q. Then we have the email that we've looked at at 58, and  
2 then if you could look at the email on 63, tab 63?

3 LORD CARLILE: I notice at 58 that you were blind copied  
4 into this email. Is there any particular reason why  
5 that would have occurred?

6 A. I don't know, sir. I don't know why that was the case.

7 LORD CARLILE: Right.

8 Okay, we were going to 63?

9 MS SMITH: I'm sorry, 58 first. If we go to 58 first  
10 [Magnum]. So it would appear that between the date of  
11 the email of midday, 22 October, by 5.43 on 23 October  
12 Mr Wagstaff was telling you and your colleagues that  
13 Tesco were to move on WeightWatchers for Heinz by the  
14 20p per kilo that had been suggested by Neil Arthey in  
15 the previous email.

16 A. Yes, that's not a surprise because we were asking for  
17 £200 per tonne or 20p per kilo on everything.

18 Q. Can we just finish that point off by going to tab 63  
19 [Magnum]. It's the first document bundle, tab 63. We  
20 now have an email from Neil Arthey of 30 October to  
21 a number of people including, three quarters of the way  
22 down, Arthur Reeves, to you.

23 A. Yes.

24 Q. I only want to draw your attention to the second  
25 paragraph -- actually maybe it's the third. Neil Arthey

1 reporting on what Tesco have confirmed:

2 "They have confirmed the price for WeightWatchers  
3 [mature] at £8.19 per kilo targeted to move on  
4 [11 November]."

5 I just want to stress the word "confirmed" there.  
6 Would you agree that what appears to be shown in these  
7 emails is that Neil Arthey had proposed a cash margin  
8 retail price increase on WeightWatchers to Tesco on  
9 22 October, that's midday 22 October, tab 55 [Magnum].

10 **A.** Yes.

11 **Q.** By the next day, on 23 October, Mr Wagstaff recorded  
12 that Tesco had agreed that 20p per kilo increase?

13 **A.** Yes.

14 **Q.** And that was confirmed again by Lisa Oldershaw or by  
15 Tesco to Neil Arthey on 30 October, he recorded that it  
16 had been confirmed by that date?

17 **A.** Yes.

18 **Q.** Thank you.

19 Can we move to a different point, a different  
20 document. Can we go to document 59, please [Magnum].  
21 Now, this is a Dairy Crest document, what appears to be  
22 a press release, it's a document provided by Dairy Crest  
23 as I understand it. It's dated 24 October. Do you  
24 recall this document at all?

25 **A.** I don't, no.

1       **Q.** Were you generally involved at this time in preparing  
2           press releases and public statements on what was going  
3           on?

4       **A.** No.

5       **Q.** By this time, 24 October, let's see what Dairy Crest say  
6           because this appears possibly, and I want to ask you  
7           about this, to be the public statement that was being  
8           discussed towards the end of September, 24 September, in  
9           your internal meeting at which you were present.

10      **A.** Yes.

11      **Q.** "Following several weeks of discussion, Dairy Crest is  
12           pleased to confirm that the major supermarkets have  
13           decided to increase the price of UK produced cheese.

14                "This follows the earlier supermarket initiative to  
15           increase the price of liquid milk and Dairy Crest's own  
16           decision to increase the price of milk on the doorstep."

17                Now, that first paragraph, when you refer to -- when  
18           Dairy Crest refers to price, "the major supermarkets  
19           have decided to increase the price of UK produced  
20           cheese", in context that must mean retail price, mustn't  
21           it, the price on the shelves in the supermarkets?

22      **A.** No, I don't think so. I think it could equally mean the  
23           price that they pay us for UK produced cheese.

24      **Q.** Because, you see, the second paragraph says:

25                "[Following] the earlier supermarket initiative to

1           increase the price of liquid milk", it must be a  
2           reference to retail price increases by the supermarkets?

3       **A.** No, I don't think so again.

4       **Q.** And what about the price of milk on the doorstep,  
5           Dairy Crest's own decision to increase the price of milk  
6           on the doorstep? That's retail prices?

7       **A.** That's clearly a retail price, yes.

8       **Q.** Clearly retail prices.

9           In that situation, isn't it in context most likely  
10          that what we're talking about, if not only retail  
11          prices, what we're talking about in the first paragraph,  
12          price, is at the very least the increase in price of  
13          both cost and retail prices.

14       **MISS ROSE:** I'm sorry to keep getting up but we're having  
15          the same thing again and again where the witness is  
16          being asked about documents, in this case a document  
17          which he says he has no recollection of, no sight of,  
18          wasn't involved in producing, and he's being asked to  
19          agree with propositions about what that document means.

20          The OFT is free to make submissions to the Tribunal  
21          about what these documents mean but, in my submission,  
22          this witness simply isn't in a position to give any  
23          relevant evidence on that question in relation to this  
24          document.

25       **MS SMITH:** If Miss Rose would allow me, sir, to finish my

---

1 line of questioning, I indicated that I'm going to take  
2 Mr Reeves back to the document at tab 48 of the bundle,  
3 which was a note of a meeting at which he was present in  
4 which Dairy Crest recorded that they were going to seek  
5 to agree with supermarkets a public statement about  
6 increases in retail prices.

7 **LORD CARLILE:** Well, I think you are straying into comment,  
8 so if we proceed towards document 48 quickly, that will  
9 resolve the problem.

10 **MS SMITH:** I'm sorry, I have misquoted. 28.

11 You will recall I took you to 28 earlier today,  
12 which is the "Action points from cheese price increase  
13 meeting of 24 September", and paragraph 3, as we've  
14 already looked at, talks about:

15 "Commercial Directors [to clear] with their senior  
16 contacts [you agreed it was a retailer contact] by no  
17 later than Friday 4th October, Dairy Crest's intention  
18 of making a public statement to the effect that farmers  
19 could expect to see retail prices for cheese increasing  
20 from mid- October onwards."

21 My question to you, it appears to be slightly late,  
22 but could this be the public statement about retail  
23 prices for cheese moving up from mid-October, it was  
24 24 October, that Dairy Crest was seeking to agree with  
25 retailers? The document at 59.

1       **A.** It's a document along the lines of the one we wanted to  
2       get at that meeting on 24 September, but I can't be  
3       certain that what we're talking there is retail prices.  
4       We did -- I think I've said in my notes with Eversheds  
5       that we did use shorthand to mean what we were charging  
6       retailers, sometimes we would call that retail. The  
7       whole thing was with the background that we didn't think  
8       we would get our cost prices up unless retails moved.

9       **Q.** Just one more question on this document, if I may, sir,  
10       and this is simply arising from a question that the  
11       president put when we opened on this document, which is  
12       the heading "Agreed" at the top of the document at 59.  
13       Can you give us any assistance on what that might mean?  
14       I think the president asked, does it mean agreed with  
15       the supermarkets as suggested by the first paragraph in  
16       that document?

17       **A.** I don't know.

18       **Q.** Okay. Thank you.

19               Can I ask you then to turn to the next document,  
20       document 60 [Magnum]. You can lose the finger in  
21       document 28.

22       **A.** Thank you very much.

23       **Q.** So document 60, this is an internal Dairy Crest email of  
24       24 October and there's a huge list of recipients which  
25       is very difficult to see who is there. If you just run

1           your finger down, you can see it's Kenton Robbins, the  
2           Asda account manager, Paul Feery, the Sainsbury's  
3           account manager, Neil Arthey, the very last person to  
4           whom it is sent before the CCs, the Tesco account  
5           manager, Colin Beaumont, another Tesco account manager.  
6           Then about halfway through the first list of CCs,  
7           there's your name?

8           **A.** Yes.

9           **Q.** This was copied to you 24 October, that's the same date  
10          as the press release we've just looked at. It's an  
11          email from Richard Wilkinson to this whole list of  
12          people within Dairy Crest, and it records in the first  
13          paragraph:

14                 "After raising RSPs [retail selling prices] on  
15                 [Cathedral] city..."

16                 So by 24 October Sainsbury's have raised retail  
17                 selling prices on Cathedral City?

18          **A.** Yes.

19          **Q.** And that is exactly as anticipated in the commercial  
20          sales group memo that we looked at at 16 October back at  
21          tab 48 [Magnum]?

22          **A.** Yes.

23          **Q.** That they were to move first, by 21 October, on the  
24          branded lines, and for Dairy Crest that was Cathedral  
25          City?

1       **A.** Yes.

2       **Q.** "But SSL [Sainsbury's Supermarkets Limited] have now  
3       stated that they want to wait to raise prices on own  
4       label products until they have evidence that Asda and  
5       Tesco are moving."

6               So Sainsbury's are concerned that Asda and Tesco may  
7       not do their bit, and that is exactly, again, as  
8       anticipated in the commercial sales group memo of  
9       16 October?

10      **A.** Yes, it was something we were worried about.

11      **Q.** In fact, it was something that Sainsbury's had stated to  
12      Richard Wilkinson or to Dairy Crest that they are now  
13      worried that Asda and Tesco are not going to raise their  
14      prices?

15      **A.** Yes.

16      **Q.** So that's what Sainsbury's have told Dairy Crest, and  
17      it's consistent with what you recorded -- or Dairy Crest  
18      recorded back in the commercial group memo?

19      **A.** Yes.

20      **Q.** So Sainsbury's needed reassurance from Dairy Crest, and  
21      it says in the second sentence:

22               "Arthur Reeves is in SSL [Sainsbury's Supermarkets  
23      Limited] tomorrow and will push for them to continue on  
24      track rather than wait based on intelligence that he has  
25      on Tesco and Asda."

1           You addressed this document in your witness  
2           statement, paragraph 22 of your witness statement  
3           [Magnum].

4           **A.** I've got that, yes.

5           **Q.** We'll just wait for everyone else to catch up with you.

6           You say in your witness statement, paragraph 22:

7           "I cannot now record whether I attended the meeting  
8           at Sainsbury's or whether that meeting even took place."

9           **A.** That's right.

10          **Q.** "I do not recall having had specific intelligence at the  
11          time from either Tesco or Asda that Tesco/Asda would  
12          increase the retail price of own label products or on  
13          what date, as seemed to be suggested by the email."

14          So you accept, I think, that the email suggests that  
15          you did have intelligence that Tesco, Asda would  
16          increase the retail prices of own label?

17          **A.** Yes.

18          **Q.** But you cannot recall?

19          **A.** I can't recall, no.

20          **Q.** Can I ask you to turn in your interview note, have you  
21          still got that open? It was in appeal bundle 1, at C/5  
22          [Magnum]. I think I may have told you a few hours ago  
23          to close that document in that bundle. It's the pink  
24          one.

25          **A.** Sorry, can you say which?

1 Q. It's C/5.

2 A. Thank you.

3 Q. Paragraph 78, you start on page 11 [Magnum]. You say in  
4 79, and you're talking about that document, the email,  
5 internal email from Richard Wilkinson on 28 October,  
6 paragraph 79:

7 "By that time I would have thought Tesco and Asda  
8 had accepted our increases and I would have wanted to go  
9 to Sainsbury's and say, look, I do not care what you do  
10 about retail prices but you have got to pay us our cost  
11 price increase. I have no specific recollection of this  
12 meeting. The intelligence referred to is that the sales  
13 force had been close to agreeing a price increase with  
14 Tesco and Asda. Continuing on track means continuing to  
15 pay us our increased prices. This is because in reality  
16 it is the same as increasing the retail selling price.  
17 The intelligence referred to is simply my knowledge that  
18 they had accepted our price increases. Everything was  
19 all out in the open because the purpose of the increases  
20 was to make the farmers happy so they would leave the  
21 retailers alone and stop picketing."

22 So you say the intelligence referred to is "my  
23 knowledge that they", Tesco and Asda, "had accepted our  
24 price increases" at paragraph 80?

25 A. Yes. I think it specifically relates back to Richard's

1 email where he talks about Asda packing blank labels.

2 If we knew that Asda had asked us to pack blank labels,  
3 we would have assumed that Asda were close to agreeing  
4 a price.

5 **Q.** Why is that? What's the significance of blank labels?

6 **A.** Because they then were shortening the time it took to  
7 get new prices into store.

8 **Q.** Because they could write, in effect, or print or  
9 whatever themselves the retail price on the labels?

10 **A.** Yes.

11 **Q.** You also say in the email that intelligence was about  
12 Asda and Tesco accepting increases, and you say in  
13 paragraph 80 your "knowledge that they had accepted our  
14 price increases". You talk about both Tesco and Asda in  
15 paragraph 79, so it wasn't just Asda, it was about Tesco  
16 as well, wasn't it?

17 **A.** Richard's email is about Tesco. I don't mean to be  
18 difficult but this was such a long time ago. If Richard  
19 put that in an email, I guess that's what he meant, but  
20 it's ten years ago.

21 **Q.** You say:

22 "Continuing on track [this is paragraph 79 of your  
23 interview note] means continuing to pay us our increased  
24 prices. This is because in reality it is the same as  
25 increasing the retail selling price."

1           When you're talking about intelligence, this again  
2           was another shorthand. You meant both cost and retail  
3           prices?

4           **A.** Yes.

5           **Q.** Now, going back to your statement, 2011 statement, in  
6           paragraph 23 [Magnum], you say:

7                   "Finally I do not believe that I would have received  
8                   any Tesco related intelligence direct from Tesco."

9                   So the information may not have come to you directly  
10                  from Tesco, it would have come to you via the  
11                  Dairy Crest sales team?

12          **A.** Yes, Colin and Neil, yes.

13          **Q.** Who would presumably have obtained that information from  
14                  their contacts with Tesco?

15          **A.** Yes.

16          **Q.** The email -- if we have got the email open as well, we  
17                  have about three bundles open at the moment -- the email  
18                  envisages you passing on that information to Sainsbury's  
19                  and pushing for them to continue on track. That  
20                  basically means implementing the cost and retail price  
21                  increases on their own label?

22          **A.** Yes.

23          **Q.** You've explained about blank labels for Asda, the second  
24                  paragraph:

25                   "We are now packing blank labels for Asda and

1           packing the new priced packs for M&S so the movements  
2           are in the pipeline."

3                    That is the cost and retail prices were starting to  
4           move --

5           **A.** Yes.

6           **Q.** The cost and retail price increases, I apologise.

7           **A.** Yes.

8           **Q.** Then it says:

9                    "This needs to be communicated so that the lag  
10           created by everyone waiting for each other to move in  
11           store can be reduced."

12                   What you say here is that the fact that retail  
13           prices are being put up by these other retailers, Tesco,  
14           Asda, M&S, needs to be communicated to other retailers.  
15           That's right, isn't it?

16           **A.** Yes. That's what Richard is saying.

17           **Q.** That's what Richard is saying, right, absolutely. As  
18           you say in paragraph 82 of your interview [Magnum], you  
19           explain:

20                    "This needs to be communicated. This is not  
21           helpful. Richard Wilkinson appears to be suggesting  
22           that we tell our customers about forthcoming retail  
23           price increases."

24           **A.** Yes.

25           **Q.** I think you've already answered this question, but the

1 reference to the "lag created by everyone waiting for  
2 each other to move in store" is that it's the time lag,  
3 that everyone was waiting to see that everyone else was  
4 moving -- the retailers were waiting to see that other  
5 retailers were moving?

6 **A.** Yes.

7 **Q.** If Dairy Crest was able to communicate to them the fact  
8 that -- able to communicate, for example, to Tesco the  
9 fact that Sainsbury's and Asda had agreed already to  
10 move, the time lag would be reduced, they wouldn't have  
11 to wait?

12 **A.** Yes.

13 **Q.** Thank you. I think -- no. I was going to say you can  
14 close one of those bundles but we just need them open  
15 for a little while longer.

16 Could I ask you then in the documents bundle, that's  
17 the pink-spined bundle -- I'm sorry, yellow. The  
18 yellow-spined bundle. If you could go to tab 69  
19 [Magnum], I'm taking you to this document because you  
20 have commented on it in your interview with Eversheds,  
21 just to anticipate the jumping up. This is an email  
22 from Neil Arthey of 4 November to Lisa Rowbottom and it  
23 says:

24 "Lisa.

25 "I have attached a spreadsheet which shows the

1 suggested rsp's of cheese lines that we supply Asda  
2 following the price increase.

3 "My understanding is that Asda will be applying £200  
4 per tonne ie 20p per kilo to rsps of Smart Price Mild &  
5 Mature."

6 You commented on this document in your interview  
7 with Eversheds at paragraph 88 [Magnum].

8 You say:

9 "Tesco's sometimes say they will agree a price  
10 increase and then pull out of it. Neil is trying to  
11 make sure that they will actually carry it through. The  
12 Asda spreadsheet would probably have been prepared by  
13 Kenton Robbins who was then the Asda account manager but  
14 the prices are probably not in store yet. Chris Ryder  
15 is Neil's junior and Colin Beaumont is his senior.  
16 Again I would say Neil sent this inappropriate level of  
17 detail to Tesco because of the pressure he felt to make  
18 sure he delivered the Tesco price increase and they did  
19 not drop back."

20 So, again, this was sent, in your view, in order to  
21 make sure that Tesco doesn't pull out of price increases  
22 that you say had already been agreed?

23 **A.** Yes.

24 **LORD CARLILE:** Just so we understand what you mean and what  
25 you meant in your Eversheds interview: "inappropriate",

1 inappropriate in what way?

2 **A.** We shouldn't be sharing one retailer's intentions with  
3 another.

4 **LORD CARLILE:** Because?

5 **A.** We knew that that was anticompetitive.

6 **MS SMITH:** You may or may not be able to assist me with  
7 another point on this. Back to the document itself, the  
8 email itself, of 4 November. The second paragraph says:  
9 "My understanding is that Asda will be applying £200  
10 per tonne ie 20p per kilo to rsps of Smart Price Mild &  
11 Mature".

12 This was November 2002. Can you confirm that by  
13 this time Dairy Crest was no longer supplying Asda with  
14 its Smart Price Mild & Mature?

15 **A.** I don't remember. I'm sure we could find out from  
16 records but I don't remember that.

17 **Q.** Thank you for the assistance anyway.

18 I think now we're going to put this bundle away,  
19 because we're right at the back of it, and I have only  
20 one or two documents I want to take you to from the  
21 second document bundle.

22 Can I ask you to be given the second document  
23 bundle, which is yellow-spined bundle, number 2. In  
24 fact you may have it already up there because we flicked  
25 to the very last one, didn't we? I think it's the one

1           that's closed. That's the one.

2           I want to take you just to one final document in  
3           that bundle, at tab 74 [Magnum]. This is a letter from  
4           Bill Haywood, you see at the end, of Dairy Crest, copied  
5           to you, to Finn Cottle of Sainsbury's, and Finn Cottle  
6           was Sarah Mackenzie's boss, do you remember that?

7           **A.** She was.

8           **Q.** Sarah Mackenzie was a cheese buyer, and Finn was  
9           probably --

10          **A.** The dairy category controller, I think, yes.

11          **Q.** Now, in this letter Bill Haywood says:

12                 "Following our discussion, I have made sure that our  
13                 cheese team are fully aware of the content of our  
14                 conversation.

15                 "I have briefed the team to be constructive in  
16                 finding ways of improving value for Sainsbury's."

17                 I won't read it all out, but if you can just read it  
18                 to yourself and I'll ask you some questions about it.

19                 What Mr Haywood is doing in this letter is he's  
20                 complaining to Sainsbury's that Dairy Crest is the only  
21                 cheese company to have announced increases in the raw  
22                 milk prices that it's paying to farmers, the only ones  
23                 to have done that yet, by this time?

24          **A.** Yes.

25          **Q.** In particular, he says, he is complaining that Glanbia

1 do not appear to have matched those increases. He says:

2 "I would go further in saying that unless Glanbia  
3 and other cheese companies match our increase in full we  
4 will have no alternative as a company but to put the  
5 whole cheese pricing initiative into reverse."

6 **A.** Yes.

7 **Q.** So he was complaining about the fact that Glanbia didn't  
8 appear to have moved its farm gate price for milk that  
9 it paid to farmers?

10 **A.** Yes, and that we consistently paid a higher price than  
11 Glanbia.

12 **Q.** Where would he have got that information from? By  
13 looking at the retail prices of Glanbia's brands in  
14 store?

15 **A.** No, no. These are raw milk prices, they're published in  
16 lots of different places.

17 **Q.** Anyway he was complaining about the fact that Glanbia  
18 didn't appear to have moved, and he was asking in effect  
19 for Sainsbury's help to ensure that Glanbia do their  
20 bit, is that right?

21 **A.** Well, I don't know. I don't know. I think the way  
22 I read this, and this is supposition --

23 **Q.** It was a document that you received at the time?

24 **A.** Yes, is that -- but it was ten years ago -- is that we  
25 have pushed Sainsbury's to put their prices up to what

1           they pay us for cheese. My guess is, in the way that  
2           Sainsbury's and other retailers work, Finn had then said  
3           to Bill, "You're too expensive, we have got Glanbia who  
4           can supply us cheaper". And Bill is saying, "Look,  
5           we're going to try to find a way of improving value to  
6           you, that means cut our prices again, but look at the  
7           disadvantage. No wonder they can offer you cheaper  
8           prices because they're not paying the same milk price as  
9           we are".

10        **Q.** So what you're saying is Dairy Crest are saying to  
11        Sainsbury's, "We've done our bit, we've increased the  
12        raw milk prices as we've been discussing with you.  
13        Glanbia have also got to do their bit and increase their  
14        raw milk prices."

15        **A.** No, no, that's not --

16        **Q.** It says:

17                    "Unless Glanbia and other cheese companies match our  
18                    increase in full we will have no alternative as  
19                    a company but to put the whole cheese pricing initiative  
20                    into reverse."

21        **A.** Yes, that is what Bill says. What he's trying to say to  
22        Sainsbury's is "Don't start taking business away from us  
23        because we're more expensive".

24        **Q.** But the purpose of this letter, why else would he be  
25        writing to Sainsbury's, is to ask Sainsbury's to put

1 pressure on Glanbia so they would also move?

2 **A.** No, I think what Bill is saying is, "Don't take business  
3 away from us, that we're making cheese with expensive  
4 milk, and give it to Glanbia because they're cheaper  
5 than us".

6 **Q.** The reason Dairy Crest were making the cheese with  
7 expensive milk at this time is because it was part of  
8 the, as it's described, cheese pricing initiative?

9 **A.** Yes.

10 **Q.** And that cheese pricing initiative was, as we've  
11 discussed on a number of occasions, an increase in cost  
12 and retail prices in order to enable an increase in the  
13 price for raw milk that Dairy Crest paid to farmers?

14 **A.** Well, the initiative meant a lot of things. It didn't  
15 necessarily mean retail prices. The initiative, from  
16 what I remember, was that it was an initiative to pay UK  
17 farmers more for their milk.

18 **Q.** The way in which that was to be done by Dairy Crest was  
19 by an increase in its cost prices?

20 **A.** Yes.

21 **Q.** And as you've agreed, it was inevitable or it was  
22 understood by Dairy Crest at the time that that would  
23 require an increase in the retail price?

24 **A.** Yes.

25 **LORD CARLILE:** And if Glanbia didn't play ball, the result

1 would be?

2 **A.** Well, we didn't particularly mind, sir, what Glanbia  
3 paid for their milk. What we didn't want was for  
4 retailers to come along in November 2002 or during 2003  
5 and say, "We've had very competitive quotes from Glanbia  
6 to supply cheese. We're dropping you, Dairy Crest,  
7 because your cheese is too expensive".

8 **LORD CARLILE:** Because your cost price would be greater than  
9 Glanbia's cost price?

10 **A.** Exactly right.

11 **LORD CARLILE:** So the inference is that Glanbia had to be  
12 persuaded to put up their cost price?

13 **A.** Or for a while supermarkets had to not buy the cheapest  
14 cheese.

15 **MS SMITH:** Just on that line, just to finish off that line  
16 of questioning, the second paragraph of the letter, the  
17 last sentence:

18 "Indeed you will note from the Dairy Industry News,  
19 we are the only cheese company to have announced  
20 increases so far."

21 So Dairy Crest were expecting Glanbia also to  
22 announce increases?

23 **A.** Yes.

24 **MS SMITH:** Just a quick consultation with absolutely  
25 everyone in the room, sir.

1       **LORD CARLILE:** Take your time, Ms Smith. You have not been  
2           wasting any.

3       **MS SMITH:** I'm happy to confirm those are all the questions  
4           I have for Mr Reeves.

5       **LORD CARLILE:** Thank you very much. Miss Rose?

6       **MISS ROSE:** Sir, there is no re-examination.

7       **LORD CARLILE:** No re-examination.

8           Thank you very much, you're released. If anyone  
9           requires you back, no doubt they will tell you, but I  
10          would lie low if I were you.

11       **A.** Thank you.

12       **LORD CARLILE:** Thank you for coming.

13           Right, we're going to have a ten-minute gap now,  
14          aren't we --

15       **MS SMITH:** And I think Mr Ferguson will then be available.

16       **LORD CARLILE:** Anybody want to say anything before we have  
17          a ten-minute gap?

18       **MS SMITH:** Sir, before we rise, there is just one matter of  
19          housekeeping, as there are so many housekeeping matters  
20          in this case. Can I ask Miss Davies to deal with it.

21       **MISS DAVIES:** Just a very short point relating to the order  
22          the Tribunal made this morning, and also the changes  
23          made by some of the third parties during last week and  
24          during the weekend. The OFT is revising the orders that  
25          were sent to the Tribunal on Friday and, in accordance

1 with that, we'll be sending a letter to you, sir,  
2 tomorrow.

3 **LORD CARLILE:** Thank you very much, that's very helpful.  
4 (2.50 pm)

5 (A short break)

6 (3.03 pm)

7 **LORD CARLILE:** Yes.

8 **MISS ROSE:** Sir, we call Mr Ferguson.

9 MR THOMAS FERGUSON (affirmed)

10 **LORD CARLILE:** Mr Ferguson, do sit down. You'll find  
11 there's water there for you, and as long as you speak up  
12 and answer only the questions that are put to you, we'll  
13 all get along fine.

14 **THE WITNESS:** Thank you.

15 Examination-in-chief by MISS ROSE

16 **Q.** Can I ask for Mr Ferguson to be given the appeal  
17 bundle 2, please. Can you turn in that bundle to tab N  
18 [Magnum].

19 **A.** Okay, I've found it.

20 **Q.** Do you have there a document headed "First Witness  
21 Statement of Thomas Tannahill Ferguson"?

22 **A.** Okay.

23 **Q.** Do you have a signature? Mine I'm afraid is unsigned.  
24 Do you have a signed version there?

25 **A.** I don't have. It's an unsigned copy here.

1 Q. Have you signed this statement in the past?

2 A. I have signed this document in the past.

3 Q. I'm told there is a signed one in court. Perhaps the  
4 Tribunal might like a copy of the signed version.

5 (Handed)

6 **LORD CARLILE:** Thank you.

7 **MISS ROSE:** Can I ask you whether the facts contained in  
8 this statement are true?

9 A. They are true.

10 Q. Can you now turn on in the same bundle to tab N/1  
11 [Magnum], after numbers 1 to 4. Do you there have  
12 a document headed "Tom Ferguson Witness Summary"?

13 A. Sorry, was that N/4?

14 Q. N/1.

15 A. N/1?

16 Q. Behind tab N, there are tabs labelled 1, 2, 3, 4.

17 A. Yes.

18 Q. Then there should be another tab labelled N/1, after  
19 tabs 1 to 4.

20 A. The document I have in N/1 is an email document.

21 Q. Are you sure that's not just tab 1?

22 A. It is tab 1.

23 Q. If you go behind tabs 1, 2, 3 and 4, do you then have  
24 a tab called N/1?

25 A. I don't have it. I just have another 1 to 10 again.



1           there.

2                   In your witness statement in paragraph 4 [Magnum],  
3           you confirm that in 2002 you worked for McLelland as  
4           a national account manager, is that right?

5           **A.** That is correct.

6           **Q.** And you were responsible in 2002 for managing the  
7           relationship with Tesco, that's right?

8           **A.** Yes, that's correct. I was managing the Tesco accounts  
9           at that time.

10          **Q.** In 2003, you were promoted to national account  
11          controller?

12          **A.** Correct.

13          **Q.** And 2003, Stuart Meikle -- how do you pronounce his  
14          name?

15          **A.** His name is actually produced (sic) Stuart "Meekle".

16          **Q.** Thank you. Someone who knows him who can finally clear  
17          that one up. Stuart Meikle took responsibility for  
18          Tesco in 2003, is that right?

19          **A.** That's correct.

20          **Q.** In 2002 and I think 2003, you reported to Jim McGregor  
21          who was group sales director, is that right?

22          **A.** That's also correct.

23          **Q.** Jim McGregor in turn then reported to Alistair Irvine  
24          who was one of the two managing directors of McLelland?

25          **A.** Correct, yes.

1 Q. You still work for McLelland as national account  
2 controller, is that right?

3 A. Well, I actually work now for Lactalis McLelland, which  
4 is the business -- Lactalis purchased the McLelland  
5 business in 2004.

6 Q. Yes, in September 2004 Lactalis purchased McLelland?

7 A. Correct.

8 Q. And Mr Irvine and his brother then left McLelland, is  
9 that right?

10 A. Absolutely.

11 Q. But you now act, let's call it for shorthand, for  
12 McLelland now as national account controller, is that  
13 right?

14 A. Yes.

15 Q. Jim McGregor still works for McLelland as sales  
16 director, is that right?

17 A. He does, yes. He's still there.

18 Q. Now, you've been taken to the statement in the witness  
19 bundle -- in the bundle, bundle 2B, your statement  
20 dated October 2011. There should also be in that  
21 bundle, I think at M/1, just before tab N, your first  
22 witness statement of October 2011, a statement that you  
23 signed in July 2011.

24 Do you recall that?

25 A. I do recall that, yes.

1       **Q.** And that was a statement that you gave to Tesco's  
2           lawyers in July 2011 and that they then sent to the OFT.  
3           Were you aware of that?

4       **A.** I was aware that I signed the statement but I wasn't  
5           aware of where the statement went to, but certainly  
6           I was aware the statement was signed.

7       **Q.** However you went back to that statement between July  
8           and October 2011 and you made some changes to it and  
9           then signed the statement dated October 2011, is that  
10          right?

11      **A.** Correct, yes.

12      **Q.** Can I ask you in the documents bundle, that other bundle  
13          you've got in front of you, to turn to --

14      **A.** This one here (indicates)?

15      **Q.** Yes, that's right. If you could leave your statement  
16          open because we'll be cross-referring backwards and  
17          forwards between your statement, which is at tab N, and  
18          the documents in the bundle. Then it's tab 52 of that  
19          bundle [Magnum].

20      **A.** Okay, tab 52, yes.

21      **Q.** You see there an email from you to Lisa Rowbottom, as  
22          she then was, 21 October 2002. I don't want to ask you  
23          any particular questions about that email at this stage.  
24          I'm just taking you to it because there is a spreadsheet  
25          attached to it which shows cheeses that McLelland sold

1 to Tesco in 2002 and 2003 and I just want to ask you, to  
2 set the scene, ask you some questions about that.

3 So you see the email says:

4 "Spreadsheet attached which will cover off the  
5 current supply prices and the new position..."

6 As I understand it, that spreadsheet included all  
7 the lines supplied by McLelland to Tesco as at that  
8 date, is that correct?

9 **A.** Yes. I would say that is definitely the detail of the  
10 product range that we would have supplied Tesco at that  
11 time.

12 **Q.** So we see the first two entries on that  
13 spreadsheet: Tesco full flavour white generic cheddar,  
14 Tesco mild white generic cheddar. Can you help me, were  
15 those Tesco Value own labels or were they just Tesco own  
16 label?

17 **A.** Yes, those two lines were Tesco Value own label which  
18 we, as a supplier, supplied the bulk cheddar to a Tesco  
19 nominated packer.

20 **Q.** That's right, so you produced the cheddar in bulk and  
21 you then I think supplied it to Kerrygold to be packed  
22 for Tesco?

23 **A.** We did, that's correct.

24 **Q.** Then we have a number of entries under the heading "Deli  
25 Lines". There are a number of McLelland brands I think,

1 all of them: Galloway, McLelland mature, Orkney  
2 coloured, SMP coloured Dunlop truckle, Howgate, SPM  
3 Mull of Kintyre, two lines, Howgate, Seriously Strong  
4 and Strathdon. Those were all deli lines and what you  
5 did with those was that McLelland would supply those  
6 lines to Tesco effectively in large chunks and they  
7 would be cut, bagged and priced by Tesco in store, is  
8 that right?

9 **A.** Yes, that's the description of deli lines in effect. It  
10 tends to be a -- say, for example, a 2.5-kilogram block,  
11 which is supplied to the Tesco distribution centre then  
12 on to stores, and then those stores would then be  
13 sold -- those blocks would then be sold on the  
14 delicatessen counter.

15 **Q.** Then we have under the heading "Prepack Lines" a number  
16 of different categories. We have Caboc double cream  
17 cheese, Galloway, two lines, Gigha mixed fruits,  
18 McLelland coloured, two lines, SMP Mull of Kintyre,  
19 Orkney, SMP Arran, three lines, Galic soft cheese and  
20 SMP Isle of Bute and Mull of Kintyre, two lines.

21 Now, those products were all pre-packed, so they  
22 went to Tesco already packed, is that right?

23 **A.** Yes, that's correct. They're pre-packed lines, yes.

24 **Q.** But they were McLelland brands?

25 **A.** The products you've mentioned were McLelland brands,

1           yes.

2           **Q.** Yes. They were McLelland brands but they were random  
3           weight pre-packed, so they were cut by McLelland to  
4           random weights and then packed and labelled in  
5           McLelland's processing plant?

6           **A.** Yes, that's correct. They were packed and labelled in  
7           that way, yes.

8           **Q.** They are all, I think, cheddars apart from the Caboc  
9           double cream cheese and the Galic soft cheese, is that  
10          right?

11          **A.** That's correct.

12          **Q.** All the others were types of cheddar?

13          **A.** Yes, they're all types of cheddar from various  
14          creameries. There would be some different creameries  
15          within Scotland in those days and we would represent  
16          those creameries with the McLelland brands and the  
17          creamery identity, so it's a mixture of product.

18          **Q.** So none of those would be what I think was called in the  
19          industry "regionals", which would have been  
20          Red Leicester, Wensleydale, those sort of products?

21          **A.** Yes. They wouldn't be called regionals, but I would  
22          feel because of the Scottish market in those days, they  
23          didn't have regionals in effect, like territorial cheese  
24          you would have selling within the English market. But  
25          the Scottish cheddar production had different styles and

1 different characteristics to it. So it was actually  
2 quite similar to being regionals, although it was all  
3 cheddar, the factories all had very distinctive  
4 characteristics. So in effect it was very similar to  
5 regionals as you have expressed that way.

6 **Q.** I think we've seen it described, and we'll come to the  
7 documents, in some of the McLelland documents as  
8 Scottish branded pre-pack?

9 **A.** Yes, that would be a potential description of that.

10 **Q.** We then have four lines, Seriously Strong,  
11 Seriously Strong coloured, two different weights and  
12 Seriously Strong white. Again, that's a McLelland  
13 brand, is that right?

14 **A.** Yes, Seriously Strong was certainly a McLelland brand.

15 **Q.** And probably I think it's safe to say it was the most  
16 successful McLelland brand in Tesco at the time?

17 **A.** I would say the most successful brand that we had in the  
18 general business at the time, yes.

19 **Q.** Right. Seriously Strong was produced in fixed weight  
20 pre-pack, is that right?

21 **A.** That's correct, yes, it was produced in a fixed weight  
22 pre-pack.

23 **Q.** So no retail price labelling was done for that product  
24 by McLelland in the processing plant? It was produced  
25 in unpriced fixed weight packs?

1       **A.** Yes, that's correct. The product was produced in  
2       standard packaging with no price visible on the  
3       packaging.

4       **Q.** And the retail price for this fixed weight pre-pack was  
5       indicated in the supermarket, for example in Tesco, by  
6       a price on the shelf edge labels?

7       **A.** Yes, that's correct. The point of sale position would  
8       determine the price, correct.

9       **Q.** And that, I think it's obvious, is a cheddar as well?

10      **A.** Yes.

11      **Q.** Then finally we have a number of lines underneath that:  
12      Tesco Caledonian, Tesco generic coloured mature, Tesco  
13      Scottish coloured mature, Tesco Orkney, Tesco  
14      Caledonian, some more Tesco Scottish coloured and some  
15      more Caledonian, Tesco generic coloured mature.

16             These are think are Tesco own label produced by  
17      McLelland, is that right?

18      **A.** Yes, they're all Tesco own label lines that we produced  
19      for Tesco.

20      **Q.** And those, again, are all cheddars, different types of  
21      cheddar?

22      **A.** Yes.

23      **Q.** And they are random weight pre-packed?

24      **A.** Yes, they're all random weight pre-packed cheddars.

25      **Q.** So as before, McLelland would produce, cut to an

1            approximate weight, pack and label with the retail price  
2            these products?

3            **A.** Yes, that's correct.

4            **Q.** If the retail price for these products, for example,  
5            these random weight products, was to change McLelland  
6            would receive an instruction from the retailer, Tesco in  
7            this instance, giving a new retail price per kilogram,  
8            is that right?

9            **A.** Yes, that's correct. We would receive that instruction  
10           and confirmation of the new retail, yes.

11           **Q.** And McLelland would then have to print new labels for  
12           each random weight piece of cheese by reference to that  
13           kilogram price?

14           **A.** Yes, that's correct, yes.

15           **Q.** And McLelland could set up their machines to do this  
16           pretty quickly depending on what was booked into the  
17           processing plant and other commercial factors such as  
18           that?

19           **A.** Yes, absolutely. We would -- we could do that with  
20           speed. As long as the price was confirmed we could make  
21           the decision to pack at that price point, yes.

22           **Q.** Can I just ask you -- sorry, I should have warned you  
23           that I'm also, just on this point, going to refer you to  
24           a document in the second bundle of documents at 106.

25           **A.** Document 106?

1 Q. 106.

2 I've just been told that sometimes your voice is  
3 dropping a little, Mr Ferguson, and the transcript  
4 writers are losing you every now and again, so if you  
5 could try to keep your voice up when you're answering  
6 the questions, that would be great.

7 A. Sure.

8 Q. So I'm just going to take you, as an example of how  
9 these things are done at the moment, to an email you can  
10 see here at 106 [Magnum] from Gerry Doyle to you and  
11 Jim McGregor on 24 September, Wednesday 24 September.

12 Who was Gerry Doyle?

13 A. Gerry Doyle was operations manager at the time for  
14 McLelland.

15 Q. He was the guy essentially who was in charge of making  
16 sure that the processing plants ran and produced the  
17 cheese and --

18 A. Yes, he would give that instruction and detail to the  
19 factory. Gerry controlled all the general  
20 administration, which revolved around the timings of  
21 when changes would be made, and he would then implement  
22 that communication to the factory. So that was Gerry's  
23 job.

24 Q. So this is an email sent Wednesday, 24 September 2002  
25 (sic) and you'll see in the first paragraph it says:

1           "Further to my telephone conversation with Tom  
2           [that's with you] who confirmed that Asda will be moving  
3           to new retails effective from Monday the 29th."

4           So he's telling you and Jim McGregor and various  
5           other people to whom this was CCed that Asda will be  
6           moving, to confirm what you've told him, Asda will be  
7           moving to new retails effective from Monday,  
8           29 September.

9           Then on that paragraph 5, it says:

10           "The retails have to be supplied to --"

11           You can pronounce this for me, please, Mauchline,  
12           I'm going to get it wrong?

13           **A.** The pronunciation is "Mocklin".

14           **LORD CARLILE:** It's a Scots version.

15           **A.** Absolutely.

16           **LORD CARLILE:** This document is to the guy who has to set up  
17           all the machinery and make sure the labels can be  
18           produced in the right form?

19           **A.** Yes, well, Gerry is -- he's put in that document because  
20           he wants to be absolutely precise with his information  
21           because he has to then implement that with the factory,  
22           yes, absolutely.

23           **LORD CARLILE:** Sorry, Ms Smith, I interrupted you.

24           **MS SMITH:** So he's saying that the retails have to be  
25           supplied to -- I've lost it now:

1            "... Mauchline first thing Thursday morning in order  
2            for them to set-up there (sic) machine prior to  
3            packing."

4            And Mauchline is your creamery in East Ayrshire, is  
5            that right?

6            **A.** Yes, Mauchline is in effect the pre-packing station.  
7            The creameries would supply the cheese to Mauchline for  
8            pre-packing.

9            **Q.** And so the packing and labelling was done at this plant  
10           in Mauchline?

11           **A.** That's correct, yes.

12           **Q.** He says:

13           "The retails have to be supplied to Mauchline first  
14           thing Thursday morning [that's the following day] in  
15           order for them to set-up there (sic) machine prior to  
16           packing."

17           Then the third paragraph after that:

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

22           So they "only have one and a half days of production  
23           left", I assume he means there Thursday afternoon and  
24           Friday, is that right?

25           **A.** I would say that's what Gerry is referring to, but

1 I would also point that Gerry would also, in  
2 circumstances when the pressure was on, tend to panic.  
3 Although he's highlighting there's a day and a half,  
4 there's always an urgency that you can express to get  
5 things done when you need them to get done, and I'm  
6 afraid Gerry, his particular manner on occasion was  
7 always panicking. So, therefore, although he's  
8 expressing that, that's not always the case. If there's  
9 an urgency, we tend to push with the urgency.

10 **Q.** Right. Well, he says there, "one and a half days of  
11 production left", he's talking about Thursday and  
12 Friday. He's not saying "We have got Saturday and  
13 Sunday as well". So there's no indication there that  
14 Mauchline will be working Saturdays and Sundays, is that  
15 right?

16 **A.** He's making that indication there but that is not always  
17 the case.

18 **Q.** It's not always the case.

19 **A.** No.

20 **Q.** On 24 September 2003, this records that Mauchline was  
21 not working for weekends, is that correct? The plant  
22 was not operating at weekends because he says "we only  
23 have one and a half days of production left", Thursday  
24 and Friday?

25 **A.** It would be hard for me to comment on that because

1 things could change and a decision could be made to  
2 rectify that. So I'm not clear if they were producing  
3 over the weekend or not.

4 **Q.** Generally they did not. Generally they worked Monday to  
5 Friday, that's the case, isn't it?

6 **A.** I can't recollect. It's far too long ago for me to  
7 remember the --

8 **LORD CARLILE:** If we take it on face value, it doesn't look  
9 as though they were working that weekend, does it?

10 **A.** You could say that just now, just on that point.

11 **Q.** And as you say, he says:

12 "... they already have this time booked for our  
13 other lines."

14 So he was concerned about the fact that basically  
15 the factory, the production lines, were already booked  
16 for other lines.

17 **A.** Again, he's making that point but, again, urgency can  
18 come into the process to change that.

19 **Q.** Now, when -- you can put this document away for the  
20 moment.

21 We were talking about the situation when McLelland  
22 is instructed by a retailer to change the retail price  
23 on the labels on random weight pre-packed. When such an  
24 instruction is received, it may be that McLelland might  
25 not start supplying the product with new retails on it

1 immediately, because you often have old price stock that  
2 you have already labelled that you need to work through  
3 the system, is that correct?

4 **A.** That's correct. You have an instance where you're  
5 supplying new retails, used all the stock, potentially  
6 the current(?) old retails, but when you are in a mode  
7 of getting close to agreeing anything, as far as  
8 implementation of new retails, you tend to manage your  
9 business by making sure you keep stocks very, very  
10 tight, and very much in control. So, therefore, it  
11 would vary on how many days' stock you would have of  
12 maybe old and new plans for retails.

13 **Q.** We'll see some specific instances of when that happened  
14 but I'll come back to those later.

15 So that stock held by the producer, the retailer may  
16 also have cheese at old prices that it would need to  
17 sell through before it could put the newly priced cheese  
18 on the shelf, that's correct?

19 **A.** That's correct. It would all vary, it would just depend  
20 store by store, I would say. It can vary enormously.

21 **Q.** Okay. If we could leave that point for a moment and  
22 just go back to your contact with Tesco during 2002. In  
23 paragraph 5 of your witness statement [Magnum], you were  
24 Tesco account manager in 2002, as we have confirmed, and  
25 you say you had contact dealing directly with

1 Lisa Rowbottom, Rob Hirst and John Scouler, is that  
2 right?

3 **A.** Yes, that's correct. I had contact with Lisa, Rob and  
4 John, and most of the contact would be with Lisa who was  
5 the buyer at the time.

6 **Q.** As you say, most of your day-to-day contact was with  
7 Lisa?

8 **A.** Yes.

9 **Q.** Now she says, and I can take you to her statement if you  
10 wish, we can do that, that she had a meeting with you in  
11 Cheshunt every four weeks, what she describes as every  
12 Tesco period she had what she describes as review  
13 meetings. Is that correct?

14 **A.** I can't remember if it was as regular as that. There  
15 would be regular meetings, I couldn't say if it was  
16 precisely every four weeks.

17 **Q.** If you want to check her statement, I can take you to  
18 it.

19 Just for the note, it's paragraph 32 of her  
20 statement [Magnum].

21 Do you want me to --

22 **LORD CARLILE:** I understand you're not disputing that you  
23 used to go to Cheshunt for meetings on a fairly regular  
24 basis?

25 **A.** Yes, absolutely.

1       **LORD CARLILE:** Whether it was every four weeks you can't say  
2           precisely.

3       **A.** Yes.

4       **MS SMITH:** She says every Tesco period, what she calls it,  
5           ie every four weeks. She also says:

6                "I would usually be in contact with the Tesco  
7           account managers at all my cheese suppliers at least  
8           once or twice a week. With the larger suppliers [and  
9           I'm reading from paragraph 33 of her statement] contact  
10          was often on a daily basis."

11               I would assume McLelland would be one of Tesco's  
12          larger suppliers, is that correct?

13       **A.** Yes, there could be regular contact. If it wasn't  
14          daily, it would certainly be every week we would speak.

15       **Q.** But it was likely that you were talking to her at least  
16          a number of times a week from what she's saying?

17       **A.** Yes, I would be. I would be in close communication with  
18          Lisa.

19       **Q.** Now, she also says at paragraph 34 of her statement  
20          [Magnum]:

21                "Our discussions would cover a range of topics,  
22           including order volumes, wastage levels, promotional  
23           activity, replacement of existing lines and so on.

24           I would sometimes tell suppliers about strategic  
25           objectives for Tesco that were also relevant to them.

1           In addition there would be periodic negotiations in  
2           relation to changes in the cost price."

3           So unsurprisingly there would be a discussion on  
4           a range of topics from promotions, to Tesco's strategies  
5           for its cheese offering, to cost price negotiations.  
6           You would agree with that?

7           **A.** Yes, there would be a number of topics of conversation  
8           around about that. It could be new listings, we might  
9           be doing TV advertising in certain products so therefore  
10          you would be communicating on a regular basis the  
11          general issues that both Tesco and I would need to be  
12          aware of, yes.

13          **Q.** Looking at what you say in paragraph 8 of your statement  
14          [Magnum], you say:

15                 "Retailers would, however, regularly ask me for my  
16                 assessment of future trends in the market, not least in  
17                 the context of cost price negotiations and particularly  
18                 where I was seeking a cost price increase. This would  
19                 cover both movements in cost prices and their potential  
20                 impact on retail prices."

21                 Presumably, you would have had similar discussions  
22                 with Tesco and particularly with Lisa Oldershaw at the  
23                 time?

24          **A.** I'm just not clear on what subject you're referring to.

25          **Q.** I'm asking you a simple question. You say in

1 paragraph 8 of your statement:

2 "Retailers would ... ask me for my assessment of  
3 future trends ... not least in the context of cost price  
4 negotiations... This would cover both movements in cost  
5 prices and their potential impact on retail prices."

6 I'm asking you whether you had similar discussions  
7 with Tesco? You talk there about all your retailers.

8 **A.** Yes, I would have. The discussions would be on  
9 a similar line with Tesco, yes.

10 **Q.** Then you talk generally about the £200 per tonne price  
11 increase, and we'll come to that in particular. But you  
12 say in paragraph 9 of your statement [Magnum]:

13 "Since the retailers wanted to avoid becoming  
14 uncompetitive, they were very interested in what the  
15 other retailers were doing."

16 I just ask you the same question: presumably Tesco,  
17 when you had your regular discussions with Lisa, was  
18 interested in what other retailers were doing,  
19 particularly Asda, Sainsbury's, Safeway. Is that  
20 correct?

21 **A.** Yes, I would say that's a general position of looking at  
22 the future trends when asking me to assess what I would  
23 think as far as the market position is concerned, yes.

24 **Q.** And particularly they wanted, you say there, to avoid  
25 becoming uncompetitive, so they were very interested in

1           what the other retailers were doing. I assume when  
2           you're talking about uncompetitive, you must therefore  
3           be talking about their prices?

4           **A.** Yes, I would say that all retailers are concerned  
5           that -- about being competitive, in all markets and not  
6           just the dairy sector. So the competitive position it  
7           would refer to would be what the retail position would  
8           be of certain products, because that's how they'd remain  
9           competitive.

10          **Q.** I'm asking you, as a witness giving evidence on what you  
11          said to retailers -- what you said to retailers -- and  
12          you've said the retailers wanted to avoid becoming  
13          uncompetitive, they were very interested in what the  
14          other retailers were doing.

15          **A.** Yes.

16          **Q.** I'm suggesting to you that the reference there to  
17          "becoming uncompetitive" can only mean that the  
18          retailers discussing -- having discussions with you,  
19          this is your evidence about what you were doing, were  
20          interested in finding out what other retailers were  
21          doing on retail prices?

22          **A.** Yes. I would say that they're referring to there the  
23          position in the market place. They would be  
24          interested -- if Seriously Strong was at £2.69 in  
25          a certain retailer they would expect the Tesco position

1 to be £2.69.

2 It's a competitive position, and that's a general  
3 position within all business places at the moment, and  
4 that was the position ten years ago. Nowadays even  
5 retailers are advertising brand match et cetera, so part  
6 of that, they want to be competitive.

7 **Q.** At the risk of repeating myself, I'm asking what you as  
8 a processor, a supplier of cheese, at the time in  
9 2002/2003, which is the period you are talking about in  
10 this evidence that you give at paragraph 9, you say  
11 that:

12 "... the retailers wanted to avoid becoming  
13 uncompetitive, they were very interested in what the  
14 other retailers were doing."

15 So you as a processor were talking to retailers  
16 about their retail prices, that's what you're saying in  
17 paragraph 9?

18 **A.** Yes, that's what I'm saying, the retailer would ask for  
19 that information, yes.

20 **Q.** You say in the rest of paragraph 9:

21 "Naturally I would answer as best I could, giving my  
22 own opinion based on what I knew as fact ..."

23 **A.** Yes.

24 **Q.** "... what I guessed or had heard from my colleagues or  
25 as market rumour and my own experience of seeing the

1 market react over the years."

2 **A.** Hmm-hmm.

3 **Q.** So there are a number of sources for the information or  
4 the replies, answers you would give to retailers. When  
5 they asked you about others' retail prices, you would  
6 tell them what you knew as fact, is that right?

7 **A.** Correct, yes.

8 **Q.** What you had guessed and what you'd heard from your  
9 colleagues, is that right?

10 **A.** Yes, that's correct. That would be my assessment of the  
11 market.

12 **Q.** But you also say, not just assessment of the market, you  
13 say what you'd guessed from your own experience of  
14 seeing the market react, but you also say you told them  
15 what you knew as fact. So you told them if you knew  
16 facts about how the retail prices were to move, you  
17 would give them that information as well?

18 **A.** Yes, and the facts would all be based on a live position  
19 within the market place. That's what I would base as  
20 a fact.

21 **Q.** Right. Well, we'll come on to consider exactly what  
22 material you provided to retailers in particular  
23 instances.

24 Going back to what is said at paragraph 5 of your  
25 witness statement, you said that in 2002 and 2003 you

1           enjoyed a good working relationship with Tesco, is that  
2           right?

3           **A.** Yes, I would describe it as a good working, healthy  
4           relationship.

5           **Q.** And in particular you say you had a healthy working  
6           relationship with Lisa Oldershaw, although of course she  
7           could be tough. But you say you had a good, healthy  
8           working relationship with Lisa Oldershaw, or Rowbottom  
9           as she was then?

10          **A.** Yes, I would agree with that, yes, we did have. We  
11          developed --

12          **Q.** In fact she agrees with you, you'll be relieved to hear.  
13          She says in her witness statement, paragraph 31 of her  
14          second witness statement [Magnum], she says that:

15                 "I had a good working relationship with Tom Ferguson  
16                 and found him both likeable and professional."

17                 You will be pleased to hear.

18          **A.** Okay, thank you.

19          **Q.** Actually in paragraph 50 of her statement [Magnum], she  
20          says:

21                 "Tom Ferguson, McLelland, was a seasoned market  
22                 observer and I gave more weight to his views than those  
23                 of Stuart Meikle or Neil Arthey from Dairy Crest but  
24                 I didn't rely on assurances from any of my suppliers."

25                 So she in effect is saying she trusted you more --

1 or she trusted what you said more than other suppliers.  
2 Do you think that's a fair reflection of the  
3 relationship you had at the time?

4 **A.** Well, we say we had a healthy relationship, it's very  
5 difficult for me to judge if it was fair or unfair.

6 **LORD CARLILE:** He's hardly going to say no.

7 **MS SMITH:** There we are.

8 She suggests in fact that she probably had a better  
9 relationship with you than Stuart Meikle, and she  
10 actually specifically says that in 2003, even though you  
11 had been promoted and he had taken over day-to-day  
12 responsibility of the Tesco account, she still sometimes  
13 came back to you when she had issues, is that right?

14 **A.** Yes, I think that's right, we would have that style as  
15 a business, because we were a small, lean organisation,  
16 so Stuart Meikle was reporting to me but I was still  
17 there if Tesco had to speak to me, yes.

18 **Q.** In paragraph 2 of your statement [Magnum], you say  
19 towards the end of that paragraph that Tesco was one of  
20 McLelland's most significant accounts at the time?

21 **A.** Yes, that's correct.

22 **Q.** I think Tesco probably accounted for about 30 per cent  
23 of McLelland's sales at the time, is that right?

24 **A.** Yes, that would be roughly the position at that time.

25 **Q.** In fact in 2002, Tesco had just doubled their orders

1 with you, the value of their orders with McLelland?

2 **A.** Yes.

3 **Q.** I don't think I need to take you to that, there's  
4 a press cutting at document 4A [Magnum] that confirms  
5 that was the case. But that is consistent with your  
6 recollection?

7 **A.** It is consistent, yes. At that time we developed  
8 significant movement of our business with Tesco, yes,  
9 absolutely.

10 **Q.** So that relationship between McLelland and Tesco,  
11 I think it would be fair to say, was an important  
12 relationship in 2002, 2003?

13 **A.** Yes, I would define it in that way.

14 **Q.** You wouldn't want to do anything to jeopardise that  
15 relationship, such as giving Tesco false information?

16 **A.** Absolutely. That's something we would not even  
17 consider.

18 **Q.** Can I take you to the general situation in 2002 in  
19 paragraph 10 of your statement [Magnum]. You describe  
20 the situation in 2002 and, effectively, there was  
21 pressure from farmers for a rise in the farm gate price  
22 of milk, is that right?

23 **A.** That's correct, yes. It was well publicised, yes.

24 **Q.** And they were picketing processors and also retailers,  
25 including Tesco, and over the summer it became more and

1 more militant and disruptive.

2 Then you say in paragraph 10 of your statement that  
3 farm gate milk prices would have to be urgently  
4 addressed, do you see that?

5 **A.** I do, yes.

6 **Q.** If I could ask you to turn to the documents bundle  
7 you've got open in front of you and go right back to the  
8 beginning, a press release -- tab 6, first of all,  
9 please [Magnum]. Tab 6 is a press release from Tesco,  
10 a news release dated 3 September. Have you got the  
11 right document bundle there?

12 **A.** Under tab 6 I have a presentation.

13 **Q.** Are you in tab 106 maybe?

14 **A.** Right at the beginning.

15 **LORD CARLILE:** I don't think you've got the right bundle.

16 I wonder if the assistant registrar could help.

17 **MS SMITH:** It should be document bundle number 1, the  
18 yellow --

19 **LORD CARLILE:** The one on your right.

20 **MS SMITH:** Tab 6, please.

21 **A.** Yes, I have it now. Thank you.

22 **Q.** I'm afraid I would also like you to, if that's okay,  
23 open your witness statement, which is back in that other  
24 bundle which you've now closed. Your witness statement  
25 is at tab N [Magnum].

1       **A.** That's it, I have it.

2       **Q.** You address these documents in paragraph 11 of your  
3       statement, so you might want to have that open at the  
4       same time [Magnum].

5               What we'll generally do is I will ask you about  
6       documents and I will ask you, where you have commented  
7       in your witness statement, I'll ask you questions about  
8       that. So if you leave your witness statement open,  
9       we'll be jumping backwards and forwards between the two  
10      bundles.

11      **A.** Okay.

12      **Q.** We see a press release of 3 September 2002 at tab 6  
13      [Magnum] from Tesco, and a statement, a quote, at tab 7  
14      [Magnum], the John Gildersleeve quote to be released to  
15      the Press Association on Wednesday, 4 September.

16              You were shown both of these documents, I think, for  
17      the purposes of preparation of your witness statement,  
18      is that right?

19      **A.** That's correct, yes.

20      **Q.** It's what you say in paragraph 11. You say you don't  
21      recall seeing them at the time that they were issued, in  
22      paragraph 11, but you say that:

23              "The quotation [and I assume that means the  
24      quotation from John Gildersleeve at tab 7] conveniently  
25      summarises my understanding of what Tesco was saying

1 publicly about paying farmers more for their milk."

2 Is that right?

3 **A.** Yes, I would agree with that. That was very much  
4 a public system -- a public statement, sorry, and it was  
5 very much in the public domain, and in particular within  
6 the dairy industry, in documents, yes.

7 **Q.** Let's see what John Gildersleeve said. He said:

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

12 So Tesco was supporting, or in your words -- yes,  
13 was supporting publicly a rise of 2p per litre in the  
14 farm gate price for milk?

15 **A.** Yes.

16 **Q.** And they were calling on the processors to pay that  
17 increased farm gate price for milk, is that right?

18 **A.** That's correct, that's what that statement very clearly  
19 says.

20 **Q.** Do you recall that a few days after that statement,  
21 which was made on Wednesday, 4 September, in fact on  
22 Monday, 9 September, Tesco raised its retail price for  
23 liquid milk by 2p per litre, do you remember that?

24 **A.** I wouldn't remember that precise timing, but it wouldn't  
25 surprise me if that statement was made and that would

1           happen.

2           **Q.** Of course McLelland didn't supply milk, McLelland was  
3           simply a cheese supplier, is that right?

4           **A.** Yes, McLelland was very much just a cheese supplier.

5           **Q.** Now, we have got this statement saying that there should  
6           be an increase of 2p per litre in the farm gate price of  
7           raw milk, we've got a retail price increase by 2p per  
8           litre on fresh milk sold by Tesco?

9           **A.** Yes.

10          **Q.** But that increase in the price of fresh liquid milk  
11          couldn't alone achieve an increase in the farm gate  
12          price of raw milk of 2p per litre, could it?

13          **A.** It couldn't, no, because in order for farmers to realise  
14          a 2p increase on their actual milk cheque, in effect,  
15          the price of milk to cheese, as opposed to just milk to  
16          liquid milk, it would all have to increase, so the whole  
17          industry would have to, in effect, move by 2p per litre  
18          to allow farmers to receive 2p per litre.

19          **LORD CARLILE:** Does it take 10 litres of milk to make  
20          1 kilogram of cheese?

21          **A.** That's roughly the assessment, yes. That's roughly it,  
22          that's correct.

23          **MS SMITH:** So when Tesco were calling on all milk processors  
24          to pay farmers at least 2p more per litre, it wasn't  
25          just calling on processors who used the raw milk to make

1 liquid milk, it was also calling on processors who used  
2 the raw milk to make cheese?

3 **A.** Yes, I would say so, because quite clearly it has to be  
4 a total industry movement.

5 **Q.** You say it has to be a total industry movement. We've  
6 looked at it has to be for products, not just liquid  
7 milk but also cheese and other dairy products.

8 **A.** Correct.

9 **Q.** Also, in order to receive that 2p per litre rise for the  
10 farmers, it wouldn't have been enough for just Tesco to  
11 raise their prices, would it, or to have paid increased  
12 cost prices?

13 **A.** Absolutely. Again, the whole industry would have to  
14 move so, therefore, everyone would have to pay  
15 processors or cheese manufacturers that level in order  
16 for, in effect, processors to afford to pay the farmer  
17 2p per litre.

18 **Q.** Thank you.

19 Let's move on from that to the following week. If  
20 I could ask you to turn -- well, your statement,  
21 paragraph 12 [Magnum], you address the Tesco Dairy  
22 Supply Group meeting of 13 September.

23 You attended that meeting with Jim McGregor from  
24 McLelland, is that correct?

25 **A.** That's correct, both of us attended that meeting, yes.

1       **Q.** He was the sales director from McLelland and your line  
2           manager at the time?

3       **A.** That's correct, yes, he was.

4       **Q.** So quite senior McLelland personnel attended the Tesco  
5           Dairy Supply Group meeting but we've already discussed  
6           Tesco was an important account for McLelland at the  
7           time, is that right?

8       **A.** Yes, that's correct. Yes.

9       **Q.** You say in paragraph 12 [Magnum] you were personally  
10          invited by Rob Hirst to the meeting, is that right?

11      **A.** I was, yes. Rob kindly invited me along to it, yes,  
12          absolutely.

13      **Q.** And he chaired the meeting for Tesco, is that right?

14      **A.** He did. Rob chaired the meeting, yes.

15      **Q.** You also say in paragraph 14 that Rob Hirst did most of  
16          the talking at the meeting, is that fair as well?

17      **A.** Yes, I would say, as Rob was the host for the meeting,  
18          yes, he chaired the meeting in effect, yes.

19      **Q.** And he also did most of the talking, is that right?

20      **A.** Yes, I would say so.

21      **Q.** Now, John Scouler from Tesco was also there, you say in  
22          paragraph 13 of your statement [Magnum], is that right?

23      **A.** I do, yes. And he was there, yes.

24      **Q.** And you also recall a member of the Tesco public  
25          relations team being present:

1                    "... however I do not recall her name and I do not  
2                    believe she spoke during the meeting."

3                    You say in paragraph 13 of your statement.

4                    **A.** That's correct. I can remember her being there but  
5                    I can't recollect her name.

6                    **Q.** Did she take a note of the meeting for Tesco?

7                    **A.** It would be hard to say. She potentially did but  
8                    I couldn't guarantee that she did take notes.

9                    **Q.** Did you or Jim McGregor take a note of the meeting with  
10                    McLelland?

11                    **A.** We didn't, no.

12                    **Q.** How did you report back to McLelland after the meeting?

13                    **A.** In what way do you mean by that?

14                    **Q.** Well, I'm assuming that you and Jim McGregor may have  
15                    reported back to Jim's line manager, Alistair Irvine,  
16                    after the meeting, is that correct?

17                    **A.** Yes, probably. We would have -- after that meeting we  
18                    would report again verbally to Alistair. It was a very  
19                    small team of people in Glasgow and we met in the one  
20                    office, in effect, so it was very, very quick and very  
21                    simple communication in most cases, so we'd confirm  
22                    verbally how that meeting went.

23                    **Q.** Obviously there was no note, as you confirmed, taken by  
24                    or Mr McGregor so I would like to take you, if I may, to  
25                    a note of the meeting taken by Express Dairies at

1 paragraph --

2 **LORD CARLILE:** Forgive me, can we just have an idea of the  
3 scale of McLelland. It was a family business owned by  
4 the Irvine family that had grown largely through its  
5 relationship with Tesco and companies like it?

6 **A.** Yes.

7 **LORD CARLILE:** How big a senior management team did you have  
8 at your headquarters?

9 **A.** The senior management team consisted of two brothers in  
10 effect. It was Alastair Irvine and Douglas Irvine who  
11 were the joint owners of the business and joint MD at  
12 the time, so joint managing directors. Their father,  
13 Hugh Irvine, was the chairman. Jim McGregor, my line  
14 manager, was group sales director, is the expression we  
15 used, and Joe Cairns(?) was the finance director. And  
16 that was the team, that was the team of people.

17 **LORD CARLILE:** Were you all in the same office on the same  
18 floor?

19 **A.** Yes, there was -- it was the same floor, there was an  
20 open-plan office, they were in an alternate room but it  
21 was an open door policy.

22 **LORD CARLILE:** So it wasn't a skyscraper where you were on  
23 different floors and had to communicate with each other  
24 by telephone all the time?

25 **A.** Not at all. It was an open-plan office with an office

1 adjoining that and, as I say that door was always open.

2 **LORD CARLILE:** Thank you, that's helpful.

3 **MS SMITH:** I've taken you to that note of the meeting,  
4 tab 14 [Magnum], because you were referred to that  
5 Express note when you were preparing your statement. So  
6 I would like you to look at that note. It's attached to  
7 an email of 16 September, the note itself starts on the  
8 second page. You've got it there, "Notes on Tesco Dairy  
9 Forum, 13 September 2002".

10 There's a list of attendees, and you're listed  
11 there as Tom Ferguson from McHollands but I assume  
12 that's you?

13 **A.** Yes.

14 **Q.** There's no mention of Jim McGregor but the note says:

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

16 So the list was incomplete.

17 How many people in total do you think attended the  
18 meeting, can you recall now? There are I think 19  
19 people listed there.

20 **A.** I would estimate it would be about 20 people, just  
21 trying to recollect the room again and the number there,  
22 but that looks like a fair assessment of the number  
23 there.

24 **Q.** It says at the end of that list of attendees:

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

1           Awaiting details from Tesco."

2           So did you ever receive details or any sort of note  
3           from Tesco subsequent to the meeting?

4           **A.** No, I didn't receive anything at all.

5           **Q.** In your statement at paragraph 15 [Magnum] you say:

6           "The meeting naturally focused on the issue of the  
7           farm gate milk price, the actions being taken by farmers  
8           and Tesco's policy in this respect."

9           You also say:

10          "The issue discussed at the meeting was relatively  
11          simple. Farmers wanted to be paid 2p per litre more for  
12          their farm gate milk. Tesco thought that the farmers  
13          were entitled to the farm gate price increase."

14          Now, we've seen that Tesco made a public statement  
15          supporting the farmers receiving that farm gate price  
16          for milk, haven't we?

17          **A.** Yes, we have.

18          **Q.** In fact they went one step further and publicly called  
19          on processors to ensure that farmers got that price  
20          increase of 2p per litre on the farm gate price of milk?

21          **A.** Yes.

22          **Q.** Tesco made that statement?

23          **A.** That's correct.

24          **Q.** Did they repeat that at the meeting? Perhaps that's  
25          a bit of an unfair question. Let me take you to the

1 note at tab 14 [Magnum], on the second page of the note,  
2 the top of that page it says:

3 "How is money passed back through the likes of  
4 DFOB/First Milk."

5 On that page there's a heading "Discussion",  
6 underlined, then it's "R Hirst", he seems to be saying  
7 quite a lot of things recording in the following three  
8 paragraphs. You've already told us he did most of the  
9 talking at the meeting, I think you said?

10 **A.** Yes.

11 **Q.** You're nodding.

12 The second paragraph, it says:

13 "Challenge to processors was that Tesco wanted to  
14 see a better return to farmers and the decision  
15 therefore taken to facilitate a price increase back to  
16 the farmer..."

17 So the challenge that Tesco laid down to processors  
18 was to get a better return to farmers. You understood  
19 that at the meeting to mean a challenge to processors to  
20 put 2p per litre on the farm gate price for milk?

21 **A.** Yes, I would say that was quite clearly the challenge  
22 and that was in line with the statement that  
23 John Gildersleeve had made.

24 **Q.** We've seen that.

25 Now, in your witness statement at paragraph 15

1 [Magnum], you say about halfway down that paragraph:

2 "In particular it was widely acknowledged at the  
3 meeting that if 2p per litre more was to be paid to  
4 dairy farmers, then the cost price of products other  
5 than milk, ie including cheese, would also have to  
6 increase."

7 So it was acknowledged by the attendees at the  
8 meeting including Tesco, is that what you're saying?

9 **A.** Yes. It would be acknowledged by everyone attending the  
10 meeting because that's the crux of the matter again.  
11 For 2p to be paid to farmers the whole industry had to  
12 move.

13 **Q.** So it wasn't enough to have an increase in the price of  
14 raw milk, we also needed an increase in the price of  
15 other products including cheese. That's what was  
16 acknowledged at the meeting?

17 **A.** Yes, absolutely. Very much acknowledged, yes.

18 **Q.** Let's look back at the meeting notes then, still on the  
19 second page.

20 **A.** Sure.

21 **Q.** Same paragraph, the second paragraph under the heading  
22 "Discussion", Rob Hirst is still speaking. About  
23 halfway through that paragraph he says:

24 "The challenge to processors was to put 2 [pence per  
25 litre] on all milk but recognising that supermarket milk

1 is only 25% of total."

2 So only 25 per cent of raw milk being produced by  
3 farmers was being sold as fresh milk by supermarkets.

4 Is that what was said at the meeting?

5 **A.** I can't remember that exact point at the meeting.

6 **Q.** Do you remember that figure being read out?

7 **A.** But that figure, again, would be an acknowledgement that  
8 liquid milk is only a percentage of the actual position.  
9 In order for farmers to have the 2p, cheese has to move,  
10 and all dairy products have to move. So they would be  
11 referring to that.

12 **Q.** Yes. You also see in the following paragraph Rob Hirst  
13 says, second line:

14 "Fresh milk was the easiest to start moving forward  
15 and Tesco looking to processors for a response in the  
16 next two weeks. Accept that it is a complex situation  
17 but liquid simplest to kick start and Tesco now looking  
18 at other areas."

19 The reference to "other areas" you understood to  
20 mean other dairy products including cheese, is that  
21 right?

22 **A.** I would say that would be the case, it would be cheese  
23 and yoghurts, desserts, et cetera. Yes.

24 **Q.** We see that point repeated towards the end of that page,  
25 Rob Hirst is speaking again. He says just before the

1 little bullet point:

2 "The decision was taken on liquid milk because it  
3 was

4 "Highly visible.

5 "Gave a big kick start to the process.

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

7 Again the reference to "other markets" is other  
8 dairy products including cheese, is that right?

9 **A.** I would agree with that, it would be the rest of the  
10 dairy sector which is cheese and everything else.

11 **Q.** That makes sense because, as you've confirmed, McLelland  
12 didn't supply fresh liquid milk, just cheese, so you  
13 were at the meeting simply as a supplier of cheese, is  
14 that right?

15 **A.** Correct, yes.

16 **Q.** But you understood that you too had a role to play in  
17 passing the 2p per litre to farmers?

18 **A.** Yes, I would say so. I think the whole industry,  
19 because it was in the public domain at that time and  
20 there was this challenge from -- just a general  
21 situation at the time, farmers were beginning to  
22 consider moving out of the industry and there was a real  
23 desire to help protect that.

24 **LORD CARLILE:** There's some representation in this note from  
25 Express Dairies. Express Dairies, were they

1           predominantly a liquid milk business?

2       **A.** They would have been predominantly a liquid milk  
3           business, yes.

4       **LORD CARLILE:** Compared to say Dairy Crest who were  
5           predominantly a creamery business?

6       **A.** Yes Dairy Crest would have a mixture in the business, be  
7           it liquid milk and cheese production. Express would be  
8           totally limited to liquid milk plus some desserts  
9           I would say at that time.

10      **MS SMITH:** If we could go to paragraph 19 [Magnum] of your  
11           statement, second sentence, you say:

12                   "McLelland supported paying the farmers 2p per litre  
13           more recognising that it would lead to cost price  
14           increases of £200 per tonne on cheese."

15                   So you too supported an increase in the farm gate  
16           price of milk and that -- sorry, I'm asking you, is that  
17           right?

18      **A.** Yes, the business supported that, that position,  
19           absolutely.

20      **Q.** And for McLelland that had to be done by way of an  
21           increase in the price of cheese?

22      **A.** Yes.

23      **Q.** Now, looking at the Express note, the third page of the  
24           note, it starts at the top "P Nicholson", have you got  
25           that?

1       **A.** Yes.

2       **Q.** The third or fourth line down, Rob Hirst is talking  
3       again and he's recorded as saying:

4                "We want a plan from processors on the 2 [pence per  
5       litre] increase."

6                He says at the meeting they want a plan in effect to  
7       ensure that 2p per litre could be passed on to farmers,  
8       is that right, from the processors?

9       **A.** Yes, I would say that -- I can't remember Rob exactly  
10       saying those words but those words are there. I'm not  
11       sure what he means by that.

12       **Q.** He's already, we see, given the challenge to processors  
13       to ensure that there would be a 2p per litre price in  
14       the increase of milk, and he appears to be saying, again  
15       "We want a plan from processors in order to achieve that  
16       2p per litre increase in the price of -- farm gate price  
17       for milk". Is that consistent with what you understood  
18       him to be saying at the meeting?

19       **A.** I would say that Rob was saying at the meeting that  
20       there was a desire to move the milk price by 2p per  
21       litre, but every processor and every manufacturer had  
22       to, you know, run their own business in effect and make  
23       their own judgments in how they achieved that, so  
24       I wouldn't know exactly what Rob was referring to there.

25       **Q.** In your statement at paragraph 15 [Magnum] you've

1 confirmed -- and I think I've been here with you  
2 before -- that a 2p per litre increase in the farm gate  
3 price for milk translated into £200 per tonne for  
4 cheese?

5 **A.** Yes.

6 **Q.** You say in paragraph 19 that that was a simple equation  
7 used throughout the industry based on the number of  
8 litres of milk used to produce each tonne of cheese?

9 **A.** Yes, that's correct.

10 **Q.** Do you recall whether or not that figure, the £200 per  
11 tonne, was mentioned at the meeting at all?

12 **A.** I can't recollect if it was mentioned at the meeting but  
13 again it would be an industry awareness because it was  
14 industry figures that were at the meeting, they would  
15 all have an understanding that the 2p per litre equated  
16 to £200 per tonne, yes.

17 **Q.** Let's look at what you say in paragraph 17 of your  
18 statement about the meeting, if you've got that  
19 [Magnum]?

20 **A.** Yes.

21 **Q.** At paragraph 17(a) you say:

22 "There was no discussion of any involvement by any  
23 other retailers in Tesco's proposal that it would pay 2p  
24 more for milk to dairy processors. That said, there was  
25 an obvious common recognition at the meeting that the

1 fact that Tesco would be paying 2p per litre more to  
2 farmers via their processors did not mean that all UK  
3 dairy farmers would get 2p per litre more for their  
4 milk."

5 That is a point I think we've already discussed?

6 **A.** Yes.

7 **Q.** Tesco alone could not achieve that 2p per litre increase  
8 for the price of raw milk?

9 **A.** Yes.

10 **Q.** For the farmers. It obviously bought quite a large  
11 proportion but it only bought a proportion of milk and  
12 dairy products sold by processors. Other retailers  
13 would also have to take part in order to ensure that  
14 2p per litre was passed back to farmers. Is that right?

15 **A.** Yes, that's correct. Tesco would have, obviously,  
16 a market share of X in those days, and that would be  
17 relative to the amount of milk that they sold. So in  
18 order for the farmer again to achieve everything,  
19 everyone would have to move.

20 **Q.** As you say, at the meeting -- I think this is the same  
21 point:

22 "There was also a recognition that the farm gate  
23 price increase would not work effectively for farmers  
24 unless the industry passed back 2p per litre to the  
25 farmers."

1       **A.** Yes.

2       **Q.** That means basically the whole industry, not just Tesco?

3       **A.** Yes, that's the whole industry I'm talking.

4       **Q.** That, as you say, was an obvious common recognition that  
5       was articulated at the meeting, is that right?

6       **A.** Yes, it would be a recognition again because of the  
7       nature of the people attending the meeting. They would  
8       understand the dairy industry and the retail industry in  
9       the UK.

10      **Q.** In paragraph 17(b), you say:

11                "There was no discussion of the specific cost prices  
12                being paid by Tesco for any of its dairy products."

13                You explain why. Then you say in (c):

14                "There was no discussion at the meeting of the  
15                retail prices of any dairy products, whether of Tesco or  
16                any other retailers."

17                So there was no discussion of any particular retail  
18                prices?

19      **A.** That's correct. There was no discussion, specific  
20      discussion on those points.

21      **Q.** Right. But there were general discussion -- or there  
22      was discussion of general retail pricing issues at the  
23      meeting. If I could take you back to the note and we'll  
24      explore that point.

25      **A.** Sure.

1       **Q.** On page 2 of the note, we have got Rob Hirst speaking  
2       towards the bottom of that page. He says:

3               "Cheese and spread values have crashed over the last  
4       three years and Tesco has been selling them at a loss.  
5       Cautiously optimistic that Tesco can now start to move  
6       retail prices forward in this area but Tesco still needs  
7       to sell Value products (21% of sales). Price problem in  
8       dairy victim of shopping basket values and very  
9       difficult to move out of line with other competitors but  
10       RH [Rob Hirst] senses there is a mood to move some of  
11       these prices forward."

12               So Tesco is expressing cautious optimism that retail  
13       prices could go up for cheese and spread, is that right?  
14       That was what was said at the meeting?

15       **A.** According to that document, yes. I can't recollect  
16       exactly what was said at the meeting, it was ten years  
17       ago, but yes, the document is saying that.

18       **Q.** The note refers to a decision being taken on liquid milk  
19       because it was highly visible, gave a big kick start.  
20       We've already talked about that.

21       **A.** Yes.

22       **Q.** We know that by the date of this meeting, Tesco had  
23       moved their retail prices on liquid milk. That was  
24       discussed at the meeting, wasn't it?

25       **A.** Again, if the price was visible in the market place it

1 would have been discussed at the meeting because  
2 everyone would have an awareness of it but, again, being  
3 ten years ago, it's difficult for me to recollect when  
4 that happened.

5 Q. In fact we see under the heading "Discussion", the  
6 second paragraph, explicit reference to:

7 "All retailers have moved except for Safeway  
8 (internal price problem but down to Safeway to solve)."

9 A. Fine.

10 Q. So that's a reference to the movement on the retail  
11 price of fresh liquid milk. Do you recall Rob Hirst  
12 saying that Tesco were also cautiously optimistic that  
13 they can now start to move retail prices forward for  
14 other dairy products, he specifically refers to cheese  
15 and spread?

16 A. Yes, there would be a recognition of that again because  
17 the whole objective was to ensure that the farmers were  
18 being delivered this 2p per litre and, again, in order  
19 for that to happen, everything had to move, everything  
20 had to be in place.

21 Q. You see there's reference here to retail prices on  
22 cheese and spread, and we've established that Tesco was  
23 talking about its retail price moves that had already  
24 taken place on liquid milk. Do you recall that there  
25 was discussion about moving retail prices forward --

1 I stress retail -- in the area of cheese and spread?

2 **A.** I can't recollect a specific discussion with mention of  
3 it, but again the recognition would be there to pay  
4 the cheese processor a cost increase, it would be  
5 automatically acknowledged that retailers would move  
6 because that cost increase had moved, so it would be  
7 a recovery of the cost increase that that would be  
8 referring to.

9 **Q.** Now, on the third page of the note, so back over the  
10 page if we can, if you could look towards the bottom of  
11 page 3 [Magnum] we have John Scouler speaking, third  
12 paragraph from the bottom. He says:

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

17 Do you recall John Scouler mentioning that Tesco was  
18 particularly concerned to remain competitive against  
19 Asda?

20 **A.** I can't recall that specifically, but what I would say  
21 is that Tesco would always be concerned about being  
22 competitive and would always be concerned about their  
23 competitors, be it Sainsbury's, be it Asda, which is  
24 Walmart in this context, or be it Morrisons.

25 **Q.** So it's likely -- sorry.

1       **A.** But they would have the awareness; to be competitive  
2           they have to be competitive against those players.

3       **Q.** So it's likely that John Scouler would have made this  
4           statement, that we must be competitive, particularly  
5           against Asda?

6       **A.** I would say it's likely he made the statement, and it's  
7           one I've heard on many occasions by people at Tesco.

8       **LORD CARLILE:** It's a statement of the obvious, isn't it?

9       **A.** A bit, yes.

10      **MS SMITH:** I think you've already indicated, in answer to  
11           one of my questions, that your understanding was that  
12           retailers would not put up cost prices for cheese unless  
13           they could put up their retail prices. They didn't want  
14           to take a cut on their retail margins, is that right?

15      **A.** There was a general understanding of that, but there  
16           would be an occasion where retailers would take a cost  
17           increase and not move the retail price. That would  
18           happen.

19      **Q.** Yes. I'm talking about the situation as of  
20           13 September 2002?

21      **A.** Aha.

22      **Q.** At that date your understanding was that retailers were  
23           not prepared to put up the cost price for the cheese  
24           that you supplied to them unless they could put up their  
25           retail prices as well?

1       **A.** That would be my understanding of that position, yes.

2       **Q.** And at this stage, September 2002, McLelland couldn't  
3       afford to take a cut in its margins either, so in order  
4       to get the increase of the 2p per litre in the farm gate  
5       price for milk, McLelland needed an increase in its cost  
6       prices, is that correct?

7       **A.** Absolutely, because we couldn't afford to pay 2p more in  
8       the milk cheque, in effect, if we didn't have the cost  
9       increase to sustain that, yes.

10      **Q.** Now, you say at paragraph 20 of your statement [Magnum]  
11      that you:

12               "... have no specific recollection of Rob Hirst  
13      making the particular comments attributed to him in the  
14      Express note of the meeting. I cannot recall him saying  
15      anything that I, as one of his suppliers, considered  
16      gave me any new information about the development of  
17      prices for dairy products or which was not already in  
18      the public domain, from press comments, Tesco's public  
19      statements and the like."

20               But as we've discussed, after this meeting on  
21      13 September you knew the following. See if you agree  
22      with these propositions. You knew that Tesco supported  
23      the 2p per litre increase in the farm gate price for  
24      milk, is that right?

25      **A.** Yes, but we also knew that before the meeting.

1 Q. There were other statements before the meeting?

2 A. Yes.

3 Q. And at the meeting -- after the meeting you knew that  
4 Tesco had challenged the processors to ensure that that  
5 increase could be passed on to farmers?

6 A. Yes, they set that challenge, yes.

7 Q. You also knew, as we've been discussing, that that  
8 2p per litre increase in the farm gate price for raw  
9 milk could not be achieved by a price increase in milk  
10 alone but had to be extended to other dairy products  
11 including cheese?

12 A. Yes, absolutely, but again you would know that before  
13 you even attended the meeting I'm afraid.

14 Q. And you also have told us that a 2p per litre increase  
15 in the farm gate price for milk equated to £200 per  
16 tonne increase in the price of cheese, cost price of  
17 cheese?

18 A. Yes.

19 Q. You also knew after this meeting, or you knew at the  
20 time of this meeting, that retailers, including Tesco,  
21 would not put up their cost prices for cheese unless  
22 they could put up their retail prices, they wouldn't  
23 take a cut in their retail margins, they were not  
24 prepared to do so as of September 2002?

25 A. That would be a -- to me, that's an industry recognition

1 more than just attendee at that meeting.

2 **Q.** You also knew that Tesco, as you say -- you may say  
3 again this is a statement of the obvious, but it's  
4 a statement that Tesco made at the meeting that they had  
5 to remain competitive on their retail prices for cheese,  
6 particularly as regards Asda, is that correct?

7 **A.** I would say that's again a recognition of the industry  
8 and not a recognition of information obtained from that  
9 meeting.

10 **Q.** And it was a statement that Tesco made at the meeting?

11 **A.** I can't recollect if that statement was made at the  
12 meeting or not.

13 **Q.** The note records that such a statement was made and your  
14 view is that it was likely to have been made?

15 **A.** Again, a statement like that would be, again, a  
16 recognition and just stating the obvious, I'm afraid.

17 **Q.** I'll ask you the question again. The statement was made  
18 in a note, or recorded in a note and, in your view, it  
19 is likely that it was said at that meeting?

20 **A.** I can't comment on that because I can't remember if it  
21 was made or not.

22 **Q.** Can I just in this regard take you to paragraph 28 of  
23 your statement [Magnum]. You're talking here about, you  
24 say in the second and third lines, the negotiations for  
25 the £200 per tonne cost price increase for cheese. You

1 say:

2 "Retailers did not want to be overpriced at the  
3 retail level by reference to their competitors. They  
4 were extremely competitive on cheese retail prices."

5 So you're saying there that retailers did not want  
6 to be undercut by their competitors on retail prices?

7 **A.** Yes, I would say that's an absolute position, that all  
8 retailers would be judging and looking at what the  
9 retail level was.

10 **Q.** That is a position that was taken by the retailers  
11 during the negotiations for the £200 per tonne cost  
12 price increase for cheese?

13 **A.** They would have an awareness of that, yes.

14 **Q.** That's a slightly different question, Mr Ferguson. You  
15 say that you're describing here the negotiations for the  
16 £200 per tonne cost price increase in cheese. I am  
17 saying that the position that retailers expressed to you  
18 during those negotiations was that they did not want to  
19 be overpriced at the retail level by reference to their  
20 competitors. They didn't want to be undercut?

21 **A.** They wouldn't want to be undercut, I would agree with  
22 you, yes.

23 **Q.** You say:

24 "Equally, they did not want to take a risk on their  
25 retail margins by accepting a cost price increase and

1           having no choice but to absorb it against their retail  
2           margin, or reverse it, because other retailers had not  
3           accepted that cost price increase from the manufacturers  
4           and would then undercut them on retail prices."

5                    What you're saying is they didn't want to be in  
6           a position where they accepted a cost price increase  
7           from you but then had to absorb that cost price increase  
8           against their retail margin because other retailers had  
9           not put up their retail prices, is that right?

10          **A.** Yes, that would be the judgment they would make. They  
11           wouldn't -- as I said earlier, retailers could on  
12           occasion accept a cost increase and not move the retail.  
13           So it's all in judgment.

14          **Q.** Again I'm asking you here because you are describing in  
15           your witness statement the negotiations for the £200 per  
16           tonne cost price increase for cheese.

17          **A.** Sure.

18          **Q.** You say here that, in effect, retailers did not want to  
19           accept an increased cost price without knowing that  
20           others would do so as well because it might mean they  
21           would have to reduce their retail margin because they  
22           couldn't put up retail prices?

23          **A.** Yes, retailers wouldn't want to reduce their margin,  
24           they would want to -- and they would also want to remain  
25           competitive.

1 Q. The only way they could ensure that they didn't reduce  
2 their margin and remained competitive is by knowing that  
3 other retailers had accepted the cost price increase  
4 from manufacturers, is that right?

5 A. That's correct, yes. That would be the evidence.

6 Q. And other retailers -- and they would also need to know  
7 that other retailers would not undercut them on retail  
8 prices, as you put it there?

9 A. Yes, I would say that's exactly what I said, yes.

10 Q. So then you described the standard approach we, ie  
11 McLelland, adopted when negotiating a cost price  
12 increase? And I assume that was the approach you took  
13 when negotiating the cost price increase in 2002, is  
14 that right?

15 A. Yes, that's correct.

16 Q. And also in 2003, it was the standard approach you took?

17 A. Yes.

18 Q. You took it with all retailers, is that right?

19 A. Yes, we did. It would be a standard practice.

20 Q. Standard?

21 A. Yes, absolutely.

22 Q. So first you sought to convince the retailer that the  
23 increase was fair or appropriate given the commercial  
24 circumstances, so that's the first thing you sought to  
25 do, that this is a justified cost price increase.

1       **A.** Yes, you should have an argument or an industry  
2           rationale for why you were asking for a cost increase  
3           and be quite clear and precise.

4       **Q.** So that's the first thing you did?

5       **A.** Yes.

6       **Q.** Then you say "And also", the second thing you did, was  
7           to seek to convince the retailer that the cost price  
8           increase was being accepted by the industry so that the  
9           buyer might be able to increase their retail prices in  
10          order to maintain the retailer's margin while remaining  
11          competitive.

12                 First of all, you would seek to convince the  
13           retailers that the cost price increase was being  
14           accepted by the industry, that is other retailers?

15       **A.** Yes.

16       **Q.** You would also seek to convince the buyer that the  
17           industry, the other retailers, were increasing their  
18           retail prices, is that right?

19       **A.** Yes, you would make that assessment, yes.

20       **Q.** So that the particular retailer that you're talking to  
21           could increase its retail prices and maintain its margin  
22           while remaining competitive, that is not be undercut by  
23           any of the other retailers?

24       **A.** Yes. Again, that's the assessment you would make.

25       **MS SMITH:** Sir, I don't know how long you're prepared to sit

1           this afternoon?

2       **LORD CARLILE:** Just bear with me for a moment, I'm just  
3           marking here.

4           We did originally indicate that we were going to sit  
5           until 5 o'clock, I think that was by request. Does  
6           anyone else remember that request?

7       **MS SMITH:** I do.

8       **LORD CARLILE:** Does anyone want to sit until 5 o'clock?

9           Yes. Well, we have LiveNote to think about.

10      **MS SMITH:** Perhaps if we had a five-minute break, sir,  
11           I would then be able to consider the time it has taken  
12           me to put the questions so far and the time it will take  
13           for me to put my remaining questions. On that basis, we  
14           did also indicate that we would start sitting at  
15           10 o'clock on Wednesday, I don't know whether that's  
16           still possible.

17      **LORD CARLILE:** Yes.

18           I don't mind how long we sit up to 5 o'clock, we  
19           won't sit beyond 5 o'clock.

20      **MS SMITH:** If we could have a five-minute break and then I  
21           can come back and --

22      **LORD CARLILE:** Miss Rose wants to intervene.

23      **MISS ROSE:** Before we break, I just wanted to canvass  
24           a point on the timetable. Obviously we have  
25           Mr Ferguson's evidence to complete, and I'm assuming it

1           won't finish this afternoon and therefore some time will  
2           be needed on Wednesday morning. Then there is  
3           Mr Irvine, and that's the only witness before  
4           Ms Oldershaw.

5           At the moment she is scheduled to start on Friday  
6           but I am instructed that she is available from 8.00 am  
7           on Thursday, and it would seem sensible from everybody's  
8           perspective that she should start at 8 o'clock on  
9           Thursday.

10       **MS SMITH:** On Mr Ferguson, it's more a question of whether  
11           we finish him tomorrow -- sorry, on Wednesday. I think  
12           I will take the majority if not all of the day on  
13           Wednesday with Mr Ferguson.

14       **MISS ROSE:** Sir, perhaps we could evaluate the situation  
15           when we've finished with him and with Mr Irvine, but we  
16           can make Ms Oldershaw available on Thursday if we get  
17           there. I just wanted everyone to know that that was so  
18           well in advance.

19       **LORD CARLILE:** I have a feeling that -- let's just think  
20           this through. We will not start before 10.00 on  
21           Wednesday because I have a short medical appointment  
22           myself.

23       **MS SMITH:** I think it would be a little too much to ask the  
24           witness to start before 10.00 and then to sit for the  
25           whole of the rest of the day as well.

1       **LORD CARLILE:** Yes, so we will not be starting before 10.00  
2           on Wednesday. I think it might cause difficulties if we  
3           brought Ms Oldershaw forward by a day now. I know  
4           that -- I'm sure that some of you, I mean all the  
5           professionals here, but I know that one of my colleagues  
6           has examinations in the household and I would not wish  
7           to jeopardise that position. I understand it  
8           completely. So I think we're probably going to stick to  
9           our timings with Ms Oldershaw, particularly in the light  
10          of what Ms Smith has just said about the present witness  
11          who is in for an extended stay in London.

12       **A.** That's fine. I'm here until Wednesday evening so  
13          there's no issue with that.

14       **LORD CARLILE:** Okay.

15                Let's just have that five minutes to give LiveNote  
16                a rest and to sort out how you want to proceed but we  
17                will not sit beyond 5 o'clock.

18                You're in the middle of your evidence, this applies  
19                at all adjournments. You absolutely must not talk to  
20                anyone at all about your evidence at any stage during  
21                any adjournment, whether overnight or for just five  
22                minutes. Have you got that?

23       **A.** Got that.

24       **LORD CARLILE:** Excellent.

25       (4.25 pm)

1 (A short break)

2 (4.35 pm)

3 **MS SMITH:** Sir, I am grateful for the five-minute break  
4 which has enabled me to take stock of where I am in my  
5 cross-examination. I think, starting on Wednesday at  
6 10 o'clock, I'm confident I can finish with Mr Ferguson  
7 on Wednesday and so I don't need that extra half an hour  
8 sitting until 5 o'clock this evening, you'll be pleased  
9 to hear.

10 **LORD CARLILE:** That's a bid for early closing? Okay, right.

11 **MS SMITH:** Thank you very much.

12 **LORD CARLILE:** We will sit at 10 o'clock on Wednesday. We  
13 will not sit late on Thursday, I'd like to rise not  
14 later than 4.25 on Thursday, simply because I would like  
15 to fit in a late professional engagement.

16 **MISS ROSE:** Can I take it then that Mr Irvine will not be  
17 required on Wednesday?

18 **MS SMITH:** I think he was listed originally to give his  
19 evidence on Thursday and the Tribunal ask that he be  
20 available the day before.

21 **LORD CARLILE:** Where is he coming from, sir?

22 **MISS ROSE:** He lives in Portugal, sir.

23 **MS SMITH:** I think the flight is probably already booked,  
24 I would have assumed.

25 **LORD CARLILE:** Portugal?

1       **MISS ROSE:** I'm sorry, I've just been told that she thinks  
2                   she'll be all day with Mr Ferguson on Wednesday and,  
3                   therefore, in order not to --

4       **LORD CARLILE:** I understand. Are you suggesting that we do  
5                   not need Mr Irvine with a fall-back position of 3  
6                   o'clock on --

7       **MS SMITH:** If the Tribunal is happy to go short, then in the  
8                   possibility that we might, I can't always anticipate  
9                   down to the final minute how long I'm going to take.

10      **LORD CARLILE:** Given that we're keeping to timetable, I see  
11                   no reason to inconvenience a witness unduly. If on the  
12                   other hand he was intending to be here by, say,  
13                   lunchtime, in London, then if he could be brought here  
14                   for 3 o'clock, or 3.30 even, so be it.

15                   Can we leave that to your side to sort out?

16      **MISS ROSE:** Yes, sir.

17      **LORD CARLILE:** We really are very relaxed I think about  
18                   this, aren't we?

19      **MS SMITH:** Sir, we are equally relaxed.

20      **MISS ROSE:** The only reason it is significant is because if  
21                   in fact the assessment of the OFT is that they're likely  
22                   to go short on Wednesday, then if we sat another half  
23                   hour now, the likelihood is that Mr Irvine could also be  
24                   finished on Wednesday.

25                   The implications of that I've already canvassed, and

1 I understand there isn't enthusiasm for having Lisa on  
2 Thursday. But I only make this point, which is of  
3 course that there is a continued uncertainty about her  
4 general situation and that the quicker we can have her  
5 give evidence the better because one never knows what  
6 might happen at her end. If she were to give her  
7 evidence on Thursday and Friday, there's a good chance  
8 that her evidence could be finished before the weekend  
9 as opposed to having to go over until Monday.

10 I'm just not clear from the OFT whether they're  
11 really saying that they need a full day with Mr Ferguson  
12 or whether they're actually just seeking to avoid the  
13 possibility of Lisa giving evidence on Thursday. I'm  
14 just not clear where they're coming from.

15 **LORD CARLILE:** I very much doubt if they're trying to avoid  
16 her giving evidence on Thursday.

17 I'm sure you wouldn't do that.

18 **MS SMITH:** Of course not. Sir, my estimate, as I made  
19 clear, for Mr Ferguson is that I will take another day.  
20 Obviously that is not 100 per cent guaranteed but that  
21 is my estimate. I am happy in those circumstances that  
22 Mr Irvine does not come until Thursday, which is what he  
23 was originally timetabled to do, and I'm very relaxed  
24 about that.

25 **MISS ROSE:** I ought to formally ask for Mr Reeves to be

1 released, and indeed for all witnesses --

2 **LORD CARLILE:** I think I released Mr Reeves without being  
3 asked.

4 **MISS ROSE:** I'm grateful, sir.

5 **LORD CARLILE:** In fact, I'm sure I did.

6 I think what we will do is we will adjourn now. We  
7 will resume your evidence, sir, on Wednesday because  
8 we're not sitting tomorrow. If the next witness can  
9 conveniently, it is really his convenience, be here for  
10 3.00 or 3.30 on Wednesday then that might be helpful.  
11 We really don't need to know until we get here on  
12 Wednesday. If we start a few minutes late on Wednesday,  
13 it will be my fault and I hope I'll be forgiven. We  
14 should not have to.

15 Thank you.

16 (4.40 pm)

17 (The hearing adjourned until  
18 Wednesday, 16 May 2012 at 10.00 am)

19

20

21

22

23

24

25

|    |   |     |
|----|---|-----|
| 1  | INDEX                                   |     |
| 2  | Application by MISS ROSE .....          | 1   |
| 3  |   |     |
| 4  | Submissions by MR MORRIS .....          | 23  |
| 5  |   |     |
| 6  | Reply submissions by MISS ROSE .....    | 29  |
| 7  |   |     |
| 8  | RULING .....                            | 31  |
| 9  |   |     |
| 10 | MR ARTHUR REEVES (affirmed) .....       | 32  |
| 11 |   |     |
| 12 | Examination-in-chief by MISS ROSE ..... | 32  |
| 13 |   |     |
| 14 | Cross-examination by MS SMITH .....     | 33  |
| 15 |   |     |
| 16 | MR THOMAS FERGUSON (affirmed) .....     | 152 |
| 17 |   |     |
| 18 | Examination-in-chief by MISS ROSE ..... | 152 |
| 19 |   |     |
| 20 | Cross-examination by MS SMITH .....     | 154 |
| 21 |   |     |
| 22 |   |     |
| 23 |   |     |
| 24 |   |     |
| 25 |   |     |