Neutral citation [2012] CAT 31 Case No: 1188/1/1/11

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

20 December 2012

Before:

LORD CARLILE OF BERRIEW C.B.E., Q.C.
(Chairman)
MARGOT DALY
CLARE POTTER

Sitting as a Tribunal in England and Wales

B E T W E E N :

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

Appellants

- v -

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on
26 and 27 April, 1, 2, 14, 16, 17, 23, 24, 25, 28, 29 and 31 May, and 13 July 2012

and

at the International Dispute Resolution Centre, London, on
18, 21 and 22 May 2012

JUDGMENT (LIABILITY)

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made oral submissions. In addition, six of the seven ERA parties submitted memoranda on what they considered to be factual inaccuracies in the SO.

(d) Between April and August 2008, the OFT conducted interviews with 12 individuals employed by one or other of the addressees of the SO (although none from Tesco). In addition, Asda, Dairy Crest, Glanbia and Wiseman, in accordance with their respective ERAs, each provided the OFT with notes of interviews conducted by the relevant ERA party's legal advisors with individuals employed by that party at the time of the alleged infringements.

(e) On 23 July 2009, the OFT issued a Supplementary Statement of Objections (the "SSO"), to supplement and revise the SO, including by adducing further evidence of the alleged infringements. Following the issuance of the SSO, further written representations were made by Morrisons, Tesco and two of the ERA parties. Tesco limited its representations to the 2002 and 2003 FLM Initiatives, and did not address the 2002 and 2003 Cheese Initiatives that are the subject of this appeal.

(f) Following a review of the various representations it received, the OFT determined that it did not have sufficient evidence to prove its case in respect of the 2002 FLM Initiative, the 2003 Butter Initiative or Tesco's involvement in the 2003 FLM Initiative. This led to an amendment, by way of variation agreements, of various of the ERAs, during the early part of 2010, so as to remove admissions made in respect of alleged infringements, which the OFT had decided it would no longer pursue.[8]

(g) Despite an initial indication from Tesco that it would not contest the OFT's allegations in relation to the 2002 and 2003 Cheese Initiatives, the two sides could not agree on the correct approach to calculating Tesco's penalty and, ultimately, Tesco decided to contest those allegations and brought this appeal.

[8] It also meant that Morrisons was no longer included in the OFT's investigation as it had only been alleged to have participated in the 2002 FLM Initiative.

V. THE STATUTORY FRAMEWORK

41. The Decision concerns alleged infringements of the Chapter I prohibition contained in section 2(1) of the 1998 Act, which reads:

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part."

The Chapter I prohibition applies, in particular, to agreements, decisions by associations of undertakings or concerted practices, which directly or indirectly fix purchase or selling prices, or any other trading conditions: see section 2(2)(a) of the 1998 Act. Section 3 of the 1998 Act provides that the Chapter I prohibition does not apply to the various cases excluded pursuant to Schedules 1 to 3 to the 1998 Act; none of the exclusions apply in this case. Chapter III of the 1998 Act sets out the OFT's powers in relation to investigations under that Act (see paragraph 117 below).

42. In determining questions arising under the Chapter I prohibition, the OFT, and the Tribunal on this appeal, are required to apply the principles laid down in section 60 of the 1998 Act, which, among other things, require us to ensure, so far as possible, that questions arising under the 1998 Act in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising under EU law. That of course includes ensuring consistency with the jurisprudence of the Court of Justice and General Court of the European Union.

43. Pursuant to paragraph 3 of Schedule 8 to the 1998 Act, the Tribunal's task on this appeal under section 46 is to determine the appeal on the merits by reference to the grounds of appeal set out in Tesco's Notice of Appeal.

VI. LAW ON CONCERTED PRACTICES AND INDIRECT EXCHANGES OF FUTURE PRICING INTENTIONS

44. Before we come to our discussion of the parties' submissions on the facts of this case, it is necessary to consider the principal authorities, both at the EU level and in domestic law, to which we have been referred. There are no EU cases dealing specifically with the circumstances in which there can be a concerted practice by virtue of indirect contact between two or more undertakings via a common supplier. So far as domestic cases are concerned, there are the Tribunal's decisions in Cases 1021 & 1022/1/1/03 *Allsports Ltd and JJB Sports plc v OFT* [2004] CAT 17 ("*Football Kits*") and Cases 1014 & 1015/1/1/03 *Argos Ltd and Littlewoods Ltd v OFT* [2004] CAT 24 ("*Toys and Games*"), as well as the single judgment of the Court of Appeal in the appeals against those decisions, [2006] EWCA Civ 1318 ("*Toys and Kits*").

A. Jurisprudence of the EU Courts

45. Article 101(1) of the Treaty on the Functioning of the European Union (the "TFEU") does not define what is meant by a concerted practice. The concept was first considered by the Court of Justice in Case 48/69 *ICI v Commission* [1972] ECR 619 ("*Dyestuffs*"). The Court dismissed nine appeals against a decision of the Commission fining ten manufacturers of dyestuffs for entering into three concerted practices to increase prices for those products. The Court explained that the object of the inclusion of concerted practices in what is now Article 101(1) TFEU is to bring within the prohibition:

> "64. … a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."

46. The Court continued that a concerted practice has an independent meaning which encompasses forms of co-operation other than just those belonging to the concept of agreements between undertakings (paragraph 65). The Court noted that the question whether there had been "*a concerted action*" in that case could only be determined if the evidence upon which the decision was based was considered as a whole, taking account of the specific characteristics of the market (paragraph 68).

The Court went on to reject the producers' attempts to explain away the price increases and held:

> "118. Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases."

47. In Joined Cases 40/73, etc.,[10] *Suiker Unie v Commission* [1975] ECR 1663, a case involving *inter alia* alleged restrictions on those to whom sugar was to be supplied, the Court of Justice again considered the concept of concerted practice under Article 101(1) TFEU. In paragraphs 173 and 174, the Court of Justice laid down what have since been accepted as governing principles for the concept of a concerted practice:

> "173. The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.
>
> 174. Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."

There is, therefore, a clear and important difference between undertakings intelligently adapting their behaviour in light of the existing and anticipated conduct of competitors, which is legitimate, and co-ordination that has as its object or effect the influencing of a competitor's conduct on the market or disclosing the course of conduct which a competitor has decided to adopt, or is contemplating adopting, on the market, which is not permissible.

[10] Joined Cases 40 to 48/73, 50/73, 54 to 56/73, 111/73, 113/73 and 114/73

48. In Joined Cases T-25/95 etc.,[11] *Cimenteries CBR v Commission* [2000] ECR II-491 the Court of First Instance (now the General Court) considered various alleged collusive contacts involving a large part of the European cement industry. The General Court stated that:

> "1849. … the concept of concerted practice does in fact imply the existence of reciprocal contacts … That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it ...
> ...
> 1852. ... In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market … It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market." (references to authorities omitted)

49. In Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125 the Court of Justice affirmed the validity of a Commission decision finding that Anic had participated in a EU-wide cartel operating in the polypropylene production sector from 1977 to 1983. The Court re-affirmed what it had held in *Suiker Unie*, above, and stated:

> "118. It follows that, as is clear from the very terms of Article [101(1)] of the Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two."

So far as the relationship of cause and effect between undertakings concerting together and their subsequent conduct on the market is concerned the Court held that:

> "121. ... subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period …"

This is commonly referred to as the "*Anic* presumption". (See also Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, paragraphs 161-163.)

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[11] Joined cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95.

cheeses to a supplier in order for that supplier to print the new retail prices on the packs of cheese in advance of supply (as to which see paragraph 18(b) above).

73. Finally, there was considerable dispute as to whether a lesser state of mind than "*intend or may be taken to intend*" can be sufficient for a finding of an unlawful concerted practice. We address the parties' submissions on this point in the context of Strand 5 of the 2002 Cheese Initiative (see paragraphs 350-354, below).

74. In summary, we propose to adopt the following approach to the issue of state of mind of retailer A:

(a) acts of any employee may be attributed to his or her corporate employer, with whom they comprise the same undertaking;

(b) a retailer's state of mind is a subjective mental state but the law applies an objective standard as to whether that mental state existed or not;

(c) a retailer intends a particular result of its conduct if it actually foresees that result;

(d) a retailer may be taken to intend a particular result of its conduct, having regard to all the evidence placed before the Tribunal, including the evidence of the person alleged to have held the state of mind and the surrounding circumstances; and

(e) it is trite law that inadvertent or accidental disclosures are unlikely to constitute circumstances from which the requisite state of mind can be inferred.

E. B to C: Supplier B passes on retailer A's future pricing intentions to retailer C

75. The next limb of an infringement is that supplier B must be shown, as a matter of fact, to have transmitted retailer A's future pricing intentions to retailer C. This is a question, which will arise only if the conduct and mental elements of the A to B transmission have been established. Counsel for Tesco submitted that, even if the

information received by Tesco, in the role of C, did relate to future retail prices, the information in question was not believed by the individual recipients at Tesco and, in fact, turned out to be inaccurate. However, the fact that one party does not believe what another has said, or suspects that it will turn out to be false, does not rule out the possibility of the existence of a concerted practice (bearing in mind throughout the burden and standard of proof). Of course, if it can be factually established that the relevant individual at Tesco did not believe, and did not have reason to believe, that the information was information belonging to Tesco's competitor, then that may be relevant to the assessment of whether Tesco received the information with the requisite state of mind (discussed in the next sub-section; see, in particular, paragraphs 83 and 84). It cannot, however, affect the question of whether B, as a matter of fact, transmitted A's future retail pricing intentions to C.

76. Anti-competitive collusion between competitors may be riddled with distrust and suspicion. An agreement and/or concerted practice may nevertheless be found to exist, provided, of course, that there is sufficient and cogent evidence of the necessary conduct.

77. In Case T-186/06 *Solvay SA v Commission*, judgment of 16 June 2011, one of the appeals against the European Commission's decision in relation to the *Hydrogen peroxide and sodium perborate* cartel, the General Court concluded that Solvay had taken part in a concerted practice which had the object of restricting competition and stated:

> "152. That finding is not called into question by the applicant's argument that, given the lack of mutual trust between the competitors, it was inconceivable that they could have engaged in concerted practices.
>
> 153. The different views of the participants, or the lack of trust between them, are not in themselves sufficient to preclude the existence of concertation capable of being categorised as a concerted practice. The applicant's arguments do not tell against the facts established by the Commission, from which it is apparent that, despite a certain lack of trust between them, the competitors met regularly in the period concerned and exchanged information on market conditions and their commercial strategy with the aim of preparing an anti-competitive agreement."
>
> (The General Court's judgment has been appealed by Solvay to the Court of Justice; see Case C-455/11 P, not yet decided).

78. Counsel for Tesco further submitted that there was an important difference where a retailer, C, receives individualised, as opposed to aggregated, data from its supplier B. In general, the exchange of individualised data is much more likely to lead to a collusive outcome and thus restrict competition than the exchange of aggregated data. In support of this contention, reliance was placed on paragraphs 73, 74 and 89 of the European Commission's *Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements* (OJ 2011/C 11/01) ("Guidelines on Horizontal Co-operation Agreements"), to which this Tribunal must "*have regard*" pursuant to section 60(3) of the 1998 Act. Paragraphs 65 to 68 of the Guidelines make clear that one of the main competition concerns about the exchange of information is that it can facilitate co-ordination of competitors' behaviour and distort competition.

79. In our judgement, the exchange of individualised data is more likely to facilitate co-ordination because it makes it easier for companies to reach a common understanding regarding future prices or sales. It also contributes to a more credible prospect of retaliation which disciplines the co-ordinating companies. Conversely, the exchange of aggregated data is less likely to lead to a collusive outcome since it is less likely to be indicative of specific competitors' future conduct or to lead to a common understanding of business behaviour. Even then, however, it cannot be excluded that the exchange of aggregated data may facilitate a collusive outcome, depending on the particular facts of the case. We take account of this distinction below, when considering whether the indirect exchanges of information found by the OFT eliminated, or substantially reduced, uncertainty on the market, with the result that competition was restricted.

80. Tesco further submitted that, during the relevant period of 2002, the movements in cheese prices being discussed by suppliers and retailers were in the public domain. It was common ground that exchanging information already in the public domain is unlikely to infringe the EU and/or UK competition rules. In this respect, Tesco drew our attention to the judgment of the Court of Justice in Case C-7/95 P *John Deere Ltd v Commission* [1998] ECR I-3111.

81. We have also had regard to paragraph 92 of the Guidelines on Horizontal Co-operation Agreements and the case law there cited. Given that the law on this point is relatively clear, we consider that this submission really raises points of fact as to what information was legitimately divulged as part of parallel discussions between a supplier and its retailers. This includes whether that information was generally and equally accessible to all suppliers and customers at the relevant time, and whether there were particular difficulties involved in gathering the relevant information such that it was not, in fact, equally accessible to all suppliers and customers. We deal with these points below.

F. Retailer C's state of mind

82. In our judgement, it is sufficient for the OFT to prove that retailer C may be taken to have known the circumstances in which A disclosed its future retail pricing intentions to B (see paragraph 141 of *Toys and Kits*, quoted above).

83. As we have said above, the relevant individual receiving the information at retailer C may state that he or she did not believe that the information communicated by supplier B was, in reality, confidential information belonging to retailer A, for example, because he thought B was simply engaging in market speculation. If that were true, then that would mean that retailer C could not be taken to have known the circumstances in which the information was disclosed by A to B. That, however, will be a matter of fact to be assessed by the Tribunal in light of the evidence. The circumstances known to the individual at retailer C will be a relevant consideration for that assessment. If, for example, that individual knows that his supplier, B, is in negotiations with retailer A about cost and retail price increases, and B subsequently tells him that A will be increasing its prices on a particular date, it will scarcely be credible for the individual at C to maintain that it never occurred to him that the information came from A.

84. In *Toys and Kits*, when discussing the Tribunal's judgment on liability in the *Football Kits* appeal ([2004] CAT 17, paragraph 659), Lloyd LJ said:

> "The Tribunal may have gone too far if it intended that suggestion to extend to cases in which A did not, in fact, foresee that B would make use of the pricing information to influence market conditions or in which C did not, in fact,

appreciate that the information was being passed to him with A's concurrence" (paragraph 91; emphasis added).

85. The reference to A's concurrence is not repeated elsewhere in the judgment. It does not appear, for example, in the test suggested in paragraph 141 of the judgment, which simply refers to whether "*C may be taken to know the circumstances in which the information was disclosed by A to B*". We do not consider that this slight variation between the texts makes any substantive difference. It is to be noted that Lloyd LJ formulated the proposition in paragraph 141 to fall squarely within the parameters of the judgment of the Court of Justice in Joined Cases C-2/01 & C-3/01P *BAI eV and Commission v Bayer AG* [2004] ECR I-23. In that judgment the Court of Justice had approved the General Court's approach to the concept of an agreement, which centred around the existence of a "*concurrence of wills*" (Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383, paragraph 69). The Court of Appeal was satisfied that the proposition in paragraph 141 established a sufficient degree of consensus for the Chapter I prohibition to apply. The key point is, in our view, that C must be shown to have appreciated the basis on which A provided the information to B, so that A, B and C can all be regarded as parties to a concerted practice.

G. Retailer C's use of Retailer A's future pricing intentions

86. The final element of the proposition formulated by Lloyd LJ in *Toys and Kits* is that retailer C does, in fact, use retailer A's future pricing intentions in determining its own future pricing intentions. In our view, the word "*use*" in this context is to be understood as referring to retailer C taking into account retailer A's future pricing intentions when making decisions as to its own future conduct on the market. There was no dispute that the *Anic* presumption, as described at paragraph 49 above, applies in these circumstances. Even where C's participation is limited to the mere receipt of information about the future conduct of a competitor, the law presumes that C cannot fail to take that information into account when determining its own future policy on the market. It is open, of course, for C to seek to demonstrate that it determined independently the policies it pursued and did not act on the basis of A's future pricing intentions.

VII. THE EVIDENCE

87. There were wide-ranging and hotly contested disputes of fact between the parties. They took quite different approaches to how the Tribunal should assess the evidence. After setting out the burden and standard of proof, which was uncontroversial, we set out our approach to the evidence generally, including the ERAs, the documentary and witness evidence, and the various notes of interview with persons employed at the time of the alleged infringements. We then give our general assessment of the witnesses who gave evidence before us in Section VIII. (*Witnesses heard by the Tribunal*) below.

A. Burden and standard of proof

88. It was not in dispute that, since the legal burden of proof lies with the OFT to establish an infringement of the Chapter I prohibition, the burden also lies on the OFT to establish each of the analytical steps which are pre-requisites to a finding of an A-B-C transmission of information, amounting to a concerted practice. The standard of proof is the civil standard of balance of probabilities (see *Willis*, paragraphs 46 and 47, and the case law there cited). We have also, of course, taken account of the principle of the presumption of innocence, enshrined in Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms (Treaty Series No. 73 (1953) Cmd 8969), in the context of alleged infringements of the 1998 Act, which may result in the imposition of financial penalties. Any doubt in the mind of the Tribunal as to whether a point is established on the balance of probabilities must operate to the advantage of the undertaking alleged to have infringed the competition rules, in this case, Tesco.

B. The proper approach to the ERAs

The ERAs concluded by the OFT

89. As we have said, seven addressees of the SO, and subsequently addressees of the SSO and Decision, entered into ERAs with the OFT admitting liability for one or more of the infringements ultimately found in the Decision. Copies of the ERAs, as amended, were annexed to the Decision.

90. In the course of this appeal, Tesco has termed the ERAs, perhaps accurately, "*corporate admissions*". They are certainly agreements entered into by various bodies corporate with the OFT, in which the relevant company (or companies) admitted participation in one or more of the infringements found in the Decision.[14] They are not admissions on the part of the individuals employed, or formerly employed, at each of the ERA parties. Nor indeed were any such admissions necessary, since the Chapter I prohibition applies to anti-competitive conduct by undertakings. It is clear that in the case of these infringements the relevant undertakings were the retailers/suppliers. As Longmore LJ (with whom Pill and Lloyd LJJ agreed) held in the case of *Safeway Stores Limited & Ors v Twigger & Ors* [2010] EWCA Civ 1472 at paragraph 25, which arose out of the same factual background as this appeal, "*it was sufficient for the OFT to show that the companies intentionally ... infringed the provisions of the 1998 Act; the companies have accepted they did so infringe the 1998 Act ...*".

91. The ERAs are brief documents. For the purposes of describing the ERAs, it is convenient to refer to one of the actual documents for illustrative purposes. Reference will be made here to the ERA entered into by Asda on 6 December 2007. Nothing should be read into the choice of Asda's ERA. The other six ERAs entered into by the other admitting parties were in substantially the same form as that entered into by Asda.

92. The ERA, which is in the form of a letter sent by the OFT and countersigned on behalf of Asda, states, in pertinent part for present purposes:

> "... the [OFT] proposes to make a decision in terms of the Statement of Objections ... that Asda and the other parties set out in paragraph 3 of the SO have infringed the Chapter I Prohibition of the Competition Act 1998 ... as listed in the Appendix (the 'Infringements').
>
> ... Further to discussions between the OFT and Asda, this letter (the 'Agreement') sets out the terms upon which the OFT would be prepared to resolve its investigation of the Infringements, were Asda to accept these terms.
>
> 1) Asda will, by signing the Agreement, admit its involvement in the Infringements.

[14] It is to be noted that not all companies admitted involvement in both Infringements, and also that some admitted involvement in the 2003 FLM Initiative. Note also the amendments to the ERAs described at paragraphs 31(f) above and 96 below, in relation to the 2002 FLM Initiative, the 2003 FLM Initiative and the 2003 Butter Initiative.

..."

93. The Appendix to Asda's ERA defined each infringement for which liability was to be admitted. In Asda's case that was initially the 2002 FLM Initiative, the 2002 Cheese Initiative, the 2003 FLM Initiative and the 2003 Cheese Initiative. Each infringement is defined in broad and similar terms. We set out only one definition below by way of example:

> "Asda Group Limited ('Asda') has infringed the Chapter I prohibition of the Competition Act 1998 through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions by participating in the following initiatives described in the Statement of Objections, issued on 20 September 2007:
> ...
> The 2002 Cheese Initiative
> (i) the single overall concerted practice between Asda, Safeway, Sainsbury, Tesco, Dairy Crest, Glanbia and McLelland which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections ..."

94. The ERA also contains various undertakings by Asda to, among other things, fully co-operate with the OFT in its ongoing investigations. In relation to any subsequent proceedings before this Tribunal, Asda committed to using its:

> "f) ... reasonable endeavours to facilitate, and secure the complete and truthful co-operation, of its current and former directors, officers, employees and agents, even if Asda is not a party to those CAT proceedings, in:
>
> (i) assisting the OFT or its counsel in the preparation for those CAT proceedings;
> (ii) if requested by the OFT or its counsel, attending those CAT proceedings; and
> (iii) speaking to their witness statements and being cross-examined on such witness statements in those CAT proceedings."

95. The ERA further provides that, whilst the OFT would accept a concise memorandum from Asda indicating material factual inaccuracies in the SO, should those representations go so far as to, in the opinion of the OFT, contest Asda's liability for the infringements, the OFT may treat the ERA as ceasing to be effective. In return for its admission, as well as its full co-operation, the OFT reduced Asda's fine by 35 per cent. The other ERA parties received reductions in their fines of between 30 and 35 per cent also.

96. The decision by the OFT, following the issuance of the SSO, not to pursue certain of the alleged infringements necessitated amendments to the ERAs (see paragraph

31(f) above). Variation agreements to that effect were entered into by the various ERA parties between late March and early April 2010.

The OFT's position on the ERAs

97. In the SSO, the OFT sought to rely on the ERAs as evidence in support of its findings against Tesco in relation to the 2002 Cheese Initiative. At paragraph 5.473 of the Decision, however, the OFT, having considered submissions by Tesco that such reliance was inappropriate, decided that the ERAs:

> "... do not, on their own, amount to evidence demonstrating Tesco's involvement in the 2002 Cheese Initiative. Accordingly, the OFT does not place any reliance on these third party admissions in making its infringement finding in respect of Tesco" (emphasis added).

98. In its Defence to this appeal, the OFT stated that the ERAs were "*clear evidence*" of the admitting parties' involvement in the 2002 and 2003 Cheese Initiatives. The OFT explained that it relied on each ERA, if necessary, as evidence of the state of mind of the admitting party in question, which, it submitted, the Tribunal can and should take into account. The OFT maintains that it did not, and does not, rely on the ERAs as evidence of Tesco's involvement in the alleged infringements of the Chapter I prohibition.

Is Tesco correct that no weight at all should be attached to the ERAs?

99. Counsel for Tesco submitted that "*no weight should be attached to these admissions*", whether as evidence of the admitting parties' participation in the Infringements, and their respective states of mind, or "*for any other purpose in this appeal*."

100. Counsel for Tesco argued that these "*corporate admissions*" were in truth no more than commercial decisions by the admitting parties, and may even have been taken without knowing the true extent of their liability. It is impossible to know, it was said, whether the ERAs were entered into because the admitting parties considered the allegations of infringement justified or simply in order to take advantage of the very significant reductions in penalties offered by the OFT. Reliance was also placed on the fact that each ERA included a stipulation that an admitting party

which appeared to contest its liability in submissions on factual inaccuracies contained in the SO, and/or SSO, might lose its penalty reduction as a consequence of the OFT withdrawing the ERA.

101. We accept that the decisions to admit liability for the infringements alleged in the SO (or SSO), and ultimately found in the Decision may well have been in part commercially motivated. We do not assume, nor is it in our view necessary to assume, that the admitting parties necessarily investigated and verified all of the allegations made by the OFT. Our approach to the evidential value of the ERAs does not depend on what the admitting parties did or did not do. It is not unreasonable to suppose that it was in the admitting parties' interests to investigate and verify the allegations made against them to the extent they considered that to be appropriate. To establish the liability of the admitting parties, it was sufficient that, absent duress or any misrepresentation, the admitting parties entered into the ERAs, thereby agreeing to fulfil the obligations set out therein. Our attention was drawn to the judgment of Cranston J in *R (on the application of Crest Nicholson plc) v OFT* [2009] EWHC 1875 (Admin), where the learned judge was required to consider the status of a 'fast track offer' made by the OFT in the context of the *Construction Bid-rigging* case. The rationale behind the 'fast track offers' made in *Crest Nicholson* (see paragraphs 8-16 of Cranston J's judgment) was similar, but not identical, to that of the ERAs offered by the OFT in the present case. Cranston J held at paragraph 69 that a response to the fast track offer was "*obviously a commercial decision. However, it involved asking parties to admit liability for serious infringements of the Competition Act 1998. Infringement proceedings under the Competition Act 1998 are of a quasi-criminal nature ...*" Cranston J continued at paragraph 70 that "[a]*cceptance of the offer would have had evidential value*" and, at paragraph 71, that "[a]*cceptance was a commercial decision, but a commercial decision with significant legal consequences.*"

102. We respectfully agree with the learned judge's reasoning and treatment of the fast track offers, and consider that a similar approach should be taken to the ERAs entered into in this case. It is neither necessary nor desirable for us now to go behind the ERAs to ascertain the reasons for which each admitting party entered into those agreements. Each company that enters into an ERA must consider for

itself whether to admit liability for an alleged infringement of the 1998 Act and, in reaching that decision, it will, no doubt, take account of such factors as it considers appropriate. We consider that a very real factor that would have weighed against entering into the ERAs, a factor also recognised by Cranston J in *Crest Nicholson* at paragraph 68, was the possibility of reputational harm resulting from the admission. In our judgement, in a competitive consumer market such as the retail cheese market, a retailer admitting liability for entering into an anti-competitive concerted practice would risk reputational harm. Each retailer, and indeed each supplier, that entered into an ERA must be taken to have weighed this in the balance with such other factors as it considered relevant, and decided nonetheless to admit liability and co-operate with the OFT. That decision must, and in our judgement does, have legal consequences.

103. Counsel for Tesco submitted that the fact that the ERAs had to be amended following the OFT's decision not to pursue the 2002 FLM Initiative and the 2003 Butter Initiative in effect meant that parties which had previously admitted their involvement in those alleged infringements had, in fact, admitted to conduct that the OFT no longer maintained was unlawful. The OFT argued, however, that that was not the case. Counsel for the OFT submitted that, whilst the OFT had decided not to pursue certain allegations made in the SO and SSO because it did not have sufficient evidence against those parties which had decided *not* to admit liability, that did not mean either that the conduct did not occur or that it was not unlawful. We consider that there is force in that, as there is in the OFT's argument that, as a public authority, it had to decide how best to allocate its resources. The fact that the admissions in the ERAs were amended, demonstrates clearly why the admissions cannot stand as evidence against Tesco, but we do not consider that this prevents the ERAs from having *any* evidential value as against the admitting parties. In the context of this appeal, we have not found it necessary to reach any conclusions as to whether the previously alleged infringements did, or did not, occur.

104. Counsel for Tesco further submitted that the ERAs could have no probative value on this appeal because they were not signed by any of the individual employees of the admitting parties who were said to have been directly involved with the Infringements. In our judgement, that submission is misconceived. As noted

above, the Chapter I prohibition is addressed to undertakings and the relevant undertakings here were the corporate retailers and their suppliers, not the employees through which they acted. The companies entered into the ERAs, thereby accepting their liability for the alleged infringements and that is sufficient (see *Twigger*, cited at paragraph 90 above).

105. A related, and in our view equally misconceived, submission by Tesco was to the effect that no reliance could be placed on the ERAs because the OFT did not call as witnesses the individuals who in fact executed those documents. By declining to call those individuals, Tesco argued, the OFT had deprived it of the opportunity to cross-examine them. As already discussed, the ERAs are admissions by the undertakings accused of the Infringements; the decisions to enter into the ERAs were corporate ones taken, presumably, at the appropriate level within each company's corporate hierarchy. Obviously a legal person cannot itself execute a document and must act through those individuals to whom it has devolved the necessary authority to act on its behalf. It follows that in the present circumstances the identity of the particular individual acting on behalf of an admitting party is, in our judgement, irrelevant, provided of course that he or she had sufficient authority to bind the company. At no point was it suggested by Tesco that the individuals who executed the ERAs lacked the requisite authority to do so.

106. Finally, Counsel for Tesco submitted that the ERAs do not make it clear whether the admitting parties are taken to be admitting only their participation in the Infringements in general or some, or all, of the underlying facts alleged by the OFT in the SO and/or SSO. It was said that, since the ERAs do not require the admitting parties to admit the truth of every allegation contained in the SO and, indeed, envisaged only concise submissions as to "*material*" factual inaccuracies, it is clear that admissions may be made in respect of matters that the admitting parties do not accept as true. We have taken this submission into account in our assessment of this case and note that the OFT did in this case take into account concise submissions on material factual inaccuracies when preparing its Decision.

107. For these reasons, we do not accept Tesco's submission that the ERAs are of no evidential value at all in assessing the conduct and state of mind of the admitting

Act is a matter for it during the administrative stage. Of course, the OFT must act fairly. The OFT must also put to the parties the evidence on which it relies to establish the infringement alleged. There is no rule of law, however, that, in order to establish a Chapter I infringement, the OFT has to rely on written or oral witness evidence (see Case No. 1008/2/1/02 *Claymore Dairies Ltd v OFT* [2003] CAT 18, paragraphs 8 and 9).

117. Secondly, the OFT's powers of investigation and enforcement are set out in Chapter III of the 1998 Act and the rules made under it (the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (S.I. 2004/2751) (the "OFT's Rules"). Under section 25(1) of the 1998 Act the OFT may conduct an investigation where it has reasonable grounds for suspecting, *inter alia*, that there has been an infringement of the Chapter I prohibition. We were told that the OFT, when it begins any investigation, will do so largely on the basis of documentary evidence.[18] When conducting such an investigation, the powers of the OFT are to request information, in particular documents, and conduct inspections pursuant to sections 26 to 28A of the 1998 Act. Whilst the OFT can ask individuals about the content of documents or their location, it does not have the power to ask more generally for explanations of facts relating to the subject-matter of an inspection (*cf*. the powers of the European Commission under Article 20(2)(e) of Council Regulation (EC) No 1/2003, OJ 2003/L 1/1).

118. Thirdly, there is no rule of law which prevents the OFT from interviewing (or seeking to interview) employees, or former employees, of companies implicated in an investigation. The OFT noted the possibility of asking individuals to voluntarily attend an interview when their corporate employer has applied for immunity or leniency and/or signed an ERA. The OFT availed itself of that possibility in the present case but focused on the investigation of the alleged FLM Initiatives and did not interview other witnesses on prioritisation grounds (see paragraphs 2.92, 2.93 and 5.484 of the Decision).

119. Counsel for the OFT pointed out that the OFT's Rules do not provide it with the power to compel witnesses to attend for questioning. That is true, but we find it

[18] Transcript, Day 15, p. 57.

panel in *Football Kits* "*may have gone too far*" if the reference in its decision to reasonable foreseeability was intended to suggest that the requisite state of mind would exist in circumstances "*in which A did not, in fact, foresee that B would make use of the pricing information to influence market conditions or in which C did not, in fact, appreciate that the information was being passed to him with A's concurrence*."

354. While we also consider that the OFT may, in its opening and closing submissions recorded above, have gone too far, we, like the Court of Appeal, do not decide the point, albeit our reasons for not doing so are different. The Court of Appeal declined in *Toys and Kits* to decide the point because it determined that the higher standard of knowledge, namely intent or actual foresight, was met. In relation to this Strand, we have concluded that that higher standard is not met. The Tribunal is of course conscious that paragraph 3(2)(e) of Schedule 8 to the 1998 Act provides that the Tribunal may make any decision which the OFT could itself have made. In the circumstances of this appeal by Tesco, however, we do not consider that it would be either appropriate or fair for us to exercise that power so as to determine this point. As we have said, this Tribunal's task is to review, on the merits, the decision taken (see paragraph 124(e) above). It was open to the OFT to take its Decision, whether primarily or in the alternative, on the basis that a lower standard of proof was sufficient to make out the infringements and setting out its rationale for that conclusion. It specifically chose not to do so. If we were to now decide that point, and if we were to decide it in the OFT's favour (on which we do not comment), that would have the effect of reducing the evidential burden placed on the OFT to establish the Infringements as against Tesco. Tesco would, in effect, be disadvantaged by virtue of its own appeal against a decision, which was taken on the basis of intent or actual foresight.

D. The Tribunal's conclusion on Strand 5

355. For these reasons, the Tribunal is not satisfied, on the balance of probabilities, that there was a concerted practice between Asda, Dairy Crest and Tesco arising from contacts on or before 4 November. The OFT has failed to prove that Asda may be taken to have intended, or that it in fact foresaw, that the information contained in the 4 November email would be passed by Dairy Crest to Tesco. For the reasons

appears to us that there was no apparent way Mr Ferguson could have predicted, with such confidence, the future direction of Tesco's prices for Value cheese lines absent some inside information from Tesco.

366. Mrs Oldershaw claimed that it was obvious that any "*margin hungry*" buyer would raise the price of Value cheese in order to match Asda.[103] We do not accept the logic or accuracy of that claim. It is neither obvious nor commercially realistic to expect that a buyer would *habitually* follow the price increases of one of her competitors. Whilst such a course might be commercially advantageous on some occasions, it might also have been profitable for Tesco to undercut its major rivals at other times. Mr Scouler accepted in cross-examination that there might well have been instances in which Tesco was "*making a good profit from ...* [a] *product ... Your competitors may not have even picked ... up ... the fact that you were cheaper ...* [B]*y raising the price potentially you might have lost a competitive advantage ...*".[104] We note also that one of the exhibits to Mrs Oldershaw's second witness statement was a list of prices of Tesco Value cheese lines, some of which appear to have been offered at a lower price than Asda's Smart Price cheese during the autumn of 2002. This situation appears to have continued between September and November with no impetus on the part of Mrs Oldershaw to increase Tesco Value prices to match those of Asda. It does not, therefore, appear that there was any strong basis from which Mr Ferguson could have assumed, and told Sainsbury's with such certainty, that Tesco's retail prices would inevitably follow Asda's upwards. We also bear in mind our earlier observations about the risks for a supplier of giving one of its retailer-customers incorrect information and Mr Ferguson's comments in this respect (see paragraph 260 above).

367. Further, since McLelland did not supply or pack Tesco's Value cheese lines at the time, there appears to have been no reason for Mr Ferguson to have this information in his possession. It had nothing to do with the ordinary course of McLelland's relations with Tesco. Given this, and the unconvincing witness evidence on the point, we find that the statement regarding Tesco's pricing intentions contained in Mr Ferguson's email of 5 November to Sainsbury's was, more likely than not,

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103 Transcript, Day 9, pp. 161 and 162.

104 Transcript, Day 11, p. 26.

based on a prior communication by Mrs Oldershaw to Mr Ferguson that Tesco intended to match Asda's new retail prices for Smart Price mild and mature cheddar.

Tesco's state of mind as 'A'

368. We have concluded that, when Mrs Oldershaw disclosed Tesco's future pricing intentions to Mr Ferguson on or before 5 November, she may be taken to have intended, and in fact foresaw, that this information would be passed on by McLelland to other retailers, including Sainsbury's. In this regard, we refer to, and rely on, our assessment of Mrs Oldershaw's evidence as to her state of mind in connection with Strands 2 and 3 (see paragraphs 252-275, and 298-305 above, respectively). We also take into account the fact that the communication by Mrs Oldershaw to McLelland that Tesco would match these retail price increases by Asda cannot be explained away as part of the normal commercial dialogue between Tesco and McLelland since the latter did not then supply Tesco Value cheese to Tesco. That being the case, we find that it is more likely than not that Mrs Oldershaw disclosed her pricing intentions to Mr Ferguson in the knowledge and expectation that he was acting as a 'middleman' for the exchange of such intentions between retailers.

369. By 5 November, Mrs Oldershaw of Tesco had received one of her competitors' future pricing intentions from McLelland (Strand 2) and had disclosed her future intentions to one of her cheese suppliers, Dairy Crest, for onward transmission to one of Tesco's competitors (Strand 3). In both instances we found her to have acted with the requisite state of mind. Given those communications, we conclude that Mrs Oldershaw may, in the context of this Strand 7, be taken to have intended, and in fact foreseen, that what she told Mr Ferguson about Tesco's intentions with regard to cheeses not supplied to it by McLelland would be passed on to other retailers.

370. It also appears to us that, against the background of (a) each of the major cheese suppliers having proposed a cost price increase of £200 per tonne; (b) the likelihood and expectation of retail price increases in order to maintain margin should that cost

price increase be accepted; and (c) the commercial reality that, whilst Tesco would not want to be more expensive than Asda, it might decide to be less expensive so as to gain a competitive advantage, the information disclosed by Mrs Oldershaw to Mr Ferguson that Tesco would match Asda's new Smart Price prices – whether they increased or decreased – was information of the sort that Tesco intended McLelland to use to influence market conditions by passing it to other retailers, such as Sainsbury's.

C. The Tribunal's conclusion on Strand 7

371. The OFT found that Sainsbury's received Tesco's future retail pricing intentions and that Sainsbury's may be taken to have known the circumstances in which McLelland came by that information. The OFT further found that Sainsbury's used the information. These points were not contested by Tesco. Accordingly, we hold that, on the balance of probabilities, there was a concerted practice between Tesco, McLelland and Sainsbury's arising on or around 5 November, whereby Tesco disclosed its future pricing intentions to Sainsbury's via McLelland and that Tesco (and Sainsbury's) acted with the requisite state of mind.

XVII. STRAND 8 OF 2002: ASDA AS A; McLELLAND AS B; AND TESCO AS C

A. Outline of Strand 8

372. In paragraphs 5.399 to 5.407 of the Decision, the OFT found that, on or before 4 November, Asda had disclosed the timing of its future retail price increases on own-brand and deli cheese lines to McLelland, and did so with the relevant state of mind; this information was then transmitted to Tesco on 8 November 2002 during a conversation between Mr McGregor of McLelland and Mrs Oldershaw.

373. Tesco submitted that there was no evidential basis for the OFT's conclusion that future pricing intentions had been communicated from Asda to McLelland or from McLelland to Tesco. Even if there had been such communications, Tesco contended that neither Asda nor Tesco had been shown to possess the necessary mental state for a finding of an infringement.

B. A to B: did Asda pass its future pricing intentions to McLelland?

A to B transmission

374. In order to evidence the A to B transmission of future retail pricing information by Asda to McLelland on Strand 8, the OFT particularly relied on:

(a) the ERAs entered into by, respectively, Asda and McLelland; and

(b) an email with the subject line "*Price movement*", sent by Mr Stuart Meikle, then McLelland's manager for the Co-op account, to Mr Mike Owen of Co-op on 4 November.

375. It is our judgement that the evidence presented by the OFT establishes, on the balance of probabilities, that Asda communicated its future retail pricing intentions to McLelland on or before 4 November.

376. Although the ERAs entered into by each of Asda and McLelland constitute some evidence of the transmission of future price information from Asda to McLelland, and receipt of that information by the latter, the probative value of that evidence is, as we have said in previous Strands, very low.

377. The OFT also relied on an email from Mr Meikle of McLelland to Mr Owen of Co-op, dated 4 November, in which Mr Meikle conveyed his belief that Asda "*will move all deli and pre-pack own label*" on 11 November. This is one of the instances where the OFT has relied on events relating to Strand 6 as evidence in support of its finding of a Chapter I infringement on this Strand. The fact that the OFT did not interview Mr Meikle, nor Mr Owen, does not, in our view, affect the probabilities of what had been disclosed by Asda. On a fair reading of this email, it suggests to us that McLelland possessed intelligence concerning the likely timing of Asda retail price increases for own-label lines. The email refers to what Mr Meikle 'believed' would happen. In light of the circumstances at the time, we are inclined to construe the email as referring to his belief based on conversations he, and his colleagues, had been having with McLelland's retailer-customers, including Asda. In reaching this conclusion, we bear in mind the evidence of Mr Ferguson who,

when cross-examined, accepted that there had been ongoing discussions between McLelland and Asda, which were the likely source of Mr Meikle's information.[105]

378. Tesco submitted that, by 8 November, it had been reported in the public domain that Asda was intending to increase its prices. This is the same news report as the one described in connection with Strand 5 above (see paragraph 331 above). This news item did not report anything about when precisely Asda intended to increase its retail prices, on which cheese lines or by how much. None of these matters were genuinely public at or around the time of the communications said to comprise Strand 8.

379. For the above reasons, we are satisfied to the requisite standard that Asda had disclosed to McLelland information relating to its future retail pricing intentions for own-label cheeses.

C. B to C: did McLelland pass Asda's future pricing intentions to Tesco?

B to C transmission

380. At this point it is necessary to interrupt the chronological sequence of events and return to Mrs Oldershaw's "*Cheese £200 T plan*" for "*Cost and Retail moves*" (see paragraph 285 above). As we have already mentioned, that document had been prepared to help Mrs Oldershaw inform Tesco's suppliers on 30 October about intended price moves on various cheese lines. It shows, in particular, that she had planned to move cost and retail prices for own-label cheeses sold by Tesco on 17 November. As explained below, this was said by the OFT to be relevant to what McLelland may have told Mrs Oldershaw just over a week later, on 8 November.

381. Between 29 October and 7 November it appears that Mr Ferguson wrote to Mrs Oldershaw several times in order to ascertain the dates and amounts of Tesco's intended retail price changes. On 7 November Mr Ferguson asked Mrs Oldershaw to confirm the new retail selling prices for packing Tesco own-label, random-weight cheese lines supplied by McLelland. The email asked Mrs Oldershaw to reply either by return email or by telephoning one of his colleagues, Mr McGregor. The

[105] Transcript, Day 6, p. 129.

next day, 8 November, Mr McGregor sent an email to his colleagues at McLelland, Messrs Irvine and Ferguson, recording a conversation he had had with Mrs Oldershaw concerning the increase of Tesco's retail prices for own-brand cheese lines. The email reads:

> "Lisa called to state Tesco will not commit to moving Own Brand until they see that Asda have moved and therefore will not give us their [retail selling prices]. While they are relatively confident that everything is in place with Asda, they are taking a "We won't believe it until we see it" stance."

382. It was common ground, therefore, that Mr McGregor had been in contact with Mrs Oldershaw on 8 November. His email above referred to Mrs Oldershaw's apparent unwillingness to change Tesco's retail prices for its own-label cheese lines unless and until Asda had changed the prices of its competing lines (this is referred to in the Decision as the fourth instance of conditional commitment being given by Tesco (see paragraph 5.402)). What Mr McGregor did when Mrs Oldershaw rang was controversial. There would appear to be at least two possibilities. Mr McGregor may have tried to reassure Mrs Oldershaw that it was safe for Tesco to raise its retail prices by telling her that Asda was planning to increase its retail prices on own-label cheeses. Alternatively, he may have written the 8 November email in order to garner his colleagues' views as to what, if anything, he should do next.

383. Paragraph 5.403 of the Decision found that the first of these possibilities was the most likely. The OFT relied particularly on Mr McGregor's statement: "*While they* [i.e. Tesco] *are relatively confident that everything is in place with Asda ...*". In our judgement, however, this comment does not of itself provide any insight as to what Mr McGregor might have said to Mrs Oldershaw. The statement does not make clear, for example, whether this was something that Mrs Oldershaw had said to Mr McGregor – which, self-evidently, cannot evidence the B to C transmission (i.e. McLelland to Tesco) – or something Mr McGregor had told Mrs Oldershaw. Assuming it is the latter, the remark "*everything is in place*" could refer to a number of things, including: (a) McLelland confirming Asda's ongoing commitment to raise cost and retail prices for cheeses across-the-board; (b) a general reference to Asda's future pricing intentions; (c) a specific reference to the timing of Asda's new prices for own-label cheeses; or (d) something entirely different. We simply are not in a position to know what "*everything*" refers to. The Tribunal does not know

what Mr McGregor, the author of the 8 November email, recalled of the conversation and the surrounding circumstances because neither party called him to give evidence.

384. In her second witness statement, Mrs Oldershaw stated that during their conversation on 8 November, Mr McGregor "*may have said something about Asda being likely to move soon*". Mrs Oldershaw was cross-examined on this topic. It was put to her that she had been given detailed information about Asda's prices. Mrs Oldershaw did not accept that suggestion. She maintained that she did not recall the conversation on 8 November in detail and in particular did not recall any discussions about Asda. We have no reason to doubt Mrs Oldershaw's evidence on this point.

385. The OFT contended that Mr McGregor must have told Mrs Oldershaw about Asda's intention to increase its retail prices for own-label cheeses on 11 November because McLelland wanted Tesco to do the same the following week (on 18 November). This would have been in accordance with Mrs Oldershaw's "*Cheese £200 T Plan*". Had Tesco's agreement been delayed until after 11 November, the OFT argued, Tesco's new retail prices for own-label cheese would not be able to take effect on 18 November. They would not have taken effect until after that date due to the time taken to run down stocks of cheese and/or to affix new price labels. The difficulty with the OFT's contention is that, whilst it suggests that McLelland may have had the motivation to pass the information it had about Asda's future retail prices to Tesco, it does not prove that McLelland, in fact, did so. The OFT's case, whilst logically quite possible, overlooks the absence of documentary or witness evidence suggesting that the B to C transmission actually took place in this Strand.

386. We accept, in line with our general approach set out at paragraphs 108 to 112 above, that the OFT can rely on McLelland's ERA as some evidence of its conduct. The probative value of that evidence is, however, very low and the burden of proof rests on the OFT. Given the paucity of evidence before us on this point, and the doubt which must operate to the advantage of Tesco on this appeal, we are unable to conclude that Mr McGregor informed Mrs Oldershaw about the timing of Asda's planned increases for its retail prices for own-label cheese.

D. The Tribunal's conclusion on Strand 8

387. Our overall conclusion is that, whilst the OFT has established that Asda passed its future pricing intentions to McLelland, the general and specific matters relied upon by the OFT were not sufficient to establish the fact of a B to C transmission from McLelland to Tesco on (or around) 8 November. In circumstances where the transmission from B to C has not been proved, we do not need to reach a decision on whether Asda and Tesco had the relevant state of mind.

XVIII. STRAND 9 OF 2002: TESCO AS A; McLELLAND AND/OR DAIRY CREST AS B; AND ASDA AS C

A. Outline of Strand 9

388. In paragraphs 5.424 to 5.437 of the Decision, the OFT found that, on or before 13 November, Tesco had raised its retail prices on Stilton and disclosed to either McLelland or Dairy Crest, or to both suppliers, that, unless Asda also increased its retail prices for Stilton, Tesco would reduce its retail prices again. The OFT's case was that this amounted to a disclosure by Tesco of its future pricing intentions to Dairy Crest and/or McLelland, which then passed that information to Asda. The OFT found that both Tesco and Asda had the requisite state of mind at the time of disclosure and receipt respectively.

389. The main issue between the parties in respect of this Strand was whether the information about Tesco's retail pricing intentions for Stilton, which McLelland and/or Dairy Crest passed on to Asda, originated from Tesco.

B. A to B: did Tesco pass its future pricing intentions to McLelland and/or Dairy Crest?

A to B transmission

390. There is no direct evidence of a transmission from Tesco to either McLelland or Dairy Crest to the effect that Tesco would reduce its retail price for Stilton if Asda did not move its retail prices up. In paragraph 5.436 of the Decision, the OFT referred to the "*pattern of evidence*", emanating in particular from Asda, that this

transmission must have taken place. Before the Tribunal it was the OFT's case that such a transmission took place in light of the following matters:

(a) By 13 November, Tesco had on a number of occasions made a number of commitments to increase its retail prices conditional upon its competitors, and in particular Asda, also increasing their retail prices (paragraph 5.435 of the Decision);

(b) On 29 and 30 October, Mrs Oldershaw of Tesco had informed both McLelland and Dairy Crest of her pricing intentions for Stilton, even though neither of them supplied Stilton to Tesco at the time (Long Clawson was the relevant supplier of Stilton to Tesco at the time);

(c) On 12 November, Mr Ferguson sent Messrs Doyle, Skeffington and Day, all of McLelland, an email relating to Tesco's retail prices. It had the subject line "*Tesco own label Cheddar*" and indicated that, as at 12 November, Tesco had not confirmed any movement on retail prices (given the subject line, presumably any movement on retail prices for Tesco "*own label cheddar*") to McLelland and that "[c]*ommunication will be daily with Tesco to target Retail movements*".

(d) On 13 November, Mr David Storey of Asda sent an internal email to a number of colleagues including Messrs Peter Pritchard, Harvey Bennett, and Chris Brown. Mr Storey stated that, although Asda had not yet increased prices for Stilton, "*all*" its competitors (other than Kwik Save) had "*moved up*". Mr Storey recorded, however, that "*others*" had "*indicated that they would move* [Stilton retail prices] *back down unless*" Asda moved up.

We address each of these matters in turn below.

391. First, we have already found that there is insufficient evidence before us to find that any of the conditional commitments to raise retail prices for cheese found by the OFT were given by Tesco during the autumn of 2002 (see the following paragraphs above: 185-188 (in relation to the Tesco DSGM); 215 and 216 (in relation to the

Glanbia note of 25 September); 218 (in relation to the Glanbia note of 27 September); and 382-384 (in relation to Mr McGregor's email of 8 November)).

392. Secondly, we accept that, in her 'round-robin' email of 29 October, Mrs Oldershaw had told all of her suppliers of her planned cost and retail price movements for cheese, including Stilton. This was followed by her telephone conversations with McLelland and Dairy Crest, amongst others, during which she probably informed them that she planned to increase cost and retail prices for Stilton by 4 November (as to which, see paragraph 288 above). We have already expressed our surprise in respect of those communications (see paragraph 286 above). This applies, *a fortiori*, to the disclosure by Tesco of its retail prices for Stilton to McLelland and Dairy Crest because neither of them supplied that cheese to Tesco at the time. Yet this disclosure does not evidence that Tesco had informed either McLelland or Dairy Crest that it would move its Stilton prices back down unless Asda increased its prices. Mrs Oldershaw categorically denied having provided such an indication on or around 13 November.[106] We cannot, in the absence of some further evidence, assume, still less conclude, that Mrs Oldershaw's communications at the end of October demonstrate either that she (i) at that time, or (ii) at some later but unspecified time, disclosed to McLelland and Dairy Crest that, if Asda did not match Tesco's retail price increases on Stilton, Tesco would reduce those prices again.

393. Thirdly, the OFT referred us to an internal McLelland email sent on 12 November. We note that this email is not referred to in the Decision. In any event, the email does not indicate that Tesco had told McLelland about its future retail pricing intentions for Stilton. All it shows is that McLelland had been engaged in an ongoing "*dialogue*" with Tesco "*regarding the market movement of £200 per Tonne*" and that Tesco had not confirmed "*any movement on retail* [prices]". The email also refers to stock levels and the time taken for packing cheeses. This suggests that McLelland had been keen to ascertain Tesco's new retail prices for random-weight cheeses so that they could be packed and labelled in a timely manner, in order to, as Mr Ferguson put it in the email, "*ensure that we continue with our* [s]*ervice levels*". It does not establish that Mrs Oldershaw had

[106] Transcript, Day 9, pp. 179 and 180.

communicated to McLelland that Tesco would move its retail prices on Stilton back down, unless Asda moved up its prices.

394. Fourthly, the OFT relied on an internal Asda email, dated 13 November, which recorded that Asda had not yet increased its retail prices for Stilton but "*All have moved up except Kwik Save*". The email also noted that Asda had apparently been told that "*others have indicated* [that they] *will move back down unless we follow due to moving 2 weeks ago*". The OFT submitted that the word "*others*" must have included Tesco as Tesco was Asda's main competitor. The OFT further submitted that the email was an internal and contemporaneous Asda document, and there was no reason to doubt its veracity. Even if we accepted both of those submissions, they do not mean that this email evidences that Tesco had been the source of that pricing information during a prior communication with one or both of Dairy Crest and McLelland.

395. In our judgement, the email does not, of itself, demonstrate a communication from Tesco to either McLelland or Dairy Crest. The position recorded by Mr Storey could equally be, as Tesco suggested, a logical deduction made on the basis of Tesco's basket policy, which allowed for a limited period in which Tesco's retail price for a basket product could be higher than those of a competitor. This might explain the reference in Mr Storey's email to an indication that others would reduce their prices again "*due to moving 2 weeks ago*". We do not consider it necessary to determine this point but record it to demonstrate the ambiguity that exists and which, in accordance with our approach set out at paragraph 126 above, must be resolved in favour of Tesco, since the burden of proof rests with the OFT. We note also that, since Mr Storey was not called as a witness, we do not know what he might have said about the circumstances that led him to write this email.

396. In the light of all these considerations taken together, the Tribunal considers that, in so far as it concerns Tesco, the evidence set out in that part of the Decision which relates to Strand 9 is not sufficient to support the conclusion that there had been an A to B transmission from Tesco to McLelland and/or Dairy Crest.

C. The Tribunal's conclusion on Strand 9

397. We conclude that the evidence relied upon by the OFT is not sufficient for us to find that Tesco passed its future retail pricing intentions to Dairy Crest and/or McLelland on or before 13 November. In our judgement, Strand 9 of the 2002 Cheese Initiative is not proved on the balance of probabilities. That being so, we do not need to decide whether each of Tesco and Asda had the relevant state of mind.

XIX. THE TRIBUNAL'S OVERALL CONCLUSIONS ON THE 2002 CHEESE INITIATIVE

398. In conclusion, as regards Strands 2, 3 and 7 of the 2002 Cheese Initiative, Tesco's appeal as to liability is dismissed. We have found that the evidence relied upon by the OFT was sufficient to establish, on the balance of probabilities, the concerted practices found in the Decision in which Sainsbury's and Tesco indirectly exchanged cheese retail pricing intentions via McLelland (Strand 2) and via Dairy Crest (Strand 3). We have also concluded that Tesco was party to a concerted practice whereby it indirectly communicated its future retail pricing intentions to Asda, via McLelland (Strand 7). We have found, however, that there was insufficient evidence to support the findings made by the OFT in the Decision in respect of Strands 1, 4, 5, 8 and 9 of the 2002 Cheese Initiative. As such, the OFT's finding that Tesco had infringed the Chapter I prohibition in those respects is set aside.

XX. THE 2003 CHEESE INITIATIVE

399. All dates referred to in the following sections analysing the individual communications said to comprise the 2003 Cheese Initiative are 2003 dates, unless otherwise stated. We adopt the same approach to the Strand analysis here as we did in relation to the 2002 Cheese Initiative (see paragraphs 157-159 above).

A. Introduction

400. The OFT found that, in September and October, Asda, McLelland, Sainsbury's and Tesco infringed the Chapter I prohibition by participating in a single, overall concerted practice which had as its object the restriction of competition in respect of

retail prices of British cheddar and territorial cheeses through the co-ordination of retail price increases in respect of cheese supplied by McLelland to each of these retailers. Each of Asda, Sainsbury's and McLelland have admitted their liability for this infringement by entering into their respective ERAs with the OFT.

401. The features of the 2003 Cheese Initiative found by the OFT in the Decision differed from those relating to the 2002 Cheese Initiative in two particular respects. First, the 2003 Cheese Initiative was narrower in scope since the OFT found that it involved only a single supplier, McLelland, and only three of the four major retailers, namely Tesco, Asda and Sainsbury's. Secondly, although the 2003 Cheese Initiative, like that in 2002, involved a proposed cost price increase of £200 per tonne, that increase had nothing to do with bringing about an increase in farmgate prices. Whilst Tesco indicated, on at least one occasion, its preference that any extra revenue received by McLelland from the proposed cost price increase be passed back to farmers, the OFT considered that the motivation for the 2003 Cheese Initiative was McLelland's desire to improve its margins in the face of rising production costs, which it considered threatened the viability of its business. In order to make the proposed cost price increase acceptable to its retailer-customers, McLelland is said by the OFT to have assisted Asda, Sainsbury's and Tesco to co-ordinate common retail price increases on McLelland cheese lines.

B. Background

402. The pertinent background to the 2003 Cheese Initiative began with a letter written by McLelland's sales director, Mr McGregor, to Mrs Oldershaw of Tesco on 29 August. That letter was initially sent to Mrs Oldershaw as an attachment to an email from Mr Stuart Meikle but, it seems, was also sent by post. Mr Meikle held the position of Tesco account manager at McLelland at the time, following Mr Ferguson's promotion to the position of national account controller earlier in 2003. Mr McGregor's letter stated that McLelland had decided to increase its cost prices across the entire range of cheeses it supplied to Tesco with effect from 1 October. Mr McGregor stated that:

> "I am sure you are aware of the current situation in the dairy market with cheese stocks running low and forecast to become shorter unless returns begin to improve. This, combined with the fact that we have not increased our manufacturing costs outside of fluctuations on the milk price in the last five years, means that we have

> no option but to make this move. Specifically, rising costs on labour, distribution and insurance have markedly increased year on year and we need to recover against this inflation.
>
> Your account manager will be able to provide you with further details on your position, and will forward a breakdown of the cost implications by product line."

403. Mr Meikle's covering email referred to a meeting which was planned between him and Mrs Oldershaw for, and did in fact take place on, 4 September, in order to discuss McLelland's proposed cost price increase. The email indicates that, amongst other things, they were also due to discuss a concern Tesco had regarding the margins that it was achieving on McLelland's branded pre-pack cheddar, Seriously Strong.

404. We have also seen a copy of Mr McGregor's letter of 29 August, which was sent to Safeway (which was not found by the OFT to have participated in the 2003 Cheese Initiative). Although we have not seen copies of letters sent to either Asda or Sainsbury's, it is common ground that they received a similar proposal, in one form or another. Indeed, the text of Mr McGregor's letter suggests that it was a generic letter sent to a number of McLelland's customers. On 5 September, Mr Calum Morrison, McLelland's account manager for Sainsbury's, sent an email to Sainsbury's attaching a copy of a PowerPoint presentation, which to set out the rationale for the proposed cost price increase. The first slide, which was titled "*Price Increase*", recorded:

> "• £200 tonne increase on all business from October 2003
> • This is to bring margin back into cheese for the manufacturer
> • Not related to milk prices
> • This will be a total market move
> • All major suppliers
> • All major retailers
> • All [retail selling prices] will move..."

405. At this point in our judgment, we consider it appropriate to record that the OFT's decision not to call witnesses in this appeal has affected the Tribunal's ability to determine what happened in 2003. This is partly because the documentary evidence is incomplete and, often, far from conclusive; but also because the key individual at McLelland in 2003 (as regards the Tesco account) was Mr Meikle, from whom we heard no evidence. The majority of McLelland documents relied upon by the OFT

to establish the 2003 Cheese Initiative were authored by Mr Meikle, and passed between him and Mrs Oldershaw of Tesco. It was Mr Meikle who had day-to-day responsibility for the Tesco account in 2003. Mr Ferguson was neither the author, nor the recipient, of the material documents. In this context, and taking account of the circumstances, we have resolved ambiguities in the evidence in favour of Tesco, in accordance with our general approach set out at paragraph 126 above.

XXI. STRAND 1 OF 2003: ASDA AS A; McLELLAND AS B; AND TESCO AS C

A. Outline of Strand 1

406. The OFT's findings in respect of Strand 1 of the 2003 Cheese Initiative are set out at paragraphs 5.513 to 5.517, and 5.529 to 5.539 of the Decision. In essence, the OFT found that, during a telephone conversation on Friday, 26 September, Mr Meikle of McLelland informed Mrs Oldershaw of Tesco that it was Asda's intention to raise its retail prices for cheese on Monday, 29 September. It is not clear whether this information related only to cheese lines supplied to Asda by McLelland or cheeses more generally. Either way, the OFT found that this was information, which Asda had communicated to McLelland on or before 24 September. On the basis of the evidence set out in paragraphs 5.589 to 5.613 of the Decision (which is in the form of three internal Asda emails dated 10, 22 and 23 October, respectively), the OFT concluded that Asda had disclosed its future retail pricing intentions to McLelland in circumstances where it may be taken to have intended, and did in fact foresee, that McLelland would make use of that information to influence conditions on the retail cheese market by passing Asda's future retail pricing intentions to Asda's competitors.

B. Background to Strand 1

407. The OFT's case on this Strand rests principally on an internal McLelland document authored by Mr Meikle and titled "*Tesco Briefing*" (the "Tesco Briefing Note"). Although the document was undated, it was common ground, based on its content, that it was most likely drafted on 2 or 3 October. The Tesco Briefing Note set out Mr Meikle's understanding of the then "*present situation*" with respect to the discussions between Tesco and McLelland, *vis-à-vis* the proposed cost price

increase of £200 per tonne. It was prepared as a briefing for McLelland's sales director, Mr McGregor, and its joint managing director, Mr Irvine, in advance of a meeting scheduled to take place on 6 October with Mr Scouler and Mrs Oldershaw, both of Tesco. We shall return to that meeting below. Before coming to the communications alleged to constitute this Strand, it is necessary to say a little more about the Tesco Briefing Note, since it is that document which forms the basis of the OFT's case on the A to B transmission.

408. The Tesco Briefing Note recorded that, at the close of the 4 September meeting between Mr Meikle and Mrs Oldershaw, Mrs Oldershaw "*accepted the cost increase on the basis that we* [McLelland] *would work to increase retail prices across the market to maintain retailer margin.*"

409. The OFT found, at paragraphs 5.499 and 5.500 of the Decision, that the record of the meeting of 4 September in the Tesco Briefing Note proved that Mrs Oldershaw had accepted McLelland's cost price increase as at 4 September, subject to a conditional commitment to participate in co-ordinated increases in retail prices for cheese. Tesco challenged the veracity of that version of events.

410. Mrs Oldershaw accepted in cross-examination that she knew that McLelland would be approaching the major other retailers regarding the cost price increase.[107] She also accepted that Mr Meikle had proposed a retail price increase to her, as "*all suppliers do when they ask for* [a] *cost price increase*".[108] Mrs Oldershaw's evidence was, however, that she never agreed to cost price increases at a first meeting with one of Tesco's suppliers and that she did not do so on this occasion either.[109] She also denied that she gave the conditional commitment attributed to her by Mr Meikle in the Tesco Briefing Note.[110] Indeed, it was her evidence that at that time there was no discussion of retail prices because she had not yet accepted the cost price increase.[111]

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107 Transcript, Day 10, p. 54.
108 Transcript, Day 10, p. 56.
109 Transcript, Day 10, p. 56.
110 Transcript, Day 10, pp. 61 and 62.
111 Transcript, Day 10, p. 61.

411. Mr Irvine of McLelland said in cross-examination that the conditional commitment, which Mrs Oldershaw was recorded as having given or acquiesced to, was an instance of McLelland trying to represent "*that this is a safe rise, everybody is going up, all the processors, all the retailers, all the prices, this is safe ... don't be alarmed about it. So we are trying to create a safe scenario for everybody to put their prices up.*"[112] There are, however, several reasons to treat this evidence with caution. First, Mr Irvine could not recall actually having seen the Tesco Briefing Note at the time, although he accepted he may have done.[113] Secondly, even had he done so, he was not in attendance at the meeting of 4 September (that was attended by Mr Meikle and Mrs Oldershaw only) and so his evidence was no more than his interpretation of the Tesco Briefing Note some nine years on. Thirdly, Mr Irvine's evidence contradicts the unequivocal evidence of Mrs Oldershaw, the only witness we have heard who was at the meeting in question. She maintained that no such commitment was given.

412. Mrs Oldershaw stated that, although she had not ruled out the possibility of Tesco accepting the cost price increase, she dragged out the process as long as she could, as was her usual practice, by requesting that McLelland provide a more detailed justification for it. Mrs Oldershaw suggested that Mr Meikle may have misinterpreted the fact that she did not reject outright the proposed cost price increase as an in-principle acceptance of it. She also speculated that Mr Meikle may have chosen to present matters in the Tesco Briefing Note so as to cast himself in a better light for the benefit of his superiors.

413. On the balance of probabilities we reject the speculation by Mrs Oldershaw that Mr Meikle, in effect, fabricated her acceptance of the cost price increase to impress his superiors. It seems to us unlikely (although we recognise of course that we have not heard evidence from him) that Mr Meikle would have fabricated information for the purpose of briefing his superiors prior to a meeting with McLelland's most important customer, Tesco.

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112 Transcript, Day 7, p. 114.
113 Transcript, Day 7, p. 113.

414. Mr Meikle recorded in the Tesco Briefing Note, however, that "*Lisa* [Oldershaw] *requested a further explanation as to why we* [McLelland] *arrived at the figure of £200*". That further explanation was duly sent by Mr Meikle on 12 September. This appears to be inconsistent with Mr Meikle's recorded understanding that Mrs Oldershaw had already accepted the cost price increase. On the basis of the evidence before us, the most likely explanation for this is that Mr Meikle had, incorrectly, understood Mrs Oldershaw to have accepted, in principle, the proposed cost price increase at the 4 September meeting but that she needed further convincing that the figure of £200 per tonne was justified. Our conclusion is reinforced by the fact that Mr Meikle also recorded in the Tesco Briefing Note that, on Tuesday, 30 September, he had a telephone conversation with Mrs Oldershaw in which she stated that "*she had not agreed to the £200 cost increase and that further justification was needed ...*". This is consistent with Mrs Oldershaw's evidence that, first, she had not accepted the cost price increase at the 4 September meeting and, secondly, that she had followed her normal policy and dragged out cost price negotiations for as long as possible.

415. The Tesco Briefing Note goes on to record that "[a]*ll conversations subsequent to this meeting* [of 4 September] *focused on what was happening to retail prices with my understanding* [being] *that the £200 increase was agreed*." We have not seen a record of any conversations between Mr Meikle and Mrs Oldershaw "*focused*" principally on retail prices. Indeed, on 24 September, Mr Meikle sent Mrs Oldershaw an email addressing both cost and retail prices. Whilst that email does appear to proceed on the basis that Mrs Oldershaw had accepted the proposed cost price increase, we have not been taken to any reply from Mrs Oldershaw to that email and it contradicts the position recorded in the Tesco Briefing Note that, on 30 September, Mrs Oldershaw said she had not accepted the cost price increase and further justification was required.

C. A to B: did Asda pass its future pricing intentions to McLelland?

A to B transmission

416. The Tesco Briefing Note records that, on 26 September Mr Meikle spoke to Mrs Oldershaw by telephone and told her that it was McLelland's understanding that

"*Asda would move to new retail prices from Monday 29th September*." At paragraph 5.531 of the Decision, the OFT relied on this statement as evidencing that Mr Meikle had disclosed Asda's future retail pricing intentions to Mrs Oldershaw. It was the OFT's case that Asda was the source of that information.

417. To support its case, the OFT relied on an email sent by McLelland's logistics manager, Mr Gerry Doyle, to Messrs McGregor and Ferguson, both of McLelland, on 24 September, which states in material part:

> "Jim [McGregor] / Tom [Ferguson]
> Further to my telephone conversation with Tom who confirmed that Asda will be moving to new retails effective from Monday the 29th.
> I urgently require the following information before I can proceed with the price change. ..."

The reference to "*proceed*[ing] *with the price change*", appears to be a reference to packing random-weight cheeses at the new retail prices.

418. The clear terms in which that email was expressed, "*Asda <u>will</u> be moving*" (our emphasis), suggests that Mr Ferguson had received that information from Asda. It is hard to conceive how else Mr Ferguson could have been so certain of the date of the retail price move by Asda. The email also makes it clear that McLelland proposed to act on the information. This further supports the OFT's conclusion, set out at paragraph 5.514 of the Decision, that the information, ultimately passed by Mr Meikle to Mrs Oldershaw, originated from Asda. Tesco now accepts that this is possible but argues that it is not a conclusion open to us because the OFT called no witnesses from Asda. We disagree. We do not consider that evidence from an employee of Asda is necessary in order for us to hold that the information given first by Mr Ferguson to Mr Doyle, and then by Mr Meikle to Mrs Oldershaw, originated from Asda. For the reasons set out above, that is a clear and permissible inference from the contemporaneous documentary evidence.

419. Whilst we have seen no direct evidence of how Mr Meikle obtained that information, we were told that McLelland operated from very small office premises and we accept that it is likely that one of his colleagues, such as Mr Ferguson who it appears had the information originally, gave him that information. It is equally

possible of course that one of his colleagues simply forwarded him Mr Doyle's email.

420. We have, therefore, concluded, that Asda did, either on or shortly before 24 September, communicate to McLelland that Asda would be increasing its retail prices for, at the least, cheeses supplied to it by McLelland on 29 September.

Asda's state of mind as 'A'

421. In order for the A to B limb of this Strand to be established, Asda must have had the requisite state of mind at the time it passed its future retail pricing intentions to McLelland. In other words, we must find that Asda may be taken to have intended, or in fact foresaw, that McLelland would pass Asda's future retail pricing intentions to its competitor-retailers with a view to influencing conditions on the retail cheese market.

422. The OFT submitted that Asda's state of mind could be inferred from any or all of the following matters:

(a) Asda subsequently received and acted on confidential future pricing information without objection. This is based on three internal Asda emails dated 10, 22 and 23 October respectively and, in so doing, Asda expressly discussed how its pricing behaviour would give a "*strong signal that* [it] *had no intention of holding back the market*";

(b) the 2003 FLM Initiative provided similar examples of Asda acting conditionally and participating in the co-ordinated setting of retail prices;

(c) Asda's participation in the 2002 Cheese Initiative;

(d) Asda was facing the same request for a cost price increase that Tesco was facing and Asda would not have wanted to be 'out of line' on retail prices; and

(e) Asda's admission of its participation in the 2003 Cheese Initiative pursuant to its ERA.

423. We have concluded that, based on the evidence we have seen, these points do not, whether individually or cumulatively, substantiate the OFT's conclusion, as recorded at paragraph 5.516 of the Decision, on this issue.

424. In our judgement, although the OFT can rely on Asda's ERA as some evidence, it is very little probative value in establishing Asda's conduct and state of mind at the relevant time. Furthermore, Tesco has challenged that evidence and argued that there is nothing to support the conclusion that Asda had disclosed its future retail pricing intentions to McLelland with the intention, or actual foresight, that McLelland would use that information to influence market conditions on the retail cheese market by passing it to Asda's competitors. On the contrary, Tesco argued that Mr Doyle's email of 24 September showed that Asda had clearly provided its future retail pricing intentions for the legitimate purpose of packing and labelling. We must, therefore, examine each of the other points relied upon by the OFT to establish Asda's state of mind. It is convenient to address these in reverse order.

425. First, it is true that Asda was faced with the same proposal for a cost price increase from McLelland that its competitors had received but that, of itself, tells us nothing about how Asda reacted to that proposal. Whilst the Tribunal accepts that Asda was unlikely to have wanted its retail cheese prices to be higher than those of its competitors, that simple commercial reality is not sufficient to discharge the burden of proof on the OFT, namely to prove on the balance of probabilities that Asda had disclosed its retail pricing intentions to McLelland with the requisite state of mind on or shortly before 24 September.

426. Secondly, whilst Asda accepted that it participated in the 2002 Cheese Initiative, that was a separate infringement, which occurred approximately one year previously and in markedly different market circumstances, most notably, the intense pressure from the farmers for an increase in farmgate prices. Furthermore, we have no evidence as to who the individuals concerned at Asda were in this particular instance since we do not know who passed this information to

McLelland. He or she might have been different from any of those individuals involved in the 2002 Cheese Initiative. We simply do not know. Whilst the infringement is committed by Asda as an undertaking, and not by the individuals employed by it (who form a part of the same undertaking with their corporate employer), Asda's state of mind can only be established by reference to the knowledge and intentions of its employees.

427. Thirdly, similar criticisms to those set out in the previous paragraph can be made as regards the OFT's reliance on Asda's participation in the 2003 FLM Initiative. We have seen no evidence that the same individuals were involved at Asda with both cheese and FLM, and it is clear that, according to the Decision, McLelland was not involved in the 2003 FLM Initiative. It did not supply FLM and was not an addressee of that part of the Decision: see paragraphs 1.5.iii. and 7.2.

428. Fourthly, it is our view that, whatever the correct interpretation of the emails of 10, 22 and 23 October referred to at paragraph 422(a) above, those communications post-date that of 24 September by a fortnight and more. In our view, what Asda did with information it appears to have received on or around 10 October can shed little, or no, light on its state of mind when imparting its own intentions to McLelland, with a *prima facie* legitimate commercial purpose, on or before 24 September. There would need to be some evidence demonstrating that the same state of mind existed at that earlier time. No such evidence has been adduced in this appeal.

429. For these reasons, we have reached the conclusion that there is insufficient evidence before us to establish the requisite state of mind on the part of Asda at the time it passed its future retail pricing intentions to McLelland on, or shortly before, 24 September.

D. The Tribunal's conclusion on Strand 1

430. It is, therefore, our judgement that, although the OFT has established that Asda passed its future retail pricing intentions to McLelland on or before 24 September, the evidence was not sufficient to satisfy us to the requisite standard that Asda may be taken to have intended, nor that it in fact foresaw, that that information would be

passed by McLelland to Asda's competitors. In circumstances where the OFT has failed to establish a necessary element of the A to B transmission, there is no need to carry out an analysis of the alleged B to C transmission, said to be from McLelland to Tesco.

XXII. STRAND 2 OF 2003: SAINSBURY'S AS A; McLELLAND AS B; AND TESCO AS C

A. Outline of Strand 2

431. The OFT's findings in relation to Strand 2 of the 2003 Cheese Initiative are set out at paragraphs 5.541 to 5.559 of the Decision. It was the OFT's case that, on 30 September, Mr Meikle disclosed to Mrs Oldershaw that Safeway and Sainsbury's were going to increase retail prices on certain cheese lines in that he faxed to Mrs Oldershaw "*pristine*" labels, showing retail prices which those retailers had not yet begun to change in-store. The OFT found that that information had been previously disclosed to McLelland by Safeway and Sainsbury's and, in the case of Sainsbury's only, that that had been done with the intention or foresight that such information would be passed to other retailers. No infringement was found against Safeway, however, because the OFT accepted that it was not in possession of any evidence in relation to the 2003 Cheese Initiative demonstrating the circumstances in which Safeway had disclosed its future retail pricing intentions to McLelland.

B. Background to Strand 2

432. On 29 September, Mr Brian Skeffington of McLelland sent an internal email to Mr John Bolton, the manager of McLelland's Mauchline packing facility. That email was copied to several other McLelland employees, including Mr Calum Morrison and Mr Meikle, the account managers for Sainsbury's and Tesco respectively. Mr Skeffington stated as follows:

> "To confirm [the] earlier telephone call in which I asked for your assistance to provide photocopy examples of all pre-pack labels that have been packed with the new retail prices as advised ...
>
> This information is to send to the buyers this afternoon so that they can be encouraged with proof that retails have moved and expedite price increases across the board."

433. The OFT analysed this email in the Decision at paragraphs 5.518 to 5.528. It determined that this email meant that McLelland staff were planning to, and did, photocopy price labels to demonstrate to the retailers' cheese buyers, like Mrs Oldershaw at Tesco, that retail price increases were being implemented by their competitors. During the investigation, McLelland informed the OFT, pursuant to its ERA, that the labels copied were most likely Safeway and/or Sainsbury's labels. The OFT concluded that they were both. The OFT further concluded that the retail prices to which the labels related were future prices. It reached this conclusion on the basis of the wording used in Mr Skeffington's email, taking into account the fact that, for random-weight cheeses, there would be a time-lag between packing them with the new prices printed and those same packs reaching the retailers' shelves (see paragraph 18(b) above).

C. A to B: did Sainsbury's pass its future pricing intentions to McLelland?

A to B transmission

434. Whilst we note Sainsbury's and McLelland's ERAs, there is no direct evidence of a transmission from either Sainsbury's or Safeway, in the role of 'A', to McLelland as 'B', of their respective future pricing intentions. It was the OFT's case, however, that such transmissions must have taken place in light of an email sent by Mr Meikle of McLelland to Mrs Oldershaw of Tesco on Tuesday, 30 September. It stated, in pertinent part:

> "Lisa,
> ...
> I have faxed copies of the Safeway & JS [Sainsbury's] labels to you.
> Safeway Savers Mild has increased in price by 26p / kilo and JS [Sainsbury's] "Isle of Bute" has increased by 20p / kilo.
> Regards,
> Stuart"

That email was also said to evidence the B to C (McLelland to Tesco) transmission for this Strand.

435. Both of the cheeses referred to in Mr Meikle's email were random-weight cheeses, meaning that McLelland had printed the prices on the labels on the instructions of Safeway and Sainsbury's respectively. In order for McLelland to have printed those labels, it is axiomatic that the two retailers must have provided their new retail

prices to McLelland. It goes without saying that, at the time those prices were provided to McLelland by the retailers, they would have been future prices.

436. We are satisfied, on the evidence before us, that by 30 September, someone at Sainsbury's (and Safeway) had disclosed its future retail pricing intentions to McLelland and that there was, therefore, an A to B transmission.

Sainsbury's state of mind as 'A'

437. It is now necessary to examine the state of mind of Sainsbury's at the relevant time (as we have said, no finding of infringement was made against Safeway). The OFT found at paragraph 5.543 of the Decision that Sainsbury's disclosed its future retail pricing intentions to McLelland in circumstances where it may be taken to have intended, and did in fact foresee, that McLelland would pass that information on to competing retailers to influence conditions on the retail cheese market. The OFT accepted that Sainsbury's would have needed to disclose its retail pricing intentions to McLelland in respect of Isle of Bute cheddar in order for the latter to print the relevant prices on the labels. As such, the OFT accepted that there was a legitimate reason for the disclosure (see Decision, paragraph 5.522). The OFT relied, however, on the context in which that disclosure was made in order to establish that Sainsbury's nevertheless had the requisite state of mind:

(a) the proposal for a "*£200 tonne increase on all business from October 2003*" sent by McLelland to Sainsbury's on 5 September (see paragraph 404, above), which referred to a "*total market move*" involving retail price increases for all cheeses by "[a]*ll major retailers*";

(b) there was no evidence suggesting that Sainsbury's took any steps to distance itself from that proposal and Sainsbury's did not identify any inaccuracies regarding this email as part of its representations on the SO and SSO;

(c) Sainsbury's entered into an ERA with the OFT; and

(d) Sainsbury's participation in the 2002 Cheese Initiative.

438. It is our judgement that those factors, whether taken individually or cumulatively, are not sufficient to establish that Sainsbury's passed its future retail pricing intentions to McLelland with the requisite state of mind. First, we reject the OFT's reliance on Sainsbury's conduct during the 2002 Cheese Initiative for the same reasons that we rejected it in relation to Asda under Strand 1 of the 2003 Cheese Initiative (see paragraph 426 above). Secondly, whilst Sainsbury's ERA can stand as evidence of Sainsbury's state of mind, it has little or no probative value in this regard and, as Tesco observed, there was quite clearly a legitimate labelling reason for Sainsbury's to have provided its future retail pricing intentions to McLelland. Thirdly, as Tesco pointed out, although Sainsbury's received the presentation slides on 5 September, nothing in that presentation proposed that McLelland would co-ordinate or facilitate any unlawful information exchanges. In his witness statement, Mr Ferguson of McLelland said that the slides were "*over-enthusiastic*" and did not accurately represent the position. In particular, he said that there should not have been any reference to all retailers moving their retail prices because McLelland simply did not have that kind of influence. Mr Scouler of Tesco also commented on the slides in his second witness statement (although he did not see them at the time) and said that, in his view, they were not very sophisticated and would have been unlikely to convince any other retailer. Given the consistency in their evidence, and the absence of any evidence to the contrary, we accept these points made by Messrs Ferguson and Scouler.

439. In addition, we note that, on the basis of the evidence before us, Sainsbury's appears to have passed its future retail pricing intentions to McLelland in relation to one line of cheese only, namely Isle of Bute cheddar, at the relevant time. There was self-evidently a legitimate commercial reason for that disclosure, as the very existence of the label faxed by Mr Meikle to Mrs Oldershaw demonstrates. Taking account of Lloyd LJ's statement at paragraph 106 of *Toys and Kits* that there ought not to be a "*cloud of illegality*" hanging over normal, bilateral communications between a retailer and its supplier, it seems to us that, in circumstances where there was a legitimate commercial reason for Sainsbury's to convey the future retail price of Isle of Bute cheddar to McLelland, the OFT must do more than fall back on "*the context in which the disclosure was made*" to establish the requisite state of mind. In this respect we note that this was an instance where, had the OFT chosen to call

witness evidence from Sainsbury's, the outcome may – and we put it no higher than that – have been different.

440. For those reasons, we reject the OFT's case that Sainsbury's disclosed its future retail pricing intentions to McLelland with the necessary state of mind and, as such, the OFT has failed to establish the A to B transmission of this Strand.

D. The Tribunal's conclusion on Strand 2

441. For the reasons set out above, it is our judgement that, although the OFT has established the A to B transmission of future retail pricing intentions by Sainsbury's to McLelland at some point before 30 September, the evidence before us was not sufficient for us to find that Sainsbury's may be taken to have intended, nor that it in fact foresaw, that that information would be passed by McLelland to Sainsbury's competitors.

442. In other instances where the OFT has failed to establish a necessary element of a Strand, we have concluded our analysis at that point. In this instance, however, it is necessary for us to address one particular point arising from the receipt by Mrs Oldershaw of the labels from Mr Meikle since it is of some significance for our analysis of Strand 5 below.

E. Consequential matters arising out of Strand 2

443. It is necessary for us to consider Mrs Oldershaw's actions following receipt of the faxed labels (whether they in fact represented future pricing information or not by that time is a point we do not decide). In her second witness statement, Mrs Oldershaw recorded that she had been concerned at the time she received the fax from Mr Meikle because the labels appeared to be "*pristine*". She believed that the "*labels had come from McLelland's packing units, and that the products they related to might not yet have been available in-store.*" It was her evidence that she telephoned Mr Meikle to tell him that he should not send her information like that and, indeed, that she took the matter sufficiently seriously that she raised it internally with Mr Scouler. A meeting between Mr Scouler and Mrs Oldershaw, on the one hand, and Messrs Irvine and McGregor of McLelland, on the other, was scheduled for 6 October (the "6 October Meeting") (it was in preparation for this

meeting that Mr Meikle had produced the Tesco Briefing Note discussed under Strand 1 above). Mrs Oldershaw stated that at the 6 October Meeting, she complained to the McLelland representatives about Mr Meikle having faxed her the "*pristine*" labels.

444. Mrs Oldershaw accepted that, prior to the 6 October Meeting, she did not raise Mr Meikle's conduct with anyone at McLelland, other than with Mr Meikle himself. She also said that she had no recollection at all of Mr Meikle's response to her telephone call complaining about his conduct. Mrs Oldershaw could not recall whether she had made any written record of her concerns or not. When it was put to her that, had she really harboured any concerns about the labels, she would have recorded them since that was what Tesco's competition law compliance programme required of Tesco staff, she professed not to recall the content of the training she had received. She accepted that there did not appear to be any documents supporting her evidence that she telephoned Mr Meikle to complain about the "*pristine*" labels he faxed to her on 30 September.[114]

445. In support of her evidence that she had concerns about Mr Meikle's fax, however, Mrs Oldershaw referred to a document titled "*McLelland Price Increase Proposal*" (the "Scouler Briefing Note"). That document was undated but it was Mrs Oldershaw's evidence that it was an internal note that she had prepared for Mr Scouler to brief him for the 6 October Meeting. Item number 7 in the Scouler Briefing Note read: "*Competition comission* [sic] *training desperately needed*." In her third witness statement, Mrs Oldershaw said that this corroborated her account that she had raised the "*pristine*" labels issue with Mr Scouler and that it was intended to act as a prompt at the 6 October Meeting to raise the issue that McLelland needed to implement some sort of competition law compliance training. In cross-examination, Mrs Oldershaw maintained that she had "*tabled Competition Commission compliance training on the basis of the label issue*".[115] Mr Scouler confirmed in cross-examination that the Scouler Briefing Note was in the format he usually received from one of his buyers ahead of a meeting with a supplier and that

[114] Transcript, Day 10, pp. 81-83.
[115] Transcript, Day 10, p. 102.

it was likely that he received the document in advance of the 6 October Meeting, although he could not specifically recall receiving this document.[116]

446. The OFT took a number of points on the Scouler Briefing Note. First, it was suggested by Counsel for the OFT that that Note could have been prepared, or at least updated, after the 6 October Meeting. Both Mr Scouler and Mrs Oldershaw demurred from that suggestion[117] and, in the absence of any evidence to the contrary, we accept their evidence on this point. On its face, there is nothing in the terms of the Scouler Briefing Note to suggest that it was not prepared in advance of the 6 October Meeting and there would seem, as Mrs Oldershaw pointed out, to be no reason to go back to such a brief document after a meeting and "*update it with random things*".[118]

447. It was also suggested for the OFT that the reference to "*Competition comission* [sic] *training*" could have been a reference to the Code of Practice set up by the Government following a recommendation from the Competition Commission after its investigation into the activities of supermarkets in 1999 and 2000.[119] Mrs Oldershaw, despite referring to that investigation in her third witness statement, maintained in cross-examination that she had no recollection at all of the investigation, nor of the Code, and that "*Competition comission* [sic] *training*" was simply the phrase that she and other buyers used for "*that kind of training*", in other words, training on competition law obligations.[120] We find the discrepancy between Mrs Oldershaw's recollection at the time she prepared her third witness statement (March 2012) and the time she gave oral evidence before us (May 2012) surprising. However, her position that the reference to the Competition Commission in the Scouler Briefing Note was not a reference to the Code of Practice was corroborated by Mr Scouler's evidence[121] and, taking the two together, we accept that evidence.

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116 Transcript, Day 12, p. 79.
117 See respectively, Transcript, Day 12, pp. 79 and 80; and Day 10, pp. 107 and 110.
118 Transcript, Day 10, p. 107.
119 "*Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom*", October 2000, CM 4842.
120 Transcript, Day 10, pp. 47, 48, 109 and 110.
121 Transcript, Day 12, pp. 81 and 82.

448. Mrs Oldershaw claimed that she raised the issue of Mr Meikle's "*pristine*" labels with the McLelland representatives at the 6 October Meeting. When asked about this in cross-examination, Mrs Oldershaw stated that she believed she had "*definitely raised the label issue*".[122] We do not accept her evidence on this point. Although there was evidence before us suggesting that competition law issues arose in the course of the meeting, Mrs Oldershaw's version of events is contradicted by the evidence of Messrs Scouler and Irvine who both attended the meeting also. Mr Scouler had no recollection at all of the "*label issue*" being raised at the meeting, nor could he specifically recall it being raised in advance although he said that it may have been.[123] There is no other evidence to support her recollection of events.

449. Both Mr Scouler and Mr Irvine remembered, however, that competition-related issues were raised at the 6 October Meeting, but by Mr Scouler, not by Mrs Oldershaw. Mr Irvine recalled suggesting that McLelland's proposed cost price increase might lead to an increase in retail prices for cheese by all grocery retailers, although he did not give any details and revealed no one's specific pricing intentions. Both recalled Mr Scouler putting a stop to that line of discussion as being inappropriate.[124] It would be surprising, if Mrs Oldershaw had actually raised the issue of the "*pristine*" labels, for both these witnesses to recall a discussion in which Mr Scouler sharply put an end to a discussion initiated by Mr Irvine about a generalised increase in retail cheese prices but to have no recollection of a related, and potentially more serious, issue regarding Mr Meikle's conduct being raised. Furthermore, Mr Irvine had no recollection of ever receiving a complaint about Mr Meikle's conduct in any context and indeed he stated that, had there been such a complaint from Tesco, he would "*remember* [it] *very clearly*", it would have "*absolutely stuck in* [his] *mind*".[125] Whilst he did not attend the 6 October Meeting, we also note that Mr Ferguson, Mr Meikle's direct superior at McLelland, was not aware of any complaint having been made about Mr Meikle.[126]

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122 Transcript, Day 10, p. 103.
123 Transcript, Day 12, p. 78.
124 See Transcript, Day 7, pp. 118 and 119; and Day 12, p. 77.
125 Transcript, Day 7, p. 15.
126 Transcript, Day 6, pp. 170 and 171.

450. From the foregoing, we draw the following three conclusions. First, we find that the reference to "*Competition comission* [sic] *training*" in the Scouler Briefing Note was a reference to the issue of the "*pristine*" labels faxed to Mrs Oldershaw by Mr Meikle. Whilst we have some hesitation in reaching this conclusion, not least because it was a somewhat opaque reference to an issue that Mrs Oldershaw stated she regarded as very important, we reject the OFT's ambitious suggestion that this was a reference to the Code of Practice for supermarkets and there was no other suggestion as to what the phrase might have been a reference to. Secondly, in light of our first finding, we accept Mrs Oldershaw's evidence, albeit with some hesitation again, that she raised the labels issue with Mr Meikle by telephone. Finally, in light of the evidence of Messrs Scouler, Irvine and Ferguson, and there being no other indication of the labels having been discussed, we reject Mrs Oldershaw's evidence that she raised the issue of the labels at the 6 October Meeting. It is not necessary for us to speculate as to why that matter was not raised at the 6 October Meeting.

XXIII. STRAND 3 OF 2003: SAINSBURY'S AS A; McLELLAND AS B; AND TESCO AS C

A. Outline of Strand 3

451. The OFT found in the Decision, at paragraphs 5.546 to 5.559, that on 2 October Mr Meikle emailed to Mrs Oldershaw a spreadsheet showing the "*old/current*" and "*new*" prices for various lines of cheese supplied by McLelland to Tesco's competitors. The OFT found that the "*new*" prices relating to Sainsbury's were not yet in store and, therefore, were future retail prices. The OFT submitted that Sainsbury's had given that information to McLelland in circumstances where it may be taken to have intended, or in fact foresaw, that it would be disseminated to its competitors such as Tesco and that Mrs Oldershaw should be taken to have known the circumstances in which Sainsbury's disclosed that information.

B. Background to Strand 3

452. On 2 October, Mr Meikle of McLelland sent Mrs Oldershaw an email stating that "*Sainsbury's have moved retail prices across more of their own label products ...*" Mr Meikle then set out eight lines of cheese with the previous and current prices in

relation to each. He signed off saying "*I have copies of the labels so let me know if you need them faxed to you.*" Notwithstanding the reference here to "*labels*", the OFT accepted in its closing submissions that these related to Sainsbury's prices that had just come in-store.

453. Mrs Oldershaw replied about 20 minutes later requesting that Mr Meikle produce a "*matrix of all your* [McLelland's] *lines, who stocks what and what retail* [prices] *they are currently at.*" Later that day Mr Meikle responded:

> "The attached is a matrix of our pre-pack and deli brands showing the prices across the multiples [i.e. the national multiples, being another way of referring to the retailers]. I have included the old/current retail and the new retail price where relevant. I will keep this updated as changes become visible and also let you know on any own label moves that we identify.
> Give me a call if you want any more information."

Mr Meikle attached a spreadsheet setting out 11 lines of pre-pack cheese and seven lines of deli cheese. For each of Tesco, Asda, Sainsbury's, Safeway and the Co-op, the spreadsheet had two columns titled "*Old Retail*" and "*New Retail*" respectively. The "*New Retail*" column was blank for each of Tesco and Asda. In respect of Sainsbury's, Safeway and the Co-op, some cells in the "*New Retail*" columns for pre-pack cheeses contained prices, whilst other stated "*n/a*", presumably denoting those lines a particular retailer did not stock. There were no "*New Retail*" prices for any of the deli cheeses sold by any of the retailers.

454. The evidence before us suggests that on 2 October, when Mr Meikle emailed Mrs Oldershaw, the "*new*" prices for at least five of the eight pre-pack cheese lines which were stocked by Sainsbury's and included in the spreadsheet, were in fact already in Sainsbury's stores. As the OFT itself noted in the Decision, Sainsbury's, in a memorandum on what it considered to be material factual inaccuracies in the SO, informed the OFT that its retail pricing data suggested that the prices recorded by Mr Meikle for the two branded Seriously Strong lines were in store by 30 September. In addition, we know from other documents on the record, that prices of three random-weight lines were also in-store on or before 2 October. In respect of the other random-weight lines, we simply do not know when those prices appeared in store.

455. It was, however, the OFT's case that the prices in the "*New Retail*" column were future retail prices. Nevertheless, it made no finding of infringement in respect of Safeway or Co-op because it had no, or at least no sufficient, evidence "*in relation to the circumstances under which either retailer disclosed its cheese retail pricing intentions to McLelland.*"

C. A to B: did Sainsbury's pass its future pricing intentions to McLelland?

A to B transmission

456. The OFT did not, in the Decision, give any indication as to when it considered that Sainsbury's passed its future retail pricing intentions to McLelland, nor is there any direct evidence of that transmission. In relation to the random-weight, pre-pack cheeses included in the spreadsheet (nine lines, although Sainsbury's only appears to have stocked six of those), it is clear that Sainsbury's must, at some point prior to 2 October, have passed its future retail pricing intentions to McLelland in order for McLelland to have packed those cheeses. That does not, however, follow for the two fixed-weight lines included in the pre-pack section of the spreadsheet (250g and 500g packs of Seriously Strong), which would not have had the price printed on them. Whilst it is of course quite possible that Sainsbury's had passed its future retail pricing intentions in respect of the fixed-weight cheeses to McLelland, there is simply no evidence of that.

457. We find that Sainsbury's must have passed its future retail pricing intentions in respect of the random-weight cheeses to McLelland and, therefore, in respect of those lines at least, there was an A to B transmission of future retail pricing intentions from Sainsbury's to McLelland.

Sainsbury's state of mind as 'A'

458. At paragraph 5.550 of the Decision, the OFT found that Sainsbury's disclosed the relevant information to McLelland in circumstances in which it may be taken to have intended, and did in fact foresee, that McLelland would use that information to influence conditions on the cheese retail market by passing it on to competing retailers in order to facilitate further cheese retail price increases. The OFT's

reasons for that finding were in fact precisely the same reasons on which the OFT relied in relation to Strand 2 of the 2003 Cheese Initiative (see paragraph 437 above). We rejected those reasons in that context (see paragraphs 438-440 above) and we reject them again here for the same reasons.

459. We therefore conclude that the OFT has not established that Sainsbury's passed its future retail pricing intentions to McLelland in circumstances in which it may be taken to have intended, or did in fact foresee, that McLelland would pass that information on to Sainsbury's competitors, including Tesco.

D. The Tribunal's conclusion on Strand 3 of the 2003 Cheese Initiative

460. For the reasons set out above, it is our judgement that, although the OFT established the A to B transmission of future retail pricing intentions by Sainsbury's to McLelland in respect of certain random-weight cheese lines at some point prior to 2 October, the evidence before us did not provide a sufficient basis for us to conclude that Sainsbury's may be taken to have intended, nor that it in fact foresaw, that that information would be passed by McLelland to Sainsbury's' competitors.

XXIV. STRAND 4 OF 2003: ASDA AS A; McLELLAND AS B; AND TESCO AS C

A. Outline of Strand 4

461. It was the OFT's case, set out at paragraphs 5.560 to 5.570 of the Decision, that on 7 October, Mr Meikle sent Mrs Oldershaw an updated version of the spreadsheet he had previously sent to her on 2 October (see Strand 3 above, in particular paragraph 453). The spreadsheet this time included prices for Asda cheeses and, on the basis of the language used in the covering email, it was the OFT's case that those prices, at least in relation to the random-weight cheeses listed, were future, and thus confidential, prices.

462. The OFT found that Asda disclosed that information in circumstances where it may be taken to have intended, and did in fact foresee, that McLelland would pass that information to Asda's competitors. It concluded that Asda's employees knew that they were acting as part of a "*coordinated market move*".

B. Background to Strand 4

463. On 7 October Mr Meikle emailed Mrs Oldershaw twice. His first email, sent at 08:55, stated:

> "Hi Lisa,
> Quick update on the retail position of Seriously Strong.
> Asda – 250g Coloured and White was £1.52, now £1.71
> - 400g Coloured and White was £2.56, now £2.68
> These prices are taken from the Asda website. We will buy some product form [sic] store this morning and I can fax the receipts to you as confirmation ..."

On the basis of that email, it seems that Asda had moved the retail prices of Seriously Strong pre-pack cheese in-store. The OFT did not seek to contend otherwise.

464. Mr Meikle's second email, sent slightly under two hours later at 10:47, however, on its face appears to pass Asda's future retail pricing intentions to Mrs Oldershaw of Tesco. That email stated as follows:

> "Hi Lisa,
> Please find attached an updated spreadsheet including the new retail prices that Asda will run on McLelland Random Weight branded lines.
> The only Asda label line we do is Extra Special Mull of Kintyre 250g where the retail price has moved from £1.48 to £1.68 ..."

465. The attached spreadsheet was, as Mr Meikle's covering email indicated, an updated version of that sent on 2 October. Apart from McLelland's Seriously Strong, the column of "*New Retail*" prices for Tesco remained blank. That for Asda was, however, filled in. The OFT concluded that it was "*evident*", in particular from the description of those prices as "*new retail prices that Asda **will run***" (emphasis as it appears in the Decision), that the updated spreadsheet contained Asda's future retail pricing intentions. The OFT noted that Asda had not submitted any factual inaccuracies on the OFT's finding in this respect.

C. A to B: did Asda pass its future pricing intentions to McLelland?

A to B transmission

466. The evidence is that the information regarding the retail prices for the random-weight branded lines supplied by McLelland to Asda and set out in Mr Meikle's spreadsheet was passed to McLelland by Asda on 3 October.

467. On 2 October Mr Jonathan Betts of Asda sent an email to Mr Chris Reid of McLelland. He confirmed that Asda had accepted McLelland's proposed cost price increase of £200 per tonne in relation to deli and pre-pack cheeses (this would appear to be a reference to both random- and fixed-weight cheese lines), and that he would inform McLelland the following day "*what changes* [Asda] *will be making, if any, to* [its] *retail position*". The following day, 3 October, Mr Betts emailed Mr Reid at 17:07 stating:

> "... Attached above please find the revised retails per kg I would like applying to your brands supplied to ASDA. Products priced at these levels should be sent into our depots from Monday 6 October onwards ..."

The attachment to Mr Betts' email was a spreadsheet setting out "*revised*" retail prices for 13 lines of cheese. That email was forwarded by Mr Reid to Mr Meikle and Mr Calum Morrison, the McLelland account managers for Tesco and Sainsbury's respectively, on 7 October, a little under an hour before Mr Meikle sent his updated spreadsheet to Mrs Oldershaw. Of the 13 cheese lines for which Mr Betts set out "*revised*" retail prices, only six appeared in Mr Meikle's spreadsheet but the prices for those lines all match precisely the "*revised*" retail prices Mr Betts had notified to McLelland.

468. At the time that McLelland received the information (subsequently conveyed to Tesco) from Asda on 3 October, it quite clearly represented Asda's future retail pricing intentions.

Asda's state of mind as 'A'

469. The OFT found that Asda may be taken to have intended, and in fact foresaw, that its future retail pricing intentions would be passed by McLelland to Asda's retailer-competitors. Tesco contested this finding. We have not, however, determined this matter because, as we explain below, whatever Asda's intentions, by the time Mr Meikle sent his updated spreadsheet to Mrs Oldershaw at 10:47 on 7 October, the retail prices it contained appear to have been live in Asda stores.

D. B to C: did McLelland pass Asda's future pricing intentions to Tesco?

470. As noted, there can be little doubt that Mr Meikle's email to Mrs Oldershaw on 7 October communicated to Tesco information that McLelland had received from Asda. The prices for Asda's pre-pack, branded cheeses set out in the "*New Retail*" column of the updated spreadsheet are exactly the same as those set out by Mr Betts of Asda in his email to McLelland's Mr Reid on 3 October. It is clear that those prices were future prices when Asda notified them to McLelland. That does not necessarily mean, however, that the prices, by the time of transmission to Tesco on 7 October, *still* constituted future information on retail prices. In her opening submissions, Counsel for Tesco relied on an internal Asda email sent by Mr Betts shortly after Mr Meikle's email to Mrs Oldershaw, to establish that they were not future prices (seemingly the only occasion that either party referred to this document).[127]

471. We have concluded that Mr Betts' email of 7 October provides clear, contemporaneous evidence that the Asda prices set out in Mr Meikle's updated spreadsheet were no longer future prices at the time they were sent to Mrs Oldershaw. Mr Meikle sent the updated spreadsheet containing the "*new retail prices that Asda will run on McLelland Random Weight <u>branded</u> lines*" (our emphasis) to Mrs Oldershaw at 10:47 on 7 October. A mere fourteen minutes later, at 11:01, Mr Betts sent an email to a number of his Asda colleagues. The subject line read "*Cheese pricing Update*". Mr Betts wrote "***Brands** moved in the market this Monday ... Retails on our* [Asda's] *<u>branded</u> products moved <u>this morning</u> in line with increased costs*" (bold text in original; underlining added). It might be thought that the reference to "*our branded*" cheeses was a reference to Asda own-label products. That impression is immediately dispelled, however, by the very next line of Mr Betts' email which states that "***Own label** is pursuing a more cautious route ...*" (bold text in original). It is not clear whether Mr Meikle in fact appreciated that he was not sending future pricing information to Mrs Oldershaw, although we note in passing that it was Mrs Oldershaw's evidence that she did not understand the updated spreadsheet to contain future retail pricing information.

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127 Transcript, Day 2, p. 73.

472. Thus, by the time that Mr Meikle emailed Mrs Oldershaw for the second time on 7 October, the retail prices for Asda's branded cheeses were already current retail prices. As such, there was no transmission by McLelland to Tesco of Asda's *future* retail pricing intentions. The OFT did not seek to argue that the transmission of retail pricing information that had only very recently become current (as opposed to future) information was anti-competitive by effect.

473. In light of the foregoing, it is not necessary for us to determine whether Mrs Oldershaw took the information communicated to her by Mr Meikle into account in setting Tesco's retail prices. We would simply note that, if she did indeed take that information into account (and the evidence suggests that she did), it was legitimate for her to do so since, in so doing, she was, to paraphrase the Court of Justice's judgment in *Suiker Unie*, simply adapting intelligently to the existing conduct of her competitors on the market.

E. The Tribunal's conclusion on Strand 4

474. For the reasons set out above, it is our judgement that, whilst Asda did pass its future retail pricing intentions to McLelland on 3 October, McLelland did not pass that information on to Tesco until a time at which those prices were already effective and publicly available in Asda stores. As such, the OFT failed to establish, on the balance of probabilities, that there was any communication of future retail pricing intentions from McLelland to Tesco, i.e. B to C, in the context of this Strand.

XXV. STRAND 5 OF 2003: TESCO AS A; McLELLAND AS B; AND ASDA AS C

A. Outline of Strand 5

475. The OFT found, at paragraphs 5.571 to 5.613 of the Decision, that Mrs Oldershaw sent an email to Mr Meikle of McLelland on 9 October disclosing Tesco's future retail pricing intentions in respect of a number of cheese lines. The OFT accepted that there may have been a legitimate packing reason for that disclosure. It concluded, however, that, because it had found that Mrs Oldershaw had received Asda's future retail pricing intentions only two days previously and since she did not expressly request that McLelland keep Tesco's information confidential, Tesco

may be taken to have intended, or to have in fact foreseen, that McLelland would pass that information to one or more of Tesco's competitors.

476. The OFT also found that the new retail prices notified to Mr Meikle on 9 October had not been set independently by Tesco, in that they corresponded very closely (and, in a number of cases, precisely) to those set by Asda, which Mr Meikle had sent to Mrs Oldershaw on 7 October (see Strand 4 above).

B. Background to Strand 5

477. Following the 6 October Meeting, it would appear that Mrs Oldershaw had a further discussion with Mr Meikle. On 8 October Mr Meikle emailed Mrs Oldershaw attaching a spreadsheet showing the new retail prices that McLelland would "*pack the McLelland random-weight brands at for supply to Tesco*". Mr Meikle also explained that he had "*suggested new retail prices*" for Tesco generic mature cheddar lines. He further requested confirmation from Mrs Oldershaw as to the new retail prices for Caledonian and Scottish lines, as well as confirmation of the dates on which the new cost prices were to be applied. The spreadsheet attached to Mr Meikle's email listed two deli lines, Seriously Strong Coloured and Seriously Strong White. In respect of the latter, the spreadsheet provided a "*New Retail Price*" of £6.83 which was described as a "*Suggested new retail* [price] *to maintain % margin*". The "*New Retail Price*" for the former line was left blank. The spreadsheet provided for a "*New Cost* [Price] *Effective From*" date, stated to be 19 October, in respect of both deli lines. Mr Meikle's covering email made no reference to the retail prices of either of these two deli lines but did refer to 19 October as the date for the application of the new cost prices.

C. A to B: did Tesco pass its future pricing intentions to McLelland?

A to B transmission

478. On 9 October, Mrs Oldershaw replied to Mr Meikle's email of the previous day stating:

> "Stuart
>
> I have amended some of the suggested [retail selling prices] ... please pack to these [retail selling prices] ASAP. – thanks

> As for Costs ... we will increase your cost price by £200 [per tonne] ...
>
> Costs on Seriously Strong PRE PACKS will move on Sun 12th October[.] Costs on all other Mclelland [sic] lines (with the EXCEPTION of [Seriously Strong] Deli as I need to discuss) will move on Sun 19th October ..."

Mrs Oldershaw's email attached a new version of the spreadsheet attached to Mr Meikle's email of the previous day, setting out the various new retail prices, which she was requesting that McLelland pack the various random-weight cheese lines at.

479. It is, therefore, clear that Mrs Oldershaw did send McLelland Tesco's future retail pricing intentions.

Tesco's state of mind as 'A'

480. We find that Mrs Oldershaw's email clearly had a legitimate commercial explanation: she was asking McLelland to pack the random-weight cheese lines at the retail prices set out in the spreadsheet attached to her email and confirming the dates on which the new cost prices would become effective for certain lines. We must therefore consider whether there is any evidence supporting the OFT's case that, notwithstanding that legitimate explanation, Mrs Oldershaw may be taken to have intended, or to have actually foreseen, that McLelland would pass that information to Tesco's competitors in order to influence conditions on the retail cheese market.

481. At the hearing the OFT sought to suggest that, because the spreadsheet attached to Mrs Oldershaw's email had a retail price in it for Seriously Strong White deli, she must have discussed that price with Mr Meikle. It was put to her in cross-examination by Counsel for the OFT that there was no reason for her to have been discussing deli retail prices with Mr Meikle.[128] Mrs Oldershaw accepted that she would have discussed the *cost* prices for deli cheeses with Mr Meikle but denied having ever discussed Tesco's *retail* prices for deli lines. She explained that, although the attachment to Mr Meikle's email of 8 October contained a retail deli price, that did not mean that she had requested that a deli price be suggested by

[128] Transcript, Day 10, pp. 114-117.

McLelland,[129] still less that she intended or foresaw McLelland would pass such information to her competitors. She also pointed out that, whilst Mr Meikle's version of the spreadsheet showed an effective date for the cost price increase in relation to the deli lines, the version she returned to him attached to her email of 9 October had "ON HOLD" by both deli lines because she wanted to discuss those dates.[130] In her third witness statement, Mrs Oldershaw also explained that the retail price of £6.83 in respect of Seriously Strong White deli which appeared in the spreadsheet she sent to Mr Meikle was "*not a future retail price* [she] *intended to implement, but a suggested retail price included in the original version of the spreadsheet ... to maintain ... percentage margin*." Mrs Oldershaw confirmed that that remained her evidence in re-examination by Counsel for Tesco.[131] We accept Mrs Oldershaw's evidence in this respect. It accords with, and supports, our own reading of the emails of 8 and 9 October, and their respective attachments.

482. Is there then any other basis for finding that Mrs Oldershaw may be taken to have intended, or in fact foresaw, that McLelland would pass Tesco's information to Tesco's competitors? At paragraph 5.573 of the Decision, the OFT found that Mrs Oldershaw disclosed her future retail pricing intentions to Mr Meikle in circumstances where, only two days earlier on 7 October, he had sent to her Asda's future retail pricing intentions. That finding of course relies on the OFT's conclusions in relation to Strand 4. Given our finding, set out at paragraphs 470 to 473 above, that that information no longer constituted *future* retail pricing information at the time it was sent by Mr Meikle to Mrs Oldershaw, this provides no support for the OFT's finding on this point.

483. At paragraph 5.577 of the Decision, the OFT also relied on its finding that on three other, prior occasions, namely Strands 1 to 3 of the 2003 Cheese Initiative, McLelland passed to Mrs Oldershaw information about the future retail pricing intentions of Tesco's competitors. Although we have not found any of those Strands to be made out on the evidence that was before us, it will be recalled that, in our judgement, the OFT's case on each of those Strands failed in relation to the

129 Transcript, Day 10, p. 115.
130 Transcript, Day 10, p. 118.
131 Transcript, Day 10, p. 134.

state of mind of retailer A. We did not, therefore, consider it necessary to analyse whether Mrs Oldershaw, on receipt of the alleged B to C transmission by McLelland to Tesco, would have appreciated the circumstances in which she was being given her competitors' future retail pricing intentions (if indeed that was the case). Nor do we consider that to be necessary now. In the context of Strand 2 above, we found as a matter of fact that, on 30 September, when Mr Meikle faxed to Mrs Oldershaw two allegedly "*pristine*" labels, Mrs Oldershaw, believing that those labels represented the future retail pricing intentions of her competitors, rebuked Mr Meikle by telephone and raised her concerns within Tesco with Mr Scouler prior to the 6 October Meeting (although not at the meeting itself). Given that finding, it is our judgement that Mrs Oldershaw cannot be taken to have intended, nor did she in fact foresee, that McLelland would pass Tesco's future retail pricing intentions to Tesco's competitors on or after 9 October. When viewed against that background, we do not find noteworthy the fact that Mrs Oldershaw did not make a written request to Mr Meikle that he treat Tesco's retail pricing intentions as confidential. She had already spoken to him about sending her other retailers' information only a few days earlier and we consider that it was, at the least, implicit that he should treat Tesco's information confidentially also.

D. The Tribunal's conclusion on Strand 5

484. For the reasons set out above, it is our judgement that, whilst Mrs Oldershaw did convey her future retail pricing intentions to McLelland on 9 October, there was a legitimate commercial reason for that communication and the OFT has failed to establish that Mrs Oldershaw may be taken to have intended, or that she in fact foresaw, that McLelland would pass that information to Tesco's competitors.

XXVI. THE TRIBUNAL'S OVERALL CONCLUSIONS ON THE 2003 CHEESE INITIATIVE

485. In conclusion, we have found that there was insufficient evidence to support a number of the conclusions reached by the OFT in the Decision and that none of the five Strands of the 2003 Cheese Initiative, as found in the Decision, are proved as against Tesco. In our judgement, therefore, the finding at paragraphs 1.5.ii. and 7.2 (third indent) of the Decision that there was in 2003 a single overall concerted practice in which Asda, Sainsbury's and Tesco indirectly exchanged cheese retail pricing intentions via McLelland, should be set aside as against Tesco.

XXVII. DISPOSAL OF TESCO'S APPEAL ON LIABILITY

486. For all these reasons, it is our unanimous conclusion that Tesco's appeal against the OFT's findings of infringement in relation to the 2002 and 2003 Cheese Initiatives should be allowed in part.

487. The OFT's findings in relation to the 2002 Cheese Initiative are set aside as against Tesco, save in relation to the communications known as Strands 2, 3 and 7 of that Infringement, where the OFT found that:

(a) Strand 2: On or before 16 October 2002, Sainsbury's disclosed its future retail pricing intentions for cheese to McLelland, in circumstances where Sainsbury's may be taken to have intended, and in fact foresaw, that McLelland would make use of that information to influence market conditions by passing it to other retailers; McLelland did in fact pass Sainsbury's intentions to Tesco, and did so in circumstances where Tesco may be taken to have known the circumstances in which the original disclosure was made;

(b) Strand 3: On 30 October 2002, Tesco disclosed its future retail pricing intentions for cheese to Dairy Crest in circumstances where Tesco may be taken to have intended, and in fact foresaw, that Dairy Crest would make use of that information to influence market conditions by passing it to other

retailers; Dairy Crest did in fact pass Tesco's intentions to Sainsbury's, and did so in circumstances where Sainsbury's may be taken to have known the circumstances in which the original disclosure was made; and

(c) Strand 7: On 5 November 2002, McLelland disclosed to Sainsbury's that it was Tesco's future retail pricing intention to match a number of retail price increases made by Asda, having received that information from Tesco, and that each of Tesco and Sainsbury's acted with the requisite state of mind in disclosing and receiving that information.

It is therefore our judgement that the OFT was right to find that, as a result of its conduct on those three occasions, Tesco did engage in conduct, which had as its object the restriction of competition in relation to the supply of British-produced cheddar and territorial cheeses in the UK, contrary to the Chapter I prohibition. Whether that is sufficient to amount to participation by Tesco in the single overall concerted practice referred to as the 2002 Cheese Initiative and found by the OFT in the Decision, or whether those three instances should be viewed as single, isolated infringements, is a matter for further argument. The remainder of the OFT's findings in relation to Tesco and the 2002 Cheese Initiative are set aside as against Tesco.

488. The OFT's finding that Tesco infringed the Chapter I prohibition by participating in the 2003 Cheese Initiative is set aside in its entirety as against Tesco.

XXVIII. CONSEQUENTIAL MATTERS AND DIRECTIONS

489. As will be clear from paragraph 487 above, this judgment will require us to receive submissions as to whether or not Tesco's infringing conduct in 2002 is sufficient to constitute participation in the single overall concerted practice known as the 2002 Cheese Initiative, in addition to hearing argument in relation to the level of the financial penalty imposed on Tesco.

490. The parties are invited to seek to agree the appropriate form of order disposing of this phase of the appeal on liability and setting out a proposed timetable for the remainder of the proceedings. That is to be submitted to the Tribunal in draft, with any areas on which the parties are unable to reach agreement indicated, within one month of the date on which this judgment is handed down.

Lord Carlile of Berriew C.B.E., Q.C. | Clare Potter | Margot Daly

Charles Dhanowa O.B.E., Q.C. (Hons)
Registrar

Date: 20 December 2012

APPENDIX I: GLOSSARY OF DEFINED TERMS

Defined term	Meaning	Paragraph where first used
16 October email	The email sent by Mr Ferguson to Mr McGregor, each of McLelland on 16 October 2002	231
1998 Act	The Competition Act 1998 (as amended)	2
21 October email	The email sent by Mr Ferguson of McLelland to Mrs Oldershaw of Tesco on 21 October 2002	242
4 November email	The email sent by Mr Arthey of Dairy Crest to Mrs Oldershaw Tesco, copied to two of his Dairy Crest colleagues, Messrs Ryder and Beaumont on 4 November 2002	326
6 October Meeting	The meeting between Mr Scouler and Mrs Oldershaw of Tesco, and Messrs Irvine and McGregor of McLelland, held on 6 October 2003	443
admitting party	See "ERA party"	31(c)
Arla	Arla Foods Limited and Arla Foods UK Holding Limited	30
Arthey Email	The email sent by Mr Arthey of Dairy Crest to a number of his Dairy Crest colleagues on 30 October 2002	287
Asda	Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited and Broadstreet Great Wilson Europe Limited	31
basket policy	Tesco's policy of matching any lower prices charged by one of its major retailer-competitors on a notional basket of goods	23
Dairy Crest	Dairy Crest Limited and Dairy Crest Group plc	13(a)
Dairy Crest briefing document	Dairy Crest document sent to Tesco and other retailers on or around 23 September 2002 relating to the proposed £200 per tonne cost price increase	195

Defined term	Meaning	Paragraph where first used
Decision	The decision taken by the OFT on 26 July 2011, issued on 10 August, and entitled "Dairy retail price initiatives" (Case CE/3094-03)	2
Dyestuffs	Case 48/69 *ICI v Commission* [1972] ECR 619	45
ERA	Early resolution agreement	31(b)
ERA party	Refers to one of the seven parties that concluded ERAs with the OFT, namely Asda, Dairy Crest, Glanbia, McLelland, Safeway, Sainsbury's and Wiseman	31(c)
farmgate price	The price paid to the farmers by the suppliers for the raw milk	11
FLM	Fresh liquid milk	1
Football Kits	Judgment of the Tribunal in Cases 1021 & 1022/1/1/03 *JJB Sports plc and Allsports Ltd v OFT* [2004] CAT 17	44
Glanbia	The Cheese Company Limited, Waterfood Foods International Limited, Glanbia Investments (UK) Limited and Glanbia (UK) Limited	13(b)
Guidelines on Horizontal Co-operation Agreements	Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements, OJ 2011 C11/1	78
Infringements	The 2002 and 2003 Cheese Initiatives as defined at paragraph 1.5 of the Decision and set out at paragraphs 33 and 34 of the judgment	9
KPIs	Key performance indicators	22
McLelland	Lactalis McLelland Limited	13(c)
Morrisons	WM Morrison Supermarkets plc	31(b)
national multiples	See "retailers"	15
NFU	National Farmers' Union	164
NFU Scotland	National Farmers' Union of Scotland	164

Defined term	Meaning	Paragraph where first used
notes of interview	Notes and/or transcripts of interviews that were conducted (whether by the OFT or solicitors acting for one or other of the ERA parties) with individuals who were employed by one or other of the companies under investigation at the time of the Infringements	137
OFT	The Respondent, namely the Office of Fair Trading	2
OFT's Rules	The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751)	117
ppl	Pence per litre	1
raw milk	The untreated, unprocessed milk bought directly from dairy farmers by the suppliers	11
retailers	Those grocery retailers with multiple stores across Great Britain, the so-called "national multiples", who were addressees of the Decision, including Tesco	15
Safeway	Safeway Stores Limited, Stores Group Limited and Safeway Limited	31(a)
Sainsbury's	Sainsbury's Supermarkets Limited and J Sainsbury plc	31(a)
Scouler Briefing Note	The briefing note prepared by Mrs Lisa Oldershaw for Mr John Scouler, both of Tesco, in advance of the 6 October Meeting	445
SO	The Statement of Objections issued by the OFT on 20 September 2007	31(b)
SSO	The Supplementary Statement of Objections issued on 23 July 2009	31(e)
Storey Interview	Interview conducted by Mr Heideman of the OFT with Mr Storey of Asda on 26 June 2008	339
suppliers	A reference to both processors and suppliers of dairy products to the retailers	12
Tesco	The Appellants, namely Tesco Stores Limited,	2

Defined term	Meaning	Paragraph where first used
	Tesco Holdings Limited and Tesco plc	
Tesco Briefing Note	An internal McLelland document created by Stuart Meikle on or around 2 or 3 October 2003	407
Tesco DSGM	The Tesco Dairy Supply Group Meeting held on 13 September 2002	172(b)
TFEU	The Treaty on the Functioning of the European Union	45
Toys and Games	Judgment of the Tribunal in Cases 1014 & 1015/1/1/03 *Argos Ltd and Littlewoods Ltd v OFT* [2004] CAT 24	44
Toys and Kits	Judgment of the Court of Appeal ([2006] EWCA Civ 1318) in the joined appeals against the Tribunal's judgments in *Football Kits* and *Toys and Games*	44
Tribunal's Rules	The Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) ,as amended by the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (S.I. 2004/2068)	123
Wiseman	Robert Wiseman & Sons Limited and Robert Wiseman Dairies plc	31

APPENDIX II: DRAMATIS PERSONAE

Addressees of the Decision (see paragraphs 1.5 and 7.2 of the Decision)

Infringement(s)	Undertaking(s)	Defined term used in Judgment
2003 FLM Initiative	Arla Foods Limited and Arla Foods UK Holding Limited	Arla
2002 Cheese Initiative 2003 Cheese Initiative 2003 FLM Initiative	Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited and Broadstreet Great Wilson Europe Limited	Asda
2002 Cheese Initiative 2003 FLM Initiative	Dairy Crest Limited and Dairy Crest Group plc	Dairy Crest
2002 Cheese Initiative	The Cheese Company Limited, Waterfood Foods International Limited, Glanbia Investments (UK) Limited and Glanbia (UK) Limited	Glanbia
2002 Cheese Initiative 2003 Cheese Initiative	Lactalis McLelland Limited, which was formed following the acquisition of A McLelland & Son Limited by Groupe Lactalis	McLelland
2002 Cheese Initiative 2003 FLM Initiative	Safeway Stores Limited, Stores Group Limited and Safeway Limited	Safeway
2002 Cheese Initiative 2003 Cheese Initiative 2003 FLM Initiative	Sainsbury's Supermarkets Limited and J Sainsbury plc	Sainsbury's
2002 Cheese Initiative 2003 Cheese Initiative	Tesco Stores Limited, Tesco Holdings Limited and Tesco Plc	Tesco
2003 FLM Initiative	Robert Wiseman & Sons Limited and Robert Wiseman Dairies plc	Wiseman

Individuals referred to in the course of the Judgment

Where an individual's name is followed by "(W)", this denotes that he or she gave evidence before the Tribunal. All positions within an organisation are stated as at 2002/3.

Person	Organisation; and, where relevant, role	Paragraph where first introduced
Allen, Mark	Dairy Crest; executive director for cheese	210
Arthey, Neil	Dairy Crest; account manager for Tesco (cheese and spreads from January 2001 to February/March 2003)	282
Beaumont, Colin	Dairy Crest; sales director with responsibility for Tesco account	210
Bennett, Harvey	Asda; general manager for chilled foods and dairy products	390(d)
Betts, Jonathan	Asda; cheese buyer	467
Bolton, John	McLelland; manager of packing facility at Mauchline	432
Brown, Chris	Asda	390(d)
Cottle, Finn	Sainsbury's; general manager for dairy and cheese	229
Day, Alasdair	McLelland	390(c)
Doyle, Gerry	McLelland; operations manager	390(c)
Feery, Paul	Dairy Crest; senior national account manager for Sainsbury's	282
Ferguson, Thomas (W)	McLelland; in 2002 account manager for Tesco and in 2003 national account controller	32
Flower, David	Dairy Crest; commercial director for cheese, liquids and spread for the Sainsbury's account	311
Haywood, Bill	Dairy Crest; managing director, retail milk and juice	296
Heideman, Tom	OFT; investigation team	339
Hirst, Rob	Tesco; category manager for dairy	63

Person	Organisation; and, where relevant, role	Paragraph where first introduced
Irvine, Alastair (W)	McLelland; joint managing director	146
Jipps, Matthew	Safeway	316
Lawrence, Tim	Safeway; commercial manager for pricing	316
Mackenzie, Sarah	Sainsbury's; senior buyer for cheese	222
McGregor, Jim	McLelland; sales director	147
Meikle, Stuart	McLelland; national account manager for Tesco (2003 only)	321
Morrison, Calum	McLelland; account manager for Sainsbury's	404
Oldershaw, Lisa (W)	Tesco; buying manager for cheese	9
Owen, Mike	Co-op; cheese buyer	321
Pritchard, Peter	Asda	390(d)
Reeves, Arthur (W)	Dairy Crest; commercial director for cheese	18(b)
Reid, Chris	McLelland; account manager for Asda	467
Rigby, Chris	Tesco; buyer for butter, spreads and fats	195
Robbins, Kenton	Dairy Crest; senior account manager for Asda	328
Ryder, Chris	Dairy Crest	326
Scouler, John (W)	Tesco; category director for dairy	63
Skeffington, Brian	McLelland; sales support manager	390(c)
Storey, David	Asda; senior buyer for cheese	338
Stump, Colin	Glanbia	207(b)
White, Russell	Safeway	316
Wilkinson, Richard	Dairy Crest	347