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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24 May 2012

Before:

LORD CARLILE OF BERRIEW CBE QC
MARGOT DALY
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING (DAY 12)

APPEARANCES

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

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

1 Thursday, 24 May 2012

2 (10.00 am)

3 MR JOHN SCOULER (continued)

4 **LORD CARLILE:** Mr Scouler, you're still on oath.

5 Mr Morris.

6 Cross-examination by MR MORRIS (continued)

7 **MR MORRIS:** Good morning, Mr Scouler.

8 Yesterday, when I asked you some questions, you
9 recall that I referred to a total cost price of around
10 £17 million based on Tesco purchases of around 80,000 to
11 90,000 tonnes, you remember that?

12 **A.** Yes, I do, sir.

13 **Q.** I asked you, this is Day 11, page 64, approximately line
14 22, whether a figure of £17 million would be a big
15 issue, and you said:

16 "Yes, it would have been. It would be a material
17 sum."

18 Now, we do not have precise figures for British
19 cheese, but if that figure of £17 million that I gave
20 you was in fact, say, 14 million or 9 million or even
21 6 million, that would still be a material sum for Tesco,
22 wouldn't it?

23 **A.** I think -- a material sum, I think, in a commercial
24 negotiation of that scale and size would probably be
25 more than £5 million.

1 **Q.** Also in the course of yesterday I asked you questions
2 about participation in the initiative, and you will
3 recall that your counsel or your company's counsel then
4 raised questions about what I meant about the word
5 "participating", you'll remember that little
6 interchange?

7 **A.** I do.

8 **Q.** Can I just be clear what the OFT means by that shorthand
9 phrase. "Participation" is raising cost and retail
10 prices on all cheese products in line with the proposal
11 first put forward by Dairy Crest for a £200 per tonne
12 increase. That's what I mean and what the OFT means
13 when I use the shorthand "participation".

14 I asked you questions about Tesco indicating its
15 willingness to raise cost and retail prices in that way,
16 and particularly indicating at the meeting on
17 25 September that you think you may have attended, which
18 you don't recall, on page 148 of yesterday's transcript.

19 Now, I'm suggesting to you that, both generally and
20 at that meeting, Tesco indicated that Tesco was willing
21 to raise its cost and retail prices in line with the
22 Dairy Crest proposal that had just been received.

23 That's right -- and I'm putting that question to you --

24 **LORD CARLILE:** Miss Rose rises not unexpectedly.

25 **MISS ROSE:** This witness has said on more than one occasion

1 that he cannot recall this meeting.

2 **LORD CARLILE:** I think, Miss Rose, that Mr Morris is
3 certainly entitled to put to the witness that, to his
4 knowledge, if that's the assertion, Tesco was willing to
5 raise its cost and retail prices in line with the
6 Dairy Crest proposal. Now, there's a dot dot dot at the
7 end of that which I was waiting for. In the knowledge
8 that it was part of a concerted attempt to raise prices.

9 **MR MORRIS:** Well --

10 **MISS ROSE:** Sir -- sorry, can I just respond to that.

11 **MR MORRIS:** Sir, can I --

12 **MISS ROSE:** What you have just said is a matter of very
13 great significance, and I'm going to return to it in my
14 closing submissions, because the case that has been
15 mounted by the OFT throughout this hearing --

16 **MR MORRIS:** Sir --

17 **MISS ROSE:** -- as to what the initiative or the plan is now
18 said to be is very significantly different from the case
19 pleaded in the OFT's defence and further and better
20 particulars, because, sir, as you rightly say, it was
21 central to the OFT's original case that the plan was for
22 a coordinated, concerted price rise. That has not been
23 put to any witness and, as you've just heard, has not
24 been put to this witness.

25 **LORD CARLILE:** Before you respond, Mr Morris, because this

1 may help you, I'm trying to be helpful. I should have
2 said -- should say that when I used the term
3 "knowledge", I meant it in the broadest legal sense in
4 which you opened the case on behalf of the OFT.

5 **MR MORRIS:** I'm grateful for that observation, sir, but can
6 I just make an observation. Every time I get to this
7 question, Miss Rose rises. What then ensues is a debate
8 which is a matter of submission. That is, in my
9 submission, a matter to be dealt with in submission,
10 it's interrupted the flow of the questions, it indicates
11 to the witness the area of the debate and, in my
12 submission, it's not an appropriate manner.

13 I was attempting to clarify, in the light of
14 Miss Rose's interjection yesterday, what I mean by the
15 term, for the benefit of the witness. I will make that
16 clarification again, and it's not about knowledge of
17 concerted action, this is a question of fact. It's not
18 a question of law, it is a question of fact. And let me
19 make it clear, if I may, both to the Tribunal and to the
20 witness, what -- when I ask the question "willingness to
21 participate in the initiative", the question I'm asking
22 the witness is willing to raise cost and retail prices
23 in line with the proposal for a £200 per tonne increase.

24 Let me further make this point clear: it is part of
25 our case that that proposal had a number of elements to

1 it, and I have asked the witness about that and he has
2 answered those questions. That proposal has the
3 following elements in it. It was a proposal from A to B
4 for a £200 per tonne cost price increase, it was
5 a proposal also that included a suggestion of a £200 per
6 tonne retail price increase, and I have asked the
7 witness the question about whether or not he was aware
8 that that proposal was going rounds the market. But
9 I have asked that question and I have got the answer.

10 **LORD CARLILE:** That's the element I was referring to
11 specifically.

12 Can I just say that I think it's very important for
13 us, you will understand that we have been discussing
14 this case in some detail, without reaching any
15 decisions, obviously, over the last 12 days, and it is
16 very helpful to us if questions about participation also
17 focus on whatever is the requisite mental element. I'm
18 now trying to avoid the word "knowledge".

19 **MR MORRIS:** I understand that, sir. But I don't think
20 I need to, or it is right for me -- I have asked the
21 witness, I'm sure you would agree, in painstaking detail
22 about what his understanding of what that proposal, the
23 original Dairy Crest proposal, was, I've asked those
24 questions. It is our case that that is a proposal for
25 cost, for retail and for industry-wide. The word

1 "industry-wide" means that it's a request or a proposal
2 for a rise not just by retailer A but by all of them.

3 I have put that to the witness, and I have also put
4 to the witness, to all witnesses, that when they
5 received the proposal, they were aware that that
6 proposal was going to everybody else.

7 **LORD CARLILE:** That's the key element.

8 **MR MORRIS:** With respect, I would suggest I have made that
9 clear throughout.

10 **LORD CARLILE:** You now know what concerns us, Mr Morris, so
11 let's move on in the hope that we can get on without too
12 many interruptions, injury time, yellow cards or
13 anything else, wherever they come from.

14 **MR MORRIS:** I have been trying to pare down overnight. Now
15 I will not ask a question specifically about the
16 meeting, but when I ask the question -- well, actually
17 when I ...

18 **MS POTTER:** Sorry, before we go on, Mr Morris, can we just
19 look back at the transcript because I want to be
20 absolutely clear.

21 When you were outlining your elements of the
22 proposal:

23 "It was a proposal from A to B for a £200 per
24 tonne ..."

25 Is it B to A or A to B? I'm not sure.

1 **MR MORRIS:** Sorry, I wasn't using As and Bs in the A to B
2 test.

3 **LORD CARLILE:** You meant B to A.

4 **MR MORRIS:** What I meant, it wasn't A to B. What I meant
5 was that when it came individually to each individual
6 retailer, it was a bilateral proposal -- the fact of it
7 was bilateral.

8 **LORD CARLILE:** It helps us if we refer to the processors as
9 B, because they are B.

10 **MR MORRIS:** It was a proposal by B to each of the As.

11 **MS POTTER:** Right, that's useful, thank you.

12 **MR MORRIS:** But the proposal was for all the As to do it,
13 that's the second element, and the third element is that
14 all the As knew that all the As were being asked.

15 **LORD CARLILE:** Right, well this is a bit like a player being
16 injured badly in the first minute of the match but let's
17 now get on, shall we?

18 **MR MORRIS:** In the light of that interjection, and just to
19 make sure that I asked the question correctly, if you
20 give me a moment, I just want to check back on
21 yesterday's transcript.

22 **LORD CARLILE:** Of course.

23 (Pause)

24 **MR MORRIS:** I'm very grateful for the time.

25 At page 148 of yesterday, I said:

1 "Question: In the light of your knowledge of what
2 the proposal was, which you've just accepted, I would
3 suggest to you that you indicated that Tesco was willing
4 to participate?

5 "Answer: At that time I hadn't ruled out Tesco
6 taking a price increase. If that meeting had taken
7 place I would not have ruled out the assumption of Tesco
8 taking a cost increase because that, again, goes back to
9 the principle of, you know, it would have potentially
10 opened up a different area so discussions would have
11 been ongoing.

12 "Question: If you had hesitated ... it would have
13 been extremely damaging ..."

14 Line 16:

15 "Question: So what I'm suggesting to you is you
16 didn't hesitate, I'm suggesting to you that you actually
17 said, 'We are willing to participate'?

18 "Answer: I don't recall saying that, sorry.

19 "Question: I would suggest that, given what was
20 going on at the time, you must remember one way or the
21 other, and I'm asking you to think again, you must
22 remember that you actually gave an indication that you
23 were willing to participate?

24 "Answer: I can't remember the specifics of it, but
25 I would have been open and prepared to have a discussion

1 around sort of cost prices ..."

2 Now, in the light of that answer and in the light of
3 the objection about my language, about the use of the
4 word "participation", and in the light of the
5 clarification which I hope I have given to everybody,
6 I am putting to the witness again the suggestion that
7 you indicated that Tesco was willing to raise its cost
8 and retail prices in line with the Dairy Crest proposal
9 you had just received?

10 **A.** What I would say, sir, is that I was prepared to have
11 a discussion around cost prices. We clearly,
12 I indicated, had a formal request from a supplier, and
13 if a supplier makes a formal request for a cost price
14 increase then we would end up having a negotiation
15 around the cost price, sir.

16 **Q.** There was no point in having a negotiation because it
17 was £200 -- the proposal was a £200 per tonne proposal,
18 you knew what it was. I'm suggesting to you that that
19 proposal was put to you, I'm not suggesting to you that
20 you then and there pressed the button and put the price
21 increases through, what I'm suggesting to you is that at
22 that meeting you indicated to Dairy Crest that you were
23 willing -- you were willing to accept the cost price
24 increase that they had put forward?

25 **A.** As I say, sir, I can't remember that meeting

1 specifically on 25 September, but it would be unlikely
2 for me to just say I would accept a cost price of any
3 nature or size, because commercially that would maybe
4 undermine the future negotiating position of the buyers
5 if I was just to accept a flat fee of any degree.

6 **Q.** Mr Scouler, this was not a normal negotiation with horse
7 trading about the amount of the cost price increase.
8 There was never any horse trading thereafter about the
9 amount of the cost price increase. You were either
10 effectively in or you weren't in. What I'm suggesting
11 to you, and I put it for the last time, is that that
12 answer that you gave about constraining the buyers'
13 freedom to negotiate thereafter makes no sense in the
14 context of what was then being proposed, which was an
15 across-the-board all cheese line, all retailer £200 cost
16 increase.

17 I would just invite you to consider finally once
18 again, cast your mind back and think carefully and tell
19 us whether or not you gave that indication of Tesco's
20 willingness to be on board with the proposal.

21 **A.** As I said, I can't remember the specifics of the
22 meeting, again, if it did take place on 25 September.
23 What I would have assumed I would have done, I would
24 have had a discussion around the cost price, the nature
25 of the size and scale of that cost price. It is

1 unlikely I would have said "I am prepared to take a £200
2 increase" specifically at that, because that leaves open
3 any discussion potentially about cash margin, percentage
4 margin, and that would be potentially unlikely, again to
5 the best of my knowledge, sir.

6 **Q.** I also asked you questions yesterday in this context, at
7 a slightly different stage, about receiving
8 information -- I'm now looking at other retailers'
9 position, not your position -- about receiving
10 information about other retailers' willingness to
11 participate. I asked you about Lisa Oldershaw informing
12 you in October that other retailers were participating,
13 and you said, I think it's page 167, line 4:

14 "It would probably have happened but I can't say for
15 definite."

16 So this is information coming in. Just to be clear,
17 in view of what I have explained about what I mean, what
18 you were accepting in that answer yesterday was that
19 Lisa Oldershaw had probably informed you in October, in
20 the run-up to the decision that you took at the end, to
21 accept -- sorry, in the run-up to the decision at the
22 end of October, that the other retailers had indicated
23 that they would be raising their cost and retail prices
24 by £200 per tonne in line with the proposal?

25 **A.** Sorry, can I ask you to ask that question -- it was

1 quite a long-winded question so I'd like to --

2 **Q.** Yes, it was a very long question.

3 **LORD CARLILE:** Ask from [draft] line 7 downwards again, if
4 you don't mind.

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

6 What you were accepting in the answer you gave
7 yesterday about what Lisa had told you, was that Lisa
8 Oldershaw had probably informed you in October that the
9 other retailers had indicated that they, the other
10 retailers, would be raising their cost and retail prices
11 by £200 per tonne in line with the proposal?

12 **A.** In response, what I would say is that the discussions
13 I would have had with Lisa during October would have
14 been comments that she held back from suppliers to say
15 they were in active discussions around having a cost
16 price increase with other retailers. It would have been
17 done in the spirit of trying to negotiate and to get
18 Tesco to agree to a cost price increase.

19 **LORD CARLILE:** Sorry, I don't understand that answer. It
20 doesn't make any sense to me.

21 Let me just read back what you said because you may
22 want to clarify. I don't blame you for it being
23 incomprehensible, and it's probably my fault:

24 "... what I would say is that the discussions
25 I would have had with Lisa during October would have

1 been comments that she held back from suppliers to say
2 they were in active discussions around having a cost
3 price increase with other retailers."

4 I think we need some clarification of what you
5 meant.

6 **A.** Let me attempt for a second time, sorry, sir.

7 What I was trying to describe was that certain
8 suppliers may have said to Lisa that they are pursuing
9 cost price negotiations with other retailers and that
10 I would be aware of the fact that other retailers were
11 being pursued for a cost price increase.

12 **LORD CARLILE:** I understand that completely. Thank you.

13 **MR MORRIS:** I'm suggesting to you that she told you about --
14 that the information you say she probably gave you,
15 I just want to be absolutely clear that I've got your
16 answer correct, that the information she probably gave
17 you included information that other retailers were going
18 to raise cost and retail price?

19 **A.** I go back to the answer that I gave, which was the cost
20 price increase would have been raised as a negotiating
21 tool.

22 **Q.** Right, but we know, and you may have found out for the
23 first time yesterday, that Lisa Oldershaw received an
24 email -- could you take document bundle 1 and go to
25 tab 52 [Magnum].

1 **LORD CARLILE:** Document 52 opens itself in my bundle,
2 Mr Morris.

3 **MR MORRIS:** Mine is completely unmarked, sir.

4 I took you to this and you observed yesterday
5 that -- I can't remember exactly but, if you'd seen it,
6 you would have done something about it, broadly?

7 **A.** Yes, (inaudible) I said I was surprised to see that.

8 **Q.** What I'm going to suggest to you, but let's assume she
9 didn't send you the email -- not assume, she didn't --
10 that the information that I'm talking about that she
11 gave you would have included the information in this
12 email?

13 **A.** No, the information, the discussions I would have had
14 with Lisa would have been on broadly cost prices and
15 what the pressure was being put on by the suppliers at
16 that time for a cost price increase, sir.

17 **Q.** I'm suggesting to you that we can see here that she is
18 getting information about cost and retail, and there
19 is -- and if she is passing information on to you
20 about -- generally, which you've accepted she probably
21 did, I'm suggesting to you that it is -- I'm suggesting
22 to you that that information included information about
23 cost and retail, and there is no reason why she would
24 not pass on what was in this email?

25 **A.** To the best of my knowledge, the conversations would

1 have been with Lisa around cost prices with those
2 suppliers, not retail prices.

3 **Q.** I'm going to try and... yesterday I had taken you to
4 document 64 [Magnum]. If we try to stick to the
5 bundle a little bit then it will refresh -- I'm not sure
6 I'm going to ask you any more about that document. You
7 remember that's Lisa's internal cost and retail plan
8 with the three waves.

9 What then happened was that Tesco definitively
10 confirmed to the processors that it was going to accept
11 the cost price increase at some point on 29 October in
12 relation to the first wave, and if you go to document 62
13 [Magnum], at this point -- by this time Lisa has had
14 your instruction to go ahead, and the email on the
15 bottom half of 62 is her writing an email to six
16 different processors.

17 **A.** Yes.

18 **Q.** It would be unusual, wouldn't it, to be sending
19 a round-robin email to all your main suppliers,
20 accepting a cost price increase from all of them by the
21 same amount at the same time. Would you agree with that
22 statement?

23 **A.** It would be unusual, sir, but not unprecedented because
24 a look at the list of products, to the discussion we had
25 yesterday about sort of maintaining price hierarchies,

1 you would move all stiltons, and there could be two or
2 three suppliers of stilton cheese, sir, and there could
3 be -- well, and I know there would be three or four
4 suppliers of regional cheese, different brand suppliers.
5 So if you were moving the prices you wouldn't just move
6 one stilton and then the following week another stilton,
7 you would probably move your stilton prices up together,
8 and that is why they may have done -- what she did, to
9 do -- to try and speed the process up, sir.

10 **Q.** How many other occasions do you recall when all
11 suppliers of stilton all asked for the same cost price
12 increase by the same amount at the same time?

13 **A.** The suppliers were asking for a £200 increase or a £180
14 increase, whatever the discussion was taking place with
15 regard to the cost price increases with that supplier,
16 sir.

17 **Q.** Where do you get this figure of £180 per tonne from?

18 **A.** The reason why I occasionally refer to the £180 figure
19 was that, if Lisa was negotiating a margin rate benefit
20 or a quantum -- a cash margin maintenance at 200 or
21 a rate benefit at £180, that's where the two figures
22 come from, sir.

23 **Q.** Mr Scouler, there is no evidence in this case that at
24 any time either -- in the events of autumn, that either
25 a processor or Tesco suggested that the cost price

1 increase should be anything other than £200 per tonne.

2 Is it your evidence to this Tribunal that that was
3 raised, to your knowledge?

4 **A.** Sorry, could I ask you to repeat that question again,
5 please?

6 **Q.** There is no evidence in this case that at any time, and
7 I'm talking about the events of autumn 2002, that either
8 a processor or Tesco suggested that the cost price
9 increase should be anything but £200 per tonne?

10 **A.** Yes, sir, I would agree that was the proposal made by
11 the suppliers.

12 **Q.** Is it your evidence to this Tribunal that you or anyone
13 else at Tesco ever suggested a figure of £180 per tonne
14 instead?

15 **A.** What I don't know was happening with the detailed
16 negotiations that took place between Lisa and her
17 suppliers, and to protect her margin position, to try
18 and manage cost prices down to a minimum, she may well
19 have negotiated a rate increase as opposed to a full
20 benefit, but I cannot confirm that for certain, sir.

21 **Q.** Never mind for certain. To your knowledge, did you ever
22 suggest to anybody within Tesco or a processor that the
23 cost price increase should be £180 per tonne?

24 It's a yes or no question, if I may.

25 **A.** No, but I did have a discussion with Lisa about the

1 benefit between rate and quantum as a discussion around
2 the margin benefits, sir.

3 **Q.** Did you ever suggest to any -- directly yourself, to any
4 processor that the figure should be £180 per tonne
5 rather than £200 per tonne?

6 **A.** No, sir, I wasn't involved in the detailed negotiations.

7 **Q.** And to your knowledge, did Lisa Oldershaw ever suggest
8 to any processor that the figure for the cost price
9 increase should be £180 per tonne?

10 **A.** No, sir, but I would be -- what I would suggest is that
11 she would have negotiated quite -- in a tough, measured
12 way, to try to get the best deal for Tesco. To suggest
13 that she would have just taken a £200 flat may well have
14 surprised me because I think Lisa was quite an
15 independent person, very clear on her own KPIs, and may
16 well have negotiated around those edges, but I don't
17 know that for certain, sir.

18 **Q.** Mr Scouler, I have been roundly criticised in this case
19 for asking questions about what would probably, likely,
20 might have happened.

21 I'm asking you, to your knowledge, did
22 Lisa Oldershaw, to your knowledge -- not what she might
23 have done, to your knowledge -- did she ever suggest to
24 any processor that the figure for the cost price
25 increase should be £180 per tonne?

1 **A.** I don't know what she said individually to the
2 suppliers, sorry, sir.

3 **LORD CARLILE:** So to your knowledge the answer is no?

4 **MR MORRIS:** The answer is no, thank you.

5 What then happened, if you go to document 63
6 [Magnum], is that -- well, if you go back -- rather than
7 taking you to the document, go back to 62 [Magnum]. In
8 that email, you'll see:

9 "I will call you all tomorrow with confirmation."

10 Okay?

11 **A.** Yes, sir.

12 **Q.** What happened, and what Lisa Oldershaw says happened, is
13 that on the next day -- you don't need to look at the
14 document I don't think -- the next day she rang at least
15 six processors and told them the waves, a minimum, that
16 appear on document 64 [Magnum].

17 She told each of the processors of the price
18 increases and of the dates, and she told them that Tesco
19 would be increasing on the 4th, 11th and 18th. You see
20 that from document 63 [Magnum]. What document 63 is is
21 an email, internal Dairy Crest email from Neil Arthey,
22 recording the conversation that he had just had that
23 afternoon with Lisa Oldershaw.

24 I don't know -- you've seen that document before?

25 **A.** Yes, I have, sir.

1 Q. Yes.

2 The OFT says that the information she gave to each
3 of them was about both Tesco's cost and retail prices,
4 so that you know what the OFT's case is.

5 Did Lisa Oldershaw tell you about that email at the
6 time and about those calls that she made?

7 A. No, I don't remember if she did.

8 Q. Did you know that she was passing this information to
9 each of the processors?

10 A. No, I didn't.

11 Q. You recall that for sure, do you?

12 A. I can't remember if she did, sir, no.

13 Q. I would suggest to you that given the fact you had given
14 her the instruction to go ahead, you would have known
15 that she was going to go and tell the processors that
16 you had accepted?

17 A. Yes, I knew she would have a discussion with the
18 suppliers around what she was going to do in terms of
19 the cost price discussion, and that's what I instructed
20 her to do, was to accept the cost price, and she was
21 going to go and see the suppliers to talk to the
22 suppliers and negotiate that cost price and have
23 a discussion around the cost price, sir.

24 Q. What I suggest to you is that what Lisa Oldershaw was
25 doing when she sent that email was indicating to each of

1 the processors, and I've got the word "participating" in
2 my notes here again, that Tesco was going to raise its
3 cost and retail prices by the £200 per tonne increase
4 which we first saw proposed around 23 September. That's
5 what she did, isn't it?

6 **A.** Sorry, I'm unclear what the question is.

7 **Q.** I'll ask the question again.

8 What Lisa Oldershaw was doing was actually -- well,
9 she didn't send an email, I apologise. Well, she sent
10 the email on the 29th, and when she rang round she was
11 indicating to each of the processors that Tesco was
12 going to raise its cost and retail prices by the £200
13 per tonne increase, which is the subject of the
14 proposal, the original proposal by Dairy Crest.

15 **A.** And to the best of my knowledge, what Lisa would have
16 had a discussion was with the suppliers about the £200
17 cost increase that we agreed we should do at the end of
18 October.

19 **Q.** And the decision that Tesco took to move on those dates,
20 and you accept that there was a decision -- there was
21 a decision to move on those dates -- there was
22 a decision taken, and the decision, which was to move at
23 those wave dates, 4th and 11th, was taken before you or
24 anybody else had seen other retailers move their prices
25 in store, subject to Sainsbury's on fixed weight --

1 I'll clarify the question.

2 We know that by that date, Sainsbury's had moved up
3 on fixed weight branded, okay, on, remember, the
4 Seriously Strong, on the 21st/22nd. But apart from
5 that, the decision to move in respect of all the
6 categories listed in that email was taken before you had
7 seen other retailers moving their prices for those
8 products in store?

9 **LORD CARLILE:** Sorry, what's the question?

10 **MR MORRIS:** Do you agree? I'm sorry.

11 **A.** Sorry, sir, I'm still unclear of the question.

12 **Q.** I'll ask you the question in shorter form. I was
13 anticipating the point that Seriously Strong had moved.

14 In general, when you took the decision to raise your
15 prices by those waves, cost and retail, your decision,
16 that decision was taken before your competitor retailers
17 had raised their prices in store for those equivalent
18 products. Do you agree?

19 **A.** Sir, I can't remember. I know the decision was made
20 towards the end of October to accept the cost price, and
21 the schedule then corresponded to support that, but
22 I can't remember at what date or at what specific time.
23 Sorry, sir.

24 **Q.** But the decision you took was not just a decision in
25 principle to raise the cost price, the decision -- I'm

1 not talking about what you communicated. The decision
2 that you took in conjunction with Lisa was not just to
3 raise cost, it was to raise retail, wasn't it?

4 **A.** Yes -- well, accepting a cost price, Lisa would have had
5 to determine a retail price at the same time, or may
6 have delayed that retail price at that stage, and that
7 was her, I assume, first draft of when she was going to
8 propose to change her retail prices on the products that
9 she looked after, after the cost price discussion.

10 **Q.** I'm not sure that that answers the question.

11 You took a decision in principle, you went to Lisa
12 and you said, "Right, time to accept", whatever. I'm
13 suggesting to you that that decision, and I'm not
14 talking about specific lines of cheese, I'm talking
15 about the decision to -- in relation to prices of
16 categories of cheese on particular dates was a decision
17 internally to accept cost and raise retail. That's
18 right, isn't it?

19 **A.** Sorry, could I have clarification on that question
20 again? Sorry, sir.

21 **Q.** The decision that Tesco took internally at the end
22 of October was a decision to move up prices generally on
23 cost and on retail.

24 **A.** The decision we made, sir, at the end of October was to
25 accept a price increase from the suppliers for cheese,

1 sir.

2 Q. And I'll put it to you one more time: and the decision
3 also included a decision to raise retail prices at the
4 same time?

5 A. The instruction I gave to Lisa was to accept a cost
6 price increase at the end of October.

7 Q. So your evidence and your recollection is that you said,
8 "Accept the cost price, Lisa, but we won't make any
9 decision on retail at all"?

10 A. I don't recall the breadth of the conversation. What
11 I do remember saying to Lisa is that we should accept
12 a cost price increase from the supplier. Any more than
13 that I can't remember, I'm sorry, sir.

14 Q. When you saw her document, "Cost and Retail Moves" at
15 document 64 [Magnum], you said, "Well, you see that
16 heading, Lisa, 'Cost and Retail Moves', I'm okay with
17 cost but I'm not okay with retail"; is that the effect
18 of what you told her?

19 A. I can't remember what I specifically said to her at the
20 time, sir, sorry.

21 Q. That is the effect of the evidence you have just given,
22 so I want you to consider very carefully whether that is
23 in fact what happened.

24 The effect of the evidence you have given is, "No
25 decision on retail, Lisa, but we will accept cost.

1 We'll come back to retail later". I'm suggesting to you
2 that that could not possibly have been what happened.

3 **MISS ROSE:** Sir, I'm reluctant, but that's not the effect of
4 the evidence that the witness gave.

5 **LORD CARLILE:** Well, the question has been asked three times
6 so it may be time to move on.

7 **MR MORRIS:** I'm grateful, sir.

8 Can we then go to document 66 [Magnum], this is the
9 next day, and this is a further round-robin email to the
10 same people from Lisa.

11 "As you can see from my hiding away and changing all
12 the figures this week, the £200 T price increase is
13 happening. What I would like from you now is to
14 outline:

15 "How are you proposing to get this money back to the
16 farmers ... and

17 "How you/we address the issue of ..."

18 That's what I -- the cheese maturity issue, which
19 I'm sure you'll be more aware of than I am or understand
20 it certainly better than I do. And she raises those
21 two -- I'm not going to ask you about the two issues,
22 but the question is: she copied you in on this email,
23 this is the day after, so she was keeping you closely
24 informed of what was going on, wasn't she?

25 **A.** Yes, she was.

1 Q. I would suggest that it's obvious from this email, which
2 you saw at the time, that the cost and retail price
3 increase was not a normal commercial increase but formed
4 part of an industry-wide proposal to pay back
5 2p per litre to the farmers? You knew what this
6 increase was about from that --

7 A. Yes, sir.

8 Q. And it was sent to all six at the same time?

9 A. Yes, sir.

10 Q. I would suggest that you knew at the time all the other
11 main retailers were going also to raise their cost and
12 retail prices in line with the proposal to ensure that
13 the 2ppl gets back to the farmers?

14 A. No, I wasn't, sir. Sorry. I knew I was having
15 a discussion with my suppliers around a £200 cost price
16 increase, but I had absolutely no future evidence about
17 what the competitors may or may not have done with
18 regard to that cost price discussion. I was being led
19 to believe that every other retailer had accepted the
20 cost price increase at that time but I had -- I would
21 never, ever have any evidence to support that.

22 Q. Can I move on to a general topic. In paragraphs 31 and
23 32 of your witness statement [Magnum], which is
24 bundle 2A at J -- it's not J, I'm sorry, it's H.

25 This is general, this isn't to do with 2002, and

1 just so the Tribunal -- you talk about cost price
2 negotiations being commercial, a fair amount of cut and
3 thrust:

4 " My buyers knew that suppliers were susceptible to
5 overstating market trends or providing misinformation
6 about other retailers' positions to try to persuade them
7 to accept the cost price increase. As a result there
8 was often a healthy distrust."

9 Essentially, what you're saying there is that your
10 buyers had a distrust of the information that was
11 provided by suppliers in general and that you were wary
12 of the information that was not in the form of till
13 receipts, that's a fair summary?

14 **A.** Yes, sir.

15 **Q.** If you look at the position in autumn 2002 specifically,
16 discussions with the processors at that time were
17 intense, weren't they?

18 **A.** Yes, they would have been.

19 **Q.** And you knew that this arose from their attempt for an
20 across-the-board price rise of £200 per tonne?

21 **A.** Yes, sir.

22 **Q.** And you knew that the processors were also in discussion
23 with the other retailers?

24 **A.** I would assume so.

25 **Q.** Those discussions would also be intense? There was

1 a lot going on at the time?

2 **A.** Yes.

3 **Q.** At the time, Dairy Crest and the other processors were
4 desperate to get you to accept the cost price increase?

5 **A.** Yes.

6 **Q.** In the course of the telephone -- of the conversations
7 that Lisa Oldershaw had with Dairy Crest and the
8 processors -- and the other processors, in relation to
9 the £200 per tonne increase, Lisa Oldershaw told them of
10 Tesco's plans?

11 **LORD CARLILE:** Did you know that, if it be the case?

12 **A.** Sorry, I'm a little bit unclear about what is being
13 asked there.

14 **LORD CARLILE:** It is being suggested, I think, that you were
15 aware that, in the conversations on the telephone that
16 Lisa Oldershaw had with Dairy Crest and the other
17 processors, she told them of Tesco's plans?

18 **MISS ROSE:** Sir, I'm not clear. Is this talking about the
19 conversations on 30 October?

20 **MR MORRIS:** Yes, it is, at least, yes.

21 I'm not saying that you were party to the
22 conversations, but I am suggesting that you knew that
23 she had given those processors information about Tesco's
24 intentions.

25 **A.** Well, to implement it -- sorry, sir -- to implement

1 a cost price increase, she would have had to have had
2 a discussion with the suppliers to, you know, accept the
3 dates, the timings and when that would have been going
4 to be implemented from, sir.

5 Q. And at an earlier stage, you and/or Rob Hirst, this is
6 back in September, had been discussing your position
7 with Dairy Crest?

8 The question I'm just getting to is that you, Tesco,
9 were talking to the processors, you accept that?

10 A. Yes, we were talking to the processors --

11 Q. Yes, and you were telling them, you were giving them
12 information about what you thought and were going to do?
13 It's an obvious -- you just accepted the 30th?

14 A. Yes, I accepted there was discussions around the
15 principle of a cost price increase --

16 Q. And on the 30th -- I'm sorry to interject but I'm
17 conscious of time as well -- Tesco gave at least six
18 processors the dates of the waves of your increases?

19 A. Are you referring to the note that Lisa has outlined
20 here?

21 Q. Yes.

22 A. Yes, sir.

23 Q. It's right, isn't it, that in that way the processors
24 had genuine information from you, you being Tesco, about
25 your, Tesco's, intentions at that time?

1 **A.** Yes, they would have had an understanding that we were
2 going to accept a cost price increase.

3 **Q.** Yes, and you knew that the other retailers would only
4 accept the cost price increase if they could increase
5 their retail prices?

6 **A.** Sorry, sir, I can't speak on behalf of what Sainsbury's
7 and Asda --

8 **Q.** Well -- sorry.

9 **A.** I can't speak on behalf of them, but I would have
10 assumed they wouldn't have -- you know, if they had
11 taken a cost price, they would have had to reflect that
12 in retail price. Unless they had some extra funds or
13 something available, I would have assumed they would
14 have to accept both, sir.

15 **Q.** So what we have is processors sending information to one
16 retailer to show that that retailer -- to show that
17 retailer that the others were going to move their retail
18 prices; this is what the processors were doing? You
19 would accept that?

20 **A.** Can I just clarify what I'm being asked to accept?
21 Sorry, sir.

22 **Q.** Yes, that the processors were sending information to one
23 retailer to show that retailer, let's call him A, that
24 other retailers, C1, 2 and 3, were going to move their
25 retail prices?

1 **A.** And I would be surprised and disappointed if that had
2 taken place, sir.

3 **Q.** And I've suggested to you it was in their interests for
4 the processors to do this?

5 **A.** They may have wanted to do that, yes, as a way of --

6 **Q.** Because they too would have known that the other
7 retailers would only accept the cost price increase if
8 they could increase their retail prices?

9 **A.** Sorry, again, I'm slightly unclear as to what I'm being
10 asked to comment on.

11 **Q.** I'm saying to you that the processors were giving
12 information about other retailers' retail prices
13 because, just as you realised, they realised that those
14 other people to whom they were giving the information
15 would only accept the cost price increase that they were
16 agitating for if the retailer could increase -- if the
17 retailer that they were sending the information to could
18 also increase their retail prices?

19 **A.** No, I wasn't aware that was taking place, sir.

20 **Q.** Right. And I put to you this, it was also in the
21 interests of the retailers -- the retailers, not just
22 the processors -- it was in the interests of each of the
23 retailers that they should disclose and receive this
24 information in the context of the £200 per tonne
25 increase?

1 **A.** I wasn't aware of that, sir.

2 **Q.** I'm not saying were you aware; I'm asking you to agree
3 that it was in the interests of the retailers, each
4 retailer, that the information -- that their information
5 should be passed forward and that they should receive
6 information coming back about retail price intentions?

7 **A.** No, I would regard my discussions with all my suppliers
8 on a confidential basis. I would be very angry and very
9 frustrated if I knew that my information was being
10 passed to one of my competitors, sir.

11 **Q.** As one of those retailers, you must at least have been
12 interested in what Asda or Sainsbury's were going to do
13 at that time?

14 **A.** Yes, I would, sir.

15 **Q.** Yes. Therefore, it was in your interest to receive that
16 information, such information?

17 **A.** No, sir, it wasn't.

18 **Q.** I would suggest that, in the context of what was going
19 on in 2002, the only circumstance in which you would
20 have ignored information that you were receiving from
21 a processor about what a retailer was going to do was
22 that if it was clearly, absolutely clearly, unsound and
23 not credible?

24 **A.** Sorry, I need that question rephrased again,
25 I apologise.

1 **Q.** I'm casting your mind back to 2002, I'm casting your
2 mind back to this effort to try -- by the processors, at
3 least to try and get everybody to go up, and I'm
4 suggesting that in that context, if you received
5 information about what another retailer was going to do
6 about retail prices through the mouth of the processor,
7 the only circumstance in which you would ignore that
8 information would be if you could see that it was
9 clearly unsound or not credible?

10 **A.** But I wouldn't accept that information, sir. I wouldn't
11 pursue it and I wouldn't ask for information, and
12 I wouldn't accept information about what a future
13 competitor's retail price would be.

14 **Q.** You accepted you were receiving information through Lisa
15 Oldershaw about what other retailers were going to do?

16 **A.** I accepted from Lisa Oldershaw that there may well have
17 been discussions that other suppliers were pursuing
18 other retailers for a cost price increase.

19 **Q.** I'm putting to you that when you received the
20 information that you received in 2002 about what other
21 retailers were going to do, information of the sort of
22 document 52 [Magnum], I'm not going to take you back to
23 the document, you did not dismiss that information as
24 irrelevant because you knew that the retailer in
25 question had every reason for you to want to know that

1 information?

2 **A.** As I said earlier, I'd be surprised to have seen that
3 information and don't recall seeing that information at
4 the time.

5 **Q.** There would be no reason, would there, for the processor
6 to give you false -- the processor to give you false
7 information about what another retailer was going to be
8 doing?

9 **A.** There was every reason for it, sir, for a processor to
10 give me false information, whether it could be about
11 cost prices, as I said -- my earlier comments yesterday,
12 a supplier could suggest that, you know, a cost price
13 had been accepted, I was the last one to accept it, and
14 it was unfair, it wasn't the way to do business.

15 **LORD CARLILE:** Correct me if I'm wrong, Mr Scouler, but my
16 impression from your answers to the last few questions
17 is that, really, you're inferring or you're saying that
18 you were aware of compliance issues, competition law
19 issues? Is that what would have made you have
20 misgivings about receiving such information?

21 **A.** I was fully aware of compliance reasons at that time,
22 absolutely fully aware of my responsibilities, yes sir.

23 **LORD CARLILE:** So what you're saying is that that would have
24 meant you would not have wanted to receive such
25 information?

1 **A.** Yes, sir, correct.

2 **LORD CARLILE:** That's how I understood your answers, thank
3 you.

4 It's a matter for us to assess, Mr Morris,
5 obviously.

6 **MR MORRIS:** Yes, it is, but there may be a follow-on
7 question.

8 **LORD CARLILE:** Yes.

9 **MR MORRIS:** Which I think I asked yesterday.

10 So when you received information from Lisa of
11 whatever nature, given that you were fully aware -- and
12 I didn't quite get the precise wording -- of compliance
13 issues, if you were, I'm suggesting to you that you
14 would have warned Lisa or you would have said something
15 to Lisa, wouldn't you?

16 **A.** Yes, but I don't remember receiving that email with that
17 information at that time, and it was shown to be
18 subsequently as a result of doing that, sir.

19 **Q.** There's no evidence at all in this case, from you or
20 from Lisa Oldershaw, that you ever raised the question
21 of compliance issues with her in this period. That's
22 a statement, is that a correct statement? That's my
23 question.

24 **A.** Tesco, Lisa and myself are fully aware of our
25 compliance.

1 **LORD CARLILE:** The question was whether you ever raised
2 compliance issues with Lisa at this time?

3 **A.** No, I don't recall doing so, sir.

4 **MR MORRIS:** Can I suggest this to you, that in view of your
5 knowledge of compliance and its importance, and I think
6 your knowledge, you accepted yesterday, of the
7 background, the FFA issue, can I suggest that given the
8 importance of the initiative at the time, normal
9 compliance was put to one side?

10 **A.** No, I would disagree with that completely. I would say
11 it was an unusual set of cost price discussions, as we
12 said earlier today, but I would absolutely categorically
13 say no.

14 **Q.** Mr Scouler, if I put it this way, you knew that the FFA
15 and all this issue raised compliance issues, because you
16 had been told about that?

17 **A.** I'd been told about that yesterday, about the FFA and
18 compliance --

19 **Q.** Well, you weren't told about it yesterday, but I think
20 you accepted yesterday that you had been told about it.

21 I'm suggesting to you, in those circumstances, and
22 given the answer you have just given to the chairman of
23 the Tribunal, it is surprising -- well, I'll put it
24 another way: why did you not raise this issue with Lisa?
25 Now, I accept that you say you didn't see document 52,

1 that's not the question. You have said that you were
2 receiving information from Lisa about what other
3 retailers were doing in a general sense, let's not
4 get -- in a general sense, yet your evidence to this
5 Tribunal is you didn't say anything to Lisa in
6 compliance terms, and my question is, why didn't you?

7 **A.** Because the information that I was receiving from Lisa
8 at the time was around information about whether other
9 retailers were allegedly taking a cost price increase or
10 not as the case may be, so there wasn't a discussion
11 around retail price at that time, sir.

12 **Q.** But you've accepted that you knew, if the other
13 retailers were going to accept a cost price increase, it
14 was highly likely that they would go up on retail as
15 well, haven't you?

16 **A.** It's likely at some stage they would go up in retail
17 price as well.

18 **Q.** I'm suggesting to you that given everything you knew
19 about the FFA and two years earlier, and given what was
20 going on, if you were really concerned about compliance
21 you would have said something?

22 **A.** I think compliance is so ingrained into the Tesco
23 business that it's taken as a second nature and people
24 would be very conscious of their responsibilities, sir.

25 **Q.** I just want to clarify, I'm going -- actually I'll come

1 back to that in a moment, if I may. I just wanted to
2 clarify a question.

3 Can I then ask you a second -- actually, one further
4 question. Can I just read to you -- I asked you
5 a question about: it was not in the interests of the
6 processor to give you false information, and you sort of
7 retorted I think firmly to that.

8 Can I just read to you what Mr Ferguson said when he
9 was asked that question. Day 5, page 179, lines 14 to
10 17. I'm just trying to find it.

11 "Question: So that relationship between McLelland
12 and Tesco, I think it would be fair to say, was an
13 important relationship in 2002, 2003?

14 "Answer: Yes, I would define it in that way.

15 "Question: You wouldn't want to do anything to
16 jeopardise that relationship, such as giving Tesco false
17 information?

18 "Answer: Absolutely. That's something we would not
19 even consider."

20 **A.** I wish all my suppliers would say that. A wonderful
21 testament.

22 **Q.** I'm suggesting to you that actually that's the truth
23 because, if they'd given you false information about
24 what another retailer was going to do, made it up, and
25 he knew that you might then take your decisions

1 partially in the light of that information -- that's
2 right, isn't it? That's what he was trying to get you
3 to do, wasn't he?

4 **A.** Sorry, again I'm unclear --

5 **Q.** The purpose of him giving you this false information
6 that you've envisaged was to encourage you to accept the
7 cost price increase?

8 **A.** What false information, sorry, sir?

9 **Q.** You are suggesting that they would give you false
10 information, they would do it regularly?

11 **A.** Sorry, I'm sorry if that's the impression that I gave to
12 the Tribunal, sir. I would say that it's a regular
13 occurrence that you will get misinformation or things
14 are miscommunicated and, therefore, you have to have
15 a working assumption that you -- based on the facts that
16 you actually know at that time as opposed to what you
17 suspect in the future, sir.

18 **Q.** I'll put the point very quickly. What I'm suggesting to
19 you is, if they gave you misinformation, they would be
20 found out that that information was wrong pretty soon
21 afterwards?

22 **A.** They may well do, and they may well then apologise and
23 say, "I'm sorry".

24 **LORD CARLILE:** Can I take it that what you're saying is that
25 you don't take unverified information from suppliers on

1 trust; you check out the information by objective means
2 if you can?

3 **A.** Yes, sir.

4 **LORD CARLILE:** Is that what it amounts to?

5 **A.** Absolutely, sir.

6 **MR MORRIS:** I would suggest to you that you might be able to
7 check out down the line that the information at the time
8 you get it -- I suggest to you that you don't ignore
9 that unverified information, and you certainly didn't in
10 2002? Is that a fair -- I think that's a sort of middle
11 line. I'm putting to you that you wouldn't ignore it?

12 **A.** And I would put it back to the Tribunal, sir, that
13 I would only deal with the facts that we knew at that
14 time, sir. We would be distrustful of it.

15 **Q.** I'm suggesting to you the reason you wouldn't ignore it
16 is because actually knowing beforehand what the others
17 were going to do reduced your uncertainty as to how the
18 market was going to react?

19 **A.** To the best of my knowledge we didn't have that
20 information at the time.

21 **Q.** Now, in your evidence, you say that you expected the
22 processors would treat your information as being
23 confidential?

24 **A.** Yes, sir.

25 **Q.** I suggest to you that, whatever the position might have

1 been in normal circumstances, in the context of the 2002
2 initiative, neither you nor your dairy team had any such
3 expectation that the information you gave would be
4 treated as confidential?

5 **A.** I would disagree with that, sir, and I would expect all
6 my information, all my suppliers at any moment in time
7 would be kept on a confidential basis, sir.

8 **Q.** At that time your buyers were receiving information
9 regarding other retailers' retail pricing intentions?

10 **A.** I was unaware of that, sir.

11 **Q.** You and your buyers would have been aware that, in
12 acting in this way, the processor was not feeling
13 constrained by concerns for the confidentiality of the
14 other retailers?

15 **A.** Sorry, can I ask you to rephrase that?

16 **Q.** If Lisa was receiving information, I'm not saying -- as
17 we see she was, about what Sainsbury's were going to do,
18 you would be -- from Tom Ferguson, you would see from
19 that, or she would see from that, that they were not
20 keeping Sainsbury's information confidential; that's
21 right, isn't it?

22 **A.** Yes, they looked like they were not keeping Sainsbury's
23 information confidential, and if I were Sainsbury's I'd
24 be very annoyed.

25 **Q.** Yes, precisely. I'm suggesting to you that in those

1 circumstances, where the processors are leaking inwards
2 to you, if I can use that phrase, there is no reason why
3 those processors would treat the information that you
4 then gave to them any differently from the information
5 it had received inwards from the others?

6 **A.** I would have to assume that the information I gave to my
7 suppliers was kept on a confidential basis.

8 **Q.** And I'm suggesting to you, in the circumstances where
9 you've just accepted that you could see, you generally,
10 that they were leaking information towards you, that if
11 you had wanted your information to be truly
12 confidential, in the circumstances of everything that
13 was going on, and in the circumstances of your
14 compliance knowledge, you would have said expressly,
15 "This information must be kept confidential"?

16 **A.** I have to assume that it's kept on a confidential basis,
17 that has to be my working stance, and always has been my
18 working stance, that any discussions I have with
19 a supplier has to be based on a confidential basis.

20 **Q.** Can I just put very finally on that issue what Mr Reeves
21 said about this issue and ask you whether you agree.

22 This is paragraph 10 of his witness statement which
23 is at volume -- tab 0 [Magnum]. I don't think you need
24 to do it, I can just read it to you very briefly. This
25 is what he says:

1 "Confidentiality, request for information.

2 "Dairy Crest would from time to time receive future
3 retail pricing information from its customers, including
4 Tesco, in the context of its supplier/retailer
5 commercial dealings."

6 The next sentence:

7 "As regards Tesco, in ordinary circumstances,
8 I think they would have been upset that Dairy Crest were
9 sharing this information, but I do not know what Tesco
10 would have thought during this initiative as it was very
11 unusual."

12 He does say:

13 "I do not know whether anyone at Tesco had said they
14 were happy to share the information. I wasn't aware of
15 the level of specifics."

16 What he says, he confirms that normally you would
17 expect it to be kept confidential, but he says that the
18 circumstances were very unusual in 2002, and he
19 expresses doubt:

20 "I do not know what Tesco would have thought about
21 confidentiality during the initiative."

22 What I'm suggesting to you is that your general
23 concerns about confidentiality were pushed to one side
24 in the context of the very unusual circumstances of this
25 initiative?

1 **A.** I wouldn't accept that, sir.

2 (Pause)

3 **MR MORRIS:** Sir, I'm just talking with my junior about time
4 and I have got some time issues here. I can either cut
5 or I can ask to go on for a little bit longer and I will
6 cut as long as I can. I have another 25 minutes.

7 Perhaps we should just see where we get to.

8 **LORD CARLILE:** Well, we're going to give the LiveNote team
9 a break at some point. It might be sensible to give
10 them a break now-ish and then resume at, say 11.25, and
11 you can go on until 12.00 and then Miss Rose will have
12 whatever time she needs.

13 **MR MORRIS:** That would be my submission in application, if
14 I have to make one. Sir, this is an important period.
15 I will go back now and do as much cutting as I can, I am
16 obviously in the Tribunal's hands, but I would invite
17 the Tribunal to give me --

18 **LORD CARLILE:** Miss Rose, it did occur to me that you might
19 want a little time before you start making your
20 submissions but maybe I'm wrong about that.

21 **MISS ROSE:** Sir, I'm ready to start, the sooner the better.
22 But as I've made clear, I do need two full days and then
23 I will need half a day to reply. What I am not clear on
24 is precisely what times this Tribunal is available to
25 sit next week and how Mr Morris is planning to cut his

1 own cloth for his closing, given that he's gone over
2 time on the cross-examination.

3 **LORD CARLILE:** Well, we will answer the first question when
4 we return, or before, we'll send a message out. The
5 second question I can't answer because it's one for
6 Mr Morris.

7 We have sat on two occasions at 7 o'clock in the
8 morning, I don't have any particular objection to doing
9 that again, but I can see that the referendaires are --
10 I see them here, well, I certainly see Mr Hiendl here
11 early in the morning!

12 **MISS ROSE:** I would have a very strong preference for not
13 sitting at 7 o'clock in the morning if I have to make my
14 closing submissions. It would be very difficult.

15 **LORD CARLILE:** Quite. It was intended as a joke.

16 It's easier for us to adjust our morning hours than
17 our evening hours, is what I really meant.

18 **MISS ROSE:** Is it still the case that the Tribunal is
19 unavailable next Wednesday?

20 **LORD CARLILE:** Yes.

21 **MR MORRIS:** Can I just enquire, on the Thursday, at the
22 moment half a day is allocated, I think?

23 **LORD CARLILE:** We will have to have a look at our diaries
24 outside.

25 **MR MORRIS:** May I just make one observation in response,

1 I would respectfully submit that I have not overrun on
2 the time for cross-examination. As I have pointed out,
3 four days were allotted, I'm still within that time.
4 That's my only observation.

5 **LORD CARLILE:** Thank you. Right. Well, we'll adjourn now
6 until 25 past.

7 (11.10 am)

8 (A short break)

9 (11.30 am)

10 **MR MORRIS:** Sir, we're grateful for the Tribunal's
11 indications about timing.

12 **LORD CARLILE:** We've done a bit of diary bashing to try and
13 help you.

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

15 We had got to the end of October and the decision in
16 principle. What I suggest then happened is that the
17 increases in waves, and again the waves I'm talking
18 about are the three waves, went ahead, and over November
19 and December the cheese retail prices of Tesco and the
20 other retailers did indeed go up in rough compliance
21 with those waves. Would you agree with that?

22 **A.** I don't recall the detail of that. I would assume so.

23 **Q.** Just to remind you that retail prices for your fixed
24 weight branded products moved on 4 November?

25 **A.** Yes, sir.

1 Q. And certainly your McLelland random weight branded moved
2 on 11 November?

3 Is that a yes?

4 A. Yes, sir. I'm just checking a clarification against
5 that (inaudible).

6 Q. Could I ask you to go to document 69 [Magnum], I'm still
7 in the first bundle of documents. This is an email,
8 have you seen this email before?

9 A. Yes, sir.

10 Q. This is an email from... sorry, you just said you've
11 seen it before. When did you see it?

12 A. Sorry, here.

13 Q. When did you see it before?

14 A. Sorry, I thought you were suggesting have I seen this --
15 sorry, I misunderstood.

16 Q. Have you read it? Have you seen this document before?

17 A. No, I have not, sir, sorry.

18 Q. This is an email from Neil to Lisa and it attaches in
19 the first sentence -- if you go over the page, it
20 attaches a spreadsheet with suggested prices of cheese
21 lines for Asda, not for Tesco but for Asda, do you see
22 that? You should have the spreadsheet -- I'm not sure
23 your version does have the spreadsheet -- on the back.

24 You don't have the spreadsheet?

25 A. No, I haven't, sorry, I've just got the covering letter.

1 **LORD CARLILE:** Are you on 69?

2 **A.** I am: email from Neil Arthey to Lisa Rowbottom dated
3 4 November 2002.

4 **MR MORRIS:** Does anyone have an unmarked copy? Thank you.
5 (Handed)

6 You see now the reverse side, that's the spreadsheet
7 of suggested RSPs for Asda.

8 **A.** Yes, sir.

9 **Q.** If you go back to the email itself, it also says:

10 "My understanding is that Asda will be applying £200
11 per tonne ie 20p per kilo to rmps of Smart Price mild &
12 mature."

13 Smart Price, your equivalent presumably would be the
14 Value mild and mature?

15 **A.** Yes, it would be, sir.

16 **Q.** You say you've never seen this document before?

17 **A.** No, sir.

18 **Q.** Did Lisa Oldershaw tell you about the contents of this
19 email?

20 **A.** No, I'm not aware she did.

21 **Q.** Would you agree that this was -- the contents of this
22 email contained important information about your most
23 important competitor relevant to your most important, or
24 part of your most important line of cheese products, or
25 category of cheese products, Value?

1 **A.** Yes, I would, sir.

2 **Q.** I suggest to you that, given that it was such important
3 information from your most important competitor, she
4 would have kept you informed of this development?

5 **A.** Possibly not, sir. She may have. I don't know, she may
6 have not used the data, ignored the data. I don't know
7 what she did with the data but I don't recall receiving
8 this information.

9 **Q.** If you had seen this information at the time or seen
10 this email at the time, how would you have reacted?

11 **A.** I would have been surprised, sir.

12 **Q.** Would you have done anything else?

13 **A.** If I had personally seen it, I probably would have sent
14 it back to the supplier. I like to think I would have
15 done that, sir.

16 **Q.** I think you can put that email... I think I've put it to
17 you, but I suggest to you this is one of the pieces of
18 information, never mind about whether you've seen the
19 email, that Lisa would have told you about, about what
20 she was hearing about other retailers?

21 **A.** No, sir.

22 **Q.** No she wouldn't have done, or no you don't recall?

23 **A.** No, I don't recall, but I do remember discussions around
24 the cost price but not of any of the other competitors'
25 retail price, sir.

1 **Q.** Can I then just describe briefly what then happened and
2 see if you remember. At one point in November, as
3 things were developing, Lisa Oldershaw became hesitant
4 about carrying on, particularly in relation to Tesco own
5 label categories, which were in the third wave, because
6 she was unsure of what Asda were doing. Do you recall
7 that?

8 **A.** I don't recall specific detail like that, sorry.

9 **Q.** If she had become -- had hesitated because she was
10 concerned about what Asda were doing, I would suggest to
11 you that that would have been one of the big issues that
12 she would have raised with you?

13 **A.** She may well have raised the fact, and I don't know this
14 for sure, she may well have raised the fact that
15 Sainsbury's prices had risen in the market, or Safeway
16 or whoever the competitor had been, and at the time Asda
17 had not raised their prices. That's what she may have
18 told me. She wouldn't have told me any future
19 indications of what that was happening to do, sir.

20 **Q.** Can we go to the second yellow bundle, which is in your
21 book case. Can we go to document 78 [Magnum] and
22 document 79 [Magnum]. The first document, 78, is an
23 email from Tom Ferguson to Lisa Rowbottom and it's dated
24 7 November and it's headed "New Retails":

25 "Time marches on, guess who goes on holiday... next

1 week. I will be out of the office... We need to
2 confirm the new retails for packing on Monday the 11th
3 for supply [on] the 17th. Can you ... send the
4 information to Jim McGregor..."

5 This, just to keep you fully in the picture, is
6 information about new retails, about Tesco own label
7 cheese supplied by McLelland which was due to go, move
8 up, in the week of the 18th, and he's writing on the 7th
9 saying:

10 "We need to confirm the new retails for packing
11 [this is on the 7th] ... for supply [on the 18th]."

12 Do you see that?

13 **A.** Yes, I do, sir.

14 **Q.** Then where we go is 79 [Magnum], which is the next day.
15 This is an email, internal email, from Mr McGregor to
16 Alastair Irvine and Tom Ferguson recording
17 a conversation, presumably on the 7th or the 8th:

18 "Lisa called to state Tesco will not commit to
19 moving own brand until they see that Asda have moved and
20 therefore will not give us their rsps. While they are
21 relatively confident that everything is in place with
22 Asda, they are taking a 'We won't believe it until we
23 see it' stance."

24 The first thing I'm putting to you is that that
25 records Lisa's hesitation, as I put it a moment ago,

1 that there was hesitation about the last wave because of
2 Asda, and you would agree with that?

3 **A.** Yes, I would.

4 **Q.** The OFT says that this email shows that McLelland had
5 given information to Lisa Oldershaw about what Asda were
6 going to do, and I should put to you that -- or -- yes,
7 put to you that Lisa Oldershaw accepts that, in that
8 conversation she had with Jim McGregor, Jim McGregor may
9 have said something about Asda being likely to move
10 soon. Now, that's the background. The question I have
11 is, did Lisa Oldershaw keep you updated about what was
12 happening about own label at this time and her concern
13 about Asda?

14 **A.** I don't recall having a specific conversation around
15 Asda, sir, sorry.

16 **Q.** I would suggest to you that as the own label lines were
17 a very important part of Tesco's cheese business at the
18 time, and Asda was your most important competitor, she
19 would have said something to you about this particular
20 issue; that's likely, isn't it?

21 **A.** She may well have said that Asda have not moved their
22 retail price in the market, she may well have said that
23 Sainsbury's have moved their price, or she will have
24 given me some information about what was happening in
25 the market place at that time.

1 Q. I suggest to you further that, in those conversations,
2 she reported to you the contents of her conversation
3 with Mr McGregor about Asda being likely to move soon?

4 A. No, I disagree. Sorry.

5 Q. So she would have told you that Asda hadn't -- that
6 Sainsbury's had moved, that Asda hadn't moved, but she
7 would have kept from you the information that she had
8 received from Jim McGregor that Asda were likely to move
9 soon?

10 A. Yes, I think very likely. I mean, I think she would go
11 back to the principle of the fact that she wouldn't
12 believe it, you know, what suppliers might or might not
13 be saying about what was happening, so she would reject
14 it, I would hope.

15 Q. Reject it in what way?

16 A. Well, reject that information as either in appropriate
17 or it's just not correct.

18 Q. Reject it by saying back to Mr McGregor, "I'm not
19 accepting this information", is that what you mean by
20 reject it?

21 A. I don't know what she meant, sorry, I can't describe
22 what she meant by her phrase, but what she wouldn't do
23 is accept that -- you know, she would be looking to see
24 the price in Asda in the shop before she made
25 a decision.

1 **Q.** I can see why you say that, but I think I put to you,
2 and you don't accept, that whilst she would have told
3 you that they hadn't moved, which was information she
4 knew, she wouldn't at the same time have told you that
5 Jim McGregor had said they were likely to move soon?

6 **A.** I don't recall her saying that.

7 **Q.** Then what we see, and I won't take you to the detail, is
8 that as far as McLelland was concerned, that issue was
9 eventually resolved on 22 November. Perhaps I can just
10 take you to the email, I said I wouldn't but...

11 What then happened is that at document 87 [Magnum]
12 and 88 [Magnum], document 87, this is on the Tesco own
13 label range. We've now moved forward a couple of weeks,
14 and the wave goes -- gets put back. There's an email at
15 88 from Tom Ferguson to Rob Hirst where he's recording
16 the fact that they've agreed on the named creameries
17 with the dates, and they're getting -- it looks like
18 they're getting close on the others. Do you see that?

19 **A.** Yes, I do.

20 **Q.** You see at the end:

21 "This completed movement will allow us as a business
22 to confidently commit to our 2p per litre increase on
23 milk from the 1st of December."

24 At that point Tom Ferguson was dealing directly with
25 Rob Hirst, can you see that?

1 **A.** Yes, I see that the email is sent directly to Rob with
2 a copy to Lisa, yes.

3 **Q.** Were you told about those events at that time? I mean,
4 Rob Hirst was your direct report?

5 **A.** No. Rob is a naturally reserved person, he wasn't
6 forthcoming with lots of information.

7 **Q.** So the answer is he didn't tell you?

8 **A.** No, he didn't. I would be surprised -- I don't remember
9 if he did, but I would be surprised if he did.

10 **Q.** The reason you say you'd be surprised is that here's
11 McLelland saying, "It's now all done as far as we're
12 concerned because we can confidently commit to
13 2p per litre". What I'm suggesting to you is that, with
14 that news -- and in terms of recollection here, I think
15 you're saying -- it may be you're saying "I absolutely
16 remember he didn't", or maybe you're saying "I can't
17 recall whether he did"?

18 **A.** No, what I was trying to say is I can't recall that he
19 did. I would be surprised if he did because the nature
20 of Rob was, he was a very private individual and didn't
21 ever show you much back-up paperwork or discussions on
22 any subject, let alone people's reviews, discussions
23 about promotional strategy. It tended to be lots of
24 verbal discussions, he wasn't that -- very structured
25 a person.

1 **Q.** I'm not suggesting he sent you the email. What I'm
2 suggesting to you is given where we are now, everything
3 is done, McLelland are relieved that it is all done, he
4 would have come to you and said, "John, it's all now
5 wrapped up, the problem with Asda is sorted out", or
6 whatever it was, "We've now agreed to move on own label
7 on 1 December"?

8 **A.** I don't recall that conversation.

9 **Q.** Very well.

10 What I'd like to do now, if I may, is just ask you
11 some final questions on the 2002 initiative and then
12 I'll turn to 2003. Can I just take you to your witness
13 statement. At paragraph 25 [Magnum], it says:

14 "In 2002 and 2003, Tesco set its retail prices for
15 cheese unilaterally. Contrary to what the OFT has said
16 in the decision, Tesco did not set retail prices in
17 coordination with other grocery retailers, I completely
18 reject that suggestion. It seems to me that the OFT has
19 made this mistake by misinterpreting communications
20 about cost price increases. I find it strange that the
21 OFT put so much weight on the word 'initiative' in the
22 parts of the case I've seen. Initiative means different
23 things at different times. What it certainly did not
24 mean was any kind of arrangement between retailers to
25 fix the retail price of cheese which is what the OFT

1 seems to mean by that term."

2 Then if you go to paragraph 36 [Magnum], you repeat
3 the point that you did increase but those decisions were
4 all taken unilaterally.

5 If I can summarise, your evidence is that Tesco
6 didn't set its prices in coordination with other grocery
7 retailers and that there was not any kind of arrangement
8 between retailers to fix the retail price of cheese.

9 **A.** That's correct, sir.

10 **Q.** Can I just make it clear that the OFT's case is not
11 about Tesco agreeing or fixing specific retail prices
12 for specific lines of cheese; you understand that,
13 I presume?

14 **A.** Yes, I do, sir.

15 **Q.** Let me put to you what the OFT says happened in 2002,
16 see if you can agree. There was a proposal for
17 a market-wide increase to raise cost and retail prices
18 at certain times, intervals, and in respect of
19 categories of cheese. You would agree with that
20 proposition?

21 **A.** I would agree with the proposition that there was
22 a broad movement to raise the cost prices of cheese to
23 support the dairy farmers in 2002, sir.

24 **Q.** That's not quite what your evidence yesterday was. You
25 accepted that the Dairy Crest proposal was a proposal to

1 raise cost and retail prices, as a proposal.

2 **A.** I apologise if I've been misinterpreted or I didn't hear
3 the question correctly yesterday. Without a doubt it
4 was a movement to accept a cost price increase on behalf
5 of the farmers.

6 **Q.** Well, we have the transcript of yesterday and I don't
7 propose to take you back, but my understanding of your
8 evidence yesterday was that you accepted that the
9 proposal was a proposal which was putting forward an
10 increase in cost and retail prices.

11 And Tesco, this is the (inaudible), indicated its
12 willingness to participate, in the sense I have
13 described this morning, in that market-wide proposal?

14 **A.** Tesco was prepared to have discussions with its
15 processors around trying to resolve the situation with
16 farmers, including a potential price increase or
17 otherwise.

18 **Q.** Just -- Mr Scouler, whilst I'm on that question, just to
19 clarify -- just to make sure this is really -- to
20 clarify the question I raised earlier this morning, and
21 I want to make sure I put it clearly to you, Tesco
22 indicated on 25 September at the meeting that you went
23 to, or previously, that it would raise not just cost but
24 also retail prices in line with the Dairy Crest
25 proposal?

1 **A.** I don't recall that meeting, sorry.

2 **Q.** You didn't answer the question.

3 I suggested to you -- I did mention 25 September and
4 you don't recall that. I'm saying indicated at that
5 meeting, or previously -- and we have -- that it would
6 raise not just cost but also retail in line with the
7 proposal?

8 **A.** No, we would have accepted or not accepted a cost price
9 increase and not a discussion around retail price, sir.

10 **Q.** In that way, by indicating its willingness, Tesco
11 reduced uncertainty on the part of the other retailers
12 as to what Tesco was going to do?

13 **A.** At the time the other retailers were -- at the time the
14 retailers and Tesco was being asked for a cost price
15 increase on dairy products, it was having discussions
16 around the cost price of those products.

17 **Q.** I'll put this to you. At the time, and I'm talking
18 September leading into October -- certainly at the time,
19 September, there was real uncertainty, wasn't there,
20 about what Tesco might do on other dairy products
21 including cheese?

22 **A.** Can I just clarify the question?

23 **Q.** Okay. In the context of the call for the 2p per litre,
24 your senior management's call for the 2p per litre
25 increase on all raw milk, there was real uncertainty

1 amongst everybody else about what Tesco was going to do
2 on other dairy products, I mean other than liquid milk,
3 including cheese?

4 **A.** I can't speak on behalf of the other retailers in the
5 other parts of the industry.

6 **Q.** They wouldn't have known what you were going to do,
7 would they?

8 **A.** No, of course not.

9 **Q.** You agreed yesterday that market forces in autumn 2002
10 would not lead to an increase in cheese retail prices.
11 Given where the market was at that time, you agreed,
12 given the supply and demand, you agreed, I think it's
13 page 37 of Day 11, that market forces would not indicate
14 a price increase?

15 **A.** Yes, I would, sir.

16 **Q.** I think you gave evidence yesterday, in connection with
17 your evidence in this period in September, that other
18 people were wondering about what Tesco would do next in
19 relation to other dairy products?

20 **A.** Yes, they may well have done.

21 **Q.** So there was uncertainty amongst those other people
22 about what Tesco would do next in relation to other
23 dairy products; on their part, they didn't know?

24 **A.** I would agree with that, yes, sir.

25 **Q.** And it wasn't obvious to them what you were going to do?

1 **A.** I hope not, yes, sir.

2 **Q.** That's why I asked the question about the indication
3 that you gave reduced that uncertainty on their part?

4 **A.** Sorry, can I just again ask for clarification really on
5 the date of when I would ask, because what I tried to
6 say, and I tried to say in the last too, is that during
7 September, early October, there was large negotiations
8 going on with the suppliers about the fact that they
9 should be taking a hit to their margins as opposed to
10 taking the Tesco cost price up.

11 I'm just a little bit unsure about what I'm being
12 asked here, sir.

13 **Q.** If we go back to that bit of your evidence, and I'm
14 going to ask you again about that --

15 **LORD CARLILE:** You see, your questions are based on at least
16 two hypotheticals that he does not accept so I'm not
17 getting a very clear sense of destination.

18 **MR MORRIS:** I'm putting the case -- the destination is I'm
19 trying to put the case, because it's not about price
20 fixing, it's about reducing uncertainty in the market by
21 the passing of information.

22 **LORD CARLILE:** I think we've been here before.

23 **MR MORRIS:** I'm just trying to sum it up, but I did want to
24 ask those questions about the others not knowing what
25 Tesco would do given where the market forces --

1 **LORD CARLILE:** We understand the point, I'm sure.

2 **MR MORRIS:** I'm going to put this to you: you received
3 information about what other retailers were going to do,
4 and that reduced your uncertainty about what would
5 happen in the market, about what they would do?

6 **A.** As I said earlier this morning, people were saying that
7 other retailers may or may not have accepted a cost
8 price, or it may not have been happening, this was --
9 people were trying to push through a price increase,
10 sir.

11 **Q.** People, who?

12 **A.** Sorry, I made that unclear. Dairy Crest had made
13 a request for a price increase of Tesco and, as you
14 explained to me yesterday, that would -- as
15 I subsequently looked -- as subsequently shown, that was
16 then put forward as across a number of retailers. At
17 the time I was dealing with a price increase from
18 Dairy Crest at the time, sir.

19 **Q.** And others; McLelland and the other processors?

20 **A.** Yes. I just don't know at what times they came in, sir.

21 **Q.** You said that you took your pricing decisions
22 unilaterally, and I put to you that, at the time you
23 took that decision, you knew or believed that your
24 competitors would be raising their cost and retail
25 prices?

1 **A.** No, I don't know that, sir.

2 **Q.** You don't or you didn't know that?

3 **A.** I didn't know that.

4 **Q.** Are you suggesting that in between September
5 and November 2002 you had no idea whether other
6 retailers were going to be raising their cost and retail
7 prices?

8 **A.** I'd no idea that they would be increasing their retail
9 prices. I would be aware that there was a big lobby
10 from the farmers group to try and push through cost
11 price increases across dairy products, that they would
12 be under pressure, like Tesco, to accept a cost price or
13 have a discussion.

14 **Q.** Are you suggesting that you had no idea whether other
15 retailers were going to be raising their cost price?

16 **A.** No, I didn't know whether other retailers would
17 accept -- I didn't know whether other retailers would be
18 accepting a cost price.

19 **Q.** I suggest to you that you knew -- you don't accept it,
20 but that you knew this from the information Tesco, and
21 in particular Lisa Oldershaw, had been receiving from
22 the processors?

23 **A.** I don't know for certain, sir.

24 **Q.** You didn't know for certain?

25 **A.** Well, I wouldn't know -- again, it's the commercial cut

1 and thrust that suppliers may suggest that other people
2 have accepted a cost price and may not have accepted
3 a cost price, so I wouldn't know.

4 **Q.** You took your decisions, when you took them, about your
5 cost and retail prices on the basis of that knowledge
6 about what the others were going to do?

7 **A.** Sorry, is that a question or ...

8 **LORD CARLILE:** It's a question.

9 **A.** Sorry, could I have it rephrased?

10 **LORD CARLILE:** Put the question again. It seemed to me to
11 be a clear question.

12 **MR MORRIS:** You took decisions, when you took them, about
13 your cost and retail prices on the basis of that
14 knowledge about what the others were going to do, didn't
15 you?

16 **A.** No, I didn't, sir.

17 **Q.** And your competitors' retailers also knew or believed
18 that it was likely that Tesco would be doing the same on
19 both cost and retails?

20 **A.** No, I don't know that, sir.

21 **Q.** You do accept that you had indicated to them -- you had
22 indicated to the processors what you were going to be
23 doing?

24 **A.** I'd indicated to the processors that I was prepared to
25 have a cost price discussion, sir.

1 **Q.** And when Tesco raised its retail prices, it was
2 participating, given all the background that I have put
3 to you, in this industry-wide initiative to raise prices
4 to put money back in the farmers' pockets?

5 **A.** No, I don't accept that, sir.

6 **Q.** And you did so knowing in advance that the other
7 retailers were also going to participate?

8 **A.** No, I don't know that, sir.

9 **Q.** I suggest to you that this is the only explanation for
10 the events in October and November and that there is no
11 other possible explanation, events being you raising
12 your prices and everybody else raising their prices in
13 waves?

14 **A.** No, I don't accept that, sir.

15 **Q.** Are you suggesting then that it was pure coincidence
16 that in or around the period from 16 to 30 October all
17 the retailers settled upon such similar waves of price
18 changes for categories of products over a three-week
19 period?

20 **A.** Sorry, can I just check that I understand the first part
21 of that question? Sorry, sir.

22 **Q.** Is it your evidence that it was a pure coincidence that,
23 by 30 October, all the retailers had settled upon
24 a three-week wave plan to raise prices?

25 **A.** I wouldn't describe it as being a coincidence, I would

1 describe it as the fact that the processors were pushing
2 through a cost price and, logically, if they'd pushed
3 through a cost price at similar times, then the retail
4 price might have occurred at a similar sequence of
5 events, sir.

6 **Q.** Are you suggesting that it is a coincidence that all
7 major retailers raised their prices for Seriously Strong
8 and Cathedral City on 4 or 5 November?

9 **MISS ROSE:** Sir, that is not factually correct because
10 Sainsbury's raised the price on 21 October.

11 **LORD CARLILE:** What was going through my mind, Mr Morris,
12 was that your questions are pretty argumentative, in the
13 literal sense, in the sense that they seem to be more
14 a matter for argument than cross-examination.

15 **MR MORRIS:** It may be, and I will be putting those points in
16 submission.

17 **LORD CARLILE:** I'm sure you will.

18 **MR MORRIS:** If you, the Tribunal, feel it's not a fair
19 question for the witness, obviously I will abide by
20 that.

21 **LORD CARLILE:** I don't know that it's an unfair question,
22 it's just it seems to me at least that we understand
23 that is the argument and it can be as well put in
24 argument as to the witness.

25 **MR MORRIS:** Very well. Can I put it another way.

1 Apart from the explanation that I have put to the
2 witness about how it happened, how else did it happen
3 that, bar Sainsbury's -- I can't remember -- Asda and
4 Tesco and, presumably, Safeway, but Asda and Tesco
5 certainly raised their prices for Seriously Strong and
6 Cathedral City on the same date?

7 **A.** I don't think it's unusual for a retail price to go up
8 at a same time -- and a same retailer at the same time,
9 maybe one retailer, maybe two retailers, maybe three
10 retailers, so that it can happen that retailers' prices
11 will rise at similar times.

12 **Q.** What I put to you is that this could only have happened
13 as a result of coordination?

14 **LORD CARLILE:** Mr Morris, you've put this again and again
15 and again. We must move on. I'm sorry.

16 **MR MORRIS:** Very well. The reason I put the point was
17 because -- there we are.

18 **LORD CARLILE:** Thank you.

19 **MR MORRIS:** Cheese 2003, can we turn to that. You recall
20 the events of autumn 2003 relating to McLelland, do you?

21 **A.** Yes, I do, sir.

22 **Q.** And if I can just summarise very quickly. In August
23 and September 2003, Tesco was unhappy with the margin it
24 was achieving on its sales of McLelland's brand
25 Seriously Strong, do you recall that?

1 **A.** Yes, sir.

2 **Q.** Lisa Oldershaw had indicated to Stuart Meikle that, if
3 the position didn't improve, Tesco would reduce the
4 volume of Seriously Strong you purchased by the end
5 of October 2003?

6 **A.** Yes, sir.

7 **Q.** And the volume of -- the reduction of volume in
8 practical terms meant that you would take it out,
9 I think, of half your stores?

10 **A.** I can't recall the exact number of stores but there was
11 a challenge to reduce the distribution.

12 **Q.** Yes. At the same time, McLelland asked Tesco for an
13 increase in its cost price of £200 per tonne on all of
14 its cheese lines?

15 **A.** Yes.

16 **Q.** You deal with this briefly in your witness statement at
17 paragraphs 82 to 91, and if you go to paragraph 86
18 [Magnum], you say:

19 "My recollection is that Lisa Oldershaw continued to
20 resist McLelland's proposed cost price increase
21 throughout September ... I would have known that at
22 about that time because Lisa would have briefed me
23 during September in advance of the meeting ... At the
24 time, Lisa was having protracted negotiations with
25 McLelland, as we had significantly increased the volumes

1 we were selling of McLelland's Seriously Strong branded
2 [cheese] and we did not feel this justified the shelf
3 space because of the return we [received] ...
4 Accordingly, we were seeking a cost price reduction or
5 some other commitment from McLelland which would
6 increase our profitability."

7 That sentence is relating to Seriously Strong,
8 that's right, isn't it?

9 **A.** Yes, sir.

10 **Q.** And:

11 "McLelland was now seeking a cost price increase
12 [that meant generally]. Our position was that until
13 McLelland was willing to restore the profitability on
14 Seriously Strong to a level that was acceptable on the
15 volumes that we were placing with them, we were not
16 willing to entertain a cost price increase."

17 **A.** Yes, sir.

18 **Q.** So you wouldn't entertain the proposed general cost
19 price increase unless the Seriously Strong issue was
20 resolved?

21 **A.** Yes, sir.

22 **Q.** It's right, isn't it, that there were then discussions,
23 and for the most part you weren't directly involved in
24 the discussions between Lisa Oldershaw and
25 Stuart Meikle?

1 **A.** Yes, sir.

2 **Q.** Can I ask you very briefly to go to document bundle 2,
3 which is the one -- I think you can put document
4 bundle 1 away, and if you go to document 101 [Magnum].

5 **A.** Sorry, it took a bit longer to close the file than
6 I thought it would do.

7 **Q.** 101. That is a presentation made by McLelland to
8 Sainsbury's on around 5 September 2003. Now, you didn't
9 see that document at the time?

10 **A.** No, I didn't, sir.

11 **Q.** And you were not involved at all in McLelland's dealings
12 with Sainsbury's at that time?

13 **A.** No, I wasn't.

14 **Q.** But nevertheless in your witness statement at
15 paragraph 85 [Magnum], you pass comment on that
16 presentation document by saying it wasn't very
17 sophisticated and it shows their naivety.

18 **A.** Yes, sir.

19 **Q.** That's purely a matter of your opinion on a document you
20 never saw at the time, isn't it?

21 **A.** That's correct, sir.

22 **Q.** Can I ask you a couple of questions. I mentioned to you
23 yesterday about a Competition Commission investigation,
24 and I think your recollection was that you didn't
25 recall, is that right? I mentioned to you the 1999 and

1 2000 Competition investigation?

2 **A.** Yes, you did, sir.

3 **Q.** I think your answer was -- I think you said to me, "I
4 wasn't aware of that judgment", or something?

5 **A.** I think there had been quite a lot of Competition
6 investigations into the supermarkets.

7 **Q.** Can I just mention this to you, and I'm giving you this
8 as a matter of fact just to refresh your memory and I'm
9 not suggesting... In March 2002, as a result of that
10 investigation, there was a code of practice brought into
11 force which dealt with how supermarkets should behave
12 towards their suppliers. Are you aware of that code of
13 practice now?

14 **A.** Yes, I am, sir.

15 **Q.** Were you aware of it back in the autumn of 2003?

16 **A.** Yes, I was, sir.

17 **Q.** It's right, isn't it, that the code of practice covered
18 issues such as requiring supermarkets to give reasonable
19 notice when they were seeking to reduce agreed cost
20 prices or when they were seeking to vary their terms of
21 business with their suppliers. Is that a fair -- you
22 might not know the detail, but it's that sort of thing,
23 does that sound right?

24 **A.** Yes, I think we always endeavour to treat our suppliers
25 fairly.

1 Q. Are you aware that you -- or that there was a training
2 programme within Tesco to keep everybody abreast of the
3 code of practice?

4 A. There is a training -- there is a regular training
5 programme that exists now as well. It happens
6 frequently, yes sir.

7 Q. Thank you. Can I then, and I'm getting through things
8 I hope quite quickly now in relation to cheese 2003,
9 refer to the meeting of 6 October which you deal with in
10 your witness statement. Can I just ask you generally,
11 can you tell us now what you actually recall about that
12 meeting?

13 A. I don't recall a great deal about the meeting. I recall
14 that in the room was myself, Lisa Rowbottom,
15 Alastair Irvine from McLelland's cheese company, and he
16 had a colleague with him but I can't recall at that
17 time, and I still can't recall, who that colleague may
18 or may not have been with him.

19 Q. Can you recall now, just thinking back, I suspect
20 sometimes (inaudible), you can see that -- the meeting
21 was at Cheshunt, was it?

22 A. Yes, it was, sir.

23 Q. Was it in your offices?

24 A. Yes, it was.

25 Q. Can you somehow picture it now? I don't know how often

1 you have meetings with Alastair Irvine. We think it was
2 Jim McGregor the other person, did you know
3 Jim McGregor?

4 **A.** He was the sales director for McLellands at the time, it
5 may have been him.

6 **Q.** But you don't recall -- you can't see him in your mind's
7 eye at the moment?

8 **A.** No, I'm sorry, sir.

9 **Q.** Can you actually recall what else you discussed at that
10 meeting?

11 **A.** I remember Alastair's enthusiasm for the
12 Seriously Strong brand, about what he wanted to do with
13 the brand and how he's excited by the brand and how it
14 was doing very well and how he wanted to grow the brand.
15 I recall us being unhappy with the current terms that we
16 were receiving for that product and what it was doing in
17 terms of impacting on our business performance. And
18 then unfortunately at a later part in the meeting
19 I remember suggesting that some form of compliance
20 training might be required. That's what sticks with me,
21 that thought, sir.

22 **Q.** Can you remember how that came up?

23 **A.** I can't fully remember the facts of the discussion but
24 it was along the lines of, well, that sort of
25 general: if Tesco raised their prices, then that will

1 get your profitability back and then, surely, other
2 competitors will just follow you and it won't be
3 a difficult situation.

4 I can't remember my exact words, but "That's
5 inappropriate and you need some form of compliance
6 training, that's not possible".

7 **Q.** Can I put this to you. I've asked you to recall and
8 I just wanted to see what you could actually remember
9 now, but your evidence in your witness statement is that
10 the outcome of the meeting was that you would accept the
11 £200 per tonne cost price increase and you would leave
12 the Seriously Strong issue to be resolved later by
13 Lisa Oldershaw?

14 **A.** Yes, sir.

15 **Q.** So the Seriously Strong issue was not resolved at the
16 meeting?

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

18 **Q.** You certainly didn't tell Mr Irvine at that meeting that
19 you had decided to de-range Seriously Strong at the end
20 of October?

21 **A.** Lisa had made that warning in an earlier correspondence,
22 to suggest that we(?) would have done that. So if
23 that's what -- I was suggesting(?) you said to me.

24 **Q.** No, what I'm suggesting is what happened at the meeting.
25 You've just agreed that you would effectively park that

1 issue, okay? I'm also suggesting to you that you didn't
2 say at the meeting, "Alastair, we are delisting you or
3 de-ranging you from the end of October"?

4 **A.** No, I don't recall if I said that, no.

5 **Q.** You don't recall that you said that?

6 **A.** Sorry, I don't recall if I said that.

7 **Q.** I'm suggesting to you that, if you'd agreed that the
8 issue was still going to be dealt with later, you
9 wouldn't be telling him you'd taken a final decision?

10 **A.** Sorry, again, I'm a little bit unclear as to the
11 question, sorry.

12 **Q.** I think you agreed a moment ago that the outcome of the
13 meeting was that, on the one hand, you would accept
14 their general cost price increase, and on the other hand
15 the Seriously Strong margin issue would be dealt with
16 subsequently by Lisa?

17 **A.** Yes, I suggested they had to come back with a proposal
18 to deal with the Seriously Strong issue, back to Lisa,
19 yes sir.

20 **Q.** You didn't say, "It's all too late, Alastair, we're
21 going to de-range -- I've decided we're going to
22 de-range on 30 October"?

23 **A.** I can't recall if I said that, sir.

24 **Q.** I'm suggesting it's unlikely given the issue was still
25 live.

1 Can you explain why, having previously considered
2 these two issues of the general cost price rise and the
3 Seriously Strong margin issues to be linked, you decided
4 at that meeting to uncouple them, if I can put it that
5 way, to accept the general cost price increase even
6 before the Seriously Strong issue was finally resolved?

7 **A.** At the time, they were suggesting that it was no longer
8 profitable for the McLelland cheese company to carry on
9 producing cheese at the price they were supplying to
10 Tesco, and it would be more beneficial to the business
11 if they were to go into other dairy-based products,
12 which they didn't want to do. At the current cost price
13 they were giving to Tesco, that was not going to be
14 sustainable, sir.

15 **Q.** Are you suggesting that's an explanation you heard only
16 at that meeting for the first time?

17 **A.** I may have heard more passion about the subject at the
18 meeting and more detailed background at the meeting, but
19 I wouldn't have -- it may not -- I may have had more --
20 a broader perspective of the issues at that meeting,
21 sir.

22 **Q.** I'm suggesting to you that you had heard about their
23 thinking about they were going to move out of cheese
24 into other products because it was more profitable;
25 you'd heard about that before?

1 **A.** Yes, that would have been highlighted by Lisa as part of
2 the discussions.

3 **Q.** You say that you mentioned something about competition
4 compliance, and I think you've just given evidence as to
5 why you complained. I haven't got the transcript, but
6 the reason you complained is that Alastair Irvine was
7 getting a bit enthusiastic about telling you things, is
8 that right?

9 **A.** No, that's not what I said. I remember Alastair being
10 very enthusiastic about his Seriously Strong brand,
11 that's what I said he was enthusiastic about.

12 **Q.** That was my mistake. Carry on. Perhaps you would like
13 to give the explanation again of why you complained?

14 **A.** If I recall the facts correctly, what he suggested was
15 that, if Tesco raised their retail price up in cheese
16 and restored the margin on Seriously Strong, the other
17 competitors may follow and, therefore, my margin would
18 be increased, and therefore I said "That's inappropriate
19 and it's not the right sort of conversation to have.
20 You're not dealing with the root issue which is my
21 profitability on it".

22 **Q.** And you didn't take any further action about the receipt
23 of that inappropriate information, did you?

24 **A.** No. I felt -- no.

25 **Q.** You didn't record what had been said?

1 **A.** No, I didn't.

2 **Q.** And you didn't put any objection back to McLellands in
3 writing?

4 **A.** No, I didn't, sir.

5 **Q.** Do you recall anything -- I've asked you about the
6 meeting. Do you recall Lisa Oldershaw mentioning
7 anything about labels?

8 **A.** No, I don't, sir.

9 **Q.** Do you recall her mentioning anything about labels to
10 you before the meeting?

11 (Pause)

12 **A.** I can't fully recall, sorry.

13 **Q.** Given that you thought for a long time, I'm suggesting
14 that you have no recollection of her mentioning that?

15 **A.** The reason why I may recollect it is that, in the
16 briefing document that I got to support that meeting,
17 there was a reference to competition training which is
18 very unusual to receive on a brief document ahead of
19 that. Therefore, I'm trying to understand why that may
20 have come from that basis, or it may not have come from
21 that basis, I just can't fully remember, sorry.

22 **Q.** What's this briefing document? You don't refer to the
23 briefing document in your witness statement, I don't
24 think? I'll be corrected if I'm wrong.

25 **A.** No, as part of the -- as part of meeting preparation --

1 if I have a supplier meeting, then what will happen is
2 the buyer will prepare a brief for that meeting, they
3 will cover things like sales, margin, profitability,
4 service levels, other factors, new products, and there
5 would be a commentary about some things that may be
6 happening.

7 **Q.** When did you recall that that briefing document had
8 something about competition compliance training in it?
9 I'm suggesting to you that when you first wrote your
10 witness statement, you hadn't recalled that at all? If
11 you had, you would have put something in, given what you
12 were saying in your witness statement about what
13 happened at the meeting?

14 **A.** It may have been missed out from my witness statement,
15 sir.

16 **Q.** Can we go to document 110A [Magnum] in the bundle. Now,
17 what does this document look like to you?

18 **A.** This would look like an internal briefing document from
19 one of the buyers to myself ahead of a supplier meeting,
20 I would think.

21 **Q.** Can you now recall when you first saw this document?

22 **A.** It would have been ahead of the meeting, sir.

23 **Q.** What I'm going to suggest to you is that it is possible
24 that this document is at least either wholly or in part
25 a document which was written or completed after that

1 meeting. Do you think that's possible?

2 **A.** No, no sir, absolutely not, I wouldn't.

3 **Q.** Okay. If you go to paragraph 3, over the page:

4 "Diminishing profitability of Seriously Strong
5 especially in light of such fantastic growth and also
6 against its peers, failed to be addressed and as
7 a result distribution is cut by half from end
8 of October 2003."

9 I'm suggesting to you that that records a decision
10 on Seriously Strong in circumstances where you have
11 accepted that at the meeting there had at that time been
12 no decision?

13 **A.** Yes, because as part of a briefing note proposals can be
14 put forward to me which would say, for example, I would
15 take a product out on 1 November or 15 March. So when
16 I receive a briefing from my buying team, quite often it
17 factually states when they intend to take some form of
18 action to give -- to either -- to understand the
19 immediacy of it or to look how it has been planned from.

20 So it's not unusual to suggest that -- you know, on
21 that date, they would suggest a date when -- to give --
22 another example might be, for example, they might stop
23 promotions on the next month, something would be on the
24 briefing note. So this hasn't been resolved so I've
25 told them I'm going to stop promotions from one month

1 ahead, and that's where it might come through in terms
2 of sense.

3 **Q.** Thank you. As to paragraph 7:

4 "Competition Commission training desperately
5 needed."

6 Can I suggest to you that it is possible that that
7 is a reference to the issue of de-ranging McLelland and
8 a reference to the code of practice?

9 **A.** Sorry, can I just --

10 **Q.** Yes, I'll explain the question perhaps a bit clearer.
11 It's a general statement.

12 The reason I asked this question is, if this is
13 a document that was, as you say, prepared before the
14 meeting, before the meeting Alastair Irvine hadn't made
15 his comments, but what you have on the agenda here is --
16 I don't like using -- I'm not using this phrase in any
17 way pejoratively, Mr Scouler, but the fact of the matter
18 is you knew and they knew that de-ranging or delisting,
19 cutting supplies by a certain proportion, was at least
20 on the cards?

21 Are you --

22 **A.** Yes.

23 **Q.** What I'm suggesting to you is that that issue was an
24 issue which fell within the ambit of the code of
25 practice which you've just said you were aware of?

1 **A.** No, I would interpret that document -- I would interpret
2 that comment as being very different, sir, around about
3 Competition Commission as opposed to grocery supplier
4 code of practice, as we call it now. That, to me, is
5 a very different phrase that may be used, sir.

6 **Q.** The final point I put to you is, going back to my
7 hypothesis, that it's possible this was written after
8 the meeting, that the competition training "desperately
9 needed" is a reference to what you say you actually said
10 to Mr Irvine at the meeting?

11 **A.** I would be flabbergasted if we were to ever write
12 a briefing document after a supplier meeting. We
13 wouldn't have time. I've never heard of that ever in my
14 career to this date.

15 **MR MORRIS:** If you would just allow me a moment, sir.

16 (Pause)

17 Thank you very much, Mr Scouler, and thank you to
18 the Tribunal, those are my questions.

19 Thank you, Mr Morris.

20 Yes, Miss Rose.

21 **MISS ROSE:** Sir, if I could ask Mr Morris to deliver on his
22 counsel's undertaking this morning to supply me with the
23 lecturn.

24 **MR MORRIS:** Yes, because I always do deliver, both
25 physically and otherwise.

1 **LORD CARLILE:** Are you going to reexamine?

2 **MISS ROSE:** No, I have no re-examination, sir.

3 **LORD CARLILE:** Right. Thank you very much indeed,
4 Mr Scouler. You can if you wish stay and listen to
5 counsel's fascinating submissions which will last
6 approximately four days, but you don't have to.

7 **A.** No, thank you, sir.

8 (The witness withdrew)

9 **LORD CARLILE:** Now, what do you want to do, Miss Rose? You
10 can start now, or we can have an early lunch and start
11 at 1.45, it's up to you entirely?

12 **MISS ROSE:** I would like to start now and perhaps have half
13 an hour and then have lunch.

14 **LORD CARLILE:** Fine.

15 Closing submissions by MISS ROSE

16 **MISS ROSE:** Sir, I would like to hand up some slim --
17 I emphasise slim -- volumes which contain our written
18 closing submissions. (Handed)

19 **LORD CARLILE:** Thank you. I was hoping for some such.

20 **MISS ROSE:** If I can just explain what you have here, we've
21 tried as far as possible to make this a single composite
22 document which should contain the material that has
23 previously been in the notice of appeal and the skeleton
24 argument that was prepared for the hearing, so some of
25 it will be familiar to you. But what we have done is

1 now to amplify it in the light of the evidence that
2 you've heard with, of course, the caveat that we have
3 not been able to insert all of Mr Scouler's evidence,
4 and I will try to pick those points up as and when we
5 come to them.

6 You have some tabs and, essentially, what you have
7 at the front is a legal section which is divided into
8 two parts, first of all, the substantive law and,
9 secondly, what we've called evidential issues which
10 deals with questions such as the failure to call
11 witnesses and the status of third party documents that
12 are not supported by testimony.

13 We then have separate tabs for the years 2002 and
14 2003, so for each of the separate infringements. What
15 you have for each of those years is structured in the
16 same way. First of all, there is a narrative which
17 consists of Tesco's case as to what actually happened in
18 outline in each of those years. There is then a summary
19 of the way the OFT puts its case in relation to those
20 years and our response to the flaws in that case. There
21 is then an analysis of each of the individual
22 infringement strands for the years 2002 and 2003. So
23 you have that package for each year.

24 Then at the back of the bundle there are the tables
25 that the Tribunal asked for some time ago relating to

1 the strands. If I can just show you these, if we go to
2 the begin of the 2002 strand tables, what you will see
3 is effectively this is a sort of Scott schedule with one
4 strand on each page. We have identified at the left
5 column the parties who are alleged to have communicated
6 and the individuals where identified by the OFT. So you
7 will see in each of those cases an A-B-C communication
8 with parties A, B and C identified and we've said where
9 the OFT has identified individuals and where it hasn't.

10 Then there are the dates or date ranges of the
11 communication. Then the relevant paragraphs in the
12 decision, the notice of appeal, the amended defence and
13 the skeleton arguments. There is then a column for
14 documents where we've identified the key documents on
15 which the OFT relies in support of its case on each
16 strand; where the documents are in blue, they are direct
17 communications, A to B or B to C. As we shall see,
18 there are a number of strands where in fact there are no
19 blue documents, there are no direct communications in
20 the bundles.

21 We then have a heading, "Interviews conducted by the
22 OFT", and we have here identified where the OFT actually
23 investigated those strands by interviewing individuals
24 who were said to have been involved in them. We have
25 included, in red, situations where no individual from

1 the party alleged to have been involved in the
2 communication was ever interviewed at all by the OFT or
3 where, although they were interviewed by the OFT, they
4 were not asked any questions about this particular
5 strand. If you leaf through it, you will see it is
6 absolutely striking that in the vast majority of cases
7 either the OFT did not interview any of the parties or
8 it did not interview them in relation to the particular
9 infringements that are alleged.

10 Now, that takes me to two bundles that you'll recall
11 I referred to in opening. They are the two
12 investigation bundles. The reason we put those bundles
13 together is that they provide the Tribunal, in
14 chronological order, with the course of the OFT's
15 investigation from the beginning, the initial complaint,
16 through the various interview stages, the statement of
17 objections, the supplementary statement of objections
18 and then up to the decision. You can see, if you look
19 at those bundles, precisely what steps the OFT took from
20 2005 onwards to interview individuals from particular
21 parties and we say, more significantly, you can see what
22 steps the OFT did not take to interview particular
23 individuals.

24 So then there's another heading which is "Interviews
25 provided to the OFT", and this consists of materials

1 that were sent to the OFT by the parties, principally
2 Dairy Crest. Dairy Crest's solicitors, Eversheds,
3 interviewed a number of the individuals who are said by
4 the OFT to have been involved and sent notes of the
5 interviews to the OFT. None of those people were
6 subsequently interviewed by the OFT.

7 Then, finally, the witness evidence, that is
8 a reference to the particular paragraphs in the witness
9 statements. We have not, I am afraid, been through the
10 transcripts to pick up all the cross-examination but you
11 have there all the key references to the individual
12 strands in the witness statements.

13 So that's what those tables are and I hope they're
14 of assistance and I shall be coming back to them in due
15 course.

16 We do invite the Tribunal, before reaching its
17 decision, to go back to the OFT's decision and in
18 particular to read section 5 of that decision which is
19 the section in which the OFT sets out the evidence on
20 which it relies and the facts which it finds as
21 establishing the infringements. We also invite the
22 Tribunal to read again the OFT's amended defence in this
23 appeal. We submit that, when you read those two
24 documents in the light of the evidence which the
25 Tribunal has now heard over the past two and a half

1 weeks of hearings, it is, we submit, apparent that the
2 OFT's case has simply not stood up to analysis, that
3 indeed it is clear that there are a number of
4 fundamental flaws in the way in which the OFT approached
5 its decision.

6 Just to give some examples, the OFT misunderstood
7 some of the basics about the operation of this market
8 and the operation by Tesco of its cheese buying
9 function. It misunderstood the length of time needed
10 for products to get from packing to depot to shelf. It
11 misunderstood the impact of key performance indicators
12 and the basket policy on buying decisions. It
13 misunderstood the dynamic between buyers and the account
14 managers who were their salesmen and has treated that
15 relationship as a collusive relationship when in fact,
16 as the Tribunal has heard, it is a negotiating
17 relationship marked by the sorts of tensions and
18 scepticism that you would expect in such a relationship.

19 Overall we submit that what is evident from the
20 OFT's approach in the decision, and with respect on this
21 appeal, has been an overly mechanistic and simplistic
22 approach to the operation of the market and the
23 operation of this commercial operation. Everything has
24 been seen as either/or, black or white, "Well, you can't
25 raise your retail price because your margins will be

1 affected, and so you can't raise your retail price --
2 and then you'll be out of line with your competitors
3 unless you raise your retail price, so you can't raise
4 your retail price unless you know everyone else will go
5 up as well". That's the sort of straitjacket in which
6 the OFT has sought to place the facts. We submit that
7 it is quite apparent from the evidence that that
8 completely ignores the various commercial strategies
9 that are, quite obviously, open to those who are
10 involved in buying products such as cheese.

11 If it were otherwise, with respect to the OFT, it
12 would be impossible for there to be any cost price rises
13 in not only the cheese sector but the grocery sector as
14 a whole, without there being some form of impermissible
15 consultation on price.

16 We say that what in fact the evidence has
17 demonstrated in this appeal is that, in 2002, there was
18 certainly an unusual situation, a high pressure
19 situation with significant political and industrial
20 muscle being exerted by the farmers and that that
21 certainly led to an across-the-board proposal by
22 Dairy Crest and then the other suppliers for a cost
23 price increase; but what has not been shown is that
24 there was any conspiracy or initiative or plan, in the
25 sense that the OFT used that phrase in its decision --

1 and I stress "in its decision" because, as I shall show
2 you shortly, the way it uses that phrase has changed,
3 subtly but very significantly, between the date of the
4 decision and the date of this hearing.

5 What in fact happened in 2002 was a series of high
6 pressure bilateral negotiations that resulted, not
7 surprisingly, in both cost price and retail price rises
8 at about the same time for the different retailers
9 because they were all subject to the same pressures and
10 the same negotiating strategy.

11 2003, we say, is simply a normal commercial
12 negotiation by a single supplier seeking a cost price
13 increase, on the basis that their own costs had gone up
14 and it wasn't profitable for them to produce cheese,
15 dealt with by Tesco in an entirely normal way. That in
16 summary is, we say, what happened in this case.

17 What I would like to do is, first of all, to deal
18 with the law and I'm going to take the law in two
19 sections. First of all, the substantive law dealing
20 with concerted practice and also with the hub and spoke
21 as a species of concerted practice. Then I'm going to
22 deal with the evidential issues that relate to the
23 burden of proof, the inferences that can be drawn from
24 the OFT's failure to call witnesses and the significance
25 of admissions and the significance of the OFT's reliance

1 on third party documents that have not been verified by
2 oral testimony.

3 Then I shall turn to 2002, as I've said, and finally
4 to 2003.

5 Can I now then start with the legal framework, and
6 this is paragraph 3. I am going to stick pretty closely
7 to the structure of this text. You may find, if you
8 read it, it will be very boring for everybody but it's
9 there essentially as an aide for your deliberations and
10 it has full footnotes but I shall be cross-referencing
11 it with various other comments and documents.

12 **LORD CARLILE:** I'm sure it's going to be so fascinating that
13 a Word copy of it would be useful, please.

14 **MISS ROSE:** Yes, sir. We can certainly supply that.

15 **LORD CARLILE:** If you could send that to the Tribunal.

16 **MR MORRIS:** Could we have one as well, particularly the
17 table might be useful to have in Word. It's just
18 a request.

19 **MISS ROSE:** I'm sure we can, sir.

20 The starting point, of course, is section 2.1 of the
21 Competition Act and we looked at that in opening. It
22 prohibits:

23 "... agreements and concerted practices that may
24 affect trade within the United Kingdom and which have as
25 their object or effect the prevention, restriction or

1 distortion of competition in the United Kingdom."

2 In this case, as everybody knows, we are dealing
3 with allegations of two infringements which are said to
4 be concerted practices with the object of distorting
5 retail price competition. They are the two
6 infringements that have been referred to by the OFT in
7 its decision as the 2002 cheese initiative and the 2003
8 cheese initiative. We've set out there, under
9 paragraph 4, the way in which the OFT defines those two
10 initiatives in its decision:

11 "A concerted practice in which Asda, Safeway,
12 Sainsbury's and Tesco are alleged to have exchanged
13 their retail pricing intentions for cheese via
14 Dairy Crest, Glanbia and McLelland acting as
15 intermediaries [although in Tesco's case not Glanbia]."

16 Then in 2003:

17 "A concerted practice in which Asda, Sainsbury's and
18 Tesco are alleged to have exchanged their retail pricing
19 intentions for cheese via McLelland acting as an
20 intermediary."

21 We make the point at paragraph 5 that the OFT's case
22 is that this was not a mistake by Tesco. The OFT says
23 that Tesco was a willing and knowing participant in the
24 coordination -- and can I just emphasise that word
25 "coordination", it's going to be very important later --

1 the coordination of retail prices by the disclosure and
2 receipt of future pricing information and that Tesco had
3 the requisite state of mind. In his opening
4 submissions, Mr Morris did not mince words, he said:

5 "This large and sophisticated organisation, Tesco,
6 was fully aware of its obligations under the law not to
7 distort or stifle competition to the detriment of
8 consumers. Tesco knew full well that this very sort of
9 retail price coordination through disclosure of future
10 pricing intentions as a response to farmer pressure from
11 the FFA was unlawful. They wrote to the Office of Fair
12 Trading [that's a reference to the 2000 (sic) letter]
13 and they knew this was not the response that could
14 lawfully be taken to farmer pressure."

15 So the allegation is that Tesco deliberately broke
16 the law and, more specifically, the allegation is that
17 Lisa Oldershaw and John Scouler deliberately broke the
18 law, because they are the two individuals whom the OFT
19 says had this requisite intent.

20 Indeed, it was put today by Mr Morris so high as to
21 say, there is no other possible explanation for the
22 events of 2002 other than the coordination of retail
23 price increases.

24 In order to make good its allegations, the OFT must
25 approve the existence of a concerted practice. So the

1 first question is, what is a concerted practice?
2 Paragraph 7, we say that in order to prove a concerted
3 practice the OFT must demonstrate consensus and the
4 knowing substitution of cooperation for the uncertainty
5 of competition. The OFT must prove that Tesco intended
6 to substitute coordination for competition, the
7 centrality of Tesco's state of mind is common ground,
8 and we say here that knowing coordination is the essence
9 of the infringement.

10 This concept of the substitution of knowing
11 coordination for the risks of competition is originally
12 derived from the Suiker Unie case. This is at volume 3
13 of the authorities bundle, tab 23. It's page 1916 in
14 tab 23 [Magnum]. At page 1916, paragraph 26:

15 "The concept of a concerted practice refers to
16 a form of coordination between undertakings which
17 without having been taken to the stage where an
18 agreement properly so-called has been concluded
19 knowingly substitutes for the risks of competition
20 practical cooperation between them which leads to
21 conditions of competition which do not correspond to the
22 normal conditions of the market, having regard to the
23 nature of the products, the importance and number of the
24 undertakings as well as the size and nature of the said
25 market."

1 The Tribunal will note the centrality of the
2 concepts of coordination, knowing substitution of
3 cooperation for the risks of competition and practical
4 cooperation. Those are the three phrases that are used.
5 What they all connote is conduct which is deliberate,
6 which is intentional, and which involves cooperation and
7 coordination willingly and consciously undertaken.

8 We say that's important when you come on to the
9 question of whether the OFT is right to suggest that
10 negligence or recklessness could be sufficient to
11 establish a concerted practice. We say that would be
12 wholly inconsistent with the essence of what a concerted
13 practice is.

14 Now, just at paragraph 8 of our text, you can see
15 that we set out some other formulations of this concept.
16 I simply invite you to look at those, they are all to
17 the same effect.

18 Paragraph 9, in addition to consultation, concept of
19 a concerted practice also implies conduct on the market
20 pursuant to those collusive practices, see again the
21 phrase "collusive practices", and the relationship of
22 cause and effect between the two. In the context of an
23 information exchange, that requires proof that the
24 recipient of the information has actually used the
25 information that it received.

1 There is a presumption of use where the other
2 elements of a concerted practice have been made out but
3 that presumption is rebuttable by evidence. That's the
4 famous Anic presumption. We make the point here that
5 the presumption that information that has been received
6 has been used, a rebuttable presumption, arises only
7 where the elements of a concerted practice have already
8 been established. In other words, not simply the
9 exchange of information, but the exchange of information
10 pursuant to the knowing substitution of cooperation for
11 the risks of competition. So it's only when you've
12 established that mental element that there may be
13 a presumption of use.

14 Can I just turn up Anic, which is in volume 4 of the
15 authorities bundle, tab 31. If we go to paragraph 115
16 [Magnum], at 115 you see that the court sets out the
17 Suiker Unie test that we've just looked at.

18 Then at 116 the Court of Justice has further
19 explained that:

20 "... criteria of coordination and cooperation must
21 be understood in the light of the concept inherent in
22 the provisions of the treaty relating to competition,
23 according to which each economic operator must determine
24 independently the policy which he intends to adopt on
25 the market. According to that case law, although that

1 requirement of independence does not deprive economic
2 operators of the right to adapt themselves intelligently
3 to the existing and anticipated conduct of their
4 competitors, it does however strictly preclude any
5 direct or indirect contact between such operators, the
6 object or effect whereof is either to influence the
7 conduct on the market of an actual or potential
8 competitor, or to disclose to such a competitor the
9 course of conduct which they themselves have decided to
10 adopt or contemplate adopting on the market where the
11 object or effect of such conduct is to create conditions
12 of competition which do not correspond to the normal
13 conditions of the market in question with regard to the
14 nature of the products ...", and so on.

15 Now, two points from this paragraph, the first is
16 that the court is here distinguishing a concerted
17 practice which is impermissible from the right of an
18 economic operator intelligently to adapt itself to
19 existing and anticipated conduct of their competitors.
20 There is absolutely nothing wrong with a commercial
21 operator taking action in anticipation of what its
22 competitors will do. Indeed, that is completely normal
23 business practice and it would be impossible to be in
24 business if you did not operate in that way. That, of
25 course, will frequently include making intelligent

1 assumptions about the likely conduct of your competitors
2 based on market forces, based on pressures that you are
3 all subject to, based on information in the public
4 domain and based on your knowledge of the operation of
5 the market. But that is distinguished here from direct
6 or indirect contact between the operators which has the
7 object -- and we're concerned with object here -- of
8 influencing the conduct on the market of an actual or
9 potential competitor.

10 So what you're looking for is direct or indirect
11 contact, and all that the hub and spoke sub-species of
12 a concerted practice is is a jargon term for indirect
13 contact. And it has to amount to indirect contact or it
14 will not be a concerted practice.

15 T-Mobile, this is volume 5 of the authorities
16 bundle, tab 43, this is dealing with the presumption of
17 use, paragraph 51 [Magnum]:

18 "As regards the presumption of a causal connection
19 formulated by the court in connection with the
20 interpretation of Article 81(1), it should be pointed
21 out first that the court has held that the concept of
22 a concerted practice, as it derives from the actual
23 terms of that provision, implies in addition to the
24 participating undertakings concerting with each other,
25 subsequent conduct on the market and a relationship of

1 cause and effect between the two."

2 So as well as consultation, there must be shown to
3 be subsequent conduct on the market.

4 "However, the court went on to consider that subject
5 to proof of the contrary [so this is a presumption
6 that's rebuttal by evidence] which the economic
7 operators concerned must adduce, it must be presumed
8 that the undertakings taking place in the concerted
9 action and remaining active on the market take account
10 of the information exchanged with their competitors in
11 determining their conduct on the market."

12 So once you've proved a concerted practice, in the
13 sense that I have already outlined, there is
14 a presumption that those who receive the information
15 will use it unless they rebut that presumption.

16 So that is, in general terms, the concerted
17 practice.

18 The next issue is infringement by object, because of
19 course there are two types of infringement: infringement
20 by object and infringement by effect. What is alleged
21 in this case is infringement by object. Paragraph 10 of
22 our note. The OFT must prove that the conduct alleged
23 had the object of distorting or restricting competition
24 which it can only do if the conduct was at least capable
25 of restricting, distorting or preventing competition,

1 even if it did not actually have that effect.

2 I want to take you back to T-Mobile, I'm sorry, you
3 put it away, but it's volume 5, tab 43. If you go first
4 to paragraph 27 [Magnum]. So again this is after you've
5 demonstrated the existence of a concerted practice,
6 you're then asking, does it have the object of
7 restricting or distorting competition.

8 Paragraph 27:

9 "With regard to the assessment as to whether
10 a concerted practice is anticompetitive, close regard
11 must be paid in particular to the objectives which it is
12 intended to attain and to its economic and legal
13 context. Moreover, while the intention of the parties
14 is not an essential factor in determining whether
15 a concerted practice is restrictive, there is nothing to
16 prevent the Commission of the European Communities or
17 the competent Community judicature from taking it into
18 account."

19 That is, with respect to the court, not the easiest
20 passage to understand because the notion of restriction
21 of competition by object suggests purpose, it suggests
22 intent, but the passage is clearly saying that intent is
23 not necessary, though it is relevant. My submission is
24 that what is intended here is that, objectively, the
25 question is, is this conduct which by its very nature is

1 calculated to restrict competition? If that test is
2 satisfied, then you can infer that that was its object.

3 If we read on in T-Mobile:

4 "As regards the distinction to be drawn between
5 concerted practices having an anticompetitive object and
6 those with anticompetitive effects, it must be borne in
7 mind that an anticompetitive object and an
8 anticompetitive effect constitute not cumulative but
9 alternative conditions in determining whether a practice
10 falls within Article 81(1). It has since the judgment
11 in LTM been settled case law that the alternative nature
12 of that requirement, indicated by the conjunction 'or',
13 means that it is necessary first to consider the precise
14 purpose of the concerted practice in the economic
15 context in which it is to be pursued. Where, however,
16 an analysis of the terms of the concerted practice does
17 not reveal the effect on competition to be sufficiently
18 deleterious, its consequences should then be considered,
19 and for it to be caught by prohibition it is necessary
20 to find those factors are present which establish that
21 competition has in fact been prevented or restricted or
22 distorted to an appreciable extent. In deciding whether
23 a concerted practice is prohibited by Article 81(1), no
24 need to take account of its actual effects once it is
25 apparent that its object is to prevent, restrict or

1 distort competition within a common market. The
2 distinction between infringements by object and
3 infringements by effect arises from the fact that
4 certain forms of collusion between undertakings can be
5 regarded by their very nature as being injurious to the
6 proper functioning of normal competition."

7 So that's my point, that if the very nature of the
8 conduct is such as being calculated to restrict
9 competition, then that would be regarded as
10 a restriction by object.

11 Reading on in this judgment, this is paragraph 31
12 [Magnum]:

13 "With regard to the assessment as to whether
14 a concerted practice pursues an anticompetitive object,
15 it should be noted first, as pointed out by the Advocate
16 General, that in order for a concerted practice to be
17 regarded as having an anticompetitive object, it is
18 sufficient that it has the potential to have a negative
19 impact on competition. It must simply be capable in an
20 individual case, having regard to the specific legal and
21 economic context, of resulting in a prevention,
22 restriction or distortion of competition. Whether and
23 to what extent in fact such anticompetitive effects
24 result can only be of relevance for determining the
25 amount of any fine."

1 Second there is the Suiker Unie test that we've seen
2 about consultation. Then paragraph 33, this is the
3 comment about intelligently adapting yourself to the
4 anticipated conduct of your competitors.

5 Then at paragraph 34 [Magnum], referring to
6 Deere v Commission, that's the tractors case:

7 "... the court therefore held on a highly
8 concentrated oligopolistic market, such as the market in
9 the main proceedings, the exchange of information was
10 such as to enable traders to know the market positions
11 and strategies of their competitors and thus to impair
12 appreciably the competition which exists between
13 traders."

14 Can I just ask the Tribunal to note the repeated use
15 of the term "appreciably". We are talking about an
16 appreciable restriction on competition. I shall come
17 back to that point a bit later.

18 "It follows that the exchange of information between
19 competitors is liable to be incompatible with the
20 competition rules if it reduces or removes the degree of
21 uncertainty as to the operation of the market in
22 question with the result that competition between
23 undertakings is restricted."

24 So there is the concept of the exchange of
25 information that reduces the degree of uncertainty.

1 Before I leave the judgment, can I also ask you to
2 note paragraph 43 [Magnum] which, again, summarises the
3 conclusion that:

4 "An exchange of information between competitors is
5 tainted with an anticompetitive object if the exchange
6 is capable of removing uncertainties concerning the
7 intended conduct of the participating undertakings."

8 Now, coming back to our note at paragraph 12, we
9 focus here on the concept of the reduction of
10 uncertainty. We here set out the passage from
11 paragraph 35 of T-Mobile that I've just shown to you and
12 then we make the point that the concept of a reduction
13 of uncertainty must however be understood in the context
14 of the words that follow with the result that
15 competition is restricted. So what the Tribunal is
16 looking for is an exchange of information that reduces
17 uncertainty about the conduct of competitors such that
18 competition is restricted, and we add the words
19 "appreciably restricted".

20 So paragraph 13, it is not the case that any
21 communication that conveys some information about what
22 competitors will do has the object of restricting
23 competition. It must be shown that the communication
24 reduces uncertainty as to the operation of the market in
25 question with the result that competition is restricted.

1 Now, we identify two practical illustrations, which are
2 of obvious significance to this case, where we say that
3 information may be communicated that does not reduce
4 uncertainty and that, therefore, has no appreciable
5 effect on competition.

6 **LORD CARLILE:** Choose your moment, Miss Rose.

7 **MISS ROSE:** Sir, can I just take you to paragraph 14 and
8 then stop?

9 **LORD CARLILE:** Yes.

10 **MISS ROSE:** We give two examples here. The first is where
11 information communicated is a statement of the obvious,
12 known to the participants in the market from their prior
13 experience, or if the substance of the information
14 communicated is already in the public domain. We say it
15 is, quite clearly, obviously right that, if you're
16 communicating information that will be obvious to those
17 who operate in the market anyway, it will have no effect
18 on uncertainty or on restricting competition.
19 Similarly, if you communicate information which is
20 publicly available, the communication of that
21 information is going to have no effect on reducing
22 uncertainty because it would be available from public
23 sources. That's one half of the coin.

24 The other half is (b), where the information is not
25 believed by the recipient to be accurate or reliable and

1 is therefore disregarded, because receiving information
2 that you do not consider to be reliable has no effect on
3 your uncertainty. You remain as uncertain as you were
4 before you received the information. So the
5 information, in order to be capable of having an
6 appreciable effect on competition, must first be
7 confidential, truly confidential and not obvious, and,
8 secondly, must be understood by the recipient as
9 reliable.

10 Sir, that is perhaps a convenient moment.

11 **LORD CARLILE:** Thank you very much. 2.05.

12 (1.05 pm)

13 (The short adjournment)

14 (2.05 pm)

15 **MISS ROSE:** Sir, I was just addressing the circumstances in
16 which the case law establishes that an exchange of
17 information between competitors will have the object of
18 restricting competition. The submission I was making
19 was that that will be so firstly where the information
20 that's exchanged reduces uncertainty and, secondly,
21 where it's shown that that reduction in uncertainty is
22 liable to restrict competition.

23 On the first of those limbs, that the information
24 exchanged must be shown to reduce uncertainty, I made
25 the submission that that will not be the case where it's

1 public, where it's obvious or where it is regarded as
2 unreliable by the recipient. Because in all of those
3 circumstances, the level of uncertainty will be the same
4 after the communication as it was before.

5 The second question which must also be satisfied is
6 whether the reduction in uncertainty is liable to
7 restrict competition. It's not reduction in uncertainty
8 per se, it's a reduction in uncertainty which is liable
9 to restrict competition. This is a concept which has
10 been considered in the UK Tractors case, Deere v
11 Commission. We set this passage out at paragraph 15.
12 The case itself is in volume 3 of the authorities bundle
13 at tab 29 [Magnum] but we can pick it up in the note:

14 "In the present case, in reaching the conclusion
15 that a reduced degree of uncertainty as to the operation
16 of the market restricts undertakings' decision-making
17 autonomy, and is consequently liable to restrict
18 competition... the Court of First Instance... held in
19 particular that, in principle, where there is a truly
20 competitive market, transparency between traders is
21 likely to lead to intensification of competition between
22 suppliers. Since the fact that in such a situation
23 a trader takes into account information on the operation
24 of the market, made available to him under the
25 information exchange system in order to adjust his

1 conduct on the market, is not likely, having regard to
2 the atomised nature of the supply, to reduce or remove
3 for the other traders all uncertainty about the
4 foreseeable nature of his competitors' conduct."

5 So just pausing there, you can see that it's
6 certainly not being said that any reduction in
7 uncertainty will per se have the object of restricting
8 competition. On the contrary, it is recognised that
9 there will be many circumstances in which a reduction of
10 uncertainty or transparency between traders may in fact
11 enhance and not restrict competition.

12 But then:

13 "The Court of First Instance considered, however,
14 that on a highly concentrated oligopolistic market, such
15 as the market in question, the exchange of information
16 on the market was such as to enable traders to know the
17 market positions and strategies of their competitors and
18 thus to impair appreciably [note the word "appreciably"
19 again] the competition which exists between traders."

20 Then an important paragraph:

21 "In making that assessment, the Court of First
22 Instance took account of the nature of the information
23 exchanged, the frequency with which it was disseminated
24 and of the persons to whom it was disclosed."

25 So there are three criteria: the nature of the

1 information, the frequency of the exchange and the
2 persons to whom it is disclosed.

3 "As regards, first, the nature of the information
4 exchanged, particularly that relating to sales made in
5 the territory of each of the dealerships in the
6 distribution network, the Court of First Instance
7 found... that those were business secrets and allowed
8 the undertakings, which were parties to the agreement,
9 to know the sales made by their dealers within and
10 beyond their allocated territory and also sales made by
11 the other competing undertakings..."

12 So business secrets.

13 "Second [so this is the question on frequency] the
14 Court of First Instance held... that the information on
15 sales was disseminated systematically and at short
16 intervals. Last, at paragraph 51, the Court of First
17 Instance found that the information was shared between
18 the main suppliers, for their sole benefit, to the
19 exclusion of other suppliers and of consumers.

20 "In view of that reasoning, the Court of First
21 Instance must be considered to have concluded correctly
22 that the information exchange system reduces or removes
23 the degree of uncertainty as to the operation of the
24 market and that the system is therefore liable to have
25 an adverse influence on competition between

1 manufacturers.

2 "... this assessment does not conflict with the
3 judgment in Ahlstrom... that the system of quarterly
4 price announcements in the wood pulp market did not in
5 itself constitute an infringement of Article 85(1)
6 However the system of quarterly announcements of paper
7 pulp sale prices set up by the manufacturers involved
8 the communication of information of use to purchasers,
9 whereas the information exchange system in question in
10 the present case enables information to be shared only
11 by the undertakings which are members to the agreement."

12 We summarise the key points over the page. First,
13 that in a competitive market increased transparency may
14 lead to more rather than less competition. Second, that
15 public information exchanges are not likely to restrict
16 competition, even if they do reduce uncertainty. And,
17 thirdly, in any given case, you must assess the nature
18 of the information, the frequency with which it was
19 disseminated and the persons to whom it was disclosed.

20 We then refer in the following paragraph to the
21 European Commission's guidance. Again, for your note,
22 the full text of the guidance is in volume 5 of the
23 authorities bundle at tab 49 [Magnum], but we can just
24 look at this extract:

25 "Any information exchange with the objective of

1 restricting competition on the market will be considered
2 as a restriction of competition by object. In assessing
3 whether an information exchange constitutes
4 a restriction of competition by object, the Commission
5 will pay particular attention to the legal and economic
6 context in which the information exchange takes place.
7 To this end, the Commission will take into account
8 whether the information exchange, by its very nature,
9 may possibly lead to a restriction of competition.

10 "Exchanging information on companies' individualised
11 intentions concerning future conduct regarding prices or
12 quantities is particularly likely to lead to a collusive
13 outcome. Informing each other about such intentions may
14 allow competitors to arrive at a common higher price
15 level..."

16 So there the stress is on individualised intentions.
17 We draw a contrast between individualised intentions
18 with information that is purely general in character,
19 such as, for example, a statement "Everybody is going
20 up" or "Everybody is accepting cash margin".

21 Then at 74, again, you see the reference to
22 individualised data regarding intended future prices.

23 **LORD CARLILE:** Just pause for a second.

24 **MISS ROSE:** Remember of course that all the cases we have
25 been looking at so far are cases of direct information

1 exchange between competitors, because we haven't
2 factored in yet the additional complication of the hub
3 and spoke which, in my submission, is simply a question
4 of form and shouldn't affect the substance of the
5 infringement. The substance of the infringement is
6 always information exchanged between competitors that is
7 such as to reduce uncertainty and restrict competition.
8 That's always what you're looking for.

9 **LORD CARLILE:** Leaving aside questions of state of mind for
10 the time being, which I know we're going to come on to.
11 A single communication of an individualised intention
12 could of course amount to anticompetitive behaviour,
13 couldn't it?

14 **MISS ROSE:** It could in principle, yes.

15 **LORD CARLILE:** For example, an email to Tesco that contained
16 Asda's future resale pricing intentions could fall
17 foul --

18 **MISS ROSE:** It could in principle, but you would have to
19 apply to that the tests that we've just looked at, and
20 the fact that there was only a single instance would
21 then be a relevant factor to whether or not -- first of
22 all, obviously, it would be highly relevant to the
23 question of state of mind, but it would also be relevant
24 to the question of whether it was likely to reduce
25 uncertainty and whether it was likely to restrict

1 competition. That's what we've just been looking at.

2 Frequency is one of the factors.

3 **LORD CARLILE:** Yes, but these are guidelines but in the end
4 the determination of the question you just posed, in
5 relation to the example of a single email with a price
6 list, is a question of fact?

7 **MISS ROSE:** It is indeed a question of fact, but the factors
8 that are relevant are identified in the Deere case that
9 we've just been looking at, and they include frequency
10 as well as the secrecy of the information and the --

11 **LORD CARLILE:** Yes, it's a "have regard to".

12 **MISS ROSE:** Yes.

13 **LORD CARLILE:** Thank you.

14 **MISS ROSE:** Sir, we then summarise at paragraph 18 the
15 principles relating to information exchange. It must be
16 analysed in its legal and economic context. The concern
17 is to identify exchanges that have the objective of
18 restricting competition in the sense of a collusive
19 outcome with higher prices. Exchanges of individualised
20 future pricing intentions would normally be expected to
21 have that objective. Other exchanges, such as
22 generalised information about what is likely to happen
23 to market prices, need to be analysed in context to
24 determine whether they have the object of restricting
25 competition.

1 The final point that arises is the question of
2 appreciability, and I've flagged up where that word
3 appears in a number of the judgments we've been looking
4 at. It's relevant to the question you just asked me,
5 sir, because the Chapter I prohibition is only concerned
6 with appreciable restrictions of competition, so the
7 various formulations of the tests found in the
8 guidelines and the case law should not be applied with
9 rigidity. There is no such thing as a technical breach
10 of the Chapter I prohibition.

11 So, for example, if information is communicated
12 which is not public at the moment of communication but
13 which is about imminently to become public, and which
14 a person would not be able to act upon before it becomes
15 public, then the question arises, could that give rise
16 to any appreciable restriction of competition? We would
17 submit the answer is no because there is no action that
18 could be taken to restrict competition on the market
19 before the information goes into the public domain.
20 There may technically have been a breach of confidence
21 in that situation, but it's not a breach of the
22 Chapter I prohibition in the Competition Act.

23 The second example we give is, if competitor A were
24 told that competitor -- it should be C, of course,
25 because we're talking about A and C, would charge lower

1 prices than A had otherwise anticipated, in the hope
2 that competitor A would also charge lower prices, that's
3 an exchange of future retail pricing information but
4 it's not going to restrict competition. It's going to
5 enhance it.

6 That's relevant to one of the alleged exchanges in
7 this case because you will recall that one of the items
8 of information on the notorious document 52 [Magnum], is
9 the information that others are confirming that they
10 will go up by cash margin and not percentage margin on
11 this occasion.

12 The context was that Tesco was indicating to its
13 suppliers that it wished to protect its percentage
14 margin, in other words to raise its retail prices by
15 more than cash margin, so information that competitors
16 were planning to increase retail prices by less than the
17 price that Tesco was intending to increase its retail
18 prices could not restrict competition. It would
19 encourage Tesco to raise its prices by less than it
20 would otherwise seek to do.

21 So those are the two examples that we give of
22 something which might technically be a breach of
23 confidence but would not, we submit, fall within the
24 scope of the Chapter I prohibition.

25 I'm sensing you may be pregnant with a question?

1 **LORD CARLILE:** No, I am doing that slow process in my case
2 which is known as thinking while you're speaking.

3 Carry on.

4 **MISS ROSE:** Those are the general principles that we say
5 apply to the establishment of concerted practice in
6 breach of the Competition Act.

7 Then we come to the particular sub-species of
8 concerted practice that we're dealing with in this case,
9 known colloquially as the hub and spoke, which is simply
10 an indirect exchange of information between competitors,
11 but still, as I stress and I have stressed, must meet
12 all the conditions for a concerted practice, including
13 the knowing substitution of cooperation for the risks of
14 competition.

15 We make this point at paragraph 21, that all this is
16 is the exchange of information between competitors using
17 the supplier as the intermediary. And as the OFT itself
18 states:

19 "The indirect disclosure of retail pricing
20 intentions between retailers via processors is akin to,
21 and has the same object as, direct horizontal
22 coordination."

23 What we say you cannot do is to avoid the need to
24 establish the elements of a concerted practice simply
25 because it is an indirect rather than a direct exchange

1 of information. I made this submission in opening. It
2 may be much more difficult to establish the requisite
3 intent, knowing collusion, if it's indirect information
4 exchange. That is not surprising, you would expect that
5 to be so. If two competitors are talking directly to
6 each other, it will be much easier to prove that they
7 intend to collude than if they're talking to their
8 suppliers. That's the nature of the beast, and the
9 answer to it is not to say that you lower the hurdle and
10 let the OFT find infringements without having proved the
11 existence of a concerted practice.

12 Now, this of course is going to be relevant
13 particularly to the question of the relevant mental
14 element, and we say that you cannot as a matter of
15 definition negligently collude with somebody, or
16 negligently enter into a cooperative relationship with
17 them. You must know that you're cooperating with
18 somebody and colluding with them.

19 So the test for hub and spoke, I went through this
20 in opening, the Tribunal is very familiar with it. It's
21 derived from paragraph 141 of the Toys & Kits case and
22 I don't propose to read it out again.

23 There are the three elements, and I stress all three
24 of those elements must be satisfied. So that's the
25 intent on the part of both ends of the chain, retailer A

1 and retailer C, and also the requirement of use, that
2 retailer C uses the information in determining its own
3 retail price intentions. All three of those elements
4 must be satisfied.

5 Again, a point I made in opening at paragraph 23,
6 that there are no European precedents on this. It is
7 purely the Court of Appeal that the Tribunal has as its
8 guide. We do stress the very specific context in which
9 the breaches were found in those cases.

10 In Toys, the situation was that Hasbro was a toy
11 supplier supplying to two catalogue retailers who use
12 mail order catalogues which had to be printed months in
13 advance. The scheme was that it was agreed by the
14 supplier with each of the retailers that they would both
15 have the same prices for the toys in the catalogue and
16 the retailers were sent detailed proposed pricing lists
17 of each other's proposed prices for the catalogues.

18 The motive is obvious, that once the catalogue was
19 printed, it was going to take some time for it to come
20 into production, so they couldn't react to competitive
21 forces in the market. Obvious motive for fixing the
22 price in advance, and it was all organised through the
23 supplier.

24 Kits, similarly, hinging on the Euro 2000
25 Championship and the sale of football kits for that

1 specific sporting event, and the fixing of the price in
2 advance of that specific event. Again a situation where
3 the retailers were not going to be just responding to
4 normal competitive price changes in the market but were
5 seeking in advance to set their prices through the
6 medium of the supplier of the football kits.

7 We say that the facts of those cases are strikingly
8 different from the facts of this case. I'm going to
9 come back to the questions about the way that this
10 market --

11 **LORD CARLILE:** Why are the facts of this case strikingly
12 different to Toys? As I understood the way in which
13 Mr Morris repeatedly put his propositions to Mr Scouler
14 this morning, it was very much along the Toys lines?

15 **MISS ROSE:** The key difference, sir, is that it has not been
16 shown by the OFT in this case that there is anything
17 like the same constraint on parties reacting to each
18 other's prices in the market, in this case, as there is
19 when you're dealing with a catalogue.

20 The way that the OFT has sought to mount that case
21 was by the argument that it took two to three weeks to
22 change the price on packs of cheese that were random
23 weight and so were packed by the supplier. They tried
24 to combine that with the two-week window in the basket
25 policy, which they also tried to say was in fact

1 a 24-hour window, to say, "Well, that puts you into an
2 impossible dilemma because, if you raise your retail
3 price without knowing what your competitor is going to
4 do, it will take two to three weeks before that comes
5 through the system, you'll be committed to that price,
6 then you'll find yourself out of line if your competitor
7 doesn't follow you up, and then you'll be in breach of
8 your basket policy and it will take you again another
9 two to three weeks to bring your price back down and
10 you'll be in a terrible situation".

11 Now, of course, the flaw in that argument is that
12 the facts don't stack up because the evidence that this
13 Tribunal has heard is that, in fact, first of all, the
14 retail prices can be changed very quickly when you're
15 packing cheese, it can be done within two to three days,
16 so you're not talking about two to three weeks to change
17 the retail prices. And, secondly, that the basket
18 policy allows a two-week period in which your prices can
19 be out of line from your competitors.

20 So there's absolutely nothing to stop you testing
21 the market by putting your retail price up and seeing if
22 your competitors follow you. If they don't, then you
23 may have to cut your retail price and try and recover
24 your margin from the various other sources that we heard
25 about.

1 That's why this case is different from Toys because,
2 in Toys, if you've printed your autumn catalogue and it
3 then turns out that your prices are a pound more
4 expensive for the relevant toys than your competitor,
5 you're stuck with it for the season, you're stuck with
6 it for however long that catalogue is in print. That's
7 the difference. That's a really key factual
8 distinction.

9 This is a normal market in which there's nothing to
10 prevent the retailers reacting to each other's retail
11 prices by adjusting their prices. You heard from Lisa
12 that that's what they do all the time. Of course, in
13 this particular category, you're talking about literally
14 hundreds of different lines of cheeses and retailers
15 adjusting their retail prices on different cheeses all
16 the time. They're constantly putting them up and down
17 by a few pence, checking each other's prices against
18 their basket policy, adjusting because Asda has got the
19 promotion on and they've got to match Asda, different
20 cheeses across the market.

21 So what you've got is a very volatile market which
22 is moving all the time, not a monolithic situation where
23 a catalogue comes out, that's the price, you're stuck
24 with it for three months. We submit that the whole
25 theory of the OFT fails because they haven't understood

1 the way that this market operates. I'll come back to
2 that point.

3 There is also of course the point about the quality
4 of the evidence in the Toys & Kits case, and you'll see
5 that we've set out here what some of that evidence was.
6 In the Toys case, there was evidence that Hasbro had
7 sent an email saying "I'm able to confirm a list of
8 products and prices that Argos have committed to", and
9 attaching their future prices, and that the parties knew
10 what they were doing was illegal. "This is a great
11 initiative that you have instigated. Never, ever put
12 anything in writing, it is highly illegal and could bit
13 you right in the arse".

14 So that's the quality of the evidence that you had
15 in Toys. And in Kits, you actually had a diary entry
16 saying "Sports trade cartel, arrange a meeting
17 regularly".

18 **LORD CARLILE:** It's hard to believe but there it is.

19 **MISS ROSE:** It has a certain charm.

20 **MR MORRIS:** I was the gentleman who asked that particular
21 witness about that particular diary entry.

22 **LORD CARLILE:** It must have been quite a revealing
23 experience.

24 **MR MORRIS:** It was quite interesting. I'll comment on it
25 further if I need to it when it comes to my closing, but

1 that aspect did cause a similar degree of amusement
2 perhaps.

3 **LORD CARLILE:** I'm sure it did.

4 **MISS ROSE:** Of course, and we'll come on to the evidence
5 later, but we submit that you're talking about cases of
6 a different order, both in terms of the way that the
7 markets operated and in terms of the evidence. Of
8 course, in neither of those cases was there a cost price
9 increase. The retail prices were being fixed in those
10 cases without any concomitant cost price increase.

11 Finally, at paragraph 24 we make the point that in
12 both of those cases, Toys & Kits, the OFT called witness
13 evidence from the hubs confirming that the indirect
14 communications about future retail pricing intentions
15 had taken place with the requisite intent. So there was
16 direct oral evidence from the hubs in support of the
17 OFT's case in those cases.

18 State of mind. Recklessness is insufficient. We
19 say we still don't know precisely what the OFT's
20 position is on this because they have, with respect to
21 Mr Morris, somewhat hedged their bets. But we submit
22 that if they do seek to pursue the case that anything
23 less than intent or knowledge is sufficient, that that
24 submission should be rejected in principle as a matter
25 of law, for the reasons given by the Court of Appeal in

1 Toys & Kits.

2 We say that either there must be an intent that the
3 information that you're passing to your supplier should
4 be passed on to the retailer, or foresight that it will
5 be passed on, not foresight that it might, or a failure
6 to appreciate a risk that it might, or appreciation of
7 a risk that it might. Knowledge that it will.

8 We say that those two formulations used by the Court
9 of Appeal are equivalent to the way that intent is
10 approached in the criminal law where there is either
11 subjective intent in the sense of motive desire or, at
12 the very least, foreknowledge of a virtual certainty
13 which can be treated as evidence amounting to intent.

14 If I detonate a bomb on a plane in mid-air, I may
15 say that I desire the passengers to survive, but my
16 knowledge that they will virtually certainly die is
17 sufficient for me to be guilty of murder.

18 Now, we say at paragraph 27 that the OFT's case that
19 recklessless, and of course a fortiori negligence, is
20 sufficient is wrong in principle for a number of
21 reasons. The first is there would be no consensus
22 between A and C if it were simply recklessness or
23 negligence. Retailers A and C would not have knowingly
24 substituted cooperation for competition. So you would
25 fail at the basic starting point test for the existence

1 of a concerted practice.

2 It's not enough to show that information is
3 transmitted, it's not enough to show retailer A
4 suspected or hoped, or that they should have guessed
5 that the supplier would pass the information on, or that
6 they foresaw the possibility. You cannot have
7 a reckless or negligent consensus. Consensus is
8 a deliberate, knowing cooperation.

9 Secondly, the OFT must establish actual
10 communication between A and C in which both retailers
11 were conscious of participating and both knew that there
12 was a willing and intentional participant on the other
13 side of the communication, carried out through an
14 intermediary. The indirect communication must be shown
15 to be the equivalent of a direct communication, simply
16 conducted by different means.

17 The third point is the point I made in opening, that
18 the OFT's position would lead to unacceptable commercial
19 risks and have a chilling effect on the conduct of
20 a business in the United Kingdom, because it is never
21 possible for a retailer to be 100 per cent certain that
22 information that they legitimately share with their
23 supplier will not be passed on to their competitor.

24 **LORD CARLILE:** If A conveys information to B, not intending
25 that it should be communicated to C but aware of the

1 possibility that it might be communicated to C, and it
2 is in fact communicated to C, where does that leave A?

3 **MISS ROSE:** That is insufficient to establish liability
4 because in virtually every case A will be aware of the
5 possibility that the information might be communicated
6 to C. Even if every communication is accompanied by an
7 express declaration of confidentiality, which of course
8 it never will be because that's not how business is
9 conducted in the real world between people who are
10 seeking to negotiate; even if it were, you would always
11 be aware of the possibility, you could never exclude the
12 possibility that your supplier might pass on your
13 information to a competitor.

14 If you adopt a test like that, then what you do is
15 to expand the hub and spoke far beyond the concept that
16 gave birth to it, which is the concerted practice, and
17 in doing so you give rise, in my submission, to highly
18 undesirable effects that are clearly contrary to the
19 public interest, because what you do is to severely
20 inhibit normal business communications between suppliers
21 and retailers so that they feel they cannot speak freely
22 to each other and negotiate and discuss their businesses
23 in a normal way, and that, in my submission, is simply
24 not what this legislation is for. What this legislation
25 is for is to stop people actually getting together to

1 agree to cooperate to fix prices. It's not about
2 seeking to exclude the risk that somebody might leak
3 your confidential information.

4 **LORD CARLILE:** If A conveys the information to B, he's aware
5 of the possibility that it might be given to C and
6 hopes, but does not indicate, any intention that it
7 could -- should be conveyed to C --

8 **MISS ROSE:** That makes no difference.

9 **LORD CARLILE:** That makes no difference?

10 **MISS ROSE:** No, that makes no difference because, again,
11 there is no consensus between A and C. Even though
12 you're not looking for a formal agreement, because this
13 is a concerted practice, it must be concerted, that
14 means it must be cooperative and it must be collusive.
15 If I simply hope that you do something with a third
16 party, that's not me concerting with the third party.

17 **LORD CARLILE:** I understand the submission.

18 **MISS ROSE:** There has to be a much greater degree of
19 collusion than that.

20 At (d) we make the point about the analogy with
21 criminal law. We submit that the approach that the OFT
22 advocates for gives rise to the risk of the cloud of
23 illegality surrounding communications between a supplier
24 and a retailer which the Court of Appeal deprecated in
25 Toys & Kits, so there should be no such cloud of

1 illegality, and the reasons for that are obvious, in the
2 public interest.

3 Sir, those are the submissions that we make on the
4 substantive legal principles. Now I come on to deal
5 with the evidential issues. The evidential issues are
6 quite important in this case and varied. The starting
7 point is the burden of proof. The burden is on the OFT
8 to establish, on the balance of probabilities, that each
9 of the elements of the infringement has been made out.
10 We make the point this is a quasi criminal case, there
11 is a presumption of innocence. I don't suggest it is
12 a criminal standard of proof, but it is very definitely
13 for the OFT to prove its case.

14 We then make the point at paragraph 30 that, in
15 seeking to fulfil its functions, the OFT as a public
16 authority exercising statutory investigative powers with
17 severe penal consequences, comes under a number of
18 public law duties, including a duty to conduct a fair
19 investigation, and to pursue all reasonable lines of
20 enquiry to investigate the truth about relevant events.
21 That includes interviewing witnesses whose evidence
22 might be relevant, and disclosing to Tesco relevant
23 exculpatory material in its possession and conducting
24 itself as an impartial investigator or prosecutor.

25 At footnote 32, we draw the Tribunal's attention to

1 the code of practice under the Criminal Procedure and
2 Investigations Act:

3 "In conducting an investigation, the investigator
4 should pursue all reasonable lines of inquiry, whether
5 these point towards or away from the suspect."

6 What is not acceptable is for the OFT to seek to
7 prove its case and to do so by deciding not to interview
8 those who it thinks might give unhelpful evidence, that
9 suggest that Tesco is not guilty, and does not permit it
10 to do so by declining to call witnesses who have
11 relevant evidence to give but whom it fears might not
12 give evidence favourable to the OFT.

13 **LORD CARLILE:** Where do we find authority for the
14 proposition that they have to interview witnesses?
15 There will be many cases where the documentary evidence
16 is rich.

17 **MISS ROSE:** Absolutely.

18 **LORD CARLILE:** And interviewing the witnesses who compiled
19 business records may be an entirely superfluous
20 endeavour.

21 **MISS ROSE:** Of course. I don't suggest they are under an
22 obligation to interview witnesses whose evidence would
23 be superfluous, what I do submit is that they are under
24 an obligation to conduct a fair and thorough
25 investigation, and that includes an obligation to

1 interview witnesses whose evidence is not superfluous.

2 **LORD CARLILE:** Supposing you have a witness who has prepared
3 what, on any view, are business documents, documents
4 prepared during the course of their business life, and
5 those documents are absolutely unequivocal. Are they
6 under an obligation then to go and obtain a statement
7 from the witnesses?

8 **MISS ROSE:** Of course, that depends on what you mean by
9 "absolutely unequivocal", if there is any dispute about
10 what those documents mean in the first place, how they
11 should be interpreted or, secondly, whether the
12 documents are accurate, then the OFT needs to verify its
13 case.

14 **LORD CARLILE:** So let's pin this on a document, and you know
15 which document I'm going to turn to.

16 **MISS ROSE:** Yes, document 112 [Magnum].

17 **LORD CARLILE:** Document 112.

18 **MISS ROSE:** Absolutely. As a matter of fact, sir, you might
19 want to wait before you ask me this question because I'm
20 going to analyse document 112 a little later.

21 **LORD CARLILE:** Right. I'll do as I'm told.

22 **MISS ROSE:** Let me just find you the reference, we can take
23 it now, sir, if you would like to. It's paragraph 50 of
24 the note.

25 **LORD CARLILE:** You take it in whatever order you prefer,

1 I don't mind. If you're going to come to it --

2 **MISS ROSE:** I am going to come to it, we can deal with it
3 later if you prefer.

4 But, of course, I accept that there are judgments
5 that the OFT can and has to make about how to prioritise
6 its resources and what is or is not necessary in order
7 for it to investigate a case thoroughly. But if the
8 result of the OFT's investigation is that there are gaps
9 in the evidence where the documents are not unequivocal,
10 and where the OFT has failed to interview people whose
11 evidence is plainly relevant, then in my submission the
12 OFT must take the consequences of those gaps, and the
13 consequences of those gaps may be that the OFT is unable
14 to prove its case.

15 I'm going to come on to elaborate that submission in
16 more detail.

17 Turning to paragraph 31, the OFT's case on this
18 appeal relies to a considerable extent on inferences
19 which it is inviting the Tribunal to draw against Tesco,
20 in particular as regards Tesco's intention but also as
21 regards the question of what information was in fact
22 given by Tesco to other third parties.

23 We'll see in more detail, when we come to the
24 strands, there are a number of instances where there's
25 actually no evidence at all that Tesco transmitted the

1 information, but the OFT invites the Tribunal to infer
2 from the fact that a third party refers to a piece of
3 information that that information must have come from
4 Tesco.

5 What the OFT says is that the documents provide
6 overwhelming, clear, consistent evidence of Tesco's
7 intention, but that if the Tribunal were to find one or
8 two pieces of the jigsaw are missing, because they've
9 fallen out of the box -- those were Mr Morris' words in
10 opening -- the inferences should be drawn against Tesco.

11 Indeed, the OFT relies to a large degree on
12 documents that were neither sent nor received by Tesco
13 but by other parties. In fact, we counted in his
14 opening submissions, there were ten documents that
15 Mr Morris referred to as important documents when he was
16 opening the case. Only one of those documents was seen
17 by Tesco at the time of the infringements, the others
18 were entirely internal for third parties, none of whom
19 have been called to give evidence.

20 Now, the OFT relies on the Aalborg Portland case law
21 to argue that, because cartels are generally secretive,
22 evidence may be expected to be fragmentary, so
23 inferences of anticompetitive conduct can be drawn from
24 a fragmentary evidence base. That's their argument.

25 We say that that line of authorities cannot assist

1 the OFT in this case, essentially for two reasons which
2 I'm going to elaborate. The first reason is that there
3 is nothing to support the assertion that this was
4 a secretive cartel. On the contrary, this was
5 a strikingly public initiative, publicised in the trade
6 press very widely, discussed openly in the public sphere
7 at the time. There is no evidence that any party either
8 destroyed documents or deliberately refrained from
9 creating documents. Indeed that wasn't even put to any
10 witness, as I shall indicate. So that's the first
11 reason we say that's inappropriate.

12 The second reason that it's inappropriate is that
13 the reason why the evidence is fragmentary and
14 incomplete in this case is not that the OFT has
15 conducted a thorough investigation, but there isn't any
16 more evidence because the parties have concealed it,
17 it's because the OFT hasn't investigated some of the
18 basic facts at all. In a situation where the reason for
19 the absence of evidence is the OFT's own failure
20 properly to gather the evidence, the OFT can not rely on
21 the Aalborg Portland line of cases.

22 I would like to go now to the Tobacco case, this is
23 volume 2 of the authorities bundle, tab 21. The OFT
24 unsuccessfully sought to make the same argument in the
25 Tobacco case. If you go to tab 21, paragraph 86,

1 page 31 [Magnum] of the document:

2 "As things turned out, at the point that the main
3 hearing was adjourned there had been 19 witnesses that
4 had come to the Tribunal to state on oath that the
5 contemporary documents did not bear the meaning
6 attributed to them by the OFT and that none of the
7 paragraph 40 restraints formed part of the agreement
8 between the manufacturer and the retailer. Conversely,
9 there was no witness who said the OFT was right in
10 drawing the inferences it did from the contemporary
11 documents."

12 You can immediately see the parallel with this case.

13 "There was no sworn evidence before us in written or
14 oral form in which any witness said that he or she had
15 entered into or operated an agreement of the kind
16 condemned by the decision. We recognise the OFT has to
17 adopt a sceptical attitude to the evidence of company
18 executives who deny the existence of anticompetitive
19 agreements in the teeth of unambiguous documentation
20 showing the contrary. The Tribunal has emphasised the
21 importance of contemporaneous documents and the
22 difficulties which competition authorities often face in
23 obtaining clear evidence of infringing activity. The
24 OFT's skeleton referred to Aalborg Portland where the
25 court said in most cases the existence of an

1 anticompetitive practice or agreement must be inferred
2 from a number of coincidences and indicia which taken
3 together may, in the absence of another plausible
4 explanation, constitute evidence of an infringement of
5 the competition rules. However, in our judgment, there
6 were other factors which were important here. The
7 comment of the Court of Justice in Aalborg was made in
8 the context of agreements which the parties operate in
9 a clandestine fashion because they know they're acting
10 illegally. The agreements contained in a decision were
11 not operated covertly. The appellant's case has always
12 been there is nothing unlawful about these agreements.
13 This was not a case where evidential difficulties arose
14 because the participants deliberately failed to record
15 or retain information about what they were doing."

16 We submit the same is true here, and indeed the
17 opposite has not been put to the witnesses.

18 Then secondly this:

19 "In relation to ten of the 15 bilateral agreements,
20 which were the subject of these appeals, one party,
21 Gallaher, or one of the five retailers who have not
22 appealed, had either benefited from the OFT's leniency
23 programme or had entered into an early resolution
24 agreement with the OFT. Nonconfidential copies of the
25 early resolution agreements were annexed to the

1 decision. They require the undertaking to maintain
2 continuous and complete cooperation throughout the
3 investigation and until the conclusion of any action by
4 the OFT, including any proceedings before the Tribunal.
5 Such cooperation expressly includes that in relation to
6 any Tribunal proceedings using reasonable endeavours to
7 facilitate and secure the complete and truthful
8 cooperation of its current and former employees in
9 attending the proceedings, speaking to any relevant
10 witness statements and being cross-examined on such
11 witness statements. Despite this, we were not provided
12 with any evidence from these parties confirming that
13 they had entered into agreements of the kind defined as
14 Infringing Agreements or that they had imposed or been
15 subject to paragraph 40 restraints."

16 So the two reasons why the Tribunal rejected the
17 OFT's reliance on Aalborg Portland we say both apply
18 here, first that it was not a covert cartel where the
19 parties were deliberately destroying or refraining from
20 creating documents, secondly, that it was a case in
21 which the OFT had available to it numerous witnesses who
22 were obliged to cooperate with it but had not sought to
23 call them to give evidence to support its case.

24 So it's the two factors that I have indicated: it's
25 not covert, and they could have obtained the information

1 had they sought to do so.

2 Now, coming back to the text, at paragraph 34 we
3 deal with the first of these, that this is not a covert
4 cartel. The OFT in its defence alleges that the
5 initiatives operated in a clandestine fashion, and that
6 the contemporaneous documents that still exist never
7 expected to see the light of day. We say that's
8 a pretty surprising submission given that the central
9 document which the OFT relies on for the 2002
10 infringement is the Dairy Crest briefing document which
11 was openly sent to a large number of retailers by
12 Dairy Crest. There's no suggestion at all that there
13 was anything clandestine about that document.

14 The principal meeting on which the OFT relies in
15 relation to 2002 is the Dairy Supply Group meeting which
16 was attended by between 30 and 40 people, including not
17 only Tesco's various dairy suppliers but large numbers
18 of farmers who were in a pretty hostile stance at that
19 time, both to the suppliers and to Tesco.

20 So we say the proposition that this is a covert
21 subterranean cartel is pretty difficult to sustain from
22 the starting point of those two documents on which the
23 OFT founds its case.

24 Not only that, the bundles are full of press
25 releases and articles from the trade press which report

1 the 2p per litre initiative, the 20p per kilo or £200
2 per tonne initiative on cheese, and the progress that
3 was being made by the various parties in signing up to
4 it throughout 2002. This was a very public --

5 **LORD CARLILE:** I don't want to hold you up, Miss Rose, but
6 it might be helpful if we just looked at those press
7 releases, if you don't mind.

8 **MISS ROSE:** Yes, sir, this is footnote 37.

9 **LORD CARLILE:** Because we've looked particularly at two,
10 which are closely connected, but I think there are more
11 in the bundle, aren't there?

12 **MISS ROSE:** Yes. If you look at my footnote 37 here, we've
13 identified the relevant document.

14 **LORD CARLILE:** Yes, so it's 27 [Magnum], which is the Dairy
15 Industry Newsletter.

16 **MISS ROSE:** So if we just take them -- if we go first to
17 tab 23 [Magnum], and the date of some of these is quite
18 important.

19 **LORD CARLILE:** So this is an Arla Foods press release?

20 **MISS ROSE:** No, sir, it's not. This is not an Arla Foods
21 press release, this appears to be a printout from Dairy
22 News.

23 **LORD CARLILE:** Farmers Weekly.

24 **MISS ROSE:** Yes, Dairy News, do you see?

25 "Found it ..."

1 "Dairy News - News.

2 "Headline:

3 "... Raise cost to aid producers, Dairy Crest says."

4 **LORD CARLILE:** Forgive me, it looks like Farmers Weekly.

5 Under the heading "Dairy News", we have "Farmers Weekly"
6 at the bottom.

7 **MISS ROSE:** I beg your pardon, yes.

8 **LORD CARLILE:** So Farmers Weekly is a major publication.

9 **MISS ROSE:** Yes, and that's 20 September 2002, so at a very
10 early stage before any of the alleged infringements in
11 this case:

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

16 "David Lattimore, managing director of Direct Milk
17 Supplies for the Dairy, told Farmers Weekly 'It is
18 a similar initiative to when the retailers increased the
19 price of milk - and all the extra cash will be passed
20 back to the producer'.

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

25 **LORD CARLILE:** So that's a public request for a cash margin

1 increase?

2 **MISS ROSE:** Yes, it is, sir, precisely. Across the board.
3 That is public domain by 20 September 2002.

4 The next one is tab 27 [Magnum], Dairy Industry
5 News, September 24. The first part of this article is
6 discussing the liquid milk price, 2p per litre, and then
7 at the bottom of the article:

8 "But at least it is another pull back from the
9 brink, the industry is now under intense pressure to
10 secure a better long-term deal for Britain's battered
11 milk producers. Dairy Crest have said they will
12 initiate discussions with all the major supermarket
13 chains with a view to lifting manufacturing margins on
14 cheese, butter and cream, not before time."

15 So that's 24 September.

16 Then at tab 35 [Magnum], this is The Scotsman on
17 1 October 2002:

18 "As the Countryside Alliance announced plans for an
19 all-embracing rural council yesterday, it was confirmed
20 that dairy farmers had managed to squeeze a fairer share
21 of retail cheese prices out of supermarkets."

22 This is a cost price increase.

23 "The 2p farmgate increase for milk used to make
24 cheese and other dairy products will apply from today.

25 "Commitment to it came from Asda, Safeway, Sainsbury

1 and Tesco..."

2 This statement appears to have been factually
3 incorrect because all of the evidence demonstrates that
4 at least Tesco had not agreed to pay a cost price
5 increase equivalent to 2p per litre by 1 October. But
6 what is significant is that it is being reported in the
7 public domain as early as 1 October that other retailers
8 have agreed to a cost price increase.

9 The following tab, 36 [Magnum], same date, this is
10 from the NFU. It's a press release, also 1 October:

11 "NFU secures supply chain agreement to increase milk
12 producer prices

13 "The NFU has won a commitment from Dairy Crest that
14 increases in prices for cheese and other dairy products
15 will be passed back to dairy farmers."

16 Then there is a discussion of the need for increases
17 in cheese.

18 "In recent weeks the major supermarkets have
19 increased retail milk prices by 2p per litre, which has
20 been passed back by processors to their farmers.

21 "But it is the first time that a commitment has been
22 received to pass back increases in product prices,
23 particularly cheese, by the largest supplier of dairy
24 products in the UK. The NFU says the other processors
25 of dairy products must follow this lead."

1 So again a report of an agreement that Dairy Crest
2 has received a commitment to pass back increases in
3 product prices, including cheese, back to farmers. So
4 again, implying cash margin maintenance.

5 Tab 37, this is right at the back of tab 37
6 [Magnum]:

7 "Milk increase. Asda, Safeway, Sainsbury's and
8 Tesco have agreed a 2p per [litre] price increase for
9 dairy farmers selling milk for the production of cheese
10 and other dairy products. NFU Scotland is claiming the
11 move as a victory."

12 So again the assertion that a cost price increase on
13 cheese has been agreed by the major retailer.

14 Then 43 [Magnum], Dairy Industry News, October 8th,
15 "More Historic Milk Price Moves":

16 "In a tacit acknowledgement that the UK milk market
17 is currently dysfunctional, the major supermarket chains
18 in what would be a historic move are believed to be
19 poised to offer to pay the equivalent of an extra
20 2p per litre for milk used to make cheese, butter, cream
21 and other dairy products. This follows last month's
22 move by supermarkets to increase liquid milk prices by
23 2p per litre."

24 So again, on 8 October, a report that they are
25 poised to agree the cost price increase.

1 Then at tab 56 [Magnum], October 22, "Cheese Milk
2 Price Deal Close":

3 "Despite an earlier general consensus that the
4 proposed UK milk price increase 'fix' was unworkable, by
5 the weekend it seemed close to being put in place,
6 again, as two years ago, very much the result of
7 determined political and direct action by farmers. At
8 the centre of things has been the country's main
9 supermarket chains, primarily Tesco, Sainsbury's and
10 Asda, and the biggest UK dairy company, Dairy Crest, who
11 in the past have not always been seen by some farmers as
12 the most farming friendly dairy company in the country.
13 This time DC appeared to be confounding cynics. At the
14 heart of the new deal is a proposed £200 per tonne
15 increase in wholesale cheese prices, now set to come
16 into force in the next two to three weeks to generate
17 a 2p per litre increase in cheese milk prices. However,
18 at this stage the deal is clearly ..."

19 That must be intending to say "fragile".

20 So that's 22 October.

21 "If it comes off, the effect on milk prices will be
22 mixed."

23 Then they discuss the distinction:

24 "The dairy companies will have to show all the price
25 increases are going back to the farmers."

1 Then tab 72 [Magnum], in volume 2, "Retailers Want
2 Long-Term Deal on Milk Pricing", again Dairy Industry
3 News, November 5. This date is of some significance
4 because, of course, the reported conversation between
5 Lisa Oldershaw and Jim McGregor on 8 November, where she
6 is reported as being relatively confident that
7 everything is in place with Asda, comes three days after
8 this has been in Dairy Industry News:

9 "Tesco, Sainsbury, Asda and others will increase
10 wholesale cheese prices by £200 per tonne as from this
11 week, and their retail prices will be increased over the
12 next two to three weeks. The other big retail chains
13 will do the same -- as far as we can see -- although
14 there is a good deal of nervousness and suspicion in the
15 sector, with monitoring extremely difficult."

16 So, again, already public domain by the time of that
17 conversation.

18 **LORD CARLILE:** Some colourful language in the rest of that.

19 **MISS ROSE:** Indeed there is, sir. Indeed there is. It's
20 journalism with all that that implies, but what is
21 significant is what is said to be -- what is reported in
22 the public domain.

23 Tab 84 [Magnum], this is 14 November 2002, the gist
24 of the press release issued by Somerfield:

25 "Somerfield and its Scottish cheese supplier

1 McLelland have struck a deal to pay an extra £200 per
2 metric tonne for cheese. This will ensure that Scottish
3 dairy farmers receive an extra 2p per litre for milk
4 supplied on behalf of the supermarket from 1 November.

5 "This deal, along with recent deals with Glanbia and
6 Robert Wiseman Dairies, will guarantee that all Scottish
7 dairy farmers supplying these processors will receive an
8 extra 2p per litre for all milk purchased on
9 Somerfield's behalf."

10 **LORD CARLILE:** The last paragraph of this email appears to
11 be Mr Price's comments to BT Media, which is presumably
12 some kind of press agency, on the Somerfield press
13 release?

14 **MISS ROSE:** Sorry?

15 **LORD CARLILE:** Last paragraph:

16 "We can say that this deal concludes ..."

17 **MISS ROSE:** Yes:

18 "... a series of negotiations."

19 **LORD CARLILE:** So this is a statement being issued to the
20 press by Sainsbury's (sic)?

21 **MISS ROSE:** Yes. I'm told there's also tab 77 [Magnum],
22 this is Glanbia on 7 November, a press release:

23 "Glanbia commits to return retail cheese price
24 increase to suppliers."

25 **LORD CARLILE:** Yes, we did look at this one.

1 **MISS ROSE:** Yes.

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

7 **LORD CARLILE:** Yes, thank you. I just thought it would help
8 me and my colleagues to go through those.

9 **MISS ROSE:** So you can see, sir, exactly how public it was
10 and, specifically, how early the information was in the
11 public domain saying that the major retailers would
12 accept the cost price increase and when it was being
13 reported that they would put their retail prices up over
14 the next two to three weeks. All public domain
15 information.

16 So then coming back to our note, paragraph 35. At
17 paragraph 34 we have made the point that this was very
18 far from clandestine, it was widely publicised.

19 The second point is that the OFT in its further and
20 better particulars said:

21 "Relevant personnel [and it later clarified that
22 that meant Lisa Oldershaw and John Scouler] would have
23 been aware of the competition law sensitivity of future
24 retail pricing intentions (including those of other
25 retailers) and would, therefore, have been disinclined

1 to record such communications or related communications
2 in writing."

3 So that was the case that was advanced by the OFT in
4 its further and better particulars, that both Lisa and
5 John Scouler would have been disinclined to commit their
6 intentions to writing. But that case was not put either
7 to Lisa Oldershaw or to Mr Scouler. The closest that
8 the OFT came to putting the case, and, sir, I'm sure you
9 will recall this, was when it put it to Lisa that there
10 were not very many emails from the relevant period. You
11 said, well, if you are going to put that there are fewer
12 than at some earlier period, and it's suspicious, you
13 had better to do it. The result of that was they did
14 not do it but backed off.

15 If we just look in the transcript, it's Day 8,
16 page 34 -- start at 33, line 19:

17 "Question: But it was a very hectic time, certainly
18 2002 was a very hectic time for you and the dairy team,
19 that's right, isn't it?

20 "Answer: Yes.

21 "Question: It appears, however, that not very much
22 was put into writing at the time internally? So there's
23 very few emails, for example, passing between you and
24 the team ...

25 "Lord Carlile: Do you mean there were fewer than at

1 a previous time?

2 "Mr Morris: I'm just saying there were very few.

3 No, it's an absolute statement.

4 "The question I'm asking you is it appears that
5 there's not very much in writing, and the question
6 I have is, is that because you didn't put much in
7 writing between you and Rob Hirst and John Scouler and
8 the rest of your dairy team?"

9 Then:

10 "Lord Carlile: Sorry, just a moment, please ...

11 Does it matter? If there is an allegation that
12 there was a deliberate reduction in the number of emails
13 then the question is significant. But if there were few
14 emails where does that take us, Mr Morris?

15 "Mr Morris: The question is seeking to have an
16 understanding about why there were so few emails.

17 "Lord Carlile: Let's get on, but you'll understand
18 my point I'm sure.

19 "Mr Morris: I do understand your point entirely.

20 "The first question is, there were very few, and it
21 really is to explain why there were so few emails?

22 "Answer: As I've said previously, we communicated
23 verbally because we were sat inches apart."

24 Then Mr Morris moved on, and he did not put it to
25 her that there were deliberately few, even though it had

1 been expressly flagged by you, sir, that if that was the
2 case he was wishing to put, he should put it.

3 The only other occasion where Mr Morris came even
4 close to putting that case was today with Mr Scouler
5 where he said did he deliberately not keep a meeting
6 (sic) of the Dairy Supply Group meeting? But he never
7 put it to Mr Scouler that there was any deliberate
8 nonexchange of email or nonrecording of any other
9 negotiations or communications at any later stage after
10 the Dairy Supply Group meeting.

11 Of course, the suggestion that the Dairy Supply
12 Group meeting is not documented is, with respect,
13 a somewhat bizarre one, given that there are four
14 separate notes of that meeting in existence. But what
15 was not put to Mr Scouler was that there was any
16 deliberate attempt by him not to document any later
17 matters.

18 **LORD CARLILE:** I suppose one could say that it is an oddity
19 that there's no official note of the Dairy Supply Group
20 meeting.

21 **MISS ROSE:** I'm not sure one could, sir, because there's
22 certainly no evidence that there were ever official
23 notes of the meat clubs, or that it was ever the
24 practice, and it was never suggested that there were.
25 These are all questions that could have been put by

1 Mr Morris but weren't.

2 **LORD CARLILE:** One of the evidential oddities, to use that
3 word again, is that not only are there three notes of
4 the Dairy Supply Group meeting --

5 **MISS ROSE:** There are four.

6 **LORD CARLILE:** Four, but they all appear to record different
7 aspects. The amount of consistency between them is
8 quite limited actually.

9 **MISS ROSE:** Well, sir, that's perhaps not very surprising
10 because we know it was a meeting that lasted for about
11 two hours, and nobody was there with the mission that
12 the fantastic transcribers have in this court, they were
13 simply people having a meeting and writing down what
14 struck them as interesting. One of the interesting
15 things about people is how differently they hear what's
16 being said depending on their own interests and
17 perspectives. You can have a group of four people in
18 a room having the same conversation and they'll all take
19 from it something quite different.

20 **LORD CARLILE:** Yes.

21 **MISS ROSE:** But in any event, the point I make is that the
22 case that's outlined in the further and better
23 particulars is not a case that was put in the course of
24 this hearing, and certainly was not put to the
25 suppliers.

1 So that's the first point, that the OFT can't rely
2 on the Aalborg Portland line of cases because it hasn't
3 demonstrated this was a covert cartel, and in fact the
4 evidence overwhelmingly is that this was a very public
5 initiative.

6 The second point is that the OFT can't rely on the
7 Aalborg Portland line of cases where the reason why the
8 evidence is fragmentary is not that it doesn't exist,
9 but that the OFT has made no attempt to gather it.
10 That's the second point that's made by the Tribunal in
11 the Tobacco case where the Tribunal referred to the
12 early resolution agreements and the failure of the OFT
13 to call witnesses who were obliged to cooperate with it
14 pursuant to those agreements.

15 So at paragraph 37 we make the submission that it is
16 the OFT's own failures to investigate the allegations it
17 has made that have resulted in gaps in the evidence. In
18 this situation, the Tribunal ought not to be prepared to
19 draw inferences in the OFT's failure. Direct evidence
20 of the matters the Tribunal is invited to infer was
21 available, and we would say readily available, to the
22 OFT, but it has chosen not even to attempt to obtain it.

23 For the reasons which I'm now going to go into, we
24 submit that the effect of the OFT's failure to call the
25 evidence that was available to it is that, where there

1 (3.30 pm)

2 **MISS ROSE:** So coming back to our note at paragraph 36, we
3 say that this is not a case where inferences can be
4 drawn from fragmentary evidence. If there's any
5 anticompetitive conduct, it has to be proved by the
6 evidence before the Tribunal, not inferred from gaps in
7 the evidence which could and should have been filled by
8 the OFT had it properly investigated the matter.

9 Now, I then want to turn to what we say are the
10 appropriate legal principles underlying this. This is
11 paragraph 38. We say that, in essence, it's up to the
12 OFT to call evidence -- to call witnesses to prove its
13 case, the burden of proof being upon it, on key issues,
14 and also, sir, that an appellant and the Tribunal is
15 able to test the evidence by questioning the witness,
16 and that the Tribunal may draw adverse inferences from
17 the OFT's failure to call witnesses on key questions of
18 fact where there is no good reason for the failure to
19 call a witness.

20 The first case I'd like to look at is the case of
21 Flook, this is in volume 2 of the authorities bundle,
22 tab 16 [Magnum].

23 This is a criminal appeal, it was about allegations
24 of importing drugs, and there have been various
25 shipments where the Customs and Excise had scanned the

1 shipments and had failed to find drugs in the shipments.
2 The defence case was that, where Customs and Excise had
3 failed to find drugs in the shipments, the right
4 approach for the jury to take was that there were no
5 drugs in the shipments.

6 Customs and Excise had not called any evidence about
7 the circumstances in which you might scan a shipment and
8 fail to discover drugs which were actually in the
9 shipment. One can understand why they would be
10 sensitive about doing that because it would have had
11 operational implications. The question was what
12 direction should have been given to the jury in that
13 situation.

14 So if you go first to paragraph 3 on page 3
15 [Magnum], we see the issues in the appeal, and the
16 second issue is:

17 "Did the judge set out in his summing-up evidence in
18 relation to the practices of Her Majesty's Revenue and
19 Customs which had not been given at the trial?"

20 Then going on in the judgment to paragraph 46, this
21 issue was addressed, and we're told at 46 that HMRC had
22 examined various shipments and that no drugs had been
23 found.

24 Then at paragraph 48 -- sorry, 47:

25 "It was the appellant's case that as many of the

1 containers had been examined by HMRC, the jury could be
2 satisfied that the shipments had not contained any
3 illicit substances. They should reject the suggestion
4 of the Crown to the contrary. It was clear the Crown
5 wished to call evidence to show that although
6 a container might be examined by scanning or x-ray, such
7 examination methods did not mean that the containers
8 were free of illicit substances. The judge was told,
9 'I asked for statements from Customs indicating whether,
10 if something has been scanned, does that mean there are
11 no drugs in it. Customs would neither say one way or
12 the other. They refused to cooperate'."

13 And they explained why.

14 Then at paragraph 49:

15 "Counsel for the appellant raised the issue before
16 the judge pointing out that, in the absence of evidence
17 from HMRC as to the reliability of examinations and any
18 disclosure in relation to the nature of the examination,
19 the jury could take into account the fact that the
20 containers had been examined when considering whether
21 any of the shipments previous to container 26 had
22 contained cannabis and cocaine, and it was not open to
23 the Crown to suggest that the examinations might not
24 have revealed drugs as they had not called any evidence
25 about the reliability of examination techniques."

1 In other words, they could not ask for an inference
2 to be drawn that there could have been drugs in the
3 shipments that had been examined when they had failed to
4 call evidence about the likelihood of that occurring.

5 The analogy of course that we draw is with the
6 situation in which the OFT, for example, invites the
7 court to draw an inference that there were
8 communications between Tesco and various other parties
9 when it has failed to call evidence from any of those
10 parties about whether there were actually any of those
11 communications. Obvious examples are, for example, the
12 Glanbia notes that we've looked at, that the OFT relies
13 on, as suggesting that Tesco may have had communications
14 with either Dairy Farmers of Britain or with McLelland
15 in relation to moving up, and the Asda note as well.

16 Then there's the direction that the judge gave, and
17 the judge indicated that there could have been drugs in
18 the shipments, even though evidence hadn't been given to
19 that effect.

20 At paragraph 52, the Court of Appeal said:

21 "Although it was permissible for the judge to point
22 to the evidence from South Africa and elsewhere that
23 suggested that the containers prior to container 26
24 contained drugs, including those that had been x-rayed,
25 he should not have set out what he did in respect of the

1 limitations of the scanning and other methods of
2 inspection employed by HMRC. He knew that HMRC had
3 refused to give evidence to this effect. He'd accepted
4 it was a weakness in the Crown's case. He should not
5 have filled it in in the way that he did."

6 So in other words, if the prosecutor doesn't call
7 evidence to fill an evidential gap, it is not
8 permissible for the judge to seek to fill the gap by
9 inviting the jury to draw an inference. If evidence can
10 be given, it should be given. So that's Flook.

11 Then the Competition Appeal Tribunal in Durkan, this
12 is one of the construction cases, and we looked at this
13 in opening, but it is quite important and I just want to
14 remind you of it. Still in volume 2, tab 18,
15 paragraph 108 [Magnum].

16 At 108, it is explained that there were four
17 witnesses from the appellant before the Tribunal who
18 provided statements and attended for cross-examination.
19 No witness statement provided by the OFT, no
20 cross-examination to test the OFT's version of events.

21 Then over the page:

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

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

5 Now, sir, you will immediately see the parallel
6 between that situation and document 112 [Magnum]. In
7 this case, there aren't even any interview notes but, in
8 relation to the 2003 infringement, the OFT is asking the
9 Tribunal to find an infringement on the basis of the
10 note of Mr Meikle who was never even interviewed by the
11 OFT, still less ever called as a witness.

12 "Mr Beard argued that criticism of the OFT's
13 approach to proving its case would be a complete triumph
14 of form over substance, no real difference between the
15 transcript we were shown and a witness statement setting
16 out the same facts supported by a statement of truth."

17 Then the OFT explained to the Tribunal how the
18 transcripts had been prepared and checked for accuracy.

19 "This letter misses the point. No one is suggesting
20 Mr Goodbun was lying in his interview or that the
21 transcript does not fully and properly record what he
22 said. The significance of the failure to produce a
23 witness statement is twofold. First, Mr Goodbun has not
24 been pressed about any of his answers. His comments in
25 the interview of 2007 appear simply to have been taken

1 at face value throughout the investigation of this
2 appeal."

3 Again, we say if you look back at the decision, you
4 will see over and over again the OFT accepting
5 statements at face value without probing them at all,
6 and going indeed far beyond what a statement says at
7 face value and drawing inferences about the origin of
8 the statement. So that frequently we see, for example,
9 a statement made by a third party that Tesco will go up
10 if Asda does; not only is that taken at face value but
11 an inference is then drawn that that statement is
12 derived from information received from Tesco, even
13 though there's no evidence that that is so, and the
14 individual who made that statement is never interviewed
15 and then never called to give evidence.

16 So you have multiple layers of hearsay combined with
17 inference, in this case. It goes beyond the conduct of
18 the OFT that was criticised by the CAT in Durkan.

19 "If once the appeal had been lodged the OFT had gone
20 back to Mr Goodbun to take a witness statement they may
21 well have filled in many of the gaps that currently
22 exist in the account of what happened. Faced with only
23 the transcript of the interview we did not know, for
24 example, whether his evidence was based on what Mr Hart
25 had told him had actually happened or whether he was

1 simply inferring, from the marks on the document, the
2 same facts as any person familiar with what went on
3 generally in the industry could infer."

4 Again precisely the vice that attaches to a number
5 of the documents in this case, that you cannot tell from
6 a statement on the document whether a statement about
7 Tesco's conduct is simply an inference from what's
8 normal in the industry or whether it's the result of
9 information received. These people are not even
10 interviewed by the OFT, still less required to sign
11 witness statements and tendered to give evidence.

12 "We do not know what Mr Goodbun's reaction would
13 have been had he been told Mr Sharpe vehemently denied
14 that he had given a cover price. Mr Goodbun was not
15 asked whether there might be an alternative explanation
16 for the marks on the report.

17 "The second disadvantage of relying on the interview
18 transcript is Mr Goodbun's evidence has not been tested
19 by cross-examination, a process which might also have
20 generated a better understanding of the strength of the
21 case against Durkan. We reject the OFT's suggestion,
22 made both at the hearing and in their letter of
23 6 August, that because it was open to Durkan to call
24 Mr Goodbun as a witness for the purposes of
25 cross-examining him and they decided not to do so, that

1 Durkan is somehow restricted in the extent to which it
2 can challenge what is recorded in the transcript of his
3 interview. It is not the task of the appellant to
4 supplement the evidence relied on by the OFT."

5 They say the same about the fact that the Tribunal
6 hadn't called him.

7 So the onus is on the OFT to call the evidence of
8 the witnesses that they seek to rely on to establish
9 their case. It is not good enough --

10 **LORD CARLILE:** I notice this judgment then goes on to the
11 leniency application, the ERAs. I haven't looked yet,
12 but I gather you are going to deal with this later --

13 **MISS ROSE:** I am.

14 **LORD CARLILE:** The treatment of the ERAs in fact is the
15 reason we came back in five minutes later from the
16 break, because we are concerned about those and we were
17 discussing them.

18 **MISS ROSE:** I'm going to deal with the ERAs in detail.

19 **LORD CARLILE:** Okay, thank you.

20 **MISS ROSE:** One of the challenges of these submissions is
21 there are an awful lot of issues which can of course be
22 dealt with in many different orders.

23 **LORD CARLILE:** We have absolutely no complaints.

24 **MISS ROSE:** That's Durkan, and we say there are very strong
25 parallels between the criticisms that are made of the

1 way that the OFT had investigated the matter and its
2 failure to call proper evidence to prove its case in
3 Durkan and exactly what has happened in this case.

4 I do make the observation that it is unfortunate
5 that the OFT, having been so strongly criticised in both
6 the construction cases and the Tobacco case for failing
7 to take witness statements and call witnesses to the
8 Tribunal to be cross-examined, has done exactly the same
9 thing in this case for the third time within a year.

10 The next authority is Willis, another of the
11 construction cases, and that's tab 17, paragraphs 66 to
12 68, postscript [Magnum]. Again, we looked at this in
13 opening.

14 Paragraph 67, this has relevance when we come on to
15 the issue of the relevance of admissions in the ERAs:

16 "We have considerable doubt as to whether material
17 contained in transcripts of interview, even if reviewed
18 and attested, is a satisfactory means of evidencing
19 alleged infringements in cases of this kind. It is one
20 thing to use a transcript of interview as evidence of
21 relevant admissions by the interviewee, it's quite
22 another thing to attempt to use it as evidence against
23 a third party."

24 Now, that's there talking about a properly attested
25 interview. For reasons I'm going to come back to in

1 detail, we say that applies a fortiori, whereas in this
2 case the OFT is seeking to rely upon a corporate
3 admission as evidence against Tesco, without calling any
4 witness.

5 "So notes of interview are not in our view
6 satisfactory substitutes for witness statements."

7 And they explain why. They deal with
8 cross-examination.

9 Then at 68 [Magnum]:

10 "Where crucial facts are disputed, it may in certain
11 cases, and depending upon what if any other evidence is
12 available, be very difficult to resolve the issues in
13 the absence of evidence from a witness who has been
14 deposed in the ordinary way and whose assertions are
15 available to be tested in cross-examination by those who
16 dispute them. Where central issues of fact cannot be
17 resolved, the outcome may have to turn on the burden of
18 proof. It is therefore all the more important from the
19 OFT's perspective that there should be probative
20 evidence before the Tribunal. Thus even if the OFT has
21 not obtained witness statements in order to fortify its
22 own decision-making process, once it becomes clear that
23 there is a material dispute as to the facts on which its
24 decision was based, the OFT should consider to what
25 extent such statements are necessary or desirable to

1 support those facts in an appeal, subject always to the
2 provisions of rule 22 of the CAT rules. It is not
3 normally the role of the Tribunal to decide whether and
4 if so which witnesses should be deposed or called to
5 give evidence. We should add our entire agreement with
6 the comments of the Tribunal in Durkan."

7 Which are the passages that we have just looked at.

8 So you can't rely on an interview against a third
9 party. Where the OFT fails to call proper evidence, the
10 case may turn on the burden of proof. There are certain
11 facts that cannot be established. That may mean that
12 the OFT loses because it cannot establish its case.

13 Going back to our text, we also refer to
14 Aberdeen Journals, I don't intend to turn that up. You
15 can see the statement there:

16 "If there are matters relied on by the director
17 which could have been contested by way of a witness
18 statement, the fact that there is no witness statement
19 from the applicant is also a factor which the Tribunal
20 may bear in mind when assessing the evidence as
21 a whole."

22 Tobacco, you see the quote from Tobacco where there
23 was first-hand evidence. Then Polarpark, which I dealt
24 with in opening, which deals with the fact that where
25 a party could have called evidence but failed to do so

1 and there is no good reason why not. Then --

2 **LORD CARLILE:** Well, we've had no explanation as to why --
3 we've had no paragraph 4 type explanations.

4 **MISS ROSE:** No. Sir, there actually has been an explanation
5 from the OFT and I'm going to explore that shortly.

6 So that, we say, is the relevant legal framework for
7 the approach that the Tribunal ought to take to the
8 failure of the OFT to call any evidence in this case.

9 I'm now returning to the note at paragraph 39, here
10 are our submissions on the facts. We submit first that
11 there are key issues of disputed fact in this case that
12 the OFT asks the Tribunal either to assume or infer
13 against Tesco, but which the OFT could and should have
14 resolved by calling direct evidence from witnesses who
15 could speak to those issues. Secondly, the OFT was
16 aware that direct evidence was available to it on these
17 issues. Thirdly, the OFT chose not to contact any
18 potential witnesses or to call evidence from relevant
19 individuals with the result that significant gaps exist
20 on key issues. Fourthly, there was no good reason for
21 the OFT to fail to call the evidence. And we say, in
22 those circumstances, the Tribunal should reject the
23 OFT's plea for inferences to be drawn in its favour.

24 So here are some examples and these, I stress, are
25 nonexhaustive because there are very many examples. The

1 case is saturated with examples of evidence that is
2 missing because the OFT has not gathered it or called
3 it. Here are some examples.

4 The first is the meeting of 25 September 2002, to
5 which Mr Morris returned on so many occasions yesterday
6 and today in an increasingly desperate attempt to
7 persuade Mr Scouler to remember a meeting that he had no
8 recollection of. What happened was that the OFT, for
9 the first time in its amended defence, suggested that it
10 was at the meeting on 25 September 2002 that Tesco had
11 given what the OFT calls a conditional commitment to
12 increase its cost and retail prices provided other
13 parties did the same. If I can just show the Tribunal
14 that amendment, it's in the pleadings bundle. The
15 amended defence is at tab 15, it's paragraph 113
16 [Magnum], strand one:

17 "It is the OFT's case that the cheese retail pricing
18 intentions of Tesco were passed to Dairy Crest by Tesco
19 in the course of extensive dialogue between Dairy Crest
20 and Tesco which had occurred by 27 September, in
21 particular that dialogue had occurred at the DSG meeting
22 and during discussions between Dairy Crest and Tesco."

23 As you can see, the meeting of 25 September is added
24 to that pleading. That's the first time that allegation
25 was made.

1 And at paragraph 137(a), page 50 [Magnum], again an
2 amended paragraph:

3 "Tesco passed on its retail pricing intentions for
4 cheese to Dairy Crest on one or more of the following
5 occasions."

6 We see one of those is asserted to be a meeting
7 between Dairy Crest and Tesco at Cheshunt on
8 25 September, attended by Mark Allen and Colin Beaumont
9 and John Scouler and Rob Hirst of Tesco. So that's the
10 allegation made for the first time in the amended
11 defence.

12 Now, the extraordinary thing about this -- there's
13 no evidence before this Tribunal about what happened at
14 that meeting because Mr Scouler simply cannot remember
15 the meeting. The OFT, however, could with ease have
16 obtained that evidence had it wished to because, way
17 back in 2005, the OFT asked Dairy Crest about this
18 meeting.

19 If we take up document 128A at the back of the
20 second documents bundle [Magnum], you will recall this
21 was the response by Dairy Crest to the section 26 notice
22 issued to it by the OFT in February 2005. So that is
23 less than three years after the meeting when memories
24 would of course have been much fresher than they could
25 possibly be now, and the OFT with statutory powers to

1 compel answers to its questions from Dairy Crest.

2 We see in the appendix to this letter the questions,
3 and the relevant questions are 23 and 46. Question 23,
4 they were asked for:

5 "Any notes/minutes of meeting held at Tesco's
6 Cheshunt premises on or around Wednesday
7 25 September 2002.

8 "Mark Allen confirmed he attended as the executive
9 director responsible for Dairy Crest's cheese business.
10 Mark believes he was accompanied by Colin Beaumont... he
11 also confirmed no minutes were taken and no further
12 documents had been traced."

13 Then at paragraph 46:

14 "Who attended Tesco's Cheshunt premises on or around
15 Wednesday 25 September 2002 and in what capacity did
16 [they] attend?"

17 And again Mark Allen confirmed he attended as the
18 executive director, he believes he was accompanied by
19 Colin Beaumont and met Rob Hirst and John Scouler there.

20 The first point is the OFT asked who attended this
21 meeting and were any minutes taken, but they didn't ask
22 Dairy Crest what was discussed at the meeting, which you
23 might have thought was a fairly obvious question. They
24 didn't even ask that question.

25 Secondly, they were told by Dairy Crest that

1 Mark Allen and Colin Beaumont had attended that meeting.
2 They never sought to interview either of those
3 individuals and they never sought to call them to give
4 evidence in these proceedings.

5 So here we find an event which, very belatedly,
6 becomes part of its positive case against Tesco; at the
7 eleventh hour, February 2012, it becomes part of its
8 positive case against Tesco, when the OFT has no
9 evidence to support the proposition, the bare assertion,
10 that there was a discussion of Tesco's retail pricing at
11 that meeting. The OFT's case is that this Tribunal
12 should draw an inference that that was discussed in its
13 favour when the OFT was in a position to get direct
14 evidence on that question as long ago as 2005 and made
15 no attempt to do so then and has made no attempt to do
16 so at any subsequent date.

17 So that's the first example that we give.

18 **LORD CARLILE:** Your submissions, which we all I'm sure
19 understand fully, slightly beg the question of what
20 weight we are entitled to give to those written records
21 of the Dairy Supply Group meeting that do exist, because
22 they are a reality, we have them in front of us, and
23 they are, to use a phrase I used earlier, business
24 documents albeit pretty inconsistent.

25 **MISS ROSE:** Sir, that's a separate question of what you do

1 in a situation where you have the benefit of oral
2 testimony that's been tested by cross-examination about
3 a particular event, and you also have written documents
4 that deal with the same thing.

5 Can I deal with that separately, because at the
6 moment I'm on a slightly different issue of a situation
7 where there is no evidence.

8 So in relation to what was discussed on
9 25 September, there is no evidence at all. The OFT asks
10 you to infer that Tesco passed on its retail pricing
11 information at that meeting in a situation where it
12 could have obtained direct evidence about what was
13 discussed at that meeting but chose not to.

14 Sir, I promise you I will come back to that
15 question.

16 **LORD CARLILE:** Okay.

17 **MISS ROSE:** So that's the first example.

18 The second, this is back at 40(b), is evidence as to
19 whether the Asda prices sent to Tesco on 7 October 2003
20 were in store.

21 Now, the Tribunal will recall the lengthy debate
22 about the meaning of documents 116A to 116C in volume 2
23 of the documents bundle [Magnum], and whether the
24 instruction that was given by Mr Ferguson on the Friday
25 would have been sufficient for the packing plant to

1 finish packing the cheese on the Sunday so it could be
2 delivered to Asda's depot, and then how long it would
3 have taken to get from Asda's depot to the shelf, and
4 whether it would have been on the shelf by the following
5 Tuesday, 7 October.

6 Again, this is a simple question of fact. Were
7 these particular cheese retail prices on Asda's shelves
8 on 7 October 2003? The OFT has an ERA in place with
9 Asda, it would have been a matter of extreme simplicity
10 for the OFT to write a letter to Asda and ask it, were
11 these prices on your shelf on 7 October 2003? But
12 instead of that, we have these elaborate attempts by the
13 OFT to suggest that it would have been impossible for
14 the packing plant to pack the cheese in time, all of
15 these strenuous efforts caused by its failure to ask
16 a simple question from a party who is under
17 a contractual obligation to give it full and complete
18 cooperation.

19 We submit the OFT is not entitled to ask for the
20 indulgence of the Tribunal to draw that kind of
21 inference in its favour when it could have obtained
22 direct evidence had it chosen to do so.

23 A separate point in relation to Asda's prices, that
24 is also at paragraph (b) here, is that it was put to
25 Lisa Oldershaw that Asda had not yet moved its prices by

1 27 November 2003 even though no evidence was put forward
2 by the OFT of the date on which Asda moved its prices.

3 Can I just show you that in the transcript, that's
4 Day 10.

5 **MR MORRIS:** Sir, I hesitate to rise. I'm not sure if we're
6 talking about 2003 rather than 2002. I'm a little bit
7 confused, and no doubt you --

8 **MISS ROSE:** We're talking about 2003, sir.

9 **LORD CARLILE:** Day 10, let's see on the transcript.

10 **MISS ROSE:** Sorry, this is 2002, I beg your pardon.

11 If you go to Day 10, page 18.

12 **LORD CARLILE:** Yes.

13 **MISS ROSE:** We start at line 6 on page 18 and it goes down
14 to page 19, line 4. So she's asked about the end
15 of November when Tesco were finally persuaded to move
16 the own label McLelland cheeses:

17 "Question: ... you took into account the
18 information you had received ... about Asda on
19 8 November?

20 "Answer: No, I would have made my decision ...

21 "Question: The decision you took ... was taken
22 before you had seen Asda's prices in store?

23 "Answer: I can't recall."

24 Then the OFT relied, you'll recall this, on an
25 internal Asda document from two weeks earlier in which

1 Asda proposed that it would increase its shelf prices on
2 2 December, and sought from that to infer that Asda's
3 increased retail prices were not on the shelf by
4 27 November.

5 Now, it's obviously the case that what Asda was
6 proposing two weeks earlier as the date for raising its
7 retail prices might or might not have been the date on
8 which those prices were actually raised in store. But
9 again the question, at what date did Asda raise its
10 shelf prices? Was a simple, verifiable question of fact
11 that the OFT could have ascertained. Instead the OFT is
12 inviting the Tribunal to draw an inference about the
13 date on which Asda's prices change, having failed to
14 obtain that information from Asda. We say that is wrong
15 in principle.

16 A very similar point can be made about Sainsbury's
17 based on document 113. Now, I'm going to come back to
18 document 113, you'll recall that's the document where
19 the OFT changed its position. Its position in its
20 pleaded defence was that document 113 was evidence that,
21 by this date, which is I believe 2 October 2003, by this
22 date, Sainsbury's prices were in store. That's the
23 OFT's pleaded case. But without heralding its change of
24 position, and I'm going to come back to this, it put to
25 Ms Oldershaw in cross-examination that the proper

1 interpretation of this email was that these prices were
2 not in store at that date.

3 Again, we say, an impermissible approach because the
4 OFT has in place an ERA with Sainsbury's, and a simple
5 letter would have enabled it to confirm whether or not
6 these prices were in store at that date. It's wrong in
7 principle for it to seek the Tribunal to draw an
8 inference.

9 So that whole issue of the date on which prices are
10 in store is a very good example of a simple question of
11 fact that could have been resolved conclusively by the
12 OFT but which it chose not to deal with.

13 The next example that we give is evidence as to the
14 intentions of retailer buyers said to have been involved
15 in A-B-C exchanges with Tesco. The subjective intention
16 of the authors of the particular documents and
17 recipients of documents is of central importance in this
18 case. This is common ground. The OFT interviewed some
19 of the buyers who are centrally relevant to its case,
20 including Sarah Mackenzie from Sainsbury's and
21 David Storey from Asda, but it decided not to attempt to
22 obtain witness statements from them or to tender them
23 for cross-examination.

24 Now, we submit that that has grave consequences in
25 terms of the fairness of the process from Tesco's

1 perspective because these are witnesses who are
2 employees or former employees of Tesco's principal
3 competitors. It is most unlikely that they would be
4 willing to cooperate with Tesco, but they are under an
5 obligation to cooperate with the OFT. The OFT has
6 effective control over this evidence. The effect of the
7 OFT's decision not to call those witnesses is to deprive
8 both Tesco and this Tribunal of the opportunity of
9 gauging the intentions of those key players at the
10 material time, when they are the other end of the A-B-C
11 chain.

12 In short, the OFT has chosen to ask the Tribunal to
13 infer intent rather than to call the witness and take
14 the risk that it might not be able to prove intent. Of
15 course, this Tribunal will recall the events at the case
16 management conference when, at that time, Tesco was much
17 more competently represented than it is now, by
18 distinguished leading counsel who had an availability
19 problem.

20 **LORD CARLILE:** Oh, I remember.

21 **MISS ROSE:** You will remember that, sir.

22 **LORD CARLILE:** Well, his loss is our gain.

23 **MISS ROSE:** The OFT resisted an early listing of the case on
24 the only dates that he was available on the basis that
25 it was giving active consideration to calling evidence

1 from at least three witnesses. It said on that basis it
2 would need more time and there would need to be a longer
3 hearing. It has subsequently emerged not only that the
4 OFT did not call any witnesses, but the OFT now admits
5 that it has made no attempt to contact any of the
6 parties or their witnesses since the date of the
7 supplementary statement of objections in 2009.

8 Can I just show the Tribunal that, it's in the
9 pleadings bundle. I'm taking this point slightly out of
10 order. It's in paragraph 43 of my note if you want to
11 follow the text. We've set out there the relevant
12 extract of the transcript from the case management
13 conference. The relevant part of the pleadings, tab 7
14 of the pleadings bundle, first of all [Magnum]. This is
15 a letter from my solicitors on 27 February.

16 Paragraph 5:

17 "The OFT states in its letter of 21 February 2012
18 that the OFT has not made contact with any potential
19 witnesses in this matter since the time the
20 supplementary statement of objections was issued by the
21 OFT. At the case management conference, the OFT's
22 leading counsel stated expressly that the OFT had
23 identified at least potentially three witnesses that the
24 OFT might call, and the consideration has been given and
25 is currently being given to whether the OFT would in

1 fact call them. Please clarify whether the OFT (a) made
2 any attempts to contact any potential witnesses, and (b)
3 contacted or attempted to contact any of the parties
4 involved in this case or their representatives in
5 relation to the possibility of calling witnesses in this
6 case."

7 The OFT replied to that letter on 6 March, and you
8 see the reply under paragraph 5. The reply is no to
9 both of those questions.

10 So in spite of having told this Tribunal that it was
11 actively considering calling three witnesses, it has
12 made no attempt since 2009 to contact either witnesses
13 or any of the parties to explore that possibility.

14 We're going back to paragraph 40, because we stress
15 that the failure of the OFT to do that was a particular
16 prejudice to Tesco in relation to questions of the state
17 of mind of the retailer buyers, in particular
18 Sarah Mackenzie and David Storey.

19 We make the point at paragraph 41 that the OFT was
20 aware that there was evidence available to it on key
21 issues, and at paragraph 42 we identify the failure of
22 the OFT to obtain any witness evidence at all after the
23 date of the SSO.

24 We make the point that they never sought to
25 interview the Tesco witnesses, that the OFT has never

1 interviewed witnesses for either McLelland or
2 Dairy Crest, who are the two alleged hubs, at no stage
3 of the investigation.

4 Thirdly, the OFT failed to interview most of the
5 individuals who are said to be A, B or C parties to each
6 strand. If you look at the strand tables, if you go
7 back to the 2002 strand tables and flick through them,
8 under the heading "Interviews Conducted by the OFT", all
9 of the entries in red are incidences where either the
10 OFT has not interviewed the relevant A-B-C parties at
11 all or, remarkably, has interviewed them but not asked
12 them any questions about these alleged strands.

13 So even when it actually had the individuals in the
14 room, it didn't ask them about these infringements.

15 We explore that point further at paragraph (d). The
16 OFT interviewed 14 people before it issued the SSO. Of
17 those, the majority were not asked about any alleged
18 infringements relating to cheese at all. Some of those
19 who were asked about the alleged infringements relating
20 to cheese were not asked about disputed events central
21 to the OFT's case, even though some of them could have
22 provided valuable evidence. We give here the example of
23 David Peat of Wiseman. David Peat of Wiseman is the
24 author of the Wiseman note of the Dairy Supply Group
25 meeting, which is at tab 40 in the bundle. If you just

1 turn it up, you will see his name upon it. It's
2 internal page 191 [Magnum], David Peat, 4 October 2002.

3 So he actually gave a written near contemporaneous
4 account of the Dairy Supply Group meeting, and he was
5 interviewed by the OFT. If you turn up appeal bundle 1,
6 tab F, you can see that interview, right at the back of
7 appeal bundle 1.

8 So he was interviewed in 2008, and you'll see at the
9 bottom of the first page he is told by TH, who is Tom
10 **Heideman of the OFT:**

11 "Just to note that all the questions relate to 2003
12 only and milk."

13 That is indeed the position. He was only questioned
14 about milk 2003. He was asked no questions about the
15 DSG meeting, even though he attended it and took a note
16 of it. And that's an event central to the OFT's case.
17 No explanation has ever been provided of that remarkable
18 failure.

19 The next question is what are the reasons that the
20 OFT has given for its failure to interview most of the
21 relevant personnel at all or, even when it was
22 interviewing them, to interview them about the relevant
23 events, and what is its explanation for failing to call
24 any evidence on this appeal?

25 We make the point at paragraph 44 that there can be

1 no conceivable excuse, given the unusual degree of
2 access that the OFT has and has had to witnesses for
3 years, because all of the other parties alleged to have
4 participated in these infringements, apart from Tesco,
5 have signed early resolution agreements with the OFT.

6 If we can just turn up a sample ERA, we can see the
7 very wide extent of the obligations that the early
8 resolution agreement placed upon those parties. It's
9 appeal bundle 1, and if you go to page 374, behind tab
10 A1, it's at the back of the decision [Magnum].

11 Here is the Asda early resolution agreement. I'm
12 going to come back and look at these when we come to
13 admissions, but at the moment I just want to look at the
14 extent of the cooperation agreement which is the same
15 for all parties. This is paragraph 2:

16 "Asda will maintain continuous and complete
17 cooperation throughout the investigation and until the
18 conclusion of any action by the OFT arising as a result
19 of the investigation; and reference to such action
20 includes any actions taken by the OFT in any proceedings
21 before the Competition Appeal Tribunal arising from
22 a decision of the OFT in connection with the
23 infringements.

24 "... this may include but may not be limited to:

25 "Asda using reasonable endeavours to secure the

1 complete and truthful cooperation of its current and
2 former directors, officers, employees and agents ..."

3 So it extends to former as well as current
4 employees.

5 "... and encouraging such persons to voluntarily
6 provide the OFT with specific and valuable information
7 ... which supports Asda's admission and, if applicable,
8 supports the OFT's findings in respect of the infringing
9 conduct of the other parties ...

10 "Asda using reasonable endeavours to ensure such
11 information is closely referenced to available
12 contemporaneous evidence ..."

13 And so forth. It specifies dates and venues
14 relevant to the infringements.

15 "Asda using reasonable endeavours to secure the
16 complete and truthful cooperation of its current and
17 former directors, officers, employees and agents and
18 encouraging such persons to attend interviews to provide
19 the OFT with specific and valuable information relevant
20 to the infringements."

21 Then in relation to CAT proceedings at (f):

22 "... Asda using reasonable endeavours to facilitate
23 and secure the complete and truthful cooperation of its
24 current and former directors, officers, employees and
25 agents, even if Asda is not a party to those CAT

1 proceedings in:

2 "Assisting the OFT or its counsel in the preparation
3 for those CAT proceedings;

4 "If requested by the OFT or its counsel attending
5 those CAT proceedings;

6 "Speaking to their witness statements and being
7 cross-examined on those witness statements in those CAT
8 proceedings."

9 The penalty, if we go on to paragraph 11, is that:

10 "The OFT may ... terminate the agreement and impose
11 any penalty in accordance with section 36 of the
12 Competition Act in relation to the infringements if, at
13 any time before conclusion of the case, including any
14 proceedings before the CAT, it determines that the
15 conditions in paragraphs 1 to 8 above have not been
16 complied with."

17 Asda had obtained a discount --

18 **LORD CARLILE:** 12 million.

19 **MISS ROSE:** Yes. So that is a pretty substantial threat,
20 a pretty substantial threat.

21 **LORD CARLILE:** I see dissent. It looks to me as though --

22 **MISS ROSE:** There was an amendment. To be fair, there's
23 a variation if you go on.

24 **MR MORRIS:** I was slightly balking at the discount being
25 12 million.

1 **LORD CARLILE:** I was going by paragraphs (b)(iii) and (iv).

2 **MR MORRIS:** But that was the first ERA.

3 **MISS ROSE:** If you go on, almost to the back of this tab,
4 unfortunately it's another number 375 but not all the
5 pages seem to be numbered, you'll see there's
6 a variation to Asda's early resolution agreement, and
7 there you can see that the discount is from 18 million
8 to 11.7 million, so it's only 6.3 million. But still
9 a pretty substantial sword of Damocles to be held over
10 the head of Asda if it doesn't provide cooperation, and
11 there are equivalent agreements for every other party.

12 Yet, in a situation where there are key disputes of
13 fact, of which they are put on notice in our notice of
14 appeal, accompanied by our evidence, they make no
15 attempt to even try to contact any of these parties or
16 any of these potential witnesses.

17 So what are their reasons for ...

18 And, of course, in the face of the judgments of this
19 Appeal Tribunal in the construction cases and the
20 Tobacco case, severely criticising the OFT for doing
21 exactly the same thing in both of those sets of
22 proceedings, we submit it is really quite extraordinary.

23 What's their explanation? If we go to paragraph 45,
24 they've given a number of reasons for not investigating
25 this -- for not calling evidence, at different times.

1 First of all, as at the date of the decision, if we
2 take up appeal bundle 1 again, and go to paragraph 5.484
3 of the decision behind tab A1, page 206 [Magnum].
4 There's the heading "Failure to retrieve evidence from
5 third parties". You can see that the OFT is already
6 aware of Tesco's complaint that it hasn't obtained the
7 necessary evidence, even at this stage.

8 "In its representations on the SSO, Tesco submitted
9 that the OFT has failed to obtain evidence directly from
10 Dairy Crest and McLelland witnesses and instead relies
11 on notes of witness statements without testing their
12 accuracy and makes assumptions as to what a witness
13 might have said. Tesco submitted the OFT cannot
14 substitute assumptions which favour its case for
15 a failure to ask a witness the facts about the key
16 issues."

17 So the complaint we've been making for a number of
18 years to the OFT.

19 The response is:

20 "Given the volume and nature of the contemporaneous
21 documents relating to the 2002 cheese initiative, the
22 OFT decided not to prioritise interviewing witnesses
23 relevant to that allegation."

24 So the answer is, we simply chose not to do it
25 because we thought we had enough. That's the reason.

1 **LORD CARLILE:** Well, that's then.

2 **MISS ROSE:** That's then. So we say, in terms of their
3 failure to question witnesses at that stage, they have
4 to stand or fall by that. If the Tribunal concludes
5 that there isn't enough evidence to prove their case,
6 that's it, they cannot ask for inferences, having made
7 a judgment that they didn't need to try to get anymore
8 evidence.

9 So that was then. Then on the appeal, where of
10 course we reiterated the same complaint. Their response
11 was at paragraph 28 of the defence which, sir, you will
12 be familiar with because it arose at an earlier stage in
13 relation to the disclosure issue. We don't need to turn
14 it up, it is set out in the note:

15 "The documentary evidence in this case is
16 contemporaneous and it is clear and strong. No
17 amplification of this evidence is required, by further
18 documentary evidence or oral testimony, when considering
19 the nature of the infringements found by the OFT."

20 So again, the OFT has nailed its colours to that
21 mast. It says that the documentary evidence is so clear
22 and overwhelming that it doesn't need any more. If the
23 Tribunal concludes that there are gaps in the evidence,
24 as we've indicated for example in relation to the dates
25 that cheese prices are on the shelf, or where there are

1 disputes about the veracity of documents, as in relation
2 to document 112, or where there are disputes about the
3 interpretation of documents, as there are in relation to
4 numerous of the documents in this bundle, we submit that
5 the OFT is not in a position to seek inferences in its
6 favour because its case is that the material is so
7 overwhelming it didn't need to.

8 We make the point at (c) that in fact a large number
9 of the documents in this case are very far from clear
10 and required considerable elaboration and explanation.
11 In many instances that has not been available because of
12 the choice that was made by the OFT not to gather
13 evidence from the documents' authors or recipients.

14 Can I just turn in a little more detail on this
15 issue to document 113, this is document bundle 2
16 [Magnum]. You will recall that this is the email from
17 Stuart Meikle to Lisa Rowbottom saying:

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

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

22 On the face of it, it looks pretty much like an
23 email sending current retail prices.

24 **LORD CARLILE:** Whilst we're looking at a Meikle document,
25 Miss Rose, can you help me if there's any pleaded

1 material or written evidence giving a reason why
2 Mr Meikle has not been the subject of a statement or
3 called?

4 **MISS ROSE:** No, sir. There is no explanation in relation to
5 any individuals from the OFT.

6 **LORD CARLILE:** That's what I thought.

7 **MISS ROSE:** Their explanations are simply those we've looked
8 at. In the decision, we didn't prioritise it because we
9 thought we had enough material, and in the defence, the
10 documents are completely clear and we didn't need
11 anything. They've never given any reason for not
12 calling Mr Meikle. What we do know of course is that
13 they haven't attempted to contact him, at least since
14 2009.

15 **LORD CARLILE:** Do we know that?

16 **MISS ROSE:** Yes, sir, because we know -- in their response
17 to our request for particulars they've admitted that
18 they have made no attempt to contact any party or any
19 potential witness since the issue of the SSO in the
20 summer of 2009. That was tabs 7 and 8 in the pleadings
21 bundle. So not only that they haven't contacted, but
22 they haven't even attempted to contact anybody since
23 2009.

24 Of course, by the time they received our notice of
25 appeal with the accompanying witness statements, it

1 would have been clear that we were disputing Mr Meikle's
2 account of his conversations with Lisa Oldershaw in
3 2003, that we were disputing document 112. At that
4 stage, they told this Tribunal they were actively
5 considering calling witnesses, but they made no attempt
6 to contact him.

7 So document 113, on its face, looks pretty much --
8 and we say clearly is -- simply retailing (sic) to Lisa
9 Oldershaw some current retail prices. That was the
10 OFT's original position as well.

11 If you take up the pleadings bundle and go to the
12 amended defence, paragraph 256 [Magnum], this is dealing
13 with 30 September 2003, the faxing of the pristine
14 labels in 2003. What was pleaded was that Tesco's
15 suggestion, made for the first time in its notice of
16 appeal, that Sainsbury's prices may already have been in
17 store at the time, is wrong. Lisa Oldershaw was correct
18 to conclude the pristine labels sent on 30 September
19 were for products whose price rise was not yet in store.
20 It was only later, on 2 October 2003, that Stuart Meikle
21 confirmed that the retail price had moved in store."

22 The footnote reference there, you can see, is to
23 document 113 [Magnum]. Sir, the OFT's pleaded case was
24 that document 113 showed that Sainsbury's prices had
25 moved in store. Until it came to cross-examine

1 Lisa Oldershaw, that is, because at the hearing, without
2 any warning or any notice to Tesco, and without making
3 any application for permission to amend its defence, the
4 OFT cross examined Ms Oldershaw on the basis that
5 document 113 was an instance of future retail price
6 information being given to her, of course a serious
7 allegation.

8 You can see that on the transcript at Day 10,
9 page 93. It's being put to Ms Oldershaw that the
10 information in the spreadsheet about future retail
11 prices is future and not in-store information. She said
12 that she thought it was in-store information, this is at
13 the top of 94.

14 **LORD CARLILE:** Well, it sounded to me, and I'm reminded of
15 this by 95, lines 12 to 21, as though Mr Morris put the
16 proposition, as it were, if you'll forgive me, on the
17 hoof. He was looking at the document, as he said it.

18 **MISS ROSE:** Sir, the only difficulty with that is that, as
19 you will recall, and as is clear from this transcript,
20 what happened was he put it, at 95, that it was evidence
21 that it was not in store. I then objected and said that
22 that was inconsistent with the pleading, and he
23 immediately said "That is correct, sir".

24 Now, he was fully aware, at the time that he put
25 that question in cross-examination, that what he was

1 putting was inconsistent with his own pleaded case. In
2 my submission, that was a quite improper way for
3 a public authority to go about conducting itself on this
4 appeal.

5 If the OFT had concluded that the document which,
6 remember, on its case, is completely clear and requires
7 no elaboration or clarification, meant precisely the
8 opposite from what the OFT had originally concluded, so
9 that the OFT, having originally decided that this was
10 a legitimate communication of in-store retail pricing,
11 is now deciding this is an illegitimate communication of
12 future retail pricing, in my submission, the OFT was
13 under a duty to put Tesco on notice of the fact that it
14 was seeking to change its case and to make an
15 application for permission to amend its defence.

16 Now, it never sought to do that, it still hasn't
17 sought to do that, but the key point that I make in this
18 respect is how can the OFT maintain the position that
19 the documents in this case are so clear that no further
20 evidence is required when Mr Morris has completely
21 changed his mind about the meaning of a document so that
22 it goes from anodyne to incriminating, on his case, in
23 the course of the hearing of the appeal.

24 Again, of course, an issue that could have been
25 resolved straightforwardly simply by asking Sainsbury's

1 the question, when were these prices in store, when were
2 these retail prices in store?

3 Sir, that may well be a convenient moment.

4 **LORD CARLILE:** On that note, perhaps we should adjourn until
5 tomorrow.

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

7 **LORD CARLILE:** I will remind my colleagues that we must all
8 take our homework home with us.

9 Do you want to sit at 10 o'clock tomorrow?

10 **MISS ROSE:** Yes, please.

11 **LORD CARLILE:** Then we shall sit at 10 o'clock tomorrow.

12 (4.30 pm)

13 (The hearing adjourned until
14 Friday, 25 May 2012 at 10.00 am)

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