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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25 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 15)

APPEARANCES

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

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

1 Friday, 25 May 2012

2 (10.00 am)

3 **LORD CARLILE:** Good morning.

4 Closing submissions by MISS ROSE (continued)

5 **MISS ROSE:** Sir, I think we had reached page 31. Just to
6 recap, we were dealing with the reasons that the OFT had
7 given for not calling witnesses, and we were addressing
8 the reason that was given in the defence, which was that
9 it was said that the documentary evidence was so clear
10 that it didn't require amplification. I was making the
11 point that the OFT itself had changed its stance on
12 certain documents, so that certainly could not be
13 correct.

14 Just to pick up one point, you suggested yesterday
15 that point about document 113 [Magnum] may have been put
16 on the hoof. In fact, that's clearly not the case.

17 If you go back to the transcript, it's Day 10,
18 page 85, which I don't think was a passage I showed you
19 yesterday. If you go to line 17, Day 10, page 85, the
20 question is asked:

21 "... we're now moving on to 2 October, and go to
22 document 113 [Magnum]. This is an email from Stuart
23 Meikle to you at 11.18 ..."

24 And he quotes it. Then:

25 "Question: You say in your witness statement that

1 at the time you believed those prices to be in store?

2 "Answer: Yes.

3 "Question: But in fact the likelihood is that these
4 were prices which Sainsbury's had put in motion but were
5 not yet clearly in store because, in his email, he is
6 referring again to labels ... "

7 So it was clearly a prepared question that was being
8 put on the basis that Ms Oldershaw's witness statement,
9 saying that she believed those prices to be in store,
10 was incorrect when that was also the position that the
11 OFT had adopted in its own defence.

12 So we've looked at the reasons given in the decision
13 and in the defence.

14 Another reason for not calling any evidence was
15 given by the OFT in its skeleton argument in advance of
16 this hearing. If we can just take up the pleadings
17 bundle, the skeleton argument is at tab 14, and if you
18 go to paragraph 82 [Magnum], the OFT says:

19 "It is the case that in the course of its
20 investigation the OFT did not interview particular
21 individuals or ask certain other individuals about the
22 cheese initiatives. This is explained at
23 paragraphs 5.483 and 5.484 of the decision."

24 That's the passage we looked at yesterday where all
25 that was said was, "We prioritised other matters", which

1 is hardly an explanation.

2 "Further, following the lodging of Tesco's appeal,
3 after due consideration, the OFT decided not to contact
4 further potential witnesses."

5 So there we have a statement that, after receipt of
6 our notice of appeal, which was of course accompanied by
7 the witness statements of the five witnesses that this
8 Tribunal has heard from, making it clear that some of
9 the allegations in the documents were in dispute, the
10 OFT says it decided after consideration not to call any
11 witnesses. We know that it did that without even
12 seeking to contact any witnesses.

13 "The contemporaneous documentary evidence in this
14 case is strong and is of far greater weight than
15 recollection which would by now be almost ten years
16 after the event."

17 Now, that of course simply takes one back to the
18 inadequacies of the initial investigation because as
19 we've seen, for example, in relation to the meeting of
20 25 September 2002, on which the OFT now relies, the OFT
21 was investigating that meeting in 2005 and was asking
22 Dairy Crest who attended it and whether there were any
23 minutes, but deciding not to ask Dairy Crest what was
24 discussed and deciding not to interview the individuals
25 who attended. So if the position is that the OFT now

1 finds itself, ten years after the event, with no
2 evidence, that with respect is because of its earlier
3 investigative failures.

4 "Fifthly, contrary to Tesco's apparent case, there
5 is no rule of law or evidence that provides that before
6 the Tribunal the oral evidence of witnesses cannot be
7 contradicted by inferences drawn from documents. Nor is
8 there any rule of law or evidence to the effect that the
9 OFT cannot invite the Tribunal to draw the appropriate
10 inferences from those documents because of alleged
11 deficiencies in the investigation or absence in other
12 evidence. The only question is what, in fact, do the
13 documents and other evidence show?"

14 We submit that that is an inadequate statement of
15 the law, and you have already seen our submission about
16 the right approach to be taken where a party without
17 adequate explanation fails to call evidence.

18 "It is the OFT's case that both the fact of and
19 means of achieving coordinated retail price increases
20 was hidden..."

21 So this is the return to the argument that there was
22 a deliberate covert enterprise, which has not been
23 pursued with any of the witnesses.

24 "... and that the documentary evidence does show
25 unlawful A-B-C transmission of retail pricing

1 intentions. In these circumstances, it's quite
2 understandable that the evidence is fragmentary and in
3 part circumstantial but proper for the Tribunal to draw
4 inferences from the available evidence and the
5 surrounding circumstances. As regards the contention
6 inferences can only be drawn where there's no plausible
7 alternative explanation ..."

8 They say we misrepresent Coats. Then they say
9 they've got direct documentary evidence.

10 Then finally:

11 "Tesco's suggestion that an individual knowingly
12 involved in clandestine price fixing is likely to give
13 reliable evidence is unrealistic. Such a person is, to
14 put the matter at its lowest, likely to be most
15 reluctant to say he was involved, however good his
16 recollection might be. Tesco's suggestion assumes that
17 such a person will tell the truth or will willingly and
18 openly answer questions when interviewed. Thus both
19 a person who was involved in price fixing and a person
20 who was not so involved will each say he was not
21 involved."

22 One doesn't really know where to start with the
23 inadequacy of that explanation. The first point is, of
24 course, that much of the evidence that is missing in
25 this case is not simply admissions from individuals that

1 they were involved in price fixing, it's far more
2 mundane matters such as when were particular prices
3 current at Asda or Sainsbury's? What did Stuart Meikle
4 actually say to Lisa during his conversations with her
5 in September and October 2003? So that is not an
6 explanation for the absence of that material.

7 Furthermore, the suggestion that there is no point
8 calling witnesses because they would be bound not to
9 tell the truth about their anticompetitive behaviour, we
10 submit is a very strange position for the OFT to adopt.
11 First of all, it would suggest that there's no point
12 them ever interviewing anybody because they would be
13 bound to lie. Secondly, it suggests that it is
14 inconsistent with the position that the OFT itself
15 adopts in relation to the early resolution agreements.
16 Because, as we shall see in a moment, the OFT's position
17 is that this Tribunal should assume, without evidence,
18 that the effect of the admissions made in those
19 documents is that all of the companies who signed those
20 documents investigated all the allegations of fact with
21 their current and future employees and were satisfied
22 that all the facts in the decision were established.

23 So the OFT asks the Tribunal to make that assumption
24 from the signature on the ERAs whilst simultaneously
25 claiming that there's no point in calling any evidence

1 because the witnesses would be bound to deny it.

2 **LORD CARLILE:** And as you pointed out yesterday, the ERAs
3 contain a sanction.

4 **MISS ROSE:** They do indeed, sir. I'm going to come back to
5 the admissions in a minute --

6 **LORD CARLILE:** Which includes abandoning the ERA.

7 **MISS ROSE:** Yes, but, sir that passage we've just looked at
8 is the entirety of the OFT's explanation for failing to
9 call evidence in this case. What is clear is that it
10 was a considered decision taken after service of our
11 notice of appeal, in knowledge of the matters that were
12 in dispute, and we submit wholly without proper
13 justification.

14 **LORD CARLILE:** But you're not suggesting that we can't draw
15 proper inferences from the documentary material, are
16 you?

17 **MISS ROSE:** Sir, what we suggest is this, that first of all
18 where there is a conflict of evidence between oral
19 evidence that has been tested by cross-examination and
20 a document that has not been attested to by a witness,
21 that the oral evidence should carry greater weight.

22 **LORD CARLILE:** You're not submitting that as a principle,
23 are you? You're submitting it on the facts?

24 **MISS ROSE:** All the submissions that I make are pragmatic
25 submissions about the weight that should be attached to

1 the material in this case.

2 **LORD CARLILE:** I understand.

3 **MISS ROSE:** I don't make any submissions about rules of law
4 or the best evidence rule or anything of that nature.
5 The submissions that I make are all about exercises of
6 discretion and evaluation of weight.

7 So that's the first point.

8 The second point that we make is that, in so many
9 cases, the OFT is inviting the Tribunal to draw an
10 inference to fill a gap in the evidence. So, for
11 example, there will be a statement in a third party
12 document never seen by Tesco that says "This will be
13 matched by Tesco", and they ask the Tribunal to infer,
14 first of all, that that's something Tesco said;
15 secondly, that Tesco repeated that to the individual who
16 makes the statement; and, thirdly, that Tesco intended
17 that to have onward transmission. So they ask you to
18 make three inferences based on that statement,
19 unattested to by the person who made it. Of course,
20 that statement is ambiguous because the person who made
21 it could be expressing an opinion based on a combination
22 of public knowledge and their knowledge of the market,
23 or they could be reporting something they've been told
24 by somebody else, who is not Tesco, or they could be
25 reporting something they're told by Tesco.

1 We submit there's just no proper basis on which the
2 inference that the OFT repeatedly ask the Tribunal to
3 draw, that that is information coming from Tesco with
4 intent, could properly be drawn. It would be, we would
5 submit, a perverse approach for the Tribunal to adopt in
6 that situation.

7 There might be circumstances where the OFT could
8 invite a Tribunal to draw inferences in its favour from
9 fragmentary and circumstantial evidence, but the OFT is
10 in no position to do that when the reason why the
11 evidence is full of holes is because of the OFT's
12 decision not to gather the evidence. The OFT cannot
13 take advantage of that decision by saying that gaps
14 should be filled in its favour. That's the real burden
15 of the submission.

16 The points that I've made about paragraph 83 are
17 summarised at (d), we don't need to go through that.
18 Then we make the conclusion that I've just expressed, at
19 paragraph 46. We take the Tribunal back there, to
20 Tobacco, because the two points made in Tobacco we say
21 apply a fortiori here. That, first, there is no
22 evidence this was a secret cartel, and secondly, this
23 was a case where the OFT had ERAs.

24 The next point that we address, and there is some
25 overlap between this section and the one we just looked

1 at, but this is a direct response to the question that
2 you asked, sir. You asked us to address the question of
3 the status of the contents of third party documents in
4 the context of cross-examination which goes mainly to
5 credit. We give examples here of a large number of
6 documents that were neither created by nor received by
7 Tesco personnel at the time, the contents or
8 interpretation of which are contested by Tesco. One
9 which is not on this list but which obviously deserves
10 prominence is the various meetings of the DSG group,
11 where it's principally a question of the proper
12 interpretation of the various notes of that meeting.

13 Secondly, the note of the meeting between
14 Dairy Crest and Asda on 27 September 2002, then the
15 Glanbia note, that's the Colin Stump note, the
16 conversation with Alastair Irvine, then the Dairy Crest
17 memo, the conversation between Dairy Crest and
18 Sainsbury's on 16 October at which Sainsbury's waves
19 were discussed. That's a document on which the OFT
20 places very considerable reliance for arguing that there
21 was some overarching plan for waves without having
22 called any of the participants in that meeting, and
23 thereby depriving Tesco of the opportunity to test that
24 evidence and test what was actually meant by that
25 document.

1 This is a very important point. There's serious
2 prejudice to Tesco from the OFT's decision not to back
3 up the documents with oral testimony which has deprived
4 us of the opportunity of cross-examining on that
5 evidence and finding out what was actually meant.

6 Then there is the email from Jim McGregor to
7 Alastair Irvine, that's the telephone conversation with
8 Lisa Oldershaw on 8 November where there is a dispute
9 about what was exactly said and what the interpretation
10 of that email is. Then, of course, the famous Tesco
11 briefing document, the Stuart Meikle document, document
12 112 [Magnum], from October 2003.

13 We set out a number of reasons why we say that the
14 testimony of witnesses which has been tested in
15 cross-examination should be given more weight than the
16 documentary material that the OFT seeks to rely on in
17 circumstances where the OFT has chosen not to call any
18 witnesses. The first point is that the documents that
19 the OFT relies on are hearsay, and that brings me to
20 section 4 of the Civil Evidence Act. If I can just ask
21 for copies of that to be handed up. (Handed)

22 The first obvious point to make is that the Civil
23 Evidence Act is not a direct application to this
24 Tribunal and you see that from section 11, the
25 definition of "civil proceedings" as meaning:

1 "Civil proceedings before any Tribunal in relation
2 to which the strict rules of evidence apply."

3 This is not such a Tribunal. However, we submit
4 that what is set out in section 4 is in fact a useful
5 common sense checklist of the factors which ought to
6 make any judicial body -- which any judicial body ought
7 to have in mind when it considers the weight to be given
8 to hearsay evidence where a party has not called the
9 author of the statement on which it proposes to rely.

10 So in estimating the weight to be given to hearsay
11 evidence in civil proceedings:

12 "... the court shall have regard to any
13 circumstances from which any inference can reasonably be
14 drawn as to the reliability or otherwise of the
15 evidence. Regard may be had in particular to the
16 following, whether it would have been reasonable and
17 practicable for the party by whom the evidence was
18 adduced to have produced the maker of the original
19 statement as a witness."

20 We say not only was it reasonable and practicable in
21 this case, but the OFT had exceptional powers to require
22 the attendance of witnesses and chose not to exercise
23 that.

24 "Secondly, whether the original statement was made
25 contemporaneously with the occurrence or existence of

1 the matter as stated."

2 As to that, there are of course differences between
3 the documents on which the OFT relies and, most
4 obviously, the Stuart Meikle email from early October is
5 not contemporaneous with the conversations with
6 Lisa Oldershaw that it describes. As I'm going to
7 submit in a moment, it is actually a piece of written
8 advocacy seeking to justify his position in early
9 October on the basis of the history in the preceding
10 month. So it's not a contemporaneous note of
11 a conversation; it's a worked-up document presented
12 later.

13 "Whether the evidence involves multiple hearsay."

14 Now, that point applies to many of the documents on
15 which the OFT relies so that, classically, you have
16 somebody simply making a statement like "other players
17 will move back down", and then inferences, multiple
18 inferences drawn from the OFT as to where that statement
19 would have originated, which carry with them the
20 implication of multiple layers of hearsay, suggesting
21 that that statement would have originated with Tesco.
22 So not just multiple hearsay but unattributed hearsay.

23 "Whether any person involved had any motive to
24 conceal or misrepresent matters."

25 Again, "conceal or misrepresent" may be putting it

1 a bit harshly, but certainly we do submit that Mr Meikle
2 had reasons for seeking to justify himself when he wrote
3 what he did in document 112 [Magnum].

4 "Whether the original statement was an edited
5 account or made in collaboration with another or for
6 a particular purpose."

7 Again that obviously has relevance particularly to
8 the Meikle document.

9 And finally:

10 "Whether the circumstances in which the evidence is
11 adduced as hearsay are such as to suggest an attempt to
12 prevent proper evaluation of its weight."

13 Now, I do ask the Tribunal to pause there --

14 **LORD CARLILE:** To try and understand what that sentence
15 means.

16 **MISS ROSE:** To understand what that sentence means, exactly.

17 It's asking the question: has a party made
18 a tactical decision not to call a witness because they
19 think that the witness might not actually support their
20 case.

21 We do submit that that is what has happened in this
22 case. When the Tribunal reads, as I do invite you to,
23 the interviews that the OFT conducted with the
24 Sainsbury's and Asda witnesses in particular,
25 Sarah Mackenzie, David Storey, you will see that their

1 evidence very far from unambiguously supported the OFT's
2 case. It was highly equivocal. And somebody at the OFT
3 decided that they did not want those people to give
4 evidence.

5 Now, in circumstances in which the conduct of those
6 individuals was centrally relevant, and in which the
7 OFT's case depends on establishing intent not only on
8 the part of Tesco but on the part of Sainsbury's, Asda
9 and Safeway, who are alleged to have been the A or C in
10 each of the information exchanges, so in every single
11 infringement the OFT has to establish that Sainsbury's,
12 Asda or Safeway had the requisite intent, either that
13 the information should be passed on or the knowledge
14 that it had come from Tesco with the intention it should
15 be passed on; in those circumstances, given the fact
16 that the OFT had interviewed those individuals from Asda
17 and Sainsbury's -- of course, it never interviewed
18 anyone from Safeway because Safeway had been taken over
19 by Morrison, I shall come back to that point, but it
20 interviewed people from Asda and Sainsbury's, had their
21 statements but has taken a tactical decision not to take
22 the risk of calling them to give evidence and thereby to
23 prevent the evaluation of the weight of their evidence.
24 We do say that that is a serious matter from which an
25 adverse inference can be drawn.

1 The timing of that decision is also of some
2 significance because we know that that decision was
3 taken by the OFT at some time between the case
4 management conference in this case, which was
5 in November 2011, and the service of the OFT's defence,
6 which was at the end of January 2012. Because we know
7 that as at the case management conference, they were
8 actively considering calling at least three witnesses.
9 We don't know who, but at least three witnesses.

10 What happened between those dates? The most obvious
11 thing that happened was the collapse of the Tobacco
12 litigation, and one of the main reasons that the Tobacco
13 case collapsed was that the OFT in that case called
14 evidence from a Sainsbury's witness who did not support
15 the OFT's case and, when cross-examined, it was
16 established in cross-examination that the OFT's case was
17 factually unsustainable.

18 Now, I do invite the Tribunal to draw an inference
19 that that may have been a factor in the tactical
20 decision that the OFT took in this case not to call any
21 evidence.

22 So we say that these factors are a handy checklist
23 for clearly relevant considerations and that, when you
24 go through them, it becomes apparent that no weight
25 should be placed on the written evidence that the OFT

1 relies on when either its veracity or accuracy is
2 contested by Tesco, by oral evidence, or where its
3 interpretation is contested by Tesco through oral
4 evidence.

5 Now, at paragraph 50 we deal specifically with
6 document 112. If we can perhaps turn that up, it's in
7 volume 2 [Magnum].

8 The OFT would have known on receipt of our appeal
9 that this document, the accuracy of this document was in
10 dispute, and it had the power to call Stuart Meikle but
11 it made no attempt to contact him. As I've already
12 pointed out, this is not a contemporaneous note of any
13 meeting. It is a briefing document prepared,
14 presumably -- we don't know for sure but it's
15 a reasonable inference -- by Mr Meikle for his
16 superiors.

17 The context is that he's in a difficult situation
18 because Tesco in early October 2003 were saying, first,
19 that they refused to accept the cost price increase
20 which McLelland was putting forward and, secondly, were
21 threatening to reduce the distribution of the
22 Seriously Strong brand. Both of those were conditions
23 that could have serious adverse financial consequences
24 for McLelland, and there was going to be a high level
25 meeting between Mr McGregor and Mr Irvine from McLelland

1 and Mr Scouler and Lisa Oldershaw from Tesco the
2 following week.

3 So Mr Meikle is in a bit of a fix, he's under
4 pressure, and he's trying to explain how it is that he
5 hasn't delivered acceptance from Tesco of the cost price
6 increase. What he does is he says, "Well, it came as
7 a surprise to me that they're not accepting it because
8 I thought they already had accepted it". That's his
9 excuse, that he thought they had accepted it but then
10 they back-tracked. That's the message he's trying to
11 give in the first paragraph.

12 As against that, you have Lisa Oldershaw's oral
13 evidence that she did not accept the price increase at
14 the meeting that he describes and, indeed, that she
15 would never accept a cost price increase at the initial
16 meeting. Her position would be, "Justify it to me".

17 Now, I submit that this document, not only is it
18 a piece of advocacy -- and I must stress, I don't say
19 Mr Meikle was lying because I've no basis for knowing
20 whether he believed it or not; what I do say is that
21 what he wrote was not accurate, either because he was
22 mistaken or because he had reasons for presenting it in
23 this way.

24 But his document is actually internally inconsistent
25 because he accepts here the obvious and verifiable fact

1 that, two weeks after the meeting that he had with
2 Lisa Oldershaw, he sent her at her request further
3 written justification for the £200 per tonne cost price
4 increase.

5 Now, her position is, "Yes, of course, because
6 I wasn't satisfied that he had justified his request for
7 the cost price increase so I was asking him to provide
8 me with a written justification". But on his account,
9 that is puzzling. If she had already accepted the £200
10 per tonne cost price increase, why would she be asking
11 him to provide a written rationale after that meeting?

12 So that, we submit, is an indicator that what he
13 says here is not accurate.

14 So we submit that, for those reasons, and those I've
15 already given, her account of her conversations with
16 Mr Meikle should be preferred to what is presented in
17 this document.

18 I think we can skip to "Corporate Admissions", if I
19 just invite you to read for yourselves down to
20 paragraph 55 at your leisure, I don't intend to go
21 through all that orally, but if we go over to
22 paragraph 56, "Corporate Admissions".

23 The OFT now places heavy reliance on the admissions
24 that were made by the early resolution parties as part
25 of their signature of early resolution agreements. The

1 first point we make is that that is a significant change
2 from the position that the OFT adopted in the decision.

3 If we take up the decision in appeal bundle 1,
4 paragraph 5.473 [Magnum]. You see at 5.472 that the OFT
5 records the fact that:

6 "In the SSO the OFT sought to rely on the fact that
7 other parties had admitted their role in the 2002 cheese
8 initiative as evidence to support its proposed finding
9 that Tesco had also participated in the initiative.
10 Tesco submitted that the reliance on these admissions as
11 proof of its participation in the infringement was
12 inappropriate. The OFT has carefully considered whether
13 it is appropriate to place such reliance on admissions
14 in light of Tesco's representation and has decided that
15 these admissions do not on their own amount to evidence
16 demonstrating Tesco's involvement in the 2002 cheese
17 initiative. Accordingly, the OFT does not place any
18 reliance on these third party admissions in making its
19 infringement finding in respect of Tesco."

20 That was the position in the decision. No reliance
21 placed on the admissions.

22 The position, however, is now very different, and
23 we've set out, if you go back to our text, paragraph 58,
24 we've set out a number of examples from the OFT's
25 defence. I invite you to read those through.

1 If you look particularly at the ones at the top of
2 page 39:

3 "These admissions are clear evidence of those
4 parties' involvement in the initiatives. They are
5 evidence which the Tribunal should not ignore. The OFT
6 relies upon these admissions... these parties'
7 admissions are evidence of their having had the
8 requisite state of mind, which the Tribunal can and
9 should properly take into account.

10 "All of the participants in the 2002 cheese
11 initiative, except Tesco, have admitted the infringement
12 as described in the statement of objections.

13 "Asda and Sainsbury's evidently had sufficient
14 motive for the infringement; both have admitted their
15 involvement in the infringement."

16 So they specifically rely on the admissions made as
17 evidence that the other retailers had the requisite
18 state of mind when involved in the A-B-C transmissions.
19 We submit that that is impermissible and that no weight
20 at all should be attached on those admissions for any
21 purpose in this appeal.

22 **LORD CARLILE:** Why can't we attach weight to those
23 admissions in relation to those other companies?
24 Leaving aside any involvement of Tesco.

25 **MISS ROSE:** Sir, obviously, in relation to any involvement

1 of Tesco it would be inappropriate. But my submission
2 is wider, which is that on the particular facts of this
3 case, and given the circumstances in which those
4 admissions were made, the Tribunal cannot place any
5 weight on them at all.

6 I'm going to explain why now because, again, that is
7 a fact-specific submission, it's not a general issue of
8 principle. It relies both on the nature of the
9 admissions, the identity of the persons making them and
10 the circumstances in which they were made. I want to
11 just take you through it. This is obviously quite an
12 important point.

13 Now, what are the admissions, first of all? What
14 they are is a countersignature by a representative of
15 the relevant party of a pro forma letter sent by the OFT
16 to that party, the ERA. If we take up the notice of
17 appeal bundle 1 again and have a look, we were looking
18 at the Asda ERA as an example, which is at page 374
19 [Magnum], behind tab A1.

20 **LORD CARLILE:** 374 is a cover sheet.

21 **MISS ROSE:** That's the cover sheet, yes, the actual --

22 **LORD CARLILE:** On the back. Yes, we looked at this
23 yesterday, didn't we?

24 **MISS ROSE:** Yes, we did.

25 So what it is, if you look at paragraph 1:

1 "Asda will by signing the agreement admit its
2 involvement in the infringements."

3 So that's the admission. And we see that the
4 signature is in fact redacted so we don't know who
5 signed on behalf of Asda. So we have no idea if it's
6 a person who had any personal involvement in these
7 events at all.

8 Then what were they admitting? You see the appendix
9 which sets out the infringements. This is the set of
10 infringements that Asda admitted to in 2007. You will
11 see that they included the 2002 liquid milk initiative
12 which was said to be an infringement:

13 "The single ... concerted practice between Asda,
14 Morrisons, Safeway, Sainsbury's, Tesco and Arla which
15 had as its object the prevention, restriction or
16 distortion of competition in respect of fresh liquid
17 milk..."

18 That was admitted by Asda in 2007. They also
19 admitted the 2003 fresh liquid milk initiative, also
20 said to include Tesco. That's as at 2007.

21 What then happened was that, after further
22 investigation, the OFT concluded that, actually, it
23 could not sustain a finding that there had been any 2002
24 liquid milk infringement at all, and neither could it
25 sustain a finding that in 2003 Tesco had had any

1 involvement in an infringement involving fresh liquid
2 milk.

3 What then happened was that the parties were asked
4 to amend their ERAs. We see this explained in the
5 decision. If you go back to the decision,
6 paragraph 2.105 [Magnum].

7 **LORD CARLILE:** This is the variation dated 5 May 2010.

8 **MISS ROSE:** Yes, it is. I'm going to come to the variation
9 in a moment, I just want to show you what the OFT said
10 about it.

11 Page 33 of the decision, so this is just after the
12 OFT has explained how it dropped the 2002 liquid milk
13 infringement altogether and dropped allegations against
14 Tesco relating to 2003 liquid milk.

15 Then it says this at paragraph 2.105:

16 "As a result of the OFT affirming the proposed
17 closure decision, the admissions that early resolution
18 parties had made, as set out in the appendix to each
19 early resolution agreement, needed to be amended."

20 We see the footnote there is:

21 "Specifically, where relevant, references to the
22 2002 liquid milk initiative, 2003 butter initiative
23 and/or Tesco's alleged participation in the 2003 FLM
24 initiative needed to be removed."

25 The penalties needed to be amended, and so, at

1 2.107:

2 "In order to amend admissions resulting from the
3 affirmation of the proposed closure decision, the OFT
4 requested that each ER party sign a variation agreement
5 to its ERA to reflect these amendments. They were all
6 countersigned and returned to the OFT by 27 April 2010."

7 **LORD CARLILE:** So they'd admitted something they hadn't
8 done.

9 **MISS ROSE:** Yes, in 2007 they admitted something they hadn't
10 done.

11 **LORD CARLILE:** Yes, I understand the point.

12 **MISS ROSE:** So that's the starting point for how much weight
13 you should place on these admissions. That's the first
14 point.

15 It's clear that the drive for the scope of the
16 admissions is coming entirely from the OFT. The OFT is
17 going, "Oh, damn it, they've admitted things that we
18 can't prove so let's get them to take them out", and the
19 parties are just countersigning and sending it back.

20 So that's the first point.

21 **LORD CARLILE:** I should amend what I said in response to the
22 shaking of heads. They'd admitted things that it had
23 not been proved that they had done.

24 **MISS ROSE:** Yes.

25 **LORD CARLILE:** Or which were not being pursued.

1 **MISS ROSE:** And that were not being pursued.

2 **MR MORRIS:** Not being pursued.

3 **LORD CARLILE:** Does that deal with the shaking of heads?

4 **MR MORRIS:** Yes, I apologise. Obviously we address this in
5 our skeleton.

6 **LORD CARLILE:** When you shake your head it's very
7 noticeable, Mr Morris.

8 **MR MORRIS:** I'm sure it is, and that's perhaps one of the
9 advantages.

10 **LORD CARLILE:** You don't need to explain that one. It's
11 just envy on my part.

12 **MR MORRIS:** I like to attract attention.

13 **MISS ROSE:** Sir, in fact they did admit things they hadn't
14 done, and I'm going to show it to you now.

15 **MR MORRIS:** I'm sorry, if I may finish my observation
16 because the chairman made a fair comment. The last way
17 you put it is the way that I will come to it, that they
18 had admitted things which were not being pursued.

19 **LORD CARLILE:** We'll park it on that basis, subject to
20 further submissions by Miss Rose.

21 **MISS ROSE:** Sir, I want to make a submission now on
22 a document that's in a red box. Can I ask that --

23 **LORD CARLILE:** Which red box?

24 **MISS ROSE:** It's a document that's not currently in the
25 bundle.

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1 amend its representations in a manner which satisfies
2 the OFT, the OFT may treat any agreement on the terms
3 set out in the agreement as ceasing to have effect and
4 shall notify Asda accordingly."

5 So the parties are warned that, if they kick up
6 a fuss about any of the facts, the agreement may be off
7 and the concession they've got on their fines may be
8 off. So, again, a strong disincentive to the parties to
9 quibble with the facts that are set out, but an
10 admission which does not appear to cover the facts. So
11 we say the scope of the admissions is unclear.

12 The next point is that one simply has no idea
13 whether the person who signed each of the ERAs had any
14 personal knowledge of the infringements that were being
15 admitted. These are corporate admissions, they are not
16 an admission by Sarah Mackenzie, "I transmitted my
17 information to Dairy Crest and I intended it to be
18 passed to Tesco"; they are admissions from somebody, we
19 do not know who, I assume it's somebody at board level
20 but we don't know who, and we have no idea whether they
21 had any personal involvement.

22 The next point is, of course, that the motive for
23 making the admissions is opaque. We do not know whether
24 the admissions were made because the parties genuinely
25 thought that they were guilty, or because they were

1 being offered discounts, in some cases of several
2 million pounds to do so, or for other commercial
3 pragmatic reasons. We simply don't know.

4 The OFT could have called evidence from the parties
5 who made the admissions to say, "We made these
6 admissions because we genuinely thought the OFT's case
7 was justified", but it chose not to do so.

8 We submit at paragraph 63 that, therefore, the
9 status of these admissions is no difference from the
10 status of unsigned and unsworn witness statements on
11 which the OFT sought to rely in the construction cases.

12 If the signatories of these agreements had any
13 relevant evidence to give from their personal knowledge
14 about the infringements, they should have been called to
15 give evidence so that their evidence could be tested by
16 cross-examination. What is not permissible is for the
17 OFT to bypass that course and then simply to rely upon
18 these admissions as against Tesco as establishing the
19 requisite state of mind on the part of the other
20 parties, in particular Sainsbury's, Asda and Safeway.

21 The OFT itself has in the past recognised that
22 parties may enter into admissions in ERAs for pragmatic
23 commercial reasons that are not to do with their
24 acknowledgement of their own guilt. Indeed, the OFT
25 itself positively made that submission in the

1 Crest Nicholson case. That's volume 2 of the
2 authorities bundle, tab 13. If you go to paragraph 68
3 [Magnum], this is recording the OFT's submission:

4 "The second justification advanced by the OFT is it
5 was simply a matter for each company to decide whether
6 to accept the fast track offer and to benefit from the
7 associated penalty reduction. Each company made its
8 decision having regard to its own different
9 circumstances and based on all the information at its
10 disposal. Just as it's up to a company to decide
11 whether to apply for type C leniency, it was a matter
12 for each party under investigation to decide voluntarily
13 whether to accept the fast track offer and benefit from
14 the associated penalty reduction. The claimant decided
15 not to admit liability, others did, even though they
16 might not have known the true extent of their liability.
17 Unlike the claimant, some made a commercial decision
18 that the advantage of securing a penalty reduction,
19 should they be liable, outweighed any reputational
20 damage, notwithstanding that liability is not eventually
21 established."

22 In other words, in that case, the OFT acknowledged
23 that parties might admit liability in order
24 pragmatically to obtain a reduction in the fine even
25 though they didn't know whether they were in fact

1 liable.

2 We have already made the point that, in this case,
3 very significant financial incentives were offered to
4 the parties to make these admissions, and we've seen
5 that in Asda's case it was almost £7 million. There
6 were different figures for each company, but in each
7 case a very significant financial incentive given for
8 making that admission.

9 **LORD CARLILE:** I suppose it's not all one-way traffic, is
10 it, Miss Rose? If you take a -- I know Crest Nicholson
11 built quite a lot of houses, but Tesco -- or, let's say,
12 Asda sell an awful lot of food to a very large number of
13 millions of people. If an adverse finding is made
14 against them and they accept it, in an industry like
15 that, there's always the risk of another inquiry taking
16 place into some other commodity in the future. Given
17 the percentage of turnover potential for fines,
18 I suppose there's a strong incentive for a company like
19 that to make sure that the ERA is factually accurate?

20 **MISS ROSE:** Well, sir, the problem is we simply don't know.
21 We're speculating. We don't know what are the
22 particular commercial matters that the companies will
23 have weighed up. You're right, sir, that may have been
24 a factor. Another factor may have been to consider,
25 "Well, this is not a big deal in terms of publicity. If

1 we just put it behind us, pay the fine now, which is
2 a relatively modest fine, we can carry on, there won't
3 be a big stink about it. If we resist and an adverse
4 finding is made, there may be more publicity, then if we
5 appeal there may be yet further publicity, so we would
6 rather cut our losses now and move on".

7 We know in some cases, of course, companies were in
8 the process of being taken over, that's true of
9 McLelland, and also Safeway. Both McLelland and Safeway
10 were taken over during this investigation process --

11 **LORD CARLILE:** I think all I'm suggesting to you is that
12 it's a big tactical decision rather than a small
13 tactical decision?

14 **MISS ROSE:** It is. It is obviously a decision of commercial
15 significance for these companies which is taken at board
16 level, and it's a pragmatic decision about what is in
17 the best interests of the company and its shareholders.
18 But to say that it can be taken against Tesco as
19 evidence --

20 **LORD CARLILE:** That's a different matter.

21 **MISS ROSE:** That's the point, sir. It would be one thing --
22 if, for example, there was a follow-on damages action.
23 If I were a cheese consumer who said that I had been
24 overcharged for Cathedral City by Asda, absolutely --

25 **LORD CARLILE:** Surely Ocado. Sorry.

1 **MISS ROSE:** Of course Ocado were not found to have infringed
2 anything. But if I were in that situation of course
3 I could rely, as against Asda, on the admission that
4 Asda had made, because Asda would not be entitled to
5 say, "Well, we made that admission for pragmatic
6 commercial reasons but you're going to have to prove
7 your case against us, obviously".

8 This is completely different. Tesco has no input
9 into Asda's commercial decision that it's in the best
10 interests of the shareholders of Asda to make the
11 admission of liability and accept the reduced fine. But
12 for then Tesco to be in a situation where the OFT says,
13 "We don't have to prove against Tesco that Asda had the
14 requisite intent when information was passed to Tesco,
15 or passed from Tesco via the suppliers to Asda", that we
16 submit is a wholly different matter and wholly
17 impermissible.

18 **LORD CARLILE:** We have got the point. Thank you.

19 **MISS ROSE:** The next point, paragraph 65, is that the
20 admissions were not signed by any of the individuals
21 said to have actually participated in the infringing
22 initiatives and therefore have no probative evidence.
23 No relevant individual has admitted having the necessary
24 state of mind.

25 Now, the OFT sought to get around that particular

1 problem at paragraph 88 of its skeleton argument
2 [Magnum]. You can see that -- I don't think we need to
3 turn it up because it's set out at paragraph 66.

4 What the OFT said was:

5 "The Tribunal is entitled to, and in this case
6 should, assume that when concluding an ERA containing
7 relevant admissions, the company making the admission
8 has carried out its internal inquiries such that it was
9 satisfied that all the elements of the case alleged by
10 the OFT were well-founded on the facts. In this way,
11 the Tribunal can properly conclude that the company
12 admitted the infringement on the basis that one or more
13 particular individuals had the requisite state of mind."

14 That's their submission. So they invite you to
15 assume that the company made factual enquiries of the
16 particular individuals before they made the admission.

17 Now, when that statement was made in the skeleton
18 argument, the Glanbia document that I showed to the
19 Tribunal a little earlier had not been disclosed to us.
20 The Safeway document that you will recall I took you to
21 in opening, which also contained a significant sentence
22 relating to this, had been disclosed to us only in
23 a redacted form, and the evidence that was given by
24 Mr Irvine to this Tribunal about the lack of
25 participation by McLelland in the early resolution

1 process had not been given.

2 But those were all facts that were known to the OFT,
3 and, sir, we submit that it is quite astonishing that
4 the OFT made that submission in its skeleton argument,
5 inviting the Tribunal to assume that factual enquiries
6 had been made of the individuals, when relevant evidence
7 clearly demonstrating the contrary in relation to at
8 least three of the early resolution parties had not been
9 disclosed to Tesco.

10 We set out the relevant evidence at paragraph 67,
11 and (d) is the point about the extension -- the
12 retraction of some of the admissions when the OFT
13 decided it could not prove all of the initial
14 infringements.

15 So those are the circumstances, sir, in which we at
16 paragraph 68 say that, in these factual circumstances,
17 no inference could properly be drawn from the admissions
18 and no weight could rationally be placed on them. We
19 say it would be perverse for the Tribunal to place any
20 weight at all on the admissions in this case, because
21 the basis for them, the reasons why they were made and
22 the verification of their accuracy are all entirely
23 opaque. Yet those are matters that could simply have
24 been clarified by the OFT had it called evidence from
25 the parties who had made those admissions.

1 Finally, we do make the point that the OFT's
2 reliance on admissions is inconsistent with the case law
3 of the general court, and you have the reference there.

4 Sir, that finishes the evidential section and takes
5 me to the alleged 2002 infringement. What I propose to
6 do in relation to 2002 is first to set out Tesco's case
7 as to what we say the evidence shows occurred in 2002,
8 then to look at the OFT's case and to identify what we
9 say are the flaws in the OFT's case, and then to analyse
10 each of the 2002 strands by reference to the relevant
11 documents individually.

12 So Tesco's case on the events of 2002. First of
13 all, the background. I don't think I need to read out
14 paragraph 70, this is very familiar ground, the
15 background to the events of 2002 being the pressure from
16 farmers for an increase in the farmgate price for milk
17 and the consequential blockades and industrial pressure.

18 Then at paragraph 71, Tesco supported that position
19 and issued a press release and a press statement by
20 Mr Gildersleeve, those are documents that the Tribunal
21 has seen on a number of occasions, and it issued
22 a challenge to the processors. You've heard
23 Mr Scouler's take on that. Tesco's position is, it's
24 for the processors to do their bit to make sure that the
25 money goes back to the farmers. Tesco also increased

1 both its cost price and its retail price for fresh
2 liquid milk immediately after putting out that press
3 release.

4 It was obvious to everybody that increasing the cost
5 price for fresh liquid milk by 2p per litre was not
6 going to be sufficient to fund a 2p per litre increase
7 in the farmgate price for all raw milk because the
8 majority of raw milk is not used to make fresh liquid
9 milk. Therefore, you would have to work out other ways
10 of getting that farmgate price up.

11 That issue and what could be done about it was
12 discussed at the Dairy Supply Group meeting on
13 13 September 2002. The nature of the Dairy Supply
14 Group, again, not in issue. This was a planned
15 initiative by Tesco analogous to its meat clubs and it
16 had been suggested a number of months earlier. But not
17 surprisingly, given the context, the main topic for
18 discussion at the meeting was the 2p per litre
19 initiative and the situation with the farmers.

20 The general purpose of these meetings we set out at
21 paragraph 73, and we make the point that these are not
22 small intimate secret meetings, neither are they
23 meetings between Tesco and its competitors.

24 Self-evidently this is not a smoke-filled room; this is
25 a large forum in which Tesco is meeting with a group of

1 dairy suppliers, not just cheese but milk and butter and
2 other dairy products as well, and a number of farmers
3 and farmer representatives.

4 So one of the points to bear in mind when you
5 consider what was said and not said at that meeting is
6 the tensions in the room, because the farmers are in the
7 room feeling angry and frustrated that they're not
8 getting enough for their raw milk and feeling that Tesco
9 are responsible. The processors are in the room, again
10 feeling squeezed between the farmers and Tesco. And
11 Tesco is trying to put out a human and friendly face
12 both to their suppliers and to the farmers who supply
13 their suppliers.

14 So then, paragraph 74, we make those points about
15 the number of people at the meeting and the nature of
16 those who attended. It was never intended to be
17 a decision-making meeting, it was an opportunity for
18 people to air their general views. It was only ever
19 intended to be a talking shop, a very public event.

20 Then we have summarised what we say happened at that
21 meeting, the challenge that had been issued by
22 Mr Gildersleeve in the press statement was reiterated by
23 Mr Hirst, and Mr Hirst's position was that Tesco had
24 already done its bit by increasing cost prices for
25 liquid milk and it was a challenge for the suppliers to

1 solve the rest of the problem.

2 If we look at the Dairy Crest note which is at
3 tab 14, sorry, the Express note [Magnum]. On the second
4 page, under the heading "Discussion", the second
5 paragraph:

6 "Challenge to processors was that Tesco wanted to
7 see a better return to farmers [and so forth]."

8 Then the next paragraph:

9 "The price since March has dropped 3.25ppl and
10 processors are therefore expected to help in achieving
11 the price increase."

12 That's the point that Mr Scouler made in his
13 evidence, that Tesco's view was that the processors had
14 increased their margins since March, because the
15 farmgate price for milk had fallen by 3.25p per litre
16 since March, but Tesco had not dropped the price it was
17 paying for milk and dairy products and therefore the
18 margins of the processors had increased in that time,
19 and Tesco was saying, "You ought to take some of the
20 pain yourselves".

21 One of the oddities of the OFT's case is that it
22 sought to contest this evidence of Mr Scouler and to
23 suggest that that hadn't been suggested by Tesco, and
24 yet it is on the record in this very document that it
25 was suggested by Tesco.

1 Paragraph 77, no conclusion on how to deal with the
2 farmgate price issue was reached at this meeting.
3 Mr Scouler is recorded again in the Express note as
4 saying that it was a gloomy prospect for all dairy
5 farmers, and saying:

6 "Any further ideas on how better to take this idea
7 forward please get back to Rob."

8 That's at the end of the meeting, just by the second
9 hole-punch. So after a lengthy discussion, what they're
10 saying is, "Well, it's all very difficult, if anyone has
11 got an idea about what we can do about it, please let
12 Rob Hirst know". That is consistent with the view that
13 was formed of this meeting by all those who have
14 attended who have commented on it. So, for example, the
15 cover email to tab 14 [Magnum] by John Southwell, who
16 took the longest note of the meeting:

17 "Peter asked me to circulate notes on the producer
18 forum which are attached -- for the last hour we were
19 just going nowhere and at times throughout Scouler and
20 Hirst appear to have had different views."

21 That is a statement which the OFT has consistently
22 ignored and yet it's the final verdict of the person
23 whose note of this meeting they rely upon most heavily.
24 It was also the view of Mr Peat who reported to the
25 Wiseman board, it was also the view of Mr Ferguson, and

1 it was also the view of Mr Scouler. Both of those gave
2 evidence that nothing was said at this meeting that
3 wasn't already obvious and public, and Mr Scouler's
4 evidence was that frankly he thought it had been a waste
5 of his time.

6 So there is both contemporaneous evidence and oral
7 evidence before the Tribunal that nothing happened at
8 this meeting, no decisions were taken and nothing was
9 said that wasn't obvious and banal. We submit that's
10 hardly surprising when you consider who the participants
11 were. And yet this is the meeting that forms the
12 foundation of the OFT's assertion of some sort of secret
13 price fixing initiative.

14 We submit that that is wholly implausible anyway, on
15 the evidence, and that if they had wanted to make that
16 case they would have had to have called at least one of
17 the authors of the notes which they say can be
18 interpreted, we say wrongly, to reach that conclusion.

19 What then happened after the meeting, I'm now at
20 paragraph 79, about ten days later Dairy Crest
21 circulated its proposal, which is document 25 [Magnum]
22 in the bundle. Although the OFT's position on whether
23 the catalyst for this document was the Dairy Supply
24 Group meeting or not has wavered somewhat, in our
25 submission it's pretty unlikely that the catalyst was

1 the Dairy Supply Group meeting. At this time pressure
2 was being applied by the farmers, and in particular by
3 Farmers for Action, on the suppliers directly, and so
4 there would have been all sorts of reasons why
5 Dairy Crest would have issued this proposal at this
6 time. To suggest that this is in some way the coming to
7 fruition of a scheme hatched at the DSG group meeting we
8 say just doesn't hang together.

9 So the proposal is made by Dairy Crest, and it is
10 a proposal for an across-the-board cost price increase
11 of £200 per tonne of cheese, which everybody agrees is
12 the equivalent of 2p per litre on milk, and also
13 includes some suggestions in relation to retail price.
14 It's clear from this document that Dairy Crest
15 appreciates that retail pricing decisions are for the
16 retailers and not for it. That's clear from the bottom
17 of the first page where they say, under the heading, "UK
18 Sourced Dairy Products Versus Imports":

19 "We are seeking to address an immediate problem in
20 farming today. If however we jointly change the
21 competitive set of British dairy products versus
22 imports, damage can be done to this initiative. We ask
23 that you bear this in mind when considering your retail
24 pricing decisions."

25 **LORD CARLILE:** What are we to make of the phrase which

1 I think the OFT rely upon strongly, "we jointly change
2 the competitive set"?

3 **MISS ROSE:** That's talking about Dairy Crest and its
4 customers, we and you, to whom we are addressing this --

5 **LORD CARLILE:** Jointly, what does jointly mean?

6 **MISS ROSE:** Dairy Crest plus the retailer.

7 In order for the OFT's case to succeed it has to be
8 a coordinated initiative between the retailers, but we
9 say that what is actually happening is that Dairy Crest
10 is trying to persuade each of the retailers to move its
11 pricing jointly with Dairy Crest.

12 **LORD CARLILE:** This, I think the OFT argue, is the absolute
13 essence of A-B-C. This is where you get clear
14 suggestions, say the OFT, that we must all get together,
15 jointly, and agree, jointly, to change the competitive
16 set of pricing for cheese. Is that a reasonable
17 inference?

18 **MISS ROSE:** In the first place that was not put to
19 Mr Reeves, who said he was the author of at least part
20 of this document, and in the second place we submit that
21 there's never been any suggestion to the Tesco witnesses
22 that that was what was happening.

23 I'm going to come in a little bit more detail to
24 precisely what the OFT's case has been about what the
25 nature of the plan set out in the Dairy Crest memo is,

1 because it's quite significant and it has changed
2 significantly. But the OFT has not put to any of the
3 witnesses in this case during the hearing that there was
4 a plan, whether by Dairy Crest or any of the suppliers,
5 for an coordinated retail price initiative in the sense,
6 sir, that you put it to me. All that they have put is
7 that the plan was for a market-wide cost price, and they
8 would say retail price, rise.

9 I'm going to come on in a minute to explain why that
10 is significantly different to the suggestion you just
11 made, because that case has never been put.

12 **LORD CARLILE:** Whilst I'm on that suggestion I might as well
13 throw into the pot as well the second part that
14 certainly will cause us some debate, which is the
15 "Timing" section on the next page, and especially the
16 first sentence which includes, "from the date RSPs and
17 costs have moved", as opposed to, for example, "as RSPs
18 and costs move progressively", which would be a very
19 different proposition.

20 Now, I'm not sure how far one should parse
21 a document like this, I know it's a dangerous endeavour.
22 Nevertheless it's there and it's relied upon.

23 **MISS ROSE:** Yes, but one has to remember what the document
24 is. What the document is is a sales pitch, and one of
25 the things that one sees repeatedly from the proposals

1 that are made by suppliers to the various retailers,
2 both in 2002 and 2003, is that they're always presented
3 as a fait accompli. It's a classic sales technique that
4 you don't say, "Would you please agree" and, you know,
5 "It would be great if you would". What they say is,
6 "Right, let's agree this and once we've done it we can
7 move forward".

8 So they're always assuming that the cost price will
9 go up and that the retail prices will go up and that
10 everything will be done, because the sales technique is
11 to make it seem like it's already happening and it's
12 already a fait accompli.

13 **LORD CARLILE:** Just a final point from me and then I shall
14 shut up, mainly because I want a cup of coffee.

15 We don't I think have -- this document is sent to
16 Mr Hirst, who is a reasonably senior person in Tesco.
17 We don't I think have evidence of any document from
18 Mr Hirst or anyone else of Tesco saying, "Ooh, remember
19 your Competition Act training", or "You shouldn't be
20 sending this to us", or "This could be misunderstood" or
21 something like that.

22 **MISS ROSE:** But this document is not alleged by the OFT to
23 amount to a competition law infringement.

24 **LORD CARLILE:** No, it's said to be evidence that goes
25 towards the sum of their allegations.

1 (11.35 am)

2 **LORD CARLILE:** Just going back a point or two, and I really
3 don't want an answer to this now, I just wanted to draw
4 counsel's attention to the case of Safeway Stores
5 Limited v Twigger, which is 2011, 2 All England Reports,
6 at page 841. It's a judgment of Lord Justice Longmore,
7 I draw particular attention to paragraph 25 of the
8 judgment. It relates, and I'm putting this very
9 broadly, to the responsibility of relatively junior
10 employees who do acts that affect the interest of the
11 company employing them.

12 I don't ask for an answer now, I simply draw
13 counsel's attention to that case. There are other
14 issues that arise there as well.

15 **MISS ROSE:** Sir, just to come back to the Dairy Crest
16 briefing document, the crucial distinction -- and I'm
17 going to come back to this point in a bit more detail
18 later -- the crucial distinction, we say, is between
19 a proposal for an across-the-board or market-wide cost
20 price increase and a proposal for a coordinated retail
21 price increase. That's the crucial distinction.

22 Now, there is absolutely nothing suspect or unusual
23 about proposing an across-the-board market-wide cost
24 price increase. Indeed, you would expect that normally
25 to be the case, because if a supplier is going to

1 persuade its customers to pay more for a product its
2 chances of doing so will be much greater if it persuades
3 that customer that all of its other customers are going
4 to be asked to pay the same. It's unlikely that Tesco
5 would agree to pay more for its cheese if it thought
6 nobody else was going to be asked to pay more for its
7 cheese --

8 **MS POTTER:** Miss Rose, I think it was mentioned at various
9 stages, and confirmed by witnesses, that this was an
10 unusual situation, that the across-the-board nature with
11 a standard increase on all costs was acknowledged by the
12 Tesco witnesses to be an unusual situation.

13 **MISS ROSE:** You're absolutely right, madam. I was talking
14 in a different sense there, across the board in the
15 sense of all retailers are being asked for this cost
16 price increase. For example, in 2003, which was not an
17 unusual situation, 2003 is a perfectly normal commercial
18 negotiation, and you can see, in that case, that
19 McLelland use similar language. They talk about it
20 being all retailers across the market, because that's
21 the normal way that you persuade people to move up.

22 What's unusual about 2002 is that it's being
23 suggested that there should be £200 per tonne for
24 everybody in order to pay the money back to the farmers
25 and get the farmgate price up by the 2p per litre.

1 That's what's unusual. It's the rationale and the
2 intense industrial pressure that's causing that move.
3 That's what's unusual. That, of course, is operating on
4 all the suppliers and all the retailers.

5 So what we have here is a proposal for a cost price
6 increase which is not driven by economic market forces
7 but is driven by industrial and political pressure. So
8 that means that the nature of the increase that's
9 proposed and the form that it's going to take is highly
10 unusual. For example, as we've seen, the proposal is to
11 just apply a supplement, not to simply increase the
12 price of lines of cheese, but to have -- this actually
13 didn't come to fruition, but the proposal at this stage,
14 in the interests of transparency, was that there should
15 be a market pricing supplement that would be separately
16 invoiced so that the farmers could see that they were
17 getting the benefit.

18 Those are the features that are unusual, that what
19 they're trying to do is to say, "We're not going to
20 profit, the retailers are not going to profit, this is
21 all just for the benefit of the farmers". That's what's
22 unusual.

23 But it's actually, we submit, very important to be
24 clear about the distinctions, and I'm going to return to
25 this point later, that the OFT's case has slid from what

1 was originally its case in the decision, and its pleaded
2 case, which was that this was a proposal for
3 a coordinated retail price rise, in other words, all the
4 retailers clubbing together to push the retail price
5 together (sic). Now, that would certainly be
6 anticompetitive. That's no longer alleged and hasn't
7 been alleged at this hearing.

8 What's now alleged is that this is an
9 across-the-board market-wide rise in cost prices with
10 consequential increases in retail prices. The point I'm
11 making is that that is not unusual and is not suspect in
12 competition law terms. Yes, the facts are unusual, and
13 yes, the details of the proposal are unusual, but that
14 feature, that everybody is being asked to put their cost
15 prices up, is neither unusual nor suspect.

16 Now, this document clearly contains suggestions
17 about retail prices. One is at the bottom of the page
18 we've just been looking at, where I've made the
19 submission that it clearly acknowledges that it is for
20 the retailer to make the decision on retail prices.
21 What they're saying there is, please don't make British
22 cheese uncompetitive with imported cheese. So that's
23 saying, limit your retail price. It's the opposite of
24 anticompetitive, it's saying keep the price down.

25 Similarly, the comment about cash margin is the

1 opposite of anticompetitive because it's saying, limit
2 the retail price rise, please don't put your retail
3 prices up so as to protect your percentage margin, which
4 would be the normal instinctive response of the
5 retailers, because if you do that there will be
6 accusations of profiteering.

7 So the suggestions that are made about retail
8 pricing in this document are not suggestions that the
9 retail price should be increased artificially high but
10 that the retail price increase, which everybody assumes
11 will have to follow from a cost price increase because
12 the retailers won't be able to absorb it, should be kept
13 down both so as to avoid making British cheese
14 uncompetitive and so as to avoid accusations of
15 profiteering. So that we submit that when you look at
16 this document properly, it is in no sense
17 anticompetitive, and neither does it make any suggestion
18 that there should be cooperation or collusion between
19 retailers. All it is suggesting is that this supplier,
20 Dairy Crest, is going to make a proposal bilaterally to
21 each of its customers.

22 That, we say, is also consistent with the internal
23 documents from Dairy Crest which show what Dairy Crest's
24 intended modus operandi was. There are the two
25 documents -- it would appear that they're in the wrong

1 date order because the earlier in date, Mr Reeves says,
2 is the document at 29A [Magnum], and this would appear
3 to date from the middle of September 2009. So this is
4 an internal Dairy Crest meeting and it summarises what
5 the problem is and the need for change, and under the
6 heading "Retailer Actions" the suggestion is:

7 "Accept cost price increase, £200 per tonne for six
8 months minimum. Commit to buying British. Favour
9 suppliers who pay sustainable premium prices to their
10 milk suppliers and resist switching to imports."

11 The Tribunal will note that there is nothing there
12 about retailers being requested to raise their retail
13 prices, still less to coordinate any increase in their
14 retail prices. The key point from Dairy Crest's
15 perspective is that they need to persuade the individual
16 retailers to accept the cost price increase. That's
17 consistent with the evidence that Mr Reeves gave to the
18 Tribunal which was that Dairy Crest didn't much care
19 about the retail price, their concern was to persuade
20 their customers, the retailers, to pay the cost price
21 increase.

22 Then "Modus Operandi":

23 "Retailers pay DC a cost price increase.

24 "DC pay a market supplement to our milk suppliers
25 based on sales price increases ...

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

3 "Transplant flow through of the premium."

4 Again, no suggestion there of any collaboration or
5 collusion between retailers and certainly not on retail
6 price.

7 So that's the first of the internal Dairy Crest
8 documents in time. The second one is document 28
9 [Magnum], and this is from 24 September, so this is
10 immediately after the briefing note that we've looked at
11 has gone out, because that went out on the 23rd:

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

14 And as Ms Potter noted, that date had slipped
15 already from the date proposed in the briefing document,
16 and that's because they were already getting push-back
17 from the retailers.

18 Again, I say that is significant because it points
19 out again the difference between a sales pitch, which is
20 what the Dairy Crest proposal is, and the reality of the
21 situation. What Dairy Crest is saying to their
22 customers is, "Look, it's going to be great. We'll put
23 the prices up on 1 October and the farmers will get the
24 benefit". But the reality is they know that as soon as
25 they propose that to the retailers they're going to come

1 against the buyers, and the buyers are tough commercial
2 people whose interest is in resisting the cost price
3 increase, and that's going to be a tough bilateral
4 negotiation, and it's not going to pan out the way that
5 Dairy Crest suggest in their proposal.

6 Then:

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

12 We say that is a very significant paragraph because
13 that indicates the reality of the relationships, that
14 what we have here is Dairy Crest seeking to persuade
15 each of its customers to do something that Dairy Crest
16 wants to do with no suggestion that there is any
17 cooperation or collaboration between those customers.
18 It's not a hub and spoke, it is a series of separate
19 lines.

20 So those are the internal documents.

21 Just for your note on the text, you can see that
22 we've made the points about retail price rises at
23 paragraph 79 where we point out the reasons why
24 Dairy Crest make suggestions in the proposal about
25 retail prices, and it's essentially to make sure the

1 retail prices don't go up by too much.

2 Then the initial correspondence with the retailers,
3 now, there does appear to have been quite a significant
4 difference between the way that this proposal was
5 presented to Tesco and the way that it was presented to
6 other retailers, because all that there is in relation
7 to Tesco is, first of all, the short covering email at
8 tab 25 [Magnum], this is the one to Rob Hirst:

9 "Following our conversation on Friday, I can confirm
10 that Dairy Crest are to increase prices on cheese,
11 packet butter and cream with effect from [REDACTED] October.

12 "We are fully committed to passing all revenue...
13 [to] farmers. The attached briefing document clarifies
14 all the issues. I'll contact you tomorrow to discuss
15 any questions."

16 So just a short factual description, and there is no
17 evidence that any presentation was ever made to Tesco of
18 the type that was made both to Asda and Marks & Spencer.
19 The presentations to Asda and Marks & Spencer are at
20 tabs 16 [Magnum] and 17 [Magnum] of the bundle, and the
21 Tribunal will recall those. There is no evidence that
22 presentations of that nature were made to Tesco.

23 That, we say, is not surprising because what
24 Dairy Crest had was separate account teams dealing with
25 each retailer with different personalities and different

1 approaches. This was the evidence of Mr Reeves, which
2 we've set out at paragraph 82:

3 "... different account teams would have treated
4 their customers slightly differently because there's
5 different personalities involved and different customers
6 have different ways of working..."

7 Even though the substance of the message "would be
8 similar".

9 The core messages were: Dairy Crest was seeking
10 a cost price increase; Dairy Crest was seeking an
11 across-industry cost price increase, it wasn't just
12 them; and Dairy Crest was suggesting or recommending an
13 equivalent retail price increase on cheese rather than
14 percentage margin maintenance.

15 We say that that reflects the internal
16 modus operandi, each account team dealing with its own
17 retailer, persuading them to accept the £200 per tonne
18 increase.

19 We say that the negotiations with McLellands
20 proceeded in a similar fashion, at paragraph 85.
21 Letters to retailers in early October proposing a cost
22 price increase of £200 per tonne. Correspondence with
23 retailers acknowledging and planning for the need for
24 consequential retail price increases, and
25 a recommendation of cash margin maintenance rather than

1 percentage margin maintenance.

2 The reaction of Tesco's cheese buyer,
3 Lisa Oldershaw, was the same as her reaction normally
4 when she was asked for a cost price increase, which was
5 to resist it for as long as possible.

6 You also, of course, have now heard from Mr Scouler
7 that that was also his reaction. There were very
8 lengthy attempts made yesterday and the day before by
9 Mr Morris to seek to get agreement from Mr Scouler that
10 he might have agreed to sign up to the £200 per tonne
11 increase as early as 25 September. It is very clear
12 that he did not do so. He has no recollection of the
13 meeting of 25 September where it's suggested that he did
14 that but, more fundamentally, he gave evidence that he
15 would have been surprised if he had made any such
16 agreement at that date because it would have undermined
17 the negotiating position of his buyers.

18 Sorry, I'm just trying to find the transcript
19 reference. Sorry, somebody will give it to me in
20 a moment, but he was pretty clear that he would not have
21 signed up to it as early as that, and, in fact, all of
22 the evidence consistently suggests that Lisa Oldershaw
23 did not accept the £200 per tonne cost price increase
24 until late October, immediately before 29 October when
25 she sent the email to her suppliers telling them that

1 she was accepting it, and that, when she accepted it,
2 the reason she accepted it was because she was told to
3 do so by senior management.

4 So that what you had here was a tension between the
5 public stance that Tesco was taking for PR and political
6 reasons and to get the heat off their depots, which was
7 "We support the farmers", and the commercial stance
8 being taken by its buyers which was, "We resist the cost
9 price increase", and, eventually, the senior management
10 says, "Sorry, you've got to accept the cost price
11 increase".

12 One can understand the reasons why. By that stage,
13 they were in late October, they had to sort out the
14 situation with the farmers because the risk of
15 disruption to their supply chain in the run-up to
16 Christmas would have been commercially potentially very
17 damaging for Tesco and would dwarf any question of a few
18 million pounds here or there on the cheese margin. If
19 Tesco's depots had been blockaded in the weeks before
20 Christmas, disrupting its supplies to its stores in that
21 crucial trading period, the monies it would have lost
22 would have been far, far greater than a few million
23 pounds on British and territorial cheese.

24 So one can entirely understand why the senior
25 management instructed Lisa Oldershaw to accept the cost

1 price increase in late October, and that incentive(?)
2 has nothing whatsoever to do with the pricing decisions
3 of other retailers, it has everything to do with the
4 commercial pressure on Tesco, and the two competing
5 questions of pressure from the farmers and PR versus
6 Lisa's desire not to compromise her margins.

7 Yes, I've been given the reference. It's Day 12,
8 page 9, line 25. At the bottom of that page, Mr Scouler
9 says:

10 "I can't run specifics --"

11 **LORD CARLILE:** Can you hold on for a moment, I'm having
12 a little difficulty with LiveNote. Right, page 9.

13 **MISS ROSE:** Bottom of page 9:

14 "... I can't remember that meeting ... it would be
15 unlikely for me to just say I would accept a cost price
16 of any nature or size, because commercially that would
17 maybe undermine the future negotiating position of the
18 buyers if I was just to accept a flat fee of any
19 degree."

20 Then it's put to him that this wasn't a normal
21 negotiation, and he's asked to consider again whether he
22 gave an indication of Tesco's willingness to be on board
23 with the proposal. He says:

24 "As I said, I can't remember the specifics of the
25 meeting, again, if it did take place on 25 September.

1 What I would have assumed I would have done, I would
2 have had a discussion around the cost price, the nature
3 of the size and scale of that cost price. It is
4 unlikely I would have said 'I am prepared to take a £200
5 increase' specifically at that, because that leaves open
6 any discussion potentially about cash margin, percentage
7 margin, and that would be potentially unlikely, again to
8 the best of my knowledge, sir."

9 So he's saying that they wouldn't have done it, and
10 there's clear evidence before this Tribunal that
11 a cheese buyer is never going to say "Yes" when asked
12 for a cost price increase. A cheese buyer, when asked
13 for a cost price increase, is always going to say "I'll
14 think about it, and come back and justify your
15 proposal". That's just ingrained, it's their commercial
16 stance when they're being asked to accept a cost price
17 increase. It's a negotiation.

18 So we made the point at paragraph 86 that there was
19 a tension between Tesco's public stance of support for
20 the farmers transmitted by senior management and the
21 position adopted by its buyers concerned about the
22 maintenance of the margins, and we've given you the
23 reference to that in the evidence.

24 The next point is that the suppliers were under
25 intense pressure from the farmers at this time. You

1 will recall the evidence of Mr Reeves and Mr Irvine
2 about the nature of that pressure, because they were
3 getting push-back from the retailers saying, "Well, why
4 should we pay you more for cheese now when you're making
5 that cheese with milk that you bought cheaper at the
6 farmgate; there should be a staggered increase because
7 the cheese is at different levels of maturity".

8 Mr Irvine said:

9 "What we were worried about and terrified was we
10 were going to start paying extra money to the farmers
11 and not recover it from Tesco."

12 Arthur Reeves has given an account of the pressure
13 that the sales team were under, a graphic account, which
14 was in fact originally in his interview with the OFT and
15 which he has endorsed when he gave oral evidence, about
16 being lifted by his shirt collar by Bill Haywood because
17 he was putting his salespeople under so much pressure.

18 That's the context in which the suppliers are
19 applying maximum pressure to the individual retailers.
20 We submit that there is a basic misunderstanding, with
21 respect, here by the OFT about the nature of the dynamic
22 here. This is not about collusion between retailers and
23 indirect communication between retailers to give each
24 other comfort that each other is moving up; this is
25 about suppliers under enormous pressure desperately

1 trying to get a cost price increase and desperately
2 trying to get any -- put out anything they think will
3 help to get the cost price increase. That's where it's
4 clear that Dairy Crest at least crossed the line on
5 a couple of occasions and did transmit Tesco's
6 confidential information to third parties, and we'll see
7 that later.

8 But what there is not is any evidence at all that
9 either Tesco or the other retailers were party to that.
10 That was the -- the problem was occurring at the
11 supplier level because of the pressure that they were
12 under.

13 **MS POTTER:** Can I just come back on the source of the
14 pressure on the suppliers. Why are the suppliers
15 desperate? In fact, the retailers are the ones who are
16 being targeted by the --

17 **MISS ROSE:** No, the suppliers are also being targeted, the
18 suppliers' depots.

19 **MS POTTER:** But it has largely moved, I think, by this
20 stage, hasn't it, from the supply depots to the retailer
21 depots?

22 **MISS ROSE:** The suppliers' depots are being targeted,
23 Dairy Crest in particular are not regarded with any
24 favour by the farmers. The suppliers are coming under
25 intense pressure from the farmers, and they are worried

1 that they will be forced to pay the money to the farmers
2 out of their own margin. Because, remember, one of the
3 things that Tesco had been saying to the farmers at the
4 DSG meeting was -- saying to the suppliers at the DSG
5 meeting was, "You have benefited because the farmgate
6 price for milk came down in March but we haven't dropped
7 our own cost prices, so we want you to fund this at
8 least partially from your own margin". So the suppliers
9 are coming under enormous margin pressure from that
10 perspective.

11 **MS POTTER:** Thank you.

12 **MISS ROSE:** At paragraph 89, we point out the tension that
13 the suppliers have between trying to persuade their
14 customers to agree to the cost price increase, and
15 trying to give them comfort that they can do that
16 without becoming uncompetitive, while at the same time
17 not breaching confidentiality. That's the line that the
18 suppliers are trying to walk, and there was some very
19 revealing evidence given by Mr Irvine about how that
20 tension was managed which we've set out at paragraph 90:

21 "... there's degrees of passing on sort of
22 information. On one hand, you're being very positive
23 and very bullish and, 'Yes, the whole market is going to
24 go up, everybody is on board, retails, RSPs, you know,
25 everything is in place, it's got to go up, milk price is

1 one way, it's one-way traffic', sort of like you're
2 talking it up and I think everybody that we dealt with
3 treated it in that way.

4 "I think the second thing is passing on actual
5 prices of pre-packs prior to coming into the market for
6 instance. That would be seen as a massive breach of
7 confidentiality. So, you know, on this sort of -- and
8 I think it's ... we're transmitting future price
9 information. I meant specific future price information,
10 you know, that this pack is going to cost that or that
11 pack is going to be this or whatever. That was very
12 much regarded as confidential.

13 "What was, you know, at the other end was this sort
14 of commercial positioning, if you like, was we'd never
15 managed to persuade anyone to get their prices up if
16 they felt that really they were on their own and
17 isolated and that we were only speaking to them. So we
18 tried to make it that this was such an obvious, big move
19 in the market for such obvious commercial market reasons
20 that everybody inevitably was going to go up."

21 Ms Potter will see immediately that that ties into
22 my earlier point that there is nothing at all unusual
23 about a cost price increase being represented as
24 an across-the-market move. It's the obvious way to
25 present a cost price increase if you want a retailer to

1 accept this. You're never going to go to Tesco and say,
2 "We want you, Tesco alone, to pay an extra £200 per
3 tonne for our cheese but we're not going to make the
4 same request of Asda".

5 You're only ever going to get Tesco to do it if you
6 say, "Yes, we're asking everybody the same. We have
7 exactly the same problem, it's market wide, and
8 everybody is going to have to accept it". On that basis
9 the retailer will think, okay, the likelihood is that
10 everybody will be under the same commercial pressure so
11 it is likely they will have to put their retails up.

12 But that is not anticompetitive, and that is not
13 a hub and spoke cartel. That is normal commercial
14 dealing in the market, and that's what's being described
15 here. We submit that Mr Irvine here gives a pretty
16 accurate description of the distinction between the
17 permissible conversation between a supplier and
18 customer, commercial positioning is how he puts it, and
19 impermissible passing of business secrets, to use the
20 term that was used in the Deere case, the European case.

21 That's the key distinction, so that what you see is
22 indeed what Lisa Oldershaw quite correctly perceived as
23 sales pitch, sales hustle. That, of course, is
24 precisely the reason why it's ingrained in the Tesco
25 buyers to discount this information, because they know

1 exactly what their suppliers are doing because it's what
2 the suppliers always do. Suppliers will always try to
3 give Tesco the confidence that everyone else is going to
4 go up and everybody is under the same pressure, and
5 Tesco will always treat that information with
6 scepticism.

7 That doesn't mean that Tesco thinks that its
8 suppliers are all liars, or that there's some
9 fundamental lack of trust in the relationship. It means
10 it's a normal commercial negotiation where each party
11 appreciates that they have a different interest and
12 understands that each party will be doing what they can
13 to persuade the other to do what they want them to do.
14 That's just the way business life is.

15 We submit that one of the problems with the OFT is
16 that it just doesn't appear to have understood that
17 dynamic at all, and so we've had, with respect, some
18 somewhat naive questioning from the OFT along the lines
19 that it wasn't credible that Tesco wouldn't believe
20 every word that was said to it by its suppliers. In
21 fact, as I shall show you, a quantity of the information
22 given to Tesco by its suppliers was demonstrably false.

23 That takes me to paragraph 91, where we make the
24 point that Mr Reeves made where he, frankly, accepted
25 that there was a lot of bluff and double bluff,

1 half-truths, hopeful suggestions based on public
2 announcements. What was put by Mr Morris was, "Well
3 then you'd come unstuck because the price wouldn't
4 move", but the answer to that is, "Yes, well then you
5 just tell people that people had changed their minds".

6 That of course does take you somewhat to the
7 futility of the OFT's position, because this is not
8 a situation where you're fixing the price of a catalogue
9 of toys for the next three to six months in advance,
10 this is a situation where you're talking about literally
11 hundreds of different cheese lines, the price of which
12 can go up or down on a daily or weekly basis.

13 So somebody can decide one day that they're going to
14 put their cheese price up by a particular amount but
15 decide the next day that they're not going to move it at
16 all, or they're going to move it by a different amount.
17 So one has to ask the question, what is the purpose
18 that's being served here by the collusion that the OFT
19 alleges? It just doesn't work in market terms.

20 So we submit that the information that is being
21 given is not individualised information, it is
22 information that is either obvious or in the public
23 domain and it is puff and hope and half-truths, and it
24 is commercial positioning. And it is understood as all
25 those three things by Lisa Oldershaw who receives it,

1 and for that reason she discounts it when making her
2 commercial decisions. She was very clear in her
3 evidence to this Tribunal that the information she acted
4 on was not that sort of sales hustle but hard evidence
5 of what was actually happening in the market on the
6 shelf.

7 This is paragraph 92, where we have set out her
8 evidence on that and how it was perceived by
9 Lisa Oldershaw. If the Tribunal accepts that evidence
10 then this case must fail because evidence which
11 Lisa Oldershaw, as the recipient, discounted on the
12 basis that it was unreliable could not have had any
13 effect on her level of uncertainty.

14 Paragraph 93, what then happened, as a result of the
15 resistance and delaying tactics applied by
16 Lisa Oldershaw and other retailer buyers, was that
17 suppliers did not achieve their cost price increase as
18 quickly as they had initially hoped. We've seen that
19 the timing slipped. We've set out the evidence on that.
20 The only price that moved on around 20 October was for
21 branded cheeses at Sainsbury's, which appear to have
22 moved on the morning of 22 October. We do stress the
23 point that the OFT has sought to mount a case that
24 everybody moved on the same date with the same cheeses.
25 That is simply untrue. Sainsbury's moved alone with

1 these cheeses on 22 October and there is no allegation
2 that before doing so they had received any information
3 about the intention of other retailers.

4 As we shall see later, other parties also moved on
5 different dates. We know that Tesco eventually didn't
6 move until 1 December in relation to its own label
7 cheeses. We also will see that different parties moved
8 different categories of cheeses; deli cheeses different
9 parties moved on different dates.

10 Paragraph 95, we say that the cost price increase
11 was not accepted by Tesco until immediately before
12 29 October. We say the evidence for that is simply
13 overwhelming, both on the documents and from
14 Lisa Oldershaw and from John Scouler, and that there is
15 no evidence for the OFT's case that Tesco had accepted
16 the cost price increase a month earlier, by around
17 25 September. That case is simply unsustainable. And
18 she accepted it because she was told to do it. She
19 wasn't pleased because she would have to find a way to
20 mitigate the effect of the cost price increase on her
21 margins whilst still complying with the basket policy.
22 That was a difficult task but, as she said:

23 "At the end of the day, I didn't have a choice on
24 the cost price increase."

25 That again is very important, that this was not

1 a case of Lisa Oldershaw finally deciding to increase
2 her cost prices once she'd been given a sufficient
3 tip-off about other retailers, to be confident that she
4 could do so without damaging her margins or breaching
5 the basket policy; this was a case where Lisa Oldershaw
6 was instructed to accept the cost price increase because
7 of Tesco's wider commercial strategy, regardless of what
8 other retailers were doing.

9 Then her plan to increase retail prices to
10 compensate for the cost price increase, and her
11 preference was to do so by protecting her percentage
12 margin, not the cash margin, the lower cash margin that
13 was being suggested by the suppliers. We've set out the
14 point about the flexibility in the basket policy to
15 increase retail prices above Tesco's competitors for up
16 to two weeks before she had to match the cheapest in the
17 market.

18 There might be a time lag in relation to random
19 weight products because of the need to pack and label
20 the products at new prices but that might only be two or
21 three days.

22 Then the important point that, even if
23 Lisa Oldershaw was not able fully to mitigate the effect
24 of the cost price increase on her margins through
25 increasing retail prices, she had other ways of

1 improving her overall margin throughout the year to
2 compensate.

3 Now, the OFT has suggested that Lisa was in
4 a dilemma because her KPIs required her to maintain an
5 average 35 per cent margin, her basket policy required
6 her not to be out of line, particularly with Asda who
7 was the principal competitor, on basket products. They
8 said, therefore, you could not raise your retail
9 products without being confident that Asda would do the
10 same because you'd be out of line, and if you accepted
11 a cost price increase without raising your retail price,
12 you would be in breach of your KPIs on margin.

13 But that dilemma that the OFT puts forward is
14 entirely false, for a range of reasons. The first
15 reason it's false is that in fact Lisa has a two-week
16 period to be out of line, so if Asda doesn't raise its
17 own price, she can bring her retail price back down to
18 match Asda within a two-week period. The second reason
19 that it is incorrect is that it proceeds on the
20 assumption that the only way that Lisa can make her
21 35 per cent margin is on the difference between cost and
22 retail price for the particular cheese lines. That is
23 fundamentally flawed and a significant
24 oversimplification and error made by the OFT in its
25 analysis of Tesco's business. Because the reality is

1 there are many ways in which that 35 per cent margin can
2 be obtained, even if Lisa Oldershaw accepts the £200 per
3 tonne cost price increase.

4 This point just does not seem to have been
5 appreciated by the OFT, even though it was, contrary to
6 Mr Morris' suggestion in cross-examination, set out in
7 Lisa Oldershaw's witness statement.

8 Now, there is documentary material which
9 demonstrates a number of the ways in which Tesco was
10 able to enhance its margins in circumstances where it
11 had had to accept a cost price increase.

12 **LORD CARLILE:** Forgive me for interrupting, I think you may
13 have stepped outside a red box with the figure you
14 mentioned, 35 per cent?

15 **MR MORRIS:** I think that's Tesco's own confidentiality so
16 that's obviously a matter for them.

17 **LORD CARLILE:** It has been mentioned before, has it?

18 **MISS ROSE:** I think it has.

19 **LORD CARLILE:** Forgive me, I thought it had not been
20 mentioned publicly.

21 **MR MORRIS:** I think I had deliberately avoided mentioning it
22 because I saw yellow over my document and I wasn't sure.

23 **LORD CARLILE:** Sorry, I was being overcautious, forgive me
24 for interrupting you.

25 **MISS ROSE:** Sir, I'm now at paragraph 96(a) and I want to

1 show you some of the documents which demonstrate the
2 ways in which Tesco could recover its margins even
3 though it accepted the cost price increase.

4 If we go first to volume 2 and document 112
5 [Magnum], this is Mr Meikle's document but I want to
6 look at it for a different purpose.

7 I believe this has all been put into open, is that
8 right? The red box no longer applies?

9 **LORD CARLILE:** Yes.

10 **MISS ROSE:** I think that's right.

11 **LORD CARLILE:** I think that's right.

12 **MISS ROSE:** Sir, you will recall that the sentence that's in
13 a red box here was originally redacted and was only
14 unredacted at the outset of the hearing. That's the
15 sentence I want to look at. Just opposite the second
16 hole-punch, this is where Mr Meikle is discussing the
17 problem with Seriously Strong, the margins on
18 Seriously Strong:

19 "Seriously Strong -- yes, we are showing good year
20 on year growth and, yes, [REDACTED]

21 [REDACTED]

22 "Based on year on year to date figures our total
23 [Seriously Strong] volume is [REDACTED]
24 end August. Drilling down into this figure shows that
25 standard business is up [REDACTED] and that the

1 vast majority has been promotion driven.

2 "This is further illustrated by the fact that our
3 average price per tonne has only [REDACTED]
4 [REDACTED] ... despite the £200 per tonne increase last year."

5 That is a very significant statement because what it
6 is showing is that what Lisa Oldershaw successfully did
7 with McLelland was that she accepted the £200 per tonne
8 cost price increase on Seriously Strong but then used
9 promotional activity to drive the price back down so
10 that, in fact, the cost price for Seriously Strong only
11 went up by [REDACTED] per tonne.

12 That's a sentence that was redacted by the OFT.

13 The next document is 126 [Magnum], this is
14 3 November 2003. The Tribunal will remember this, this
15 is the [REDACTED] product for filling cheese with
16 water.

17 In fact there were two points here. The first is
18 between the two hole-punches:

19 "One point to note is that we may be able to improve
20 the [REDACTED] cost on the 300g Value mild packs by
21 [REDACTED]."

22 So there's another way that you improve margin, by
23 changing the packing. And you are talking about vast
24 quantities of cheese here so that minor changes like
25 that can result in significant changes.

1 Then lower down, the [REDACTED] project was going
2 to reduce the supply price for bulk cheese by [REDACTED] per
3 tonne, that of course is a quarter of the £200 per tonne
4 cost price increase. Again, we're talking about a lot
5 of cheese.

6 A third example, if we go into volume 1, is, from
7 what we can see, what Lisa actually did as soon as she
8 accepted the £200 per tonne cost price increase. It's
9 document 66 [Magnum]. So this is the day after she has
10 phoned her suppliers to tell them the new cost prices
11 and the dates that she's going to accept the cost price
12 increase, the following day, she emails the suppliers:

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

17 "(a) how you are proposing to get this money back to
18 the farmers and...

19 "(b) how you/we address the issue of Tesco for x
20 number of months... paying a £200 per tonne inflated
21 price for cheese made with milk £200 per tonne cheaper
22 than on the new cost implementation date."

23 So Lisa's reaction to having been forced to accept
24 the £220 per tonne cost price increase is immediately to
25 open a new negotiation with her suppliers to say, "Well,

1 okay, I've accepted that, but now I want to address the
2 fact that I'm paying now £200 per tonne more for cheese
3 that was made with cheaper milk".

4 The point about this is that what you don't have is
5 what the OFT has sought to present, which is a single
6 isolated negotiation, £200 per tonne cost price
7 increase, end. What you have is a continuous process of
8 negotiation between Lisa Oldershaw and her suppliers
9 where they are constantly trying to get the price up and
10 she is constantly trying to get the price down. If they
11 make her accept a particular increase, she will then try
12 and find other ways to get the price down, either by
13 introducing efficiencies into the system or by requiring
14 promotional activity or, in this case, running a
15 staggering argument.

16 So, again, we say the OFT's model of a single
17 negotiation, a single monolithic 2002 negotiation is
18 false.

19 **MS POTTER:** In a sense, doesn't this email go the other way
20 in terms of actually emphasising this is an unusual
21 situation where, across all these various suppliers, and
22 across the board, standard increase has been agreed in
23 a way which doesn't seem to fit with a normal pattern of
24 commercial negotiation?

25 **MISS ROSE:** Madam, that's absolutely right, that this was

1 a very unusual situation, and you've seen all of the
2 public domain information about what was being done.
3 It's absolutely right that there was a politically
4 driven initiative to raise the farmgate milk price by
5 2p per litre to get the farmers out of picketing the
6 depots. That's absolutely right.

7 But the problem is that you can't jump from that to
8 the question of collusion between retailers. What you
9 have is suppliers pressuring Tesco, Tesco making public
10 its support for the farmers, then a conflict between
11 suppliers and Tesco as to who is going to fund the
12 increase to the farmers, Lisa being told, "You've got to
13 take the increase because it's in Tesco's wider
14 commercial interests", agreeing to it, "Yes, I agree,
15 absolutely, across the board, I totally accept that",
16 but then immediately trying to claw it back again by
17 other means.

18 What we see from that 2003 Stuart Meikle document
19 is, in relation to Seriously Strong, which is of course
20 a very key brand, she gets most of it back through
21 promotional activity. Now, that's just one line, it's a
22 very important brand but it's just one brand. But
23 that's an illustration of the fact that, yes, she's
24 forced to do this and, yes, I agree it's unusual, but
25 what it doesn't do is to leave her with no other

1 recourse for improving her margins. What that means is
2 that she's not in a situation that the OFT would
3 suggest, where the only way she can agree to this is if
4 she's had a tip-off that the other retailers will do the
5 same. That's the logical flaw.

6 At paragraph 97, we also make the point that, of
7 course, if worst came to the worst she would have to
8 take a hit on her margin, and ultimately her senior
9 management would have to accept that that's what had
10 happened as a result of her being required to accept the
11 £200 per tonne cost price increase.

12 So then Lisa Oldershaw formulated her plan for
13 implementing her cost and retail price increases. There
14 was some attempt by the OFT to suggest that when her
15 internal document, document 64 [Magnum], said "£200 Per
16 Tonne Plan", that that was a reference to some broader
17 cartel. But we submit it's quite obvious that that
18 document is her plan for implementing the cost and
19 retail price rises.

20 It was her decision as to when to bring the cost
21 price rises in and which categories of cheese were going
22 to move on what dates. Her evidence on that we've set
23 out at paragraph 98:

24 "It wouldn't be possible for myself to work through
25 all the prices and, more importantly, my admin assistant

1 to physically input all the cost and retail prices into
2 the system within the timeframes to deliver on one
3 day... I just basically split them up into what I saw as
4 workload groups, I suppose, manageable workload groups
5 in sub-groups... I think I probably left the more
6 expensive or costly items to the end so, basically, the
7 bigger volume lines I left nearer the back so we could
8 be working on those through the various weeks... to
9 delay any margin loss impact primarily. These are my
10 dates. The suppliers would want their bigger volume
11 lines to go as soon as possible."

12 Indeed you can see that the category that was held
13 back the longest, and in fact ultimately held back until
14 1 December, was the Tesco own brand cheese, which is the
15 biggest selling cheese lines.

16 So it's all consistent with it being Lisa driving
17 the timetable in order to maximise her margin by making
18 sure that the prices on the largest volumes of cheese
19 went up as late as possible. It is not consistent with
20 the OFT's case, which is a timetable being imposed by
21 the suppliers on the basis that everybody was going to
22 move their prices on the same day.

23 Lisa Oldershaw then communicated her acceptance of
24 the cost price increase to her suppliers by the email of
25 29 October. That's document 62 [Magnum] which the

1 Tribunal has seen many times. If we just go to it
2 quickly:

3 "I will call you all tomorrow with confirmation of
4 cost price changes and retails where relevant."

5 Yes, it's unusual to be sending it to all suppliers
6 but this was an unusual situation where everybody was
7 asking for a cost price increase. But what is important
8 is that what she says is:

9 "I will call you all tomorrow with confirmation of
10 cost price changes and retails where relevant."

11 In other words, the conversation that she's
12 proposing to have with them is about the timing of her
13 cost price prices and in relation to retail prices where
14 relevant. What she is not planning to do is to give
15 them a detailed programme of her retail price rises so
16 that that can be communicated to her competitors.

17 We can see that what she in fact communicated was
18 the programme of the date that she had set out in her
19 own document at tab 64 [Magnum], and the only retail
20 price that was communicated was the WeightWatchers
21 retail price and that was because it was urgently needed
22 for the packing.

23 There has been a huge amount of argument about
24 whether or not the dates that she communicated on the
25 30th to her various suppliers were dates for cost price

1 rises or dates for retail price rises. We submit that
2 that debate is arid because the assumption that
3 everybody was making was that retail prices would go up
4 at or about the same date as the cost price rises.

5 So if she gave the date to her supplier that she was
6 accepting the cost price rise, the supplier would
7 readily draw the inference that Tesco's retail prices
8 would go up at about the same time. But you can't infer
9 from that any illegitimate communication by
10 Lisa Oldershaw of dates for retail price rises that
11 people didn't need to have because they weren't packing
12 her cheese. It's simply the inevitable result of her
13 communicating with dates for her cost price rises.

14 What we also know is that, of course, the dates
15 slipped and they were not adhered to, and in particular
16 the date for the own brands slipped to at least
17 1 December.

18 We then say at 102 that it does now appear that some
19 supplier personnel felt under too much pressure and
20 crossed the line between confidence-building bravado and
21 breach of confidentiality. We identify two occasions,
22 one is the communication by Paul Feery who passed on the
23 information he received from Neil Arthey about Tesco's
24 plans on 31 October, and Arthur Reeves admitted in
25 cross-examination, "We shouldn't be sharing one

1 retailer's intentions with another, we knew that was
2 anticompetitive". But there is no evidence whatsoever
3 that Tesco knew that Dairy Crest were doing that. And,
4 secondly and similarly, in relation to McLelland who
5 passed on information about Tesco's dates on 5 November.

6 So that's an overview and I'm going to come back to
7 some of the details of that when we look at the
8 individual strands, but can I now turn to the OFT's case
9 and what they say happened in 2002. There's quite a lot
10 of common ground between the OFT and Tesco but the
11 differences are in some cases quite subtle and quite
12 significant as to what was happening.

13 First of all, at 104, the OFT accepts that there was
14 intense pressure from farmers for an increase in the
15 farmgate price for milk and that there was in fact such
16 an increase; that cheese suppliers sought and obtained
17 an equivalent cost price increase; that the retail price
18 increases applied by the retailers reflected the cost
19 price increases that occurred at the same time; and that
20 the consequential retail price increases in 2002 were
21 smaller than would normally be applied by retailers in
22 response to a cost price increase, because cost margin
23 maintenance is lower than percentage margin maintenance.

24 The essential difference between the OFT's case and
25 Tesco's case is that the OFT says that the consequential

1 retail price increases that occurred in 2002 were
2 achieved by unlawful coordination between retailers.
3 That is the crucial question, unlawful coordination
4 between retailers. The OFT's allegation is that
5 suppliers acted as conduits for the unlawful exchange of
6 information of retail pricing information between
7 retailers to enable the retailers to secure their price
8 increases and protect their margins.

9 Now, first of all, we say that the OFT's theory as
10 to why such unlawful coordination was necessary is
11 incoherent and flawed. The OFT's position was set out
12 in its opening submissions and it's essentially the
13 dilemma that I outlined earlier. We see it particularly
14 at the bottom of page 64, we have put a whole set of
15 quotes here:

16 "... unless all the principal retailers go up, then
17 the 2p per litre publicly stated objective of Tesco's
18 senior management could not be achieved... So those
19 factors lead to the conclusion that what's going to be
20 needed is an across-the-board retail price increase.

21 "No one would go first or would want to go first,
22 and no one would want to be out of line, and no one
23 would wait to see if anybody else had gone up first
24 because the person who went up first wouldn't go,
25 because if he went he would then be out of line and

1 wouldn't be able to come back down again and he would
2 have his own basket policy ...

3 "So what each required in order to make the thing
4 work was to know that they were not going to be alone."

5 That's the essence of their case and it's based on
6 what they say is the constraint between the KPIs and the
7 basket policy.

8 The OFT describes that argument as the essential
9 logic at the heart of the whole narrative. We say that
10 it is unsupported either by any economic theory or by
11 the factual evidence in the case.

12 The first point that we make is that the OFT's
13 argument would apply any time a supplier is seeking
14 a cost price increase for cheese. On the OFT's case,
15 any time a supplier comes to a Tesco buyer and says,
16 "I want you to pay more for cheese", the Tesco buyer
17 will not be able to agree to pay the cost price
18 increase, which is almost inevitably going to have
19 retail price consequences, unless they have advance
20 information that their competitors will also put their
21 retail prices up. Because on the OFT's case, Tesco
22 can't agree it without that comfort because, if they do,
23 they will risk being out of line with the basket policy
24 or having the margin below the KPIs. So, on the OFT's
25 case, you cannot get cost price rise for cheese without

1 a cartel. But it's not just cheese because the same
2 argument would apply to any grocery item.

3 So we say the OFT's case proves too much, there must
4 be something wrong with it. The thing that is wrong
5 with it is the point that I've already made, that it
6 makes the simplistic false assumption that the only way
7 you can recover your margin is through the difference
8 between the cost price and the retail price. That's
9 just a distortion of the way that Tesco does business.

10 Now, the OFT also suggests that a distinguishing
11 feature of cheese retailing is that it's a complex
12 product category and there's a time lag, on the OFT's
13 case, of one to three weeks between deciding on a retail
14 price change and its implementation. We say that's
15 flawed both as a matter of fact and logic. First of
16 all, the OFT's case on time lag has not been borne out
17 by the evidence. The evidence that the Tribunal has
18 heard from Mr Ferguson and Mr Irvine was that packing
19 and delivering happens on a daily basis and that a price
20 change could be implemented over a weekend if it was
21 necessary and urgent. That means that all of the
22 argument, based on the time lag for labelling random
23 weight cheese and the problem with the basket policy and
24 the two weeks, just goes.

25 The next point we make is that any time lag in the

1 labelling of the cheese is more than offset by the
2 permitted margin for which a Tesco buyer could be out of
3 line under the basket policy, which is two weeks,
4 a two-week tolerance period. The OFT made some attempt
5 to suggest to Ms Oldershaw that that was 24 hours but
6 she firmly rejected that and the document on which they
7 based it was a document that was from 2004, not 2002 or
8 2003.

9 The next point is the complexity of the products
10 that Lisa Oldershaw was dealing with and the suggestion
11 by the OFT that that would make coordination more
12 likely, we say, is a very surprising one. It is
13 intuitively very surprising. What you're dealing with
14 here is a market in which there are hundreds of
15 different products, the prices of any of which can go up
16 and down all the time, from of course a variety of
17 different retailers.

18 The idea that you're going to have some sort of
19 general coordinated price rise with your competitors we
20 say is highly unlikely in that situation. It's very
21 difficult to see how the different retailers would ever
22 have any significant confidence that everybody would be
23 in line with all their products, given that they can
24 just go up and down on a daily or weekly basis. We draw
25 attention to the fact that the OFT's own Merger

1 Assessment Guidelines make it clear that product
2 complexity is a factor that makes coordination less
3 rather than more necessary. That's footnote 211 of our
4 text.

5 Now, if we then go to paragraph 111, we say the
6 answer to the OFT's case is as follows. If, as the OFT
7 acknowledges, achieving a 2p per litre increase in the
8 farmgate price was necessary to avoid picketing, and
9 paying £200 per tonne cost price increase was necessary
10 to achieve the 2p per litre increase in the farmgate
11 price, then eventually the retailers would have all
12 agreed the cost price increase because the threat of
13 picketing, which affected the entirety of the retailers'
14 business and not just dairy, was greater than the
15 potential loss of margin. Knowing that other retailers
16 were in the same position, any one retailer would have
17 thought it was a safe bet to increase retail prices on
18 some cheeses in the hope others would follow. Others
19 retailers would then have followed.

20 That, we say, is precisely what happened in this
21 case because, even on the OFT's case, Sainsbury's did go
22 it alone and raised the price of the branded cheeses on
23 21 or 22 October 2002 and it did so without having
24 received any competitors' future retail pricing
25 intentions. The OFT makes no allegation of any A-B-C

1 transmission before Sainsbury's raised its price on
2 those branded products.

3 Secondly, Lisa Oldershaw was instructed to accept
4 the cost price increase irrespective of whether she
5 could pass it on in increased retail prices. That was
6 a rational unilateral move by Tesco given the costs of
7 Tesco being blockaded which were far greater than the
8 cost to Tesco of accepting the £200 per tonne cost price
9 increase. We say that, thus, the OFT is wrong to say
10 coordination was necessary to implement the retail price
11 increase in 2002.

12 Now, the OFT has suggested to the witnesses, "Are
13 you saying it's pure coincidence that all of the
14 retailers put their cheese prices up during the same
15 period of three to four weeks in October and November,
16 and in fact it went on until December, over this period,
17 is that a pure coincidence?" To which the answer is,
18 no, of course it's not a pure coincidence because the
19 proposal for the cost price increase is being made to
20 all the retailers at the same time and the industrial
21 pressure is being applied to all the retailers by the
22 farmers at the same time and Christmas is approaching at
23 precisely the same rate in relation to all the
24 retailers. So all the retailers are under exactly the
25 same set of commercial pressures and, of course, once

1 prices start to move in the market, once Sainsbury's
2 have gone up in the market, they all see that the market
3 is starting to move. We submit it is extremely
4 unsurprising that what you have is a move by all the
5 retailers during those weeks before Christmas,
6 specifically the November and December weeks.

7 The dates are simply the beginning of each week.
8 That's all they are. They're all week commencing dates
9 and it would appear to be the case that it was the
10 normal practice for the retailers to put their cost
11 prices up at the beginning of the week. That's why you
12 get those particular dates.

13 What is significant, we say, is that there is not an
14 identical set of cost and retail price rises for the
15 retailers or identical dates. If we just give you one
16 example, it's 62A [Magnum], if you just look at this
17 matrix. Just to give you one example, we've already
18 discussed the point that Sainsbury's move on a different
19 date in relation to the branded products, but if you
20 look at deli cheeses, you'll see that as at this date
21 the proposal is for Tesco to move deli cheeses on
22 4 November, Asda to move deli cheeses on 11 November and
23 Sainsbury's to move deli cheeses on 18 November. Now,
24 that is completely inconsistent with any suggestion that
25 there's a plan for the coordination of retail price

1 moves so that each of them can see that the others are
2 implementing some overall scheme. On that basis, it
3 just doesn't work.

4 **MS POTTER:** Sorry, presumably, of course, it could work the
5 other way round that in theory each retailer is leading
6 a different category and others are being given a signal
7 as to what's happening.

8 **MISS ROSE:** You could do that, there has never been any
9 allegation that that is what was happening, and of
10 course that would fly in the face of Lisa's evidence
11 that what she was doing was deciding on a basis of
12 workload when to move particular cheeses and holding
13 back the high value lines as late as possible to delay
14 the hit on her margin, which is entirely consistent with
15 what she did. Of course, if you were to do it that way
16 you would probably get considerable aggravation from the
17 retailer who was being told, "You've got to go first on
18 your own brand range", and take the big margin hit, when
19 somebody else is going to go first on some minor named
20 creamery range. So that's, I would suggest,
21 a fundamentally implausible proposition.

22 That then brings me to the issue of Tesco's intent
23 in 2002. For the OFT to succeed, it has to prove on the
24 balance of probabilities that Tesco had the necessary
25 intent. When I say the necessary intent, I mean the

1 intent that we have outlined at paragraph 22 of this
2 note, and that is that in every case where Tesco
3 disclosed information to a supplier, it must be proved
4 that Tesco intended or foresaw that the supplier would
5 make use of that information to influence market
6 conditions by passing it to Tesco's competitors. So
7 that's what must be proved, every time Tesco discloses
8 information to the supplier. And every time Tesco
9 receives information from a supplier, it must be proved
10 that Tesco knew that that information had been disclosed
11 to the supplier by a competitor, that competitor
12 intending or foreseeing that the information should be
13 passed to Tesco for the purpose of influencing the
14 market. So that is the intent that has to be proved in
15 relation to every strand.

16 You have heard direct evidence about Tesco's intent
17 from Lisa Oldershaw and John Scouler. They have both
18 given this Tribunal clear and consistent evidence that
19 they did not at any time intend their information to be
20 passed on, they did not know it would be passed on, and
21 they never thought that their competitors intended
22 information to be passed to them. On the contrary, they
23 would have been very surprised had they thought -- had
24 it been suggested to them that their competitors were
25 willing to have their information passed to Tesco. So

1 you have had ample oral evidence to that effect.

2 Ms Oldershaw's evidence in particular is of central
3 importance on this issue.

4 In order for the OFT to succeed on this appeal, the
5 Tribunal must be satisfied that Ms Oldershaw has
6 deliberately not told the truth on this issue, because
7 we say that this is not a question on which she could be
8 mistaken or had forgotten. If she intended her
9 information to be passed on, or knew that information
10 she was receiving had come from her competitors with
11 that intent, it is by its very nature a conscious
12 participation in a knowing concerted practice and she
13 must be not telling the truth deliberately now on oath.

14 We say that that is the finding that you must make
15 in order for the OFT to succeed, and if you do not make
16 that finding then the OFT's case fails, regardless of
17 any of the other facts.

18 We then make some points about Lisa Oldershaw. She
19 is not employed by Tesco, indeed only one witness whom
20 you have heard from is an employee of Tesco and that is
21 John Scouler. Every other witness you have heard from
22 in this hearing is an independent witness not in the
23 employment of Tesco. She lives in New Zealand, she does
24 not work in the retail industry, she is a full-time wife
25 and mother, she has a two-year-old child and her husband

1 is unwell.

2 **LORD CARLILE:** She has a consultancy, if I remember rightly.

3 I think that's right.

4 **MISS ROSE:** I beg your pardon?

5 **LORD CARLILE:** Yes, she has a retail consultancy.

6 **MISS ROSE:** She has no interest in the outcome of this
7 appeal and she is thousands of miles away. She could
8 not be compelled to attend this Tribunal or give
9 evidence, for the very obvious reason that she's not in
10 the jurisdiction, but she was prepared to travel halfway
11 across the world to give evidence. The Tribunal knows
12 what then happened, that her husband's health
13 deteriorated and she was forced to return home. In that
14 situation, under that stressful family situation, she
15 remained willing to give evidence for three days, late
16 into the night. The OFT has not made any suggestion to
17 her about why on earth she would have come to do that
18 not to tell the truth. We submit that it would be
19 a very startling thing for any witness to do.

20 If she had had any private concerns about the
21 evidence that she was being asked to come here to give,
22 whether it was accurate or not, she had the perfect
23 opportunity to pull out. She had the perfect
24 opportunity to say, "I'm really sorry, I know I said
25 I would come and give evidence but things have changed,

1 we're under a lot of stress, and I just can't go through
2 with it". If she had done that, there would have been
3 absolutely nothing that anybody could have done about
4 it, absolutely nothing. But she was determined to go
5 through with it, and we submit that is a factor of very
6 considerable significance when you assess the
7 credibility of her evidence.

8 We submit that there would have to be, in that
9 situation, some compelling material to indicate that she
10 was not an honest witness because, in that situation, it
11 is inherently implausible that she is not telling the
12 truth. In fact, and not surprisingly, the evidence that
13 she has given has been demonstrated to be both credible
14 and accurate. She was repeatedly shown to be accurate
15 on points of detail where it was initially suggested to
16 her that she was mistaken.

17 Let me just give you an example of this, it's from
18 the transcript, Day 9, page 92. At line 17, she's
19 asked:

20 "Question: If you go to document 62A, this is
21 a McLelland price move matrix document which I think you
22 have seen and looked at before.

23 Are you with me?

24 "Answer: I don't think I've seen it before.

25 "Question: Ms Oldershaw, you say you haven't seen

1 it before, but in a witness summary that you have
2 provided you refer expressly to it?

3 "Answer: Well, then I must have seen it."

4 Then at 94, Mr Morris retracts that suggestion and
5 says:

6 "I suggested a moment ago that you had mentioned
7 document 62A in your witness summary. That is not the
8 case and I apologise for that. I was thinking of
9 document 51A."

10 Now, it's a minor incident but we submit it's
11 telling and significant because it shows that she was
12 accurate in a situation where it was being suggested to
13 her that she was not.

14 The second matter of significance in relation to her
15 evidence is that, on two occasions, Lisa Oldershaw made
16 statements, witness statements, without the benefit of
17 access to documents which were later corroborated when
18 those documents were discovered. That, we submit, is
19 a matter of considerable significance because a witness
20 who says, "This is my recollection", without the benefit
21 of the document, and who is subsequently corroborated by
22 a document, that is a very strong indication of the
23 reliability of that witness.

24 That happened in this case on two occasions. The
25 first is in relation to a very important document in

1 this case, which is the briefing note that
2 Lisa Oldershaw prepared for John Scouler before the
3 meeting of 6 October 2003. Her evidence in her second
4 witness statement was that she had prepared a one-page
5 briefing note for John Scouler in preparation for the
6 meeting with McLelland on 6 October. It was also her
7 evidence in that statement that she had raised with
8 John Scouler before that meeting her concern that future
9 retail pricing information might have been given to her
10 by Mr Meikle, and indicated that she thought he needed
11 compliance training. She said all that in her witness
12 statement without access to the briefing document,
13 because at that stage Tesco had disclosed the briefing
14 document back in 2005 to the OFT but no one had realised
15 what it was.

16 When that document came to light, it fully
17 corroborated what she had said. First of all, that she
18 had prepared a briefing document for John Scouler and,
19 secondly, that that briefing document expressly raised
20 the need for what she called Competition Commission
21 training. What she put in that document was
22 "Competition Commission training desperately needed",
23 pretty strong language.

24 So that's the first example, and we say it's of
25 great significance when assessing her credibility.

1 Second is that in her second witness statement she
2 said that she never received a briefing from McLelland
3 that included the amateurish and exaggerated claims that
4 were made in the briefing presentation given by
5 Calum Morrison to Sainsbury's on 5 September 2003.

6 Let me just show you that reference, it's volume 2A
7 of the appeal bundle, tab J, paragraph 143 [Magnum].
8 She says:

9 "I understand that SO document 261 is a presentation
10 McLelland emailed to Sainsbury's on 5 September 2003.
11 The presentation proposes a £200 per tonne price
12 increase not related to milk prices but will bring
13 margin back into cheese to the manufacturer. The
14 presentation proposes a total market move involving all
15 major suppliers and all major retailers. The OFT
16 concludes that this presentation was a proposal by
17 McLelland to coordinate cheese costs and retail prices
18 between retailers. I do not recall receiving a similar
19 presentation from McLelland in September 2003. The
20 wording in the presentation is amateurish and it's the
21 kind of thing I'd remember if I'd received it. I was
22 not aware of any plan to coordinate cost or retail
23 prices by McLelland, though I understood McLelland was
24 seeking to achieve cost price increases from all of its
25 buyers."

1 Now, subsequently, the presentation that was made to
2 Lisa Oldershaw in 2003 came to light, and that is
3 document 100A [Magnum]. That bore out Lisa's
4 recollection that she did not receive a presentation
5 that contained the wording that was in the presentation
6 made to Sainsbury's:

7 "This will be a total market move. All major
8 suppliers, all major retailers, all RSPs will move."

9 That wording is conspicuously absent from the
10 presentation that was made to her which simply said:

11 "£200 per tonne cost increase required on all
12 business from 1 October 2003."

13 So, again, we submit that contrary to what the OFT
14 had proposed in its decision, that the presentation made
15 to Sainsbury's must have been a standard form, she
16 disagreed with that, because of its amateurish wording
17 which she said she would have remembered, and she was
18 right, no presentation containing that amateurish
19 wording was ever made to her.

20 We make points at paragraphs 120 and 121 about the
21 clarity of her evidence that she did intend information
22 to be passed on, and also the suggestion by the OFT that
23 it wasn't credible for her to say that she didn't
24 believe or take into account what suppliers told her
25 about future retail pricing intentions, and to say that

1 it's not credible that on the one hand she trusted her
2 suppliers to keep her information confidential, but on
3 the other hand she didn't trust them to give her
4 accurate information about other retailers.

5 We say in fact those two propositions are completely
6 logical. It's because Lisa Oldershaw trusts her
7 suppliers to keep her information confidential, and
8 makes the same assumption about the way they are dealing
9 with other retailers, that she discounts the information
10 that they're giving her because she regards it as
11 unreliable sales puff. She doesn't think she is being
12 given confidential information about other retailers
13 because she doesn't think they would ever pass on her
14 confidential information to other people.

15 So those two assumptions by Lisa are in fact
16 mutually reinforcing.

17 I have already made the point about the importance
18 of the fact that the briefing note for the 6 October
19 meeting came to light after Lisa had given evidence
20 about its existence, and after she had given evidence
21 that she'd raised with John Scouler the need for
22 compliance training.

23 That factual course of events, and the events of
24 6 October 2003, we submit, are of very great
25 significance when the Tribunal is evaluating the OFT's

1 case, because I don't understand it now to be disputed
2 by the OFT that at the meeting on 6 October 2003
3 Mr Scouler delivered a rebuke to Mr Irvine and said that
4 Tesco did not wish to receive retail pricing
5 information, and we submit that that is a clear
6 indication that, as at the time in question, Tesco was
7 not involved in a collusive concerted practice where
8 everybody thought it was okay to share such information.
9 That course of events is fundamentally inconsistent with
10 the OFT's case.

11 **LORD CARLILE:** Can I ask you a question about document 110A
12 [Magnum] which is material to the current context.
13 Remember there was an allegation made by Mr Morris on
14 behalf of the OFT that this document may have been
15 created in two parts?

16 **MISS ROSE:** Yes.

17 **LORD CARLILE:** The part up to "Points" being first and
18 everything from "Points" onwards being later.

19 **MISS ROSE:** Yes.

20 **LORD CARLILE:** It was observed by somebody that there is in
21 fact some manuscript addition at the bottom of that
22 page.

23 **MISS ROSE:** Which she says she wrote underneath it.

24 **LORD CARLILE:** Yes. She said she wrote "Milk 19.2p" and
25 that there is writing "[Dairy Crest] 18.6p". Can you

1 The submission that we make is that that course of
2 events -- if the Tribunal accepts that that occurred,
3 that has significance not only in relation to
4 Lisa Oldershaw's intent in 2003, but overall for the
5 OFT's case because that conduct on the part of
6 Lisa Oldershaw is completely inconsistent with the OFT's
7 case that she was a person who was prepared, knowingly
8 and intentionally, to share her retail pricing
9 information with competitors. So if you accept the
10 accuracy of that course of events, we submit that that
11 is extremely important evidence in rebutting the OFT's
12 case on intent.

13 Now, the OFT dealt with this in its decision. If
14 you take up appeal bundle 1, tab A1, it's
15 paragraph 5.618 on page 251 [Magnum].

16 **LORD CARLILE:** Yes.

17 **MISS ROSE:** Tesco explained this course of events in its
18 submissions in response to the SO and the SSO, and you
19 see the various elements of the complaint set out under
20 the bullets at 618.

21 The OFT at 619 said:

22 "The OFT has carefully considered Tesco's
23 representation and has concluded that it is not
24 consistent with the contemporaneous documentary evidence
25 in its possession. First, there is no contemporaneous

1 documentary evidence that substantiates or even supports
2 Tesco's representation. Tesco itself has confirmed that
3 it does not have a contemporaneous written record of any
4 complaints it purports to have made to McLelland.
5 Moreover, having received Tesco's representation, the
6 OFT asked McLelland if they had any record of any such
7 complaint and was informed no record of such complaint
8 could be found."

9 Then they say that they asked Mr McGregor and
10 Mr Ferguson if they could recall such a complaint and
11 they could not.

12 So that was the basis on which the OFT rejected
13 Tesco's account but, of course, the situation now is
14 significantly different because it now emerges that, as
15 at the date of the OFT's decision, Tesco had in fact
16 provided the OFT with contemporaneous documentary
17 evidence, namely the document at 110A [Magnum]. If the
18 Tribunal accepts that that document is what
19 Lisa Oldershaw and John Scouler both say it is, namely
20 a briefing note prepared for John Scouler before the
21 meeting of 6 October, which contains the statement
22 "Competition Commission training desperately needed",
23 then we submit it is self-evident that Lisa's account is
24 correct, because she was writing that on the document in
25 advance of the meeting of 6 October and, therefore, on

1 the basis of a concern that had already arisen for her
2 before that meeting.

3 We say that this is also consistent with Mr Irvine's
4 recollection of that meeting. You will recall that he
5 gave vivid evidence that close to the beginning of the
6 meeting he made a general comment that, if Tesco
7 accepted the cost price increase, there would be other
8 retail price rises in the market, and he said Mr Scouler
9 jumped in, and I went "Oh". And he was slightly taken
10 aback by the abruptness of the response that he got from
11 Mr Scouler when he made that comment.

12 We submit that, again, that is consistent with
13 Mr Scouler having been primed by Lisa Oldershaw before
14 the meeting and warned that this was an issue that
15 needed to be raised with McLelland, that they needed to
16 have compliance training.

17 The OFT, as you commented before the lunch
18 adjournment, has sought to get out of the difficulty
19 that this document creates for its case, which we submit
20 is fundamental, by suggesting that it was created after
21 the meeting. There is no evidence whatsoever to support
22 that assertion, it was a question put in
23 cross-examination without any foundation at all.

24 What it was said to be based upon was the comment at
25 point 3:

1 "Diminishing profitability of Seriously Strong
2 especially in light of such fantastic growth and also
3 against its peers, failed to be addressed and as
4 a result distribution is cut by half from end Oct 2003."

5 But that is entirely consistent with what Lisa had
6 been saying to McLelland before the meeting. The
7 Tribunal can see that documented, because it was
8 documented by Stuart Meikle on 16 September when he made
9 precisely that point internally to his superiors. That
10 was the document at tab 103 [Magnum]. So that's three
11 weeks before the meeting, he reported to Tom Ferguson
12 and Jim McGregor:

13

14

15

16

17 So that was the position at the date of the meeting.
18 What then happened at the meeting was that they said,
19 "Well, we will shelve this issue and see if we can agree
20 a solution to the margin problem for Seriously Strong".
21 In other words, they were given one last chance to sort
22 out the problem with the margin on Seriously Strong.

23

24

25

So in fact the point that's made by Mr Morris is
inconsistent with this note having been added after the
meeting and is consistent with it being exactly what

1 Lisa says it was, namely a briefing note for
2 John Scouler about where her negotiations with Mr Meikle
3 were before the meeting.

4 Apart from that, there is simply nothing to shed any
5 doubt upon the veracity of this document, its
6 genuineness and that it means what it says. There was
7 a feeble, frankly, a feeble attempt to suggest that the
8 reference to "Competition Commission training" was
9 referring to training in the code of practice for
10 suppliers, but I would suggest that that is clearly
11 fanciful and was regarded with some astonishment by
12 Mr Scouler because that simply wasn't the vocabulary
13 that was used within Tesco for that code of conduct.
14 Indeed, it is very difficult to see why McLelland would
15 desperately need training in a code of conduct which
16 placed obligations on Tesco. It didn't place any
17 obligations on McLelland.

18 So that is essentially Tesco's positive case on
19 intent, that we invite you to accept the evidence of
20 both Lisa Oldershaw and John Scouler.

21 We say that because the OFT has no witness or
22 documentary evidence on the issue of intent, what the
23 OFT does is to seek to invite the Tribunal to infer
24 intent, and it seeks to do that from four matters which
25 are set out at paragraph 80 of its defence [Magnum].

1 I'm now at paragraph 125 of the note. These are the
2 four matters on which the OFT relies to establish its
3 case on intent.

4 First, the plan. Tesco was aware of a plan for an
5 across-the-board increase in retail prices for cheese.
6 Secondly, conditionality, that Tesco's willingness to
7 raise its retail price was conditional upon its
8 competitors also raising their retail prices at or
9 around the same time. Thirdly, that it is said that
10 Tesco in certain instances -- at the point when Tesco
11 disclosed its retail pricing intentions to Dairy Crest
12 and McLelland, Tesco had already received from the
13 processor in question the retail pricing intentions of
14 a competitor retailer. Finally, it's disputed as to
15 whether there is a legitimate commercial reason for
16 Tesco to provide or receive future retail pricing
17 intentions.

18 So those are the four heads under which the OFT
19 seeks to invite the Tribunal to infer intent.

20 The first point we make is that this case falls away
21 if you accept the evidence of Lisa Oldershaw and
22 John Scouler. If you accept the direct evidence that
23 those individuals had no intent, that is the end of this
24 case.

25 But I now come on to deal with the way that the OFT

1 puts its case on intent, and the first relates to points
2 that have been put to me this morning, and which I now
3 want to deal with in detail, which is the question of
4 Tesco's awareness of a plan. Properly analysed, we say
5 that that breaks down into two issues. First of all,
6 what was the plan and, secondly, was Tesco aware of the
7 plan?

8 This is really central to the OFT's case on intent,
9 and at paragraph 128 we quote the OFT saying:

10 "This is the key element of context for the
11 exchanges between Tesco and Dairy Crest and McLelland in
12 the autumn of 2002."

13 This is really the heart of the OFT's case on
14 intent.

15 So the first question is, what was the plan? And,
16 in particular, what is the OFT's allegation as to what
17 were the elements of the plan? This point is slightly
18 difficult to disentangle, and very important, because my
19 submission is that it is actually very difficult to
20 gather from the decision precisely what the OFT is
21 saying the plan is. The OFT rides two horses about the
22 elements of the plan in the decision. What then happens
23 is that, in its pleaded case, the OFT opts for
24 a particular characterisation of the plan, but then, at
25 this hearing, has changed its position and put forward

1 a different plan.

2 I want to just trace that through because we say it
3 is of considerable significance on analysing this
4 appeal.

5 First of all, what were the elements of the plan
6 alleged in the decision? We say that the decision is
7 unclear as regards the elements of the plan of which
8 Tesco was said to be aware in 2002. There are two
9 versions of the plan that can be discerned in the
10 decision. The first is a plan for a market-wide or
11 across-the-board increase in the cost and retail prices
12 of cheese. That's the first characterisation. The
13 second characterisation is a plan for coordinated retail
14 price rises for these. This is the crucial distinction.

15 Was it simply a plan devised by Dairy Crest, in
16 particular, to persuade all retailers to increase their
17 cost prices of cheese with a consequential retail price?
18 That's the across-the-market plan. Or did the plan
19 include a plan for the coordination between retailers of
20 the retail price increases? We say that distinction is
21 crucial because it is only a plan of the latter type
22 which could properly be the foundation of an inference
23 that Tesco intended to share its retail pricing
24 information with other retailers. So this is really
25 important.

1 Now, can I just, first of all, show the Tribunal the
2 different ways that the plan is described in the
3 decision. So this is appeal bundle 1, and I'm going to
4 show you first of all a number of references where the
5 plan includes an element which is the coordination of
6 retail price rises.

7 So, first of all, we go to section 5, 5.14 [Magnum]:

8 "The evidence in the OFT's possession demonstrates
9 that the aim of both the 2002 cheese and 2003 fresh
10 liquid milk initiatives was to financially assist UK
11 dairy farmers by subsidising an increase in the farmgate
12 price through coordinated [note the word "coordinated"]
13 wholesale and retail price increases. The evidence in
14 the OFT's possession demonstrates that the aim of
15 the..."

16 That's 2003 cheese, we don't need to worry about
17 that.

18 So that's the first point. Then 5.15 [Magnum]:

19 "Accordingly, regardless of their aims, a key
20 component of each of the infringements was coordinated
21 retail price increases."

22 There you see it right upfront, that the element of
23 coordinated retail price increases is said to be a key
24 component of the plan.

25 Then if we go on to 5.36 [Magnum]:

1 "The OFT acknowledges that, at the time of the
2 infringements, the parties were under severe pressure to
3 take action to financially assist UK dairy farmers.
4 However, it does not accept that this pressure made it
5 necessary or justified to coordinate retail price
6 increases. In particular, the OFT considers that
7 parties could have taken unilateral action to support UK
8 dairy farmers as some retailers have indeed subsequently
9 done."

10 Now, that, we say, is a very important concession
11 made by the OFT because the OFT is accepting there that
12 the fact that there is an initiative to increase the
13 farmgate price for raw milk across the market does not
14 inevitably lead to unlawful anticompetitive conduct,
15 that you can have a plan of that nature for an
16 across-the-board market rise increase to assist the
17 farmers where the individual retailers are taking their
18 retail price decisions unilaterally, and that would be
19 perfectly acceptable.

20 It's again being made clear here by the OFT that the
21 vice is the coordination of retail price rises.

22 Then we go on to 5.44 [Magnum]:

23 "Taking into account that market forces did not
24 support or justify an increase in the wholesale and
25 retail price of fresh liquid milk in the period 2002 to

1 2003, these closely timed retail price increases raised
2 a suspicion of coordination. The evidence presented
3 below demonstrates that the retail price increases that
4 are the subject of this decision were coordinated. The
5 coordination occurred through a number of practices by
6 which the retailers knowingly substituted practical
7 cooperation for risks of competition."

8 So, again, the coordination of retail prices,
9 absolutely central and essential.

10 5.45 to 5.46, again we submit you see the same
11 thing, particularly at 5.46 [Magnum]:

12 "For each of the infringements, these disclosures
13 formed part of a common plan to coordinate retail
14 prices."

15 Then 5.145 [Magnum], here the OFT is specifically
16 addressing the Dairy Crest proposal:

17 "The OFT has carefully considered Tesco's submission
18 and Mr Flower's evidence and remains of the view that
19 the documents sent by Dairy Crest to various retail
20 accounts between 20 September and 23 September 2002 set
21 out a framework to coordinate cheese retail price
22 increases, in addition to the wholesale price increase
23 that Tesco has accepted was proposed."

24 So, again, that's at the heart of the OFT's case, or
25 it would seem to be. Because there are other paragraphs

1 in the decision which simply suggest a plan for
2 a market-wide retail price increase. We can see one on
3 this very same page. At the end of 5.143 [Magnum]:

4 "The OFT reiterates that a face value interpretation
5 of the various documents, including the briefing,
6 clearly demonstrates that Dairy Crest proposed
7 a market-wide cheese retail price increase to a number
8 of retailers."

9 We don't dispute that Dairy Crest, in its proposal,
10 proposed a market-wide cost price increase and made
11 recommendations for a market-wide retail price increase.
12 We don't dispute that. But what is significant in this
13 decision is that what is being said is that that
14 proposal from Dairy Crest included, as a key element,
15 the coordination between retailers of the retail price
16 rise.

17 Now, as I've said at 133, this distinction is
18 crucial. If the plan, of which Tesco is alleged to have
19 been aware, was simply a plan for a market-wide increase
20 in the cost and retail prices for cheese, it would not
21 support the inference that the OFT seeks to draw, namely
22 that Tesco intended to pass on confidential information,
23 or that Tesco knew that confidential information had
24 been intentionally passed on by its competitors.
25 Because if the plan is only for a market-wide increase

1 in the cost and/or retail price of cheese, yes, it could
2 be inferred that Tesco was aware that its suppliers were
3 discussing cost and retail prices with its competitors,
4 yes, that we agree, and we say that is generally the
5 case in a situation where a supplier proposes a cost
6 price increase, because it would be quite extraordinary
7 for a supplier to propose a cost price increase to only
8 one customer, so the customer will always assume that
9 the supplier is having similar discussions about cost
10 price increases with its other customers and, in the
11 case of these products, must be having discussions about
12 retail prices because the supplier has to pack cheese
13 and, therefore, has to know what the retail prices are
14 going to be.

15 However, this is 135, Tesco's awareness of a plan
16 for a market-wide increase in cost and retail prices
17 would not justify an inference that Tesco knew that its
18 own confidential communications with its suppliers about
19 future retail prices would be passed on, and still less
20 an inference that Tesco intended for that to happen.
21 Similarly, the mere fact that suppliers were proposing
22 an across-the-board increase in prices, whether cost or
23 retail, would not give Tesco any reason to appreciate
24 that its competitors' information was intentionally
25 being passed to it. That is simply a non sequitur from

1 the fact that Tesco knows that its suppliers are having
2 discussions with other retailers about cost price rises
3 at the same time.

4 In order to justify that crucial inference of
5 knowledge or intent on Tesco's part, it has to be an
6 element of the OFT's case that the plan included
7 awareness by Tesco of a plan for the coordination
8 between retailers of retail price rises because, yes, if
9 Tesco was aware that what Dairy Crest was seeking to
10 arrange was for all retailers to raise their prices by
11 the same amount, by the same date, in the advance
12 knowledge that they were each going to do it, then of
13 course you can see the basis for the inference that the
14 OFT seeks to mount. But knowledge is not, therefore,
15 simply knowledge of the existence of a market-wide plan
16 but must be knowledge of a plan to coordinate the
17 increase in retail prices. So there's two elements:
18 coordination, increase in retail prices.

19 Now, the ambiguity of the OFT's position in its
20 decision and the lack of clarity that that led to in its
21 reasoning is visible, we say, from paragraph 156(ii) of
22 that decision [Magnum].

23 Now this is, I think, a very revealing paragraph,
24 because you actually see OFT shuttle between the two
25 different theories of what the plan is within this

1 single paragraph. 5.156(ii).

2 This is the summary of the OFT's conclusions from
3 the Dairy Crest correspondence, so this is specifically
4 dealing with the Dairy Crest briefing note, the
5 Dairy Crest proposal:

6 "It is clear from the language used in Dairy Crest's
7 briefing document, pieces of covering correspondence and
8 the evidence submitted by Dairy Crest following the
9 issue of the SO, that the price initiative Dairy Crest
10 proposed involved industry-wide action on cheese retail
11 prices. As a result of this, each of the retailers that
12 Dairy Crest approached, that is, for the purpose of this
13 decision, Asda, Safeway, Sainsbury's and Tesco, would
14 have understood that it was not being asked to act
15 unilaterally in increasing its cheese retail and
16 wholesale prices but as part of a wider market move in
17 which it was intended that its competitors would also
18 implement retail and wholesale price increases.
19 Therefore, as a result of this, each retailer would have
20 understood that Dairy Crest was in contact with its
21 competitors concerning a coordinated retail price
22 increase, and each of Asda's, Safeway's, Sainsbury's and
23 Tesco's subsequent action should be considered in this
24 context. This [I'm not quite sure what "this" refers
25 to] is clearly inconsistent with the principle that

1 competitors should determine their prices
2 independently."

3 I would invite the Tribunal to go away and read that
4 paragraph at your leisure with a towel around your head
5 because it is actually impossible to understand the
6 chain of reasoning in that paragraph. It doesn't make
7 sense internally, because it starts with the
8 uncontroversial proposition that what Dairy Crest is
9 proposing is an across-the-market price rise, and then
10 it moves from that to the assertion, which is a non
11 sequitur, that therefore Tesco would have known that
12 what was being proposed was a coordinated retail price
13 rise, and says that's inconsistent with the duty to act
14 independently.

15 That, we submit, is where the flaw has crept in, in
16 the decision, to the OFT's reasoning.

17 So that's the decision itself, where you have that
18 ambiguity culminating in that particular paragraph which
19 we submit is very far from --

20 **LORD CARLILE:** I understood this to mean in the context of
21 the A-B-C, that if B are giving certain information to
22 A -- sorry, I'll start again. If B are giving certain
23 information to C about A, then it is a simple conclusion
24 or inference that C should draw that they're giving it
25 similar information to A about C.

1 **MISS ROSE:** Sir, that's a different point. That's the
2 disclosing having received point, which I'm going to
3 come to later, which is the OFT's argument that Tesco
4 must have known that its confidential information was
5 being passed on because it had received information from
6 its suppliers. So that's a separate point.

7 This is a different point. What's being said here
8 is the nature of the proposal was such, the nature of
9 the plan was such, the plan of which Tesco was aware,
10 that Tesco can be inferred to have known or intended
11 that there would be confidential information sharing.
12 That is mounted in the decision, on the finding in the
13 decision that this was a plan for a retail price
14 increase coordinated between the retailers, that's the
15 allegation, not simply market-wide but coordinated.

16 Now, I just want to show the Tribunal how --

17 **MR MORRIS:** Sir, I hesitate, I know it's an important part
18 of -- but it would help enormously perhaps if Miss Rose
19 could explain what she means by the word "coordinated"
20 in this context.

21 **MISS ROSE:** Sir, I'm delighted to hear my learned friend say
22 that because that is the crucial question, and it's the
23 question we asked the OFT, so I am indeed going to come
24 to that.

25 **MR MORRIS:** I asked what you mean by it.

1 **MISS ROSE:** No, sir, the question is not what I mean by it,
2 the question is what the OFT meant by it and we'll see
3 that very soon. Because that was the situation as at
4 the date of the decision, and the word "coordination"
5 was not defined by the OFT in its decision.

6 So then, and we're now at paragraph 138 of my note,
7 we come to the OFT's pleaded case on the appeal, and we
8 make the point that we put this in issue in our notice
9 of appeal, paragraph 64 [Magnum]:

10 "Lisa was clear that she was not conscious of any
11 hint of a plan to coordinate retail price increases."

12 Because that's what we understood to be the case we
13 had to meet, that there was a plan to coordinate retail
14 price increases.

15 The OFT, we say, appears to have appreciated the
16 importance of this point in the course of its
17 preparation for the appeal, and the amended defence
18 contains numerous references to Tesco's awareness of
19 a plan for coordinated price increases. We set out
20 a number of paragraph references there, I don't intend
21 to turn them all up, but you'll see that in the first of
22 them, paragraph 11 -- if we just have a look at that one
23 in fact, you'll see the point. Paragraph 11 of the
24 amended defence [Magnum]. It's tab 15 of the pleadings
25 bundle. Page 6, the top of page 6:

1 "The OFT's case is that, crucially, in both
2 instances, there was a plan for a coordinated retail
3 price increase by the main supermarket retailers and
4 that Tesco was aware of that plan."

5 So that is where they clearly set it out, and they
6 say correctly that it's crucial to their case. The
7 significance of this point was explained by the OFT in
8 this document at paragraph 82, under the heading
9 "Awareness of a Plan" [Magnum]. Again, we see the
10 pleading:

11 "At the relevant times, Tesco was aware of a plan
12 which involved coordinating across-the-board increases
13 in retail prices for cheese in 2002. This is the key
14 element of context for the exchanges between Tesco,
15 Dairy Crest and McLelland in the autumn of 2002. It
16 establishes clearly that Tesco must have intended or
17 foreseen that its retail pricing intentions would be
18 passed on, and that it must have known or appreciated it
19 was receiving the retail pricing intentions of its
20 competitors as part of that plan. Where there is an
21 indirect exchange of future pricing intentions between
22 competing retailers, via a supplier, the retailers'
23 awareness of a plan or initiative establishes the
24 requisite state of mind. This is so whether the plan
25 emanates from or is being driven by the supplier... or

1 one of the retailers... Significantly, such awareness
2 establishes that each retailer would know [first] that
3 the supplier would be communicating with its competitor
4 retailers and would be seeking to persuade them to
5 increase their retail prices; and [second] that, as part
6 of this, would pass on that particular retailer's own
7 retail price [intentions]."

8 The reason I put it in those ways is because the
9 plan for coordinated retail price increases is necessary
10 to establish both of those inferences of state of mind.
11 If all you have is a plan for an across-the-board price
12 rise, then you can infer that the retailer would have
13 known that the supplier would be communicating with its
14 competitor retailers and seeking to persuade them to
15 increase their retail prices, but you cannot infer that
16 the retailer would have known that the supplier, as part
17 of this, would pass on the particular retailer's own
18 retail price indications. That second inference is only
19 an inference that can arise if the plan, and I stress
20 the plan, is for coordinated retail price rises.

21 Now, paragraph 140 of my note. The precise scope of
22 the plan, we say, and the meaning of "coordination" was
23 still not clear from the amended defence. As Mr Morris
24 has so helpfully pointed out, the meaning of
25 "coordination" by this stage was obviously central to

1 the OFT's case, and therefore we asked the OFT to
2 provide particulars and to tell us what it meant by the
3 words "coordination", "coordinated", and "coordinate",
4 used on so many occasions in its defence.

5 The further and better particulars provided by the
6 OFT are at tab 5 of the pleadings bundle. If you go to
7 paragraph 29 of the particulars [Magnum], you see
8 request 9:

9 "Please explain what the OFT means by the term
10 'coordinated', 'coordinate', 'coordinating' or
11 'coordination' in relation to cost and retail price
12 increases in its description of the plan."

13 And we set out the various paragraphs in the
14 defence.

15 The reply was:

16 "Those terms mean acting on the market otherwise
17 than independently."

18 So in other words, the OFT's case was that the plan
19 of Dairy Crest, as expressed in its briefing document,
20 was not simply for a market-wide increase in cost price
21 increases, or consequential proposals for rises in
22 retail price increases, but that those price increases
23 should be undertaken by parties acting on the market
24 otherwise than independently. That's the point.

25 Then if you go back to paragraph 27 [Magnum], we

1 asked them to identify the material features of the
2 plan. They referred us to various paragraphs in their
3 defence and I have summarised those paragraphs at
4 paragraph 141: cost and retail prices would be increased
5 by 20p per kilo; retailers would recover increased costs
6 on cash rather than percentage margin basis so as not to
7 be seen to profit; retail price increases would be
8 staggered; planned dates of increase were the same.

9 So what they're saying is those elements of the plan
10 were to be coordinated by parties acting on the market
11 otherwise than independently. That was the plan for
12 coordination of retail price rises.

13 So that was the state of the OFT's case when we came
14 to the hearing, but that is not the case that the OFT
15 has pursued at the hearing of this appeal. The only
16 case that the OFT opened, and the only case, most
17 crucially, that was put to the witnesses at the hearing
18 of this appeal, was that they were aware of a plan for
19 an across-the-board or market-wide cost and retail price
20 increase by Dairy Crest. It was not put to any witness
21 before this Tribunal that they were aware of a plan by
22 Dairy Crest, or that the Dairy Crest briefing document
23 should be read as including a plan for the coordination
24 of cost or retail price increases by parties acting
25 otherwise than independently on the market. That case

1 was never put.

2 Now, if you go to paragraph 145, we've put how
3 Mr Morris opened the case. He said the plan was for
4 a market-wide increase in cost and retail prices.
5 That's consistently the case that he's put, and if you
6 look at the transcript you will see that he puts that
7 case many, many times.

8 We say that this formulation of the plan, as simply
9 a plan for a market-wide increase in cost and retail
10 prices, without the additional element to the plan that
11 parties should be acting on the market otherwise than
12 independently, was the only case put to the witnesses by
13 the OFT.

14 I've then dealt with the detail of that point, and
15 we make the point that at no point has it ever been put
16 to the witnesses that there was a plan for coordination.

17 At paragraph 151 is the point that the so-called
18 waves simply don't work because of the different dates.
19 If the objective was to avoid being out of line, the
20 plan was a failure by design, because simultaneously
21 moving prices on different cheeses would result in
22 everyone being out of line on at least some cheeses at
23 all times until the final wave completed.

24 The point about that is that, as we have seen, it
25 was envisaged that one retailer would move on deli

1 cheeses on one week, another retailer would move several
2 weeks later. That would have the necessary consequence
3 that the deli cheese prices would be out of line during
4 that period. So if the aim, as was suggested by the
5 OFT, was to avoid the parties being out of line with
6 their basket policies, the plan didn't work from its
7 very inception.

8 Here we say at 152 that, rather than coordination,
9 the pattern of price increases in the six weeks from
10 late October to early December 2002 reflects the outcome
11 of a series of bilateral negotiations between retailers
12 and suppliers in which all parties had a preference for
13 dealing in week commencing dates, and in which there was
14 pressure to complete the price increases, and in
15 particular to avoid picketing during the Christmas
16 shopping period.

17 So we say that this key central element of the OFT's
18 case, which was a central plank of the decision,
19 although somewhat ambiguous, which was a very important
20 plank of its defence, and then clarified by it through
21 its response to the request and particulars, was not
22 pursued at the hearing and is in any event inconsistent
23 with the evidence, and that means that the central part
24 of the OFT's case on intent fails.

25 The second element of the OFT's case on intent is

1 Tesco's so-called conditional commitments. It's alleged
2 that Tesco gave four conditional commitments that it
3 would increase its cheese retail prices if the others
4 did the same.

5 Now, sir, I'm getting very short of time and this is
6 a matter I dealt with in opening. My submission, in
7 summary, is that there simply isn't any evidence to
8 support any of the alleged conditional commitments given
9 by Tesco. The first is at the Dairy Supply Group
10 meeting, the next two are from documents that emanate
11 from third parties that are not even sourced to Tesco,
12 and the final one is a document from 8 November which is
13 a record of the telephone conversation.

14 I've set out here in writing in detail our
15 submission, but we say simply that the OFT's case that
16 conditional commitments were ever made by Tesco fails on
17 the facts.

18 The next point is "Disclosure, having received", and
19 that's the point, sir, that you put to me a few moments
20 ago, that it's said that you can infer that Tesco
21 intended its own confidential information to be
22 disclosed by suppliers to its competitors because, at
23 the time that Tesco disclosed that information to
24 a particular supplier, it had already received from that
25 supplier confidential information which it knew had

1 emanated from its competitors.

2 That's the allegation. Again we say this is
3 incorrect as a matter of fact.

4 The first point is in relation to Dairy Crest. We
5 know that Lisa Oldershaw disclosed her cost price
6 date -- the dates for the rises in her cost price, and
7 at least one retail price, the price of WeightWatchers
8 cheese, to Neil Arthey of Dairy Crest on
9 30 October 2002. There is no evidence that at that date
10 Lisa Oldershaw had received any confidential information
11 belonging to any retailer from Dairy Crest. There is
12 simply no evidence. So we say that "Disclosure, having
13 received" goes nowhere at all in relation to
14 Dairy Crest.

15 That's quite important, because it was to
16 Dairy Crest that Lisa Oldershaw simply read out, as you
17 will recall, read out the categories under the dates in
18 her plan. The OFT says, "Well, Dairy Crest didn't need
19 to know the dates for categories of cheese that it
20 didn't supply to Tesco and so you must have been doing
21 this for some ulterior motive". We say, no, she was
22 simply reading out the list and she had no reason to
23 think that Dairy Crest would pass that on, and certainly
24 it can't be inferred that she intended it to do so.

25 In relation to McLelland, the OFT relies upon

1 document 52 [Magnum], and much blood and ink has been
2 spilled in these proceedings over document 52 which
3 I would like to turn to now.

4 **LORD CARLILE:** I have it open already.

5 **MISS ROSE:** It may be most convenient, in fact, for me to
6 give you now all our submissions on document 52 so that
7 we don't have to come back to it, because this is dealt
8 with as well in relation to strand 2.

9 Can I invite you, if you turn on in my note to
10 page 101, paragraph 188, you'll see the heading "Strand
11 2", and this is dealing also with document 52.

12 The first question is: what information is disclosed
13 by Mr Ferguson to Lisa in this document?

14 We submit there are two pieces of information that
15 are disclosed. The first is:

16 "As we discussed last week other parties are
17 confirming that they will protect cash margin on this
18 occasion but not % margin."

19 The second is:

20 "Sainsbury are confirming that the new retails on
21 branded pre-pack will be in place Tuesday this week."

22 We submit that there is no disclosure of information
23 in this document that Sainsbury's or any other retailers
24 are intending to raise their prices on 4 November for
25 pre-pack and 11 November for deli.

1 It is quite clear, when you read the email as
2 a whole, that the sentence:

3 "The timescales are as we proposed.

4 "Ie. 4th of November for pre-pack and the 11th
5 of November for deli."

6 Relates to the conversation they have been having
7 about the proposed £200 per tonne recovery and Tesco's
8 own proposed dates for raising its prices. That was the
9 evidence of the interpretation of that document given by
10 both Lisa Oldershaw who received it and Mr Ferguson who
11 wrote it.

12 So that's the first point. Those are the two items
13 of information.

14 The next point is: is the first piece of
15 information, "other parties are confirming that they
16 will protect cash margin on this occasion but not %
17 margin" confidential?

18 The answer is, no, absolutely not. That was public
19 knowledge by this date, and the Tribunal has already
20 seen the various press releases and documents -- press
21 articles that were in the public domain that made it
22 perfectly clear that what was being asked for was the
23 cash margin to be maintained, the money to go back to
24 farmers to avoid profiteering, that was the proposal,
25 and that was the level that people were saying they were

1 going to go to. It was absolutely not a piece of
2 confidential information, it was a simple piece of
3 general market intelligence.

4 The second piece of information relates to
5 Sainsbury's:

6 "Sainsbury are confirming that the new retails on
7 branded pre-pack will be in place Tuesday this week."

8 Now, this email was sent at 16.59.55 on the Monday
9 and was telling Lisa that that price would be in the
10 store the following morning. The evidence of
11 Mr Ferguson was that, in that situation, he considered
12 the information to be equivalent to public domain
13 information because there was no basis on which it could
14 be acted on before it was public.

15 There are a number of points that flow from this in
16 relation to the strand, that it's clear that that piece
17 of information is not a piece of information that is
18 capable of restricting or distorting competition because
19 it's impossible for Tesco to act upon it before it's
20 public, so it has no effect at all on competition. It's
21 no different from sending that piece of information the
22 following morning when the price is in the store.

23 It's also the case that we don't know where either
24 of these pieces of information come from. Certainly the
25 first one, "parties are confirming that they will

1 protect cash margin on this occasion", there is no basis
2 at all for suggesting that that was a transmission of
3 confidential information from the other retailers.

4 Actually that piece of information was factually
5 incorrect, and it was apparent that it was factually
6 incorrect the next day, because the next day Sainsbury's
7 increased its prices but did not maintain cash margin,
8 and that's document 54 [Magnum], where we see that the
9 following day Sainsbury's moved its 250 grammes
10 Seriously Strong by the equivalent of £240 per tonne, in
11 other words it protected its percentage margin.

12 That's a significant piece of information for
13 a number of reasons. First of all, it gives the lie to
14 the OFT's assertion that suppliers would never give
15 incorrect information. It was demonstrably incorrect
16 information. Secondly, it supports Lisa's position that
17 she didn't treat the information she got from suppliers
18 as reliable. She was right not to treat it as reliable
19 because on this occasion it was shown to be unreliable
20 the very next day. Thirdly, it suggests that this was
21 not information that was actually received
22 confidentially from the retailers.

23 Now, the OFT seeks to rely on the internal McLelland
24 document 51A to suggest that this information did come
25 from the retailers [Magnum]. But the information at 51A

1 is not consistent with the information that was provided
2 to Lisa Oldershaw in document 52 [Magnum]. First of
3 all, document 51A says that Sainsbury's would move on
4 costs and retails from 21 October, along with
5 Cathedral City and Pilgrims Choice, but document 52 says
6 they will move on 22 October.

7 In relation to Asda, McLelland say:

8 "No info on margin position, but will probably
9 maintain cash position."

10 So that is actively inconsistent with the comment
11 about maintaining cash margin being confidential
12 information from Asda. It's consistent with McLelland
13 not having information from Asda and simply making an
14 assumption about what Asda were likely to do from their
15 knowledge of the market.

16 Finally, the suggestion that the dates here,
17 4 November for pre-pack and 11 November for deli, are
18 tipping off about the intentions of other retailers is
19 also inconsistent with the document at 51A, because the
20 document at 51A says about Asda moving across the board
21 on 4 November. That is inconsistent with 4 November for
22 pre-pack, 11 November for deli. Safeway simply says:

23 "Commence 4th November.

24 "Moving across the board."

25 Again, no reference to 11 November.

1 So we submit that, first of all, when you look at
2 this document, there is nothing in it to suggest that it
3 is passing on confidential information from other
4 retailers, as opposed to market intelligence. It is
5 actually inconsistent with the internal information that
6 McLelland had, and it was demonstrably inaccurate in
7 relation to Sainsbury's the next day. There is
8 certainly nothing to suggest that any of the retailers
9 intended that information to be passed on, and there was
10 nothing in this to have led Lisa to believe that her own
11 confidential information would be leaked by McLelland,
12 if she were to give it to McLelland, because she treated
13 this document as no different from the general puff and
14 sales hustle that she was normally receiving from her
15 suppliers.

16 The most that could be said is that McLelland were
17 unwise to jump the gun in relation to Sainsbury's price
18 going up the following day rather than on the 21st, but
19 demonstrably that could not have any anticompetitive
20 intent.

21 So far as the maintenance of cash margins is
22 concerned, again, it is impossible to see how that could
23 support the OFT's case that this is a communication that
24 could restrict competition or distort competition,
25 because the normal expectation of a retailer would be

1 that its competitors, if faced with a cost price
2 increase, would seek to maintain their percentage
3 margin, to maintain their margins in the market. So, in
4 fact, if McLelland was giving Tesco specific
5 information, which we say it wasn't, the information it
6 was giving Tesco was that its competitors were seeking
7 to raise the price by less than Tesco might otherwise
8 have expected, and the result of that would be to make
9 Tesco more reluctant to raise its prices by the amount
10 that Tesco wanted, namely to maintain percentage margin.
11 So, if anything, that is going to increase, not decrease
12 competition.

13 The next point to make about this is that the nature
14 of this communication is inconsistent with the OFT's
15 case theory about coordinated retail prices through the
16 conduit of the supplier. Because on the OFT's case,
17 what McLelland are seeking to do at this point is to
18 persuade Tesco to agree to accept the cost price and
19 consequential retail price increase by reassuring Tesco
20 that its competitors will do the same and therefore it
21 won't be alone. That's what the OFT says that McLelland
22 is seeking to do.

23 But on the OFT's case, by about 16 October, this is
24 document 51A, McLelland has in its possession
25 information about Tesco's main competitor, Asda. It's

1 said here that Asda will move across the board on
2 4 November. We know that Tesco doesn't care much about
3 Sainsbury's prices because Tesco's prices are generally
4 lower than Sainsbury's anyway at this date. The
5 competitor that Tesco is concerned about is Asda. On
6 the OFT's case theory, the crucial piece of information
7 that Mr Ferguson would have been seeking to transmit to
8 Lisa Oldershaw on 21 October was not that Sainsbury's
9 were putting prices up on Pilgrims Choice the next
10 morning but that Asda was going to move across the board
11 on 4 November, but there is no information in that email
12 at all referring to Asda. We say that's inexplicable if
13 the OFT is right.

14 The next point is we know that McLelland had its
15 information about Sainsbury's from at least 16 October
16 because that's the date of the internal email referring
17 to it. On the OFT's case, if the aim of giving that
18 information to Tesco was to make Tesco go up before the
19 prices were in the public domain, based on future retail
20 pricing information, why on earth did McLelland delay in
21 informing Tesco that Sainsbury's was going to increase
22 its prices for branded pre-pack until 21 October? That
23 doesn't make any sense. That's information that they
24 should have been passing to Tesco on 16 October.
25 Instead they passed it to Tesco at a time when it made

1 absolutely no difference because the same information
2 could have been given from an in-store check the
3 following morning. It just doesn't make sense.

4 So overall, in relation to strand 2, we say that
5 this document first of all doesn't demonstrate an A to B
6 to C transmission because the A to B element is not
7 established. Secondly, that the intent in relation to A
8 to B is not established. Thirdly, that the information
9 itself is not capable of distorting competition for the
10 reasons that I've given, and is not capable of being
11 used by Tesco in such a way as to distort competition.
12 Fourthly, that some of the information is demonstrably
13 untrue, which is contrary to the OFT's case theory, that
14 it's accurate and confidential information and that of
15 course supporting Lisa's point that she doesn't place
16 any reliance on it. Finally, we submit that there is no
17 evidence to suggest that Lisa, on receipt of it, would
18 have understood that it was confidential information
19 coming from her competitors, not least because it's not
20 accurate.

21 If you ask the question, would Lisa have thought the
22 following day that she had been given confidential
23 information? The answer is, no, obviously she wouldn't,
24 because what she would have seen the following day is
25 that what was predicted in this email didn't come to

1 pass. Yes, Sainsbury's raised their prices on those
2 brands, but they didn't raise them to maintain cash
3 margin. So why should that make Lisa think that if she,
4 in the course of a completely normal commercial process
5 with McLelland, gives to McLelland the dates for her
6 cost price increases, as she has to, that that would be
7 information passed by him to her competitors? There is
8 nothing in this email to lead her to that conclusion.
9 Remember, it can't just be a suspicion, it has to be
10 knowledge or intent that he will do so.

11 Can I now take you back to where I was.

12 **LORD CARLILE:** Page 86?

13 **MISS ROSE:** We were dealing with "Disclosure, having
14 received" and it's paragraph 160(b) on page 85. Here
15 you see a summary of the reasons why we say that this
16 would not give rise to any knowledge on the part of Lisa
17 that information she is being given is confidential
18 information from her competitors. Firstly, the
19 information relating to Sainsbury's related to date, not
20 amount of a price increase due to take place the
21 following morning, not a future retail pricing intention
22 in any competitively relevant sense. Secondly, the
23 statement relating to maintenance of cash margin was
24 a general statement of the obvious, no reason why it
25 should be interpreted as confidential information from

1 a competitor. She didn't understand it to be so, and
2 I add, and anyway it was wrong.

3 Overall, since she read the email as part of the
4 usual sales hustle to which account managers subjected
5 her, it gave her no reason to suspect, still less to
6 know, that detailed confidential information given by
7 her to her suppliers for them to pack her cheeses would
8 be passed to her competitors.

9 We make the point at (c) that what's suggested by
10 the OFT is that she intended her information to be
11 passed to the competitors significantly in advance of
12 a price appearing in store so that it could be used for
13 an anticompetitive purpose. Again, there is no reason
14 why receipt of the email on 21 October should have led
15 her to that inference. It's inconsistent with that.

16 Then at (d), it was actually put by Mr Morris, he
17 said:

18 "I would suggest to you that Mr Meikle was unlikely
19 to breach Sainsbury's and Safeway's confidence without
20 at least an indication from these retailers that it was
21 okay for him to do so, to pass it on."

22 In other words, the OFT itself was suggesting that
23 there would have had to have been some kind of nod and
24 a wink or agreement or tip-off or indication from the
25 retailer that it was acceptable for their confidential

1 information to be passed on, that mere receipt of
2 information wouldn't be enough for that. It was never
3 put to Lisa Oldershaw that she had ever given any such
4 indication to McLelland or to Dairy Crest. So again we
5 say that is an inconsistency in the OFT's case.

6 She in fact said:

7 "I would never give suppliers permission to pass on
8 my retail information. I can only surmise that other
9 buyers and retailers would act the same way."

10 **LORD CARLILE:** Supposing that we were to reach the
11 conclusion, and I don't suggest for one moment that we
12 have because we haven't discussed it, but supposing we
13 were to reach the conclusion that Lisa Oldershaw, when
14 she provided information to McLelland, had a pretty good
15 idea that that information would be dealt with in
16 a cavalier fashion by McLelland which might include
17 disclosure of the particularity to other customers of
18 McLelland. Where does that conclusion leave us?

19 **MISS ROSE:** Sir, that we submit is not sufficient for
20 liability because that is not a concerted practice. It
21 might be negligence, but this is not a tort that hinges
22 on negligence. This is an allegation of a concerted
23 practice between Tesco and Sainsbury's, or Tesco and
24 Asda, a consensus between those parties. It's not about
25 Lisa adequately or inadequately protecting the

1 confidentiality of the material that she gives to
2 McLelland; it's about Lisa being shown to have intended
3 her information to be passed to her competitors. It's
4 a completely different beast from simply somebody not
5 adequately protecting their confidential information.
6 It's really critical, that point.

7 **LORD CARLILE:** So plainly there is potential liability if
8 she intends, as in intends, the information to be
9 provided to competitors.

10 **MISS ROSE:** Yes.

11 **LORD CARLILE:** But what you say is, if she's really quite
12 relaxed about the matter and has a reasonable
13 expectation that it will be, that's not enough?

14 **MISS ROSE:** No, it's not enough, sir. Because we say that
15 when the Court of Appeal in Toys & Kits talks about
16 "intends" or "knows that it will", all that the Court of
17 Appeal is doing there is adopting the typical stance
18 that's used in criminal cases where knowledge of
19 a virtual certainty is regarded as intent, even if you
20 don't desire the consequence.

21 So it's the classic example of the man -- I said
22 this before -- going on to a plane with a bomb because
23 he wants to kill the person sitting in the seat next to
24 him. He knows that if he explodes the bomb the other
25 passengers will die, but he has no desire at all for

1 them to die. He is still guilty of all the passengers,
2 because he knows they will die if he explodes the bomb.
3 It is not enough if he is simply grossly negligent or
4 reckless as to their death; that might be manslaughter,
5 well, it would be manslaughter, but it wouldn't be
6 murder, because intent or knowledge of virtual certainty
7 are regarded as equivalent in that sense.

8 That, in my submission, is what the Court of Appeal
9 is talking about in Toys & Kits, and that is
10 appropriate. It's appropriate because what you are
11 looking for here is not negligence or recklessness but
12 the substitution, knowing substitution, of consensus and
13 cooperation for the risks of competition. So it's the
14 relationship between Tesco and Asda or Tesco and
15 Sainsbury's that has to be established.

16 That's why we say it's hard for the OFT to prove its
17 case, because there will be lots of circumstances where
18 you can say, "Well, you should have realised that the
19 person you were giving this information to was flaky and
20 couldn't be trusted, and if you didn't realise it you
21 were negligent, and I bet you suspected it". There will
22 be lots of cases where you can say that. But they have
23 to show that this is an indirect communication between
24 Tesco and Sainsbury's, and that means that Tesco is
25 actually seeking to communicate with Sainsbury's, not

1 that Tesco is seeking to communicate with McLelland and
2 is negligent as to whether McLelland will protect its
3 information. We submit that's absolutely fundamental.

4 **LORD CARLILE:** Right. Thank you.

5 **MISS ROSE:** The fourth of the bases on which the OFT seeks
6 to infer intent is "No legitimate commercial reason".
7 They say that there was no legitimate commercial reason
8 for Tesco to provide or receive future retail pricing
9 intentions. We say that's not right, that
10 communications between Tesco and its suppliers must be
11 presumed to be lawful unless the OFT can prove that they
12 were anticompetitive.

13 There are only two occasions, in this case, in which
14 Tesco provided information about its retail pricing
15 intentions. First of all, 30 October 2002, when
16 Lisa Oldershaw discussed the planned dates for cost
17 price increases and gave Neil Arthey a specific retail
18 price for the WeightWatchers cheese. That's the first
19 occasion. The second is 9 October 2003 when
20 Lisa Oldershaw sent a spreadsheet of retail pricing
21 intentions to Stuart Meikle. We say that both of those
22 communications are legitimate commercial communications
23 undertaken in the normal course of her business.

24 We then go through the events of 29 and 30 October.
25 Again, this is ground that the Tribunal will be very

1 familiar with, the round-robin email saying "Costs and
2 retails where relevant", which we submit strongly
3 corroborates Lisa's account of what she was
4 communicating, and then the calls that she made on
5 30 October after she had completed her schedule of
6 planned dates --

7 **LORD CARLILE:** "Retails where relevant" means?

8 **MISS ROSE:** Where relevant to the supplier.

9 **LORD CARLILE:** Because the supplier has to prepare the price
10 tickets?

11 **MISS ROSE:** The supplier needed to pack the cheese, yes.

12 That's why the one retail price that she gives to
13 Neil Arthey is the price for the WeightWatchers cheese
14 which is being packed by Dairy Crest for Tesco. The
15 price is going up imminently and they need to know the
16 price to pack the labels. That's why there's the
17 specific WeightWatchers price, and there is no evidence
18 that she gave them any other retail price.

19 What the OFT say is that she gave Neil Arthey dates
20 for retail price rises rather than cost price rises. We
21 say that's a completely artificial distinction because
22 it was absolutely commonplace that parties assumed that
23 the retail price would go up at or about the date of the
24 cost price increase. It would therefore have been
25 a natural inference, both for Mr Arthey and for

1 Mr Feery, who eventually passed this information on, to
2 infer that Tesco's retail prices would go up at or about
3 the date that she'd given for cost price increases.

4 But it's very hard to see how she could have avoided
5 giving him that information since she had to give him
6 the dates of the cost price rises. So we submit that
7 this whole issue that the OFT has sought to elevate
8 about the distinction here between cost and retail price
9 rises is completely detached from reality.

10 What she did do, and this is paragraph (c), was that
11 she simply read off the groups of cheese lines that she
12 planned to increase on a particular date rather than
13 excluding the lines that were not supplied by
14 a particular supplier. She said that, with hindsight,
15 she shouldn't have done that, she should only have
16 identified the cost price rises in the cheeses that that
17 particular supplier packed.

18 But having seen the form of her own internal
19 document at tab 64 [Magnum], the simple list, it's very
20 easy to understand how she came to do that, and we
21 submit that you can't draw any adverse inference from
22 that at all. It's simply the natural thing for her to
23 have done, particularly considering the amount of time
24 pressure that she was under on that particular date when
25 she was seeking to give information to all of her

1 suppliers on the same date about the timetable for the
2 cost price rises. The idea that she would have then sat
3 down and tried to detach precisely what information was
4 going to be supplied we submit is, again, just
5 unrealistic.

6 The 2003 communication, this is document 123 in
7 volume 2 [Magnum].

8 **LORD CARLILE:** We'll have a 15-minute break in a few
9 minutes, in five minutes or so.

10 **MISS ROSE:** In fact I'm just about to come to the strands,
11 so I suggest when I get to the strands that would be a
12 good moment for the break.

13 **LORD CARLILE:** Well, we will have a 15-minute break.

14 **MISS ROSE:** If we just go to document 123, this is the
15 spreadsheet which she forwarded. Again we say this is
16 self-evidently a legitimate communication to her
17 supplier giving him the details of the retail prices
18 that he needed to pack the cheese. The OFT's case is
19 based on the fact that there's one retail price included
20 for a deli cheese. All the other deli cheese lines are
21 blank.

22 The first point to make is that if, as the OFT says,
23 this was an intentional disclosure by Ms Oldershaw of
24 retail prices for cheese that McLelland were not
25 packing, why didn't she give him retail prices for the

1 other deli cheeses?

2 Secondly, Lisa Oldershaw has explained that she
3 actually was not intending to increase the retail price
4 of that deli cheese at that time. That was not her
5 retail price, it was the suggested retail price that
6 McLelland had put in and all she had done was to put "on
7 hold" against that line. So there was no disclosure of
8 any retail price that was unnecessary.

9 Sir, that would be a convenient moment because that
10 now takes me to the beginning of the strands.

11 **LORD CARLILE:** Half past.

12 (3.15 pm)

13 (A short break)

14 (3.34 pm)

15 **LORD CARLILE:** Sorry about the delay, we had a little
16 housekeeping to do.

17 **MISS ROSE:** Sir, I would like to now turn to the individual
18 strands. You might, if you wish, want to take the
19 tables out from the back and have them in front of you
20 while we go through the narrative section.

21 **LORD CARLILE:** Just give me a moment to put myself in
22 a starting again situation which does help.

23 (Pause)

24 **MISS ROSE:** In fact, putting them in the back of the same
25 file has the disadvantage that you then have to take

1 them out.

2 **LORD CARLILE:** I'm going to be disobedient and only take out
3 2002 files.

4 **MISS ROSE:** That was my intention, sir, so you were acting
5 entirely in accordance with instructions.

6 **LORD CARLILE:** Thank you.

7 **MISS ROSE:** Strand 1, this is an allegation that in
8 late September 2002 Tesco disclosed to Dairy Crest that
9 Tesco was contemplating increasing its cheese retail
10 prices, but that such an increase by Tesco was
11 conditional on other retailers also increasing retail
12 prices, and that information was subsequently passed by
13 Dairy Crest to Asda at the meeting of 27 September. Of
14 course, it goes without saying, in relation to all these
15 exchanges that there was the requisite intent on the
16 part of Tesco in making the disclosure, and an
17 appreciation of that intent on the part of Asda in
18 receiving it. That has to be taken as read in relation
19 to each of these exchanges.

20 So the OFT now says that that disclosure was made
21 either at the DSG meeting or in one of a number of
22 conversations between various Dairy Crest personnel and
23 various Tesco personnel subsequent to that at some date
24 before 27 September. So the first allegation is that
25 Tesco made that disclosure at the DSG meeting. Our

1 answer is simple, we say Tesco did no such thing. Now,
2 we've made some fairly detailed submissions here about
3 what the DSG meeting notes say. Much of this is very
4 familiar ground because we went through it in opening
5 and we've also had extensive cross-examination on it.
6 Can I invite you to read those passages but I don't
7 intend to go through them. This is all going to be very
8 familiar.

9 We particularly flag up 175, we say the OFT
10 misinterpreted the reference to "value products" that
11 was made by Mr Hirst. But the important points, the
12 conclusion starts at 178 where we say it is clear from
13 the notes that no conclusions were reached or decisions
14 made at the Dairy Supply Group meeting. The Wiseman
15 note, which is a summary of the meeting prepared by
16 David Peat for the Wiseman board and a useful snapshot
17 of how the significance of the meeting was understood
18 immediately afterwards, records:

19 "Though there was some discussion about prices
20 currently being achieved on products, with most of the
21 discussion centred on cheese, there was no real
22 conclusion to this discussion perhaps, other than the
23 realisation that this is a very difficult task and there
24 seemed to be hope that this could be tackled in some
25 way."

1 We say that's about it really, "there seemed to be
2 hope that this could be tackled in some way".

3 That view is corroborated by the Express note.
4 Towards the end of the meeting Rob Hirst said:

5 "I don't believe putting 8p on a pack of cheddar
6 will save the dairy industry."

7 John Scouler:

8 "Any further ideas on how better to take this idea
9 forward please get back to Rob."

10 And the point I've already made about the covering
11 email saying:

12 "For the last hour we were getting nowhere."

13 I have already made the point that the OFT
14 interviewed David Peat but didn't ask him about what
15 happened at this meeting or about the note that he had
16 made of it.

17 We say simply that nothing of any significance that
18 wasn't already obvious or public or known to the players
19 from their experience of the dairy industry was said at
20 that meeting.

21 The second allegation under strand 1 is the
22 allegation that we summarise at paragraph 181, where it
23 is said there were discussions between Dairy Crest and
24 Tesco on or about 20, 23, 24 and 25 September. In fact,
25 the discussion that the OFT had focused on at this

1 hearing is a meeting that is said to have taken place
2 between John Scouler and Mark Allen and Colin Beaumont
3 at Dairy Crest on 25 September 2002. The OFT alleges
4 that at that meeting Tesco indicated that it was willing
5 to participate in the £200 per tonne increase provided
6 that other parties did the same.

7 Now, there is simply no evidence that Tesco said
8 anything of that sort at any meeting at this time.
9 John Scouler cannot recall the meeting but also gave
10 evidence that it would have been unlikely that he would
11 have indicated that willingness because it would have
12 undermined the negotiating stance of his buyer, and
13 you've seen the reference to that this morning. The
14 OFT, as I've already pointed out, would have been in a
15 position as far back as 2005 to obtain direct evidence
16 about what was said at this meeting from Dairy Crest who
17 told it who had attended the meeting but were not asked
18 what had been said at the meeting. Those individuals
19 who had attended the meeting were not interviewed --
20 have never been interviewed by the OFT.

21 We also say that the proposition that the OFT puts
22 forward that Tesco had given any sort of indication that
23 it was prepared to or willing to accept the £200 per
24 tonne increase as early as 27 September 2002 is
25 inherently implausible and contrary to the evidence,

1 because the evidence shows overwhelmingly that Tesco, by
2 which I mean John Scouler and Lisa Oldershaw, were
3 pushing back and delaying giving any such indication for
4 as long as they could, and that it was not until
5 late October, when Lisa had been instructed to accept
6 the cost price increase, that she finally confirmed to
7 her suppliers on 29 October that she would do so. The
8 suggestion that Tesco would have undermined its
9 negotiating position by giving that indication a month
10 earlier is wholly unsubstantiated and, we say,
11 implausible.

12 So we say that the OFT has failed to prove that
13 there was any A to B transmission in relation to
14 strand 1. It has simply failed to prove that there was
15 any such disclosure of any information of that type by
16 Tesco, leaving aside the whole question of intent.

17 We then say that also the OFT has failed to prove
18 that there was any B to C transmission under strand 1.
19 What the OFT relies upon is document 32 in the documents
20 bundle [Magnum]. This is the note of the meeting
21 between Asda and Dairy Crest on 27 September 2002.

22 **LORD CARLILE:** Could you just hold on.

23 (Pause)

24 Sorry, I just wanted to refresh my memory about what
25 the decision says about this note which I think is

1 somewhere around 5.170.

2 **MISS ROSE:** You mean the 27 September note?

3 **LORD CARLILE:** Yes.

4 **MISS ROSE:** Yes, document 32 [Magnum].

5 **LORD CARLILE:** Document 32, yes. It's around about 5.170
6 from a note I made earlier. 5.169.

7 **MISS ROSE:** Yes, it starts at 5.165 [Magnum].

8 **LORD CARLILE:** Will you forgive me if I just have a look at
9 that.

10 **MISS ROSE:** Yes.

11 (Pause)

12 **LORD CARLILE:** Yes, thank you.

13 **MISS ROSE:** The key paragraph is 5.172 [Magnum] where the
14 OFT has inferred that the information that Tesco and
15 Asda had agreed to move all sectors -- sorry, that
16 Sainsbury's and Tesco had agreed to move all sectors:

17 "... had originated from Sainsbury's and Tesco,
18 given that Dairy Crest had engaged in extensive dialogue
19 with both Sainsbury's and Tesco by this date with the
20 aim of securing their participation in a coordinated
21 cheese price increase."

22 So it's simply an inference, from the fact that
23 they'd been talking about a proposal, that Tesco must
24 have given this information. Now, this is, of course,
25 a hearsay piece of evidence. The author of this

1 document, and indeed everybody who attended this
2 meeting, has not been called to give evidence so we
3 don't know what was actually said at the meeting or how
4 accurately this note records what was said at the
5 meeting. Even if this does accurately record what was
6 said at the meeting, we don't know who said it and we
7 don't know what their source of information was. The
8 evidence of Mr Reeves was that it was likely that this
9 was a half-truth, a bit of puff, a bluff and double
10 bluff derived from market knowledge, and precisely the
11 sort of commercial positioning that Lisa Oldershaw was
12 familiar with and that she would normally discount.
13 There is no evidence at all that this information
14 emanates from Tesco.

15 Indeed, the information at document 32 is actually
16 inconsistent with what the OFT alleges Tesco had said at
17 the DSG meeting, because the OFT's case is that Tesco
18 had given a conditional commitment that it was
19 contemplating raising its retail prices but only if
20 others did the same. But what's said here is that
21 Dairy Crest was telling Asda, "Tesco have agreed to move
22 all sectors", not "Tesco have said they will contemplate
23 moving all sectors if you, Asda, did the same", or if
24 another party did the same.

25 So what is here alleged to be evidence of Tesco

1 intentionally passing its confidential information to
2 Asda through the medium of Dairy Crest is actually
3 inconsistent with the OFT's own case of what it says
4 Tesco told Dairy Crest. So we submit that strand 1 does
5 not get off first base, it wholly fails. This is
6 self-evidently precisely the type of commercial
7 positioning that led Lisa Oldershaw to discount puff
8 given to her about future retail pricing intentions. On
9 the OFT's own case, this information is inaccurate.

10 We make these points starting at paragraph 185 of
11 our document. We also identify at paragraph 185 the
12 fact that the OFT interviewed David Storey, the Asda
13 cheese buyer, about this meeting note on 26 June 2008.
14 He hadn't attended the meeting so he wasn't able to
15 comment. Asda attendees, he said:

16 "... would probably have just disregarded it until
17 we'd seen evidence of till receipts, and I still keep
18 coming back to that. That was the policy."

19 What's interesting about that is that what
20 David Storey says there about Asda's attitude to
21 unverified future assertion of what other people intend
22 to do is entirely consistent with what both John Scouler
23 and Lisa Oldershaw have told the Tribunal their policy
24 was, and we say entirely typical of the attitude of the
25 buyers to the commercial positioning of their suppliers.

1 And everybody understood the game, and that's what
2 Mr Reeves acknowledged and indicated was happening
3 precisely here at this meeting.

4 We next make the point that the OFT received some
5 notes from Eversheds of an interview that Eversheds had
6 conducted with Bill Haywood, who was at this meeting,
7 but they themselves never sought to interview him.

8 The OFT also relies on an internal email exchange,
9 an Asda email exchange from 1 October 2002. That is
10 document bundle, 37 [Magnum]. In fact these emails are
11 discussing the press line that Asda wants to take in
12 response to the article that had appeared that day in
13 the trade press. You will recall that this was the day
14 on which it had been reported in the press that Tesco
15 and some other players had agreed to accept the cost
16 price increase. In fact that was untrue, in relation to
17 Tesco at least. This is simply discussing Asda's
18 response to that press line.

19 So we submit that what's said in this email chain
20 reflects what had been reported in the press and there's
21 no basis at all to suggest it has anything to do with
22 anything said by Tesco. And in fact Tesco had not
23 agreed to move all sectors or to increase its cost or
24 retail prices as at 27 September. That's paragraph 186.

25 So that's strand 1 and we say that goes nowhere.

1 **LORD CARLILE:** Sorry, we only looked at part of document 37
2 in any detail during the evidence. Are we to make
3 anything, for example, of the section which appears on
4 the back of the first page near the top, after "Give me
5 a shout..."?

6 **MISS ROSE:** The section that they rely on is the statement:
7 "Other retailers are proposing to put prices
8 straight up."

9 That's what the OFT relies on.

10 **LORD CARLILE:** "We may end up having to do this as well if
11 we can't get agreement from them ... get boxed into
12 a corner."

13 **MISS ROSE:** That tells you only about Asda's thinking, it
14 tells you nothing whatsoever about Tesco's.

15 The "them" there is also Dairy Crest, not the other
16 retailers. Because that paragraphs starts:

17 "What we haven't got yet is agreement from
18 Dairy Crest to this proposal."

19 Then if you go to the later email, which is of
20 course earlier in the document:

21 "Brilliant - thanks. Given that we haven't got
22 agreement from Dairy Crest and this could all fall to
23 pieces yet I will position this as a proposal but that
24 nothing's confirmed."

25 Then you will see the bit in the red box. I don't

1 know if that's still in a red box but I will assume it
2 is.

3 **LORD CARLILE:** That reflects something said earlier.

4 **MISS ROSE:** So there you see the tension between trying to
5 give a public message that things are in the bag for the
6 reason in the red box, and the reality that actually
7 nothing had been agreed at all.

8 **LORD CARLILE:** So what you would say is this is evidence of
9 Asda and Dairy Crest seeking to reach an agreement.

10 **MISS ROSE:** And to present things publicly in a way which
11 would be helpful with the political situation, but it
12 tells you nothing whatever about anything received from
13 Tesco.

14 **LORD CARLILE:** And this string of emails is entirely
15 internal to Asda?

16 **MISS ROSE:** Entirely internal to Asda.

17 **LORD CARLILE:** I ask because we'd looked at the last part.
18 I was clearing my mind.

19 **MISS ROSE:** So we say that strand 1 simply doesn't get off
20 the blocks because the OFT cannot prove A to B
21 transmission or B to C transmission so that collapses.

22 Strand 2, this is Sainsbury's to McLelland to Tesco
23 mid-October 2002, principally based upon document 52
24 [Magnum] which we have just been looking at.

25 Now, we have been through most of the points on this

1 that start at paragraph 190 and I do not propose to
2 repeat them. But the point I do want to stress is that
3 the OFT suggested to Lisa Oldershaw that information
4 about Sainsbury's retail pricing intentions, in
5 particular the dates on which Sainsbury's was intending
6 to increase its prices, had been passed to her not in
7 the email at document 52 but in conversations between
8 herself and Mr Ferguson between 16 October and
9 21 October. We deal with this point at paragraph 192.

10 The key first point is that that allegation was not
11 put by the OFT to Mr Ferguson. Mr Ferguson was asked
12 what the email meant, but it was never suggested to him
13 that he had transmitted that information to
14 Lisa Oldershaw in an earlier conversation. Neither was
15 it suggested to him that he had transmitted to
16 Lisa Oldershaw in earlier conversations the other
17 information that McLelland appears to have had that's
18 recorded at document 51A [Magnum], the internal
19 McLelland document, including the information about
20 Asda.

21 We say that, in that situation, it's not even open
22 to the OFT to make that case, and you already have my
23 submission that it is inconsistent with the whole of the
24 OFT's case theory that McLelland, being in possession of
25 all of this information, doesn't give it to Tesco at

1 a time when it could have had any impact on Tesco's
2 retail or cost pricing decisions, doesn't give Tesco any
3 of the information about its principal competitor Asda,
4 only gives Tesco information about Sainsbury's and gives
5 it to Tesco the night before the price goes up when it's
6 too late to make any difference.

7 So that, we say, is not consistent with any
8 anticompetitive exchange. What it is consistent with is
9 a supplier who is under pressure, who has made the
10 judgment that Mr Ferguson told you that he made, that by
11 5.00 pm the night before it's as good as public domain
12 and it's not going to make any difference. So that's
13 all that happens with document 52, it's as simple as
14 that.

15 You have Lisa's evidence which we discuss at 193 --
16 first of all, the point at 193(a) is that there is no
17 evidence at all that Sainsbury's provided the
18 information to McLelland with the requisite intention or
19 foresight that it should be passed on. There's simply
20 no evidence of that. Again that takes you back to the
21 fact that the OFT interviewed the Sainsbury's cheese
22 buyer, Sarah Mackenzie, but did not call her to give
23 evidence.

24 Neither Mr Ferguson nor Lisa Oldershaw believed, or
25 still less knew, that Sainsbury's had had that intent,

1 and we've given you the references to their evidence on
2 that.

3 Then Lisa Oldershaw's evidence is that she did not
4 believe that the information in Mr Ferguson's email
5 emanated from Sainsbury's. We have set out her evidence
6 at some length where she gave those replies.

7 I have already made the point that this information
8 was not capable of restricting or distorting
9 competition, that's set out in detail at 194.

10 Now, at 194(c), the OFT have suggested that even
11 though the information that is passed in this email
12 couldn't actually have been used by Tesco in any way to
13 affect or distort competition, because the price was
14 going to go up the next day anyway, nevertheless the
15 transmission of that information could have some wider
16 effect of distorting competition because, they say,
17 Tesco could have taken into account the fact that
18 a competitor was increasing its retail price, acting in
19 line with the initiative, and could have taken into
20 account the fact that McLelland was willing to pass to
21 it the retail pricing intentions of one of its
22 competitors.

23 We say that those allegations evaporate when you
24 actually think about them, because if what's said to
25 distort competition is giving Tesco the reassurance that

1 one of its competitors was acting in accordance with the
2 initiative, by putting the price up, Tesco would have
3 had that reassurance anyway the next day, when it would
4 have seen that Sainsbury's had put the prices up in
5 store. So what difference does it make whether Tesco
6 gets that information at 5.00 pm on Monday or at 9.00 am
7 or Tuesday? It makes no difference at all.

8 So all that is actually left of the OFT's case on
9 this is the assertion that the distortion of competition
10 is that this transmission of information is a coded
11 message to Lisa that Mr Ferguson is willing to pass
12 future retail pricing information and that she would
13 have understood it in that way. That was put to
14 Mr Ferguson who seems to have had great difficulty even
15 understanding the point, still less grappling with
16 whether it was right or not.

17 But in fact, of course, this transmission wouldn't
18 have given Lisa that message because it was falsified
19 the next morning. What it would have told Lisa, if
20 she'd been analysing it in that detail, I mean she
21 certainly wasn't, was that McLelland couldn't be trusted
22 to give accurate information about the future retail
23 pricing information of her competitors because, yes,
24 Sainsbury's put the price up the next day but it didn't
25 maintain cash margin, it maintained percentage margin.

1 So actually if she'd sat down and thought about it and
2 analysed it, which she didn't, what this email would
3 have done would have been to reinforce her default
4 position which was that you could not treat the
5 information about future retail pricing intentions
6 received from suppliers as accurate or reliable.

7 At 195 we make the point about protecting cash
8 margin as not being individualised and, also, of course,
9 already in the public domain.

10 Fifth is the point I've already made about this
11 being inconsistent with the OFT's case theory because if
12 the OFT were right you would expect much more
13 information transmitted much earlier and more
14 competitively relevant information. What's striking is
15 the only specific information that's given is about
16 Sainsbury's, and Tesco is not bothered about Sainsbury's
17 as a competitor because their prices are normally higher
18 than theirs anyway.

19 So that's strand 2.

20 Next, strand 3, this is said to be a transmission by
21 Tesco to Sainsbury's via Dairy Crest of the dates on
22 which various Tesco retail prices would change, and the
23 retail price specifically for the WeightWatchers cheese.
24 So this is the telephone conversation between
25 Lisa Oldershaw and Neil Arthey on 30 October 2002, and

1 it is the internal Dairy Crest email which is at
2 document 63 [Magnum].

3 There is no doubt that Lisa Oldershaw gave to
4 Mr Arthey the dates on which she intended to put up the
5 cost prices of the categories of cheese that she had
6 herself set out in her internal plan, and that she gave
7 him the specific retail price for the WeightWatchers
8 cheese.

9 I've already made my submission about the
10 artificiality, about seeking to distinguish cost price
11 and retail prices. There was no way she could have
12 given him cost price information, the dates of the cost
13 price increases, without him drawing the obvious
14 inference that she would be putting up her retail prices
15 at or about the same date. So it is very hard to see
16 how the OFT thinks that she could have given him the
17 legitimate commercial information without, on the OFT's
18 case, also giving him the illegitimate information.

19 I've also made the point that at this date there is
20 no evidence at all that she had ever had any
21 inappropriate disclosure from Neil Arthey that would
22 have made her think that he would pass her information
23 on. This is a completely normal commercial discussion
24 between her and her supplier, and that, we say, is clear
25 from the email she sent on the 29th which is

1 a completely open, straightforward email to her
2 suppliers saying, "I'll call you tomorrow with the cost
3 raises and the retails where relevant". Completely
4 normal commercial behaviour.

5 We've made our submissions about retail prices
6 versus cost prices at paragraph 202.

7 **LORD CARLILE:** That's document 63?

8 **MISS ROSE:** Yes, document 63 is the email, that's right
9 [Magnum].

10 The OFT, this is paragraph 203, says that
11 Dairy Crest would not have passed on this information to
12 Sainsbury's unless it knew that it related to retail
13 rather than cost price increases. We say that's not
14 a legitimate inference, because what happened was that
15 this email from Neil Arthey was widely disseminated
16 within Dairy Crest, and then it was Paul Feery, who had
17 no connection with Lisa Oldershaw, who gave the
18 information to Sainsbury's. What we don't know is
19 whether Neil inferred that the dates that Lisa had given
20 were likely to be the retail price rises, or whether
21 Paul inferred from the cost price rise dates set out
22 here that the retail prices might go up on the same
23 date. We just simply don't know. Again, neither of
24 those individuals were called to give evidence, but it
25 is, of course, a completely obvious inference.

1 So far as intent is concerned, at paragraph 204,
2 explanations were given by Dairy Crest employees in
3 their interviews with Eversheds of the context in which
4 these emails were sent but those people were not
5 interviewed by the OFT and I invite you to look at what
6 we've said there at 204.

7 Lisa's evidence, which we set out at (c), was that
8 she expected Dairy Crest to keep Tesco's information
9 confidential and use it for the purpose it was given.
10 She says:

11 "I never thought Neil Arthey would do anything with
12 information that didn't relate to him. I trusted my
13 supplier on that level. He was a business unit
14 partner."

15 She regarded his conduct as a breach of Tesco's
16 confidence.

17 So, again, we say there is nothing here to establish
18 any illegitimate intent on the part of Lisa Oldershaw in
19 supplying normal commercial information to her supplier
20 in the course of implementing her cost price rises. For
21 that reason, strand 3 falls. There is also no evidence
22 at all that Sainsbury's, on receiving this information,
23 knew or believed that it had been intentionally
24 transmitted to it by Tesco.

25 **LORD CARLILE:** Can we just look at document 63 for a moment,

1 please, if you don't mind [Magnum].

2 **MISS ROSE:** Yes.

3 **LORD CARLILE:** Just to be sure that my understanding of the
4 evidence is correct.

5 **MISS ROSE:** Yes.

6 **LORD CARLILE:** There are a number of categories of cheese
7 referred to in that document.

8 **MISS ROSE:** Yes, which correlate with the categories in the
9 document at 64 [Magnum].

10 **LORD CARLILE:** Yes, of which a number are not cheeses
11 supplied by Dairy Crest.

12 **MISS ROSE:** That is correct.

13 **LORD CARLILE:** And those would be stilton, Finest,
14 Speciality and regional, own line, farmhouse and most of
15 sliced and grated. And one other, I didn't note which
16 the other was but it doesn't matter.

17 **MR MORRIS:** I think the way I put it was that some of the
18 all branded would not be, because it's all branded.
19 I had put cottage, and that was disputed, and I put
20 regional, stilton, Finest, Speciality, the two own label
21 that you identified, I think, and I think that is it.

22 **LORD CARLILE:** Yes. The precise cheeses don't matter for
23 the purpose of the question.

24 **MISS ROSE:** There were some cheeses that were not supplied,
25 that's correct.

1 **LORD CARLILE:** What are we to make of the fact that she was
2 providing some fairly detailed information concerning
3 nonDairy Crest cheeses insofar as those cheeses were not
4 supplied by Dairy Crest to Tesco, but they might have
5 been supplied by Dairy Crest to somebody else?

6 **MISS ROSE:** She explains that all that she did was to read
7 through the first page of tab 64, she just went down the
8 list. And we know, on that day, that she was under
9 a huge amount of pressure speaking to all her suppliers
10 and telling them all the dates.

11 What she didn't do, what with hindsight she should
12 have done, is do separate scripts for each supplier,
13 carefully identifying only the cheeses that they
14 supplied to Tesco and telling them that the prices for
15 those cheeses would be going up on those dates. What
16 she did was simply give the standard list to each of the
17 suppliers, that's what she did.

18 We submit that you cannot draw any inference at all
19 from that of an intent for onward transmission. The
20 inference you can draw is that she was extremely
21 pressured and trying to do a very difficult job under
22 time pressure. We know that she took her work home and
23 was struggling to get her spreadsheets completed at
24 home, outside working hours.

25 **LORD CARLILE:** Thank you.

1 **MISS ROSE:** I've already made the point that there had been
2 no previous disclosure to her from Dairy Crest of any
3 inappropriate information at this date, so she had no
4 reason to think that information she gave to Dairy Crest
5 could be transmitted. That's strand 3.

6 **MS POTTER:** Can I just ask, in 63 [Magnum] there is
7 a reference to branded pre-pack going up on 4 November.
8 I know that's referred to in 52 [Magnum], and I think at
9 some point we'd had some evidence suggesting that
10 4 November wasn't a Tesco date, but is this actually
11 confirmation that it was a Tesco date?

12 **MISS ROSE:** Yes --

13 **MS POTTER:** So there's no contention that those dates are
14 not Tesco dates, the 4th and the 11th?

15 **MISS ROSE:** No.

16 **MS POTTER:** Okay.

17 **MISS ROSE:** So the next strand is strand 4, this is
18 paragraph 205, and the OFT alleges that in early
19 November 2002 Tesco disclosed to Safeway, via either
20 Dairy Crest or McLelland, the OFT doesn't say through
21 whom, that Tesco would be increasing its cheese retail
22 prices by the same amount and on the same days as all
23 other retailers. For this, the OFT relies on document
24 73 which is actually in bundle 2 [Magnum].

25 **LORD CARLILE:** This is the:

1 "All players moving by the same amount on the same
2 day."

3 **MISS ROSE:** Yes, sir. Again, we say this doesn't get off
4 first base for all of the obvious reasons.

5 The OFT's case is that this Tribunal should infer,
6 first, that Tesco must have been one of the players that
7 Sainsbury's anticipated would move, second that Safeway
8 must have received this information from Dairy Crest or
9 McLelland and, third, that Dairy Crest or McLelland must
10 have received that information from Tesco. So in order
11 to even start finding an infringement here, you have to
12 draw three inferences, none of which is justified by
13 this document, and of course no Safeway witness called
14 to give evidence about what the document means. It
15 could mean absolutely anything. We don't know who it
16 refers to, we don't know what the source is, whether
17 it's just a general statement of somebody's
18 understanding of the market.

19 What we do know, of course, is that the information
20 here is untrue, Tesco was not intending to move on the
21 same dates as other parties or by identical amounts. We
22 have seen that Tesco certainly was not intending to
23 increase its prices by a uniform cash margin maintenance
24 and did not do so. It increased some prices by cash
25 margin, some by percentage margin, some by another

1 figure in between.

2 We also know that Safeway never had sight of the
3 OFT's findings of fact, and Safeway's employees were not
4 consulted about the findings of fact, because that's the
5 correspondence from Morrisons' -- from Safeway's
6 solicitors, making that point, that we looked at
7 earlier.

8 **LORD CARLILE:** So Safeway was taken over by Morrisons --

9 **MISS ROSE:** Safeway was taken over by Morrisons, Morrisons
10 settled the case. The relevant Safeway employees were
11 no longer employed and they were not asked to comment on
12 the statement of objections. So there's no foundation
13 for this allegation whatsoever.

14 I've set the point out in more detail from 206 down
15 to 208 but the Tribunal will see the essential points.

16 Strand 5, this is an allegation that in early
17 November 2002 Asda disclosed to Tesco via Dairy Crest
18 that Asda would be increasing its retail prices for
19 Smart Price mild and mature cheddars by 20p, as well as
20 sending a spreadsheet of other Asda cheese retail price
21 changes. This strand is based upon document 69 in
22 file 1 [Magnum], an email from Neil Arthey to
23 Lisa Oldershaw:

24 "I have attached a spreadsheet which shows the
25 suggested rsp's of cheese lines that we supply Asda

1 following the price increase.

2 "My understanding is that Asda will be applying £200
3 per tonne ie 20p per kilo to rsps of Smart Price Mild &
4 mature.

5 "Please could you confirm the rsp's that you wish me
6 to pack Tesco lines with..."

7 Now, the first point is that there is no evidence
8 that this information came from Asda. The spreadsheet
9 is simply a formulaic application of a 20p per kilo cash
10 margin maintenance formula to Asda's retail prices, and
11 it is asserted by Neil Arthey that this is the suggested
12 RSPs of cheese lines that we supply Asda. In other
13 words, it is the spreadsheet that Dairy Crest was
14 sending to Asda, not information from Asda to
15 Dairy Crest.

16 As Lisa Oldershaw pointed out, in that case, it's
17 not confidential at all. She could have done this
18 exercise herself, they did regular price checks, weekly
19 price checks, she would have known what the retail
20 prices of Asda products were on the shelf and could have
21 done the math, as they say. So that has no
22 confidentiality at all.

23 The second assertion is:

24 "My understanding is that Asda will be applying £200
25 per tonne ie 20p per kilo to rsps of Smart Price Mild &

1 mature."

2 Again that is not said to come from Asda, it is said
3 to be his understanding, and because the OFT has not
4 called any evidence from Asda, we have no idea
5 whether -- or indeed from Dairy Crest -- we have no idea
6 whether that information came from Asda or not, or was
7 simply a judgment call based on knowledge of the market
8 being made by Neil Arthey.

9 What we do know is that that information is not
10 accurate. Asda did not increase the RSPs of Smart Price
11 mild and mature by 20p per kilo. What we know is that,
12 of the six lines of Smart Price cheddar, Asda cut the
13 price of four and raised the price of two. You will
14 recall the evidence on that, that Tesco actually had to
15 cut the price on four of its Value lines to match the
16 cut in the Asda price.

17 Just going to our note, the first point we make at
18 211 is that nothing in the email purported to pass on
19 a communication from Asda. The OFT bases its assertion
20 that it comes from Asda only on broad statements that
21 Dairy Crest had been in discussion with Asda about cost
22 and retail price increases, Asda would have been well
23 aware of the market-wide initiative and Asda has
24 admitted its involvement in the initiative and has not
25 raised this finding as a material factual inaccuracy.

1 We say that is not an adequate basis for the Tribunal to
2 find, in the absence of any evidence, that this
3 information came from Asda.

4 Then at (b) there's the point that there's no
5 evidence from Asda. At (c), the point that the email
6 communicated Dairy Crest's suggestions and Neil Arthey's
7 understanding, not Asda's intentions, the spreadsheet
8 was a Dairy Crest document and not an Asda document.
9 And Eversheds' notes of their interview with Neil Arthey
10 record that he may have created the document himself by
11 applying the formula 20p per kilo.

12 Then on the question of Asda's intent, if this
13 information did come from Asda, for which there is no
14 evidence, did Asda intend that this information should
15 be passed to Tesco, the OFT did interview David Storey
16 as the cheese buyer, and we see an extract from his
17 interview at paragraph 213. He said he had not seen
18 this email before, he confirmed that the core
19 information conveyed, that Asda increased its prices on
20 Smart Price cheese first, was true. The OFT questioned
21 him about whether he was surprised that this information
22 was shared with Tesco. He said:

23 "Yes, I am, yes.

24 "Question: So I take it you wouldn't expect that to
25 happen then?

1 "Answer: No.

2 "Question: Not even under the pressure of, you
3 know, at the time of farmers and...

4 "Answer: No, although, as we said earlier, I think
5 it was accepted, across the industry, that Dairy Crest
6 were trying to pass down to farmers 20p a kilo, so we
7 all naturally assumed that all retails would go up by
8 20p.

9 "Question: But you wouldn't have expected them
10 to ...

11 "Answer: "No.

12 "Question: ... circulate a spreadsheet relating to
13 your own ...

14 "Answer: Certainly not, no.

15 So that's the evidence that the OFT received from
16 Asda, from Mr Storey. But because the OFT took the
17 decision not to call any witnesses, Tesco was deprived
18 of any opportunity to cross-examine Mr Storey on Asda's
19 intent.

20 The OFT says, this is paragraph 215, that
21 David Storey's denial of having expected that
22 Dairy Crest would pass on Asda's future retail pricing
23 intentions only related to the spreadsheet and not to
24 the information about Smart Price.

25 But the OFT did not ask David Storey whether he was

1 surprised that information about Smart Price was passed
2 to Tesco. Having not asked him that question in
3 interview, it is difficult to see how the OFT could
4 rely, in support of a contention that Asda intended its
5 information to be passed to Tesco, on his failure to
6 comment upon it.

7 So that is strand 5.

8 If I can perhaps deal quickly with strand 6, which
9 is a quasi strand, if I may put it that way, because the
10 OFT don't suggest that this is an infringement.

11 Yes, there's a final point on this before I leave
12 this point. It's actually demonstrably the case in any
13 event that Lisa Oldershaw did not act on this email from
14 Dairy Crest. The reason I say that is that the
15 information that's being imparted in this is information
16 about Asda's own brand cheeses, and we know that Tesco
17 refused to move the price of its own brand cheeses until
18 1 December, and the reason it did that is because it
19 wanted to see what Asda moved to in store, and you will
20 recall that that's what is reported of Lisa having said
21 to Mr McGregor.

22 **LORD CARLILE:** Smart Price is own brand, is it?

23 **MISS ROSE:** No, I'm not talking about Smart Price, I'm
24 talking about the spreadsheet. She demonstrably didn't
25 act on the spreadsheet because what she actually did was

1 she said on 8 November, so that's four days after this,
2 that she would not move her prices until she had seen
3 Asda's prices move in store. In other words, that's
4 completely consistent with her evidence that she wasn't
5 interested in assertions about what Asda would or might
6 do, what she wanted to see was actual price rises in
7 store. So she didn't act on this information.

8 In relation to Smart Price, we know that she did not
9 act on this information but changed Tesco's
10 Smart Prices -- Tesco's Value range prices, in reaction
11 to Asda moving its prices. Because we know that what
12 then happened was that Asda moved the prices of four of
13 its Smart Price lines down and two of its Smart Price
14 lines up, and Tesco then matched those price changes.

15 So in relation to neither of the lines of cheeses
16 that are referred to in this email did Lisa act on
17 information about anticipated pricing intention; she did
18 what she said she did, which is that she waited to see
19 actual information in store.

20 So strand 6, Tesco to McLelland to Co-op, which is
21 not said to be an infringement because the OFT does not
22 suggest that the Co-op had any relevant intent. But
23 this is an email from Stuart Meikle to Mike Owen of the
24 Co-op dated 4 November 2002. It's document 70 in the
25 bundle [Magnum]. In that email, Mr Meikle sets out

1 "What I believe will happen elsewhere", including saying
2 that Tesco's random weight McLelland retails would
3 increase on 11 November and all Tesco's own label lines
4 would increase on 18 November.

5 The OFT infers that this is Tesco's future retail
6 pricing intentions transmitted to McLelland with the
7 intent that they should be transmitted onwards.

8 We make a number of points about this at 219.
9 First, that this document does not contain a report of
10 anything that Tesco had said; secondly that Lisa had of
11 course had legitimate reasons to provide the dates of
12 Tesco's cost and retail price increases for McLelland
13 random weight and Tesco own label cheeses for
14 operational reasons, because they needed to know when
15 the cost prices were going up, and she said that she had
16 probably told Tom Ferguson the dates for the cost price
17 increase by that stage but had probably not confirmed
18 the details of any consequential retail price rise.

19 The OFT seeks to rely on the fact that it says
20 18 November 2002, all own label lines. And they say,
21 ah, McLelland only supplied some own label lines to
22 Tesco, not all. So if Tesco had given McLelland the
23 information that it was putting up the price on all of
24 its own label lines, that must have been illegitimate.

25 In my submission, if you want to get a picture of

1 the sheer artificiality and the sheer difficulty that
2 the OFT's line of reasoning is going to cause for real
3 business people trying to do business in the real world,
4 this is a classic example. Tesco supplies own label
5 cheeses to McLelland and has every commercial reason to
6 tell it the date it's going to put up its cost prices.

7 **LORD CARLILE:** Other way around ...

8 **MISS ROSE:** Sorry, you're quite right.

9 **LORD CARLILE:** I thought I was losing my marbles on a
10 Friday, but it's you.

11 **MISS ROSE:** It's my marbles, sir.

12 McLelland supplies own label cheeses to Tesco, so
13 Tesco has to give McLelland information about the date
14 it's going to put its cost price up. The first point
15 is, you wouldn't have to be a rocket scientist at
16 McLelland to figure out that if Tesco is putting up the
17 prices of the own label cheeses it supplies to you on
18 that date that, in the context of 2002, it's going to
19 put up the prices that it's supplied by other people on
20 the same date. That would be pretty obvious given what
21 was happening in 2002.

22 Secondly, we don't know whether Lisa said all own
23 label lines, or that was an inference that McLelland
24 drew. Thirdly, even if she had said simply, "We're
25 putting up the own label cheeses on the 18th", that's

1 a completely normal thing to say. Is the OFT seriously
2 suggesting that what Tesco had to do in order to protect
3 itself against a £10 million fine was to sit down with
4 McLelland and say, "On 18 November, we will be putting
5 up the prices of, specifically, Tesco mild, Tesco
6 coloured Caledonian and coloured Isle of Bute supplied
7 to us by McLelland", and that if it said anything less
8 specific than that, and simply said "We'll be putting up
9 the price of the own label", it exposes itself to that
10 liability.

11 That seems to be the OFT's approach, and we submit
12 that it is an impossible standard for a retailer to
13 adhere to.

14 Sir, you suggested to me earlier, would it be
15 sufficient if Lisa Oldershaw was disclosing information
16 to McLelland knowing that McLelland was cavalier with
17 other people's information. Now, the only suggestion
18 that Lisa Oldershaw disclosed information to McLelland
19 in 2002 is here, and it's simply the dates of the cost
20 price rises that were necessary for McLelland to know.
21 The question is, what on earth could she have done, and
22 what on earth is she expected to have done?

23 Perhaps the OFT will say, well, she could only
24 demonstrate her lack of intent by including an express
25 warning to McLelland in every communication that

1 everything she said would have to be treated
2 confidentially. Sir, that would have given her no
3 comfort at all because McLelland knew full well that
4 this information was confidential, and you've heard that
5 from McLelland's witnesses, the Tribunal. That was the
6 mutual understanding of the parties.

7 If this information was going to be disclosed by
8 McLelland, it would be being disclosed, to McLelland's
9 knowledge, in breach of confidence. Why would it make
10 any difference for the risk of that happening if Tesco
11 made that express in every communication or not? It's
12 not suggested that McLelland didn't realise the
13 information was confidential.

14 That, of course, is one of the reasons why we say
15 that a standard lower than intent or knowledge is not
16 only against the principle of what is meant by
17 a concerted practice but would lead to wholly
18 unacceptable consequences from a public policy
19 perspective in terms of its effects on normal commercial
20 dealing.

21 Sir, that's probably a convenient moment to wish you
22 a good weekend.

23 **LORD CARLILE:** Right.

24 Ms Smith is about to rise. Welcome to the party, Ms
25 Smith. How can we help you?

1 **MS SMITH:** Sir, I'm only rising to my feet to let you and
2 your colleagues know that unfortunately I won't be here
3 next week. When this case was extended into next week,
4 a case in which I'm sole counsel for the respondent had
5 already been listed in front of the Court of Appeal, so
6 I'm afraid no disrespect intended but I won't be here.

7 **LORD CARLILE:** Thank you for your courtesy in letting us
8 know. We shall miss you.

9 **MR MORRIS:** So will I, in particular.

10 **LORD CARLILE:** Can we help anyone with anything else?

11 In that case, can I wish you all a good weekend and
12 we'll sit at 10 o'clock, 10.30 on Monday? 9.30, really?
13 Right, 9.30, but it will be a very tight 9.30. It might
14 be 9.45.

15 **MISS ROSE:** Well, shall we say 9.45?

16 **LORD CARLILE:** Shall we say 9.45 simply because of some
17 arrangements I have on Monday morning. Somebody is
18 coming to collect something that I have to supply from
19 a safe myself.

20 **MISS ROSE:** Sir, if it gives you any comfort, I think I'm on
21 track to finish by Monday lunchtime.

22 **LORD CARLILE:** Thank you, and we'll start at 10 o'clock on
23 Monday.

24 (4.32 pm)

25

1 (The hearing adjourned until
2 Monday, 28 May 2012 at 10.00 am)
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