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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

31 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 16)

APPEARANCES

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

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

1 Thursday, 31 May 2012

2 (10.00 am)

3 **LORD CARLILE:** Good morning.

4 Mr Morris, during the first hour or two of this
5 morning, if I look as though I'm being moved to tears,
6 it may be because of your advocacy, it may on the other
7 hand be because of the drops that a clinical torturist
8 fired into my eyes about a hour and a quarter ago.

9 Secondly, Miss Rose, I simply wanted to tell you
10 that, were we to be relying on the National Assembly of
11 Wales' aromatic cheese order of 2004, we shall tell you.

12 **MISS ROSE:** I appreciate that, sir.

13 While I'm on my feet --

14 **LORD CARLILE:** Could I just mention something else serious
15 to both of you. Could you look please at document
16 bundle 2, flag 75. We've been doing some homework,
17 particularly focusing on documents. This is a document
18 that nobody has referred to but it has been referred to
19 on paper, and we're just slightly concerned about the
20 presence of a document headed as that document is
21 headed, without an explanation as to why the first word
22 there, which is in a blue box at the moment, appears.

23 **MISS ROSE:** Sir, the reason no one has referred to it is
24 that it is not relevant to the issues in these
25 proceedings. What it deals with is the arrangements for

1 the packing of bulk cheese. As you may or may not have
2 picked up, at this time, Tesco's bulk cheese, what was
3 going to be the Value cheddar, was all packed by
4 Kerrygold but it was supplied by a number of different
5 suppliers.

6 **LORD CARLILE:** Some of it was bought by auction, wasn't it,
7 I think?

8 **MISS ROSE:** That may well be right but it came from a number
9 of different sources.

10 **LORD CARLILE:** Those behind you are nodding in agreement.

11 **MISS ROSE:** But it was packed by Kerrygold and Kerrygold had
12 to price it. This then raised confidentiality problems
13 relating to the various prices for the different prices
14 for the different suppliers, and there is a note that
15 explains this that I can hand you if you want, but the
16 way that this problem of confidentiality was dealt with
17 was that there were invoices that gave a standardised
18 price and that was then made up on an individualised
19 basis to the individual suppliers.

20 So the reference here is to a notional price that's
21 used for the packing of the bulk cheese by Kerrygold, it
22 has nothing whatever to do with any allegation made in
23 these proceedings.

24 **LORD CARLILE:** Obviously the use of language in relation to
25 cheese is not always very precise.

1 **MISS ROSE:** I appreciate that.

2 **LORD CARLILE:** "Notional" might not have caused us as much
3 concern as [REDACTED].

4 **MISS ROSE:** Indeed. When I first saw this document, my
5 eyebrows went up as well. I can supply you with a note
6 if you would like it.

7 **LORD CARLILE:** As long as it's agreed it's irrelevant.

8 **MR MORRIS:** Can we take on board what has been said, and I'm
9 getting nodding behind, although we do -- if we have
10 anything to say, can we deal with it in writing?

11 **LORD CARLILE:** No.

12 **MISS ROSE:** No, sir.

13 **LORD CARLILE:** No is the answer to that.

14 **MR MORRIS:** Can I then take instructions on that?

15 **LORD CARLILE:** You certainly can take instructions, but
16 dealing with it in writing is not acceptable.

17 The first question we want answered is, is it
18 irrelevant? If yes, we'll ignore it. If no, then
19 you'll have to deal with it by oral advocacy.

20 **MISS ROSE:** Sir, while I'm on my feet --

21 **LORD CARLILE:** Are we still on this question?

22 **MR MORRIS:** If I may, I know Miss Rose has an application to
23 make, sir. If I may open and then I'll see to her, but
24 can we just deal with one thing at a time.

25 I will take some instructions -- somebody behind me

1 will tell me whether I can say that's fine or not. Can
2 I then start my submissions and then, if Miss Rose
3 wishes to make an application, then she can make an
4 application.

5 **MISS ROSE:** Sir, I gave my learned friend notice that
6 I wanted to make a short application at the outset.

7 **LORD CARLILE:** What is this about? Is it about the Mintel
8 report?

9 **MISS ROSE:** That's a minor aspect, sir, but there's a major
10 issue, and the major issue is this document which was
11 served on us at --

12 **LORD CARLILE:** I have to tell you that I have not read
13 a word of that document because I received it at 10.30
14 last night. I have looked at it but in the most literal
15 sense.

16 **MISS ROSE:** Can I just explain the difficulty that it
17 leaves --

18 **MR MORRIS:** Really, I'm sorry, sir --

19 **LORD CARLILE:** Mr Morris, please. I'm going to hear
20 Miss Rose at the moment.

21 Application by MISS ROSE

22 **MISS ROSE:** Can I just explain the difficulty that this
23 leaves us in. This document was served on my
24 instructing solicitors shortly before 5 o'clock
25 yesterday afternoon and I saw it I think at around

1 6 o'clock yesterday. I have obviously not had an
2 opportunity to read it, it is over 200 pages long, it
3 contains a multitude of footnotes and references. It
4 contains many new allegations which have never been put
5 to any witness which did not feature in the decision and
6 which were not pleaded.

7 Let me just give you a couple of examples. One
8 example is that it is suggested for the first time in
9 this document that document 110A [Magnum], where it says
10 "Competition Commission training desperately needed",
11 that that may have been a nod and a wink that McLelland
12 were being too unsubtle. That's something that was
13 never put to any witness.

14 It is also now suggested that the Isle of Bute
15 cheese, which was already on the shelf at the date that
16 it was communicated to Tesco, is a different pack size
17 from the Isle of Bute cheese that was notified. That
18 has never been put.

19 It is also suggested in this document that, you will
20 recall, Sainsbury's raised the price of its cheese the
21 morning after 21 October 2002 but not by cash margin
22 maintenance. It is for the first time suggested in this
23 document that that may have been cash margin maintenance
24 but rounded up to the next penny. Again a completely
25 new case never put.

1 Now, those are just three small factual examples
2 that I've managed to identify from a very cursory
3 reading. There are also significant new legal passages.
4 There is a whole case developed in this document,
5 arguing for a lower mental element based on
6 recklessness, which relies upon authorities from the law
7 of tort, confidential information and misfeasance in
8 public office, none of which were developed orally by
9 Mr Morris.

10 We have also received, and I received these for the
11 first time this morning, two new volumes of legal
12 authorities. Sir, you will not be surprised to hear
13 that in those circumstances I will not be in a position
14 to reply to the submissions of the OFT today because the
15 case that is contained in this document is radically
16 different from that which has ever been put by the OFT
17 before and very significantly different from that which
18 was closed orally by Mr Morris over the last two days
19 that we have been sitting.

20 That then leaves us with the question of how do we
21 take this forward. I've been exploring with my team the
22 problem that this leaves us in. It will not surprise
23 you to know that virtually every member of my team,
24 including myself, is going to be on holiday next week,
25 for obvious reasons. There are then major conflicting

1 commitments for various members of the team. One of the
2 key members of the team is about to get married and then
3 go on honeymoon. Ms Lester is based in New York and
4 would have to make arrangements to return to the
5 United Kingdom. Mr Piccinin is fully committed in the
6 month of June on other matters.

7 What we think would be feasible would be for us to
8 produce a written reply to the OFT's submissions by the
9 end of the first week in July.

10 Now, I realise that sounds a long way off, but it's
11 simply enormously difficult for us to get people
12 together to deal with the mass of new material that has
13 now being put forward in a shorter timescale, given
14 conflicting commitments from various members of the
15 team.

16 We would then seek to have one day of further
17 hearing so that I could make oral submissions based on
18 the reply because there is so much that is new that, in
19 my submission, it simply wouldn't be fair for us to be
20 deprived of the opportunity to deal with it. I would
21 suggest that, if we served our written document at the
22 end of the first week in July, we would then have
23 a one-day hearing as soon as possible after that, giving
24 people an opportunity to read the written document
25 before the oral hearing.

1 Now, I'm not suggesting any of this is anywhere near
2 ideal, but I'm frankly at a loss as to how else this
3 situation can be fairly dealt with. There is, of
4 course, a draconian suggestion which is to say they're
5 not allowed to rely on this but I anticipate that that
6 would not find favour with the Tribunal, for obvious
7 reasons.

8 But we are in a genuine difficulty here, we simply
9 cannot deal with this material today, and we then have
10 real problems of getting people together to be able to
11 manage it, and we really ask for your guidance as to
12 what is the most efficient way to take it forward.

13 **LORD CARLILE:** Well, I do think we should deal with this in
14 principle now.

15 Mr Morris, do you want to respond?

16 Submissions by MR MORRIS

17 **MR MORRIS:** Yes, I'm grateful. The reason I -- the first
18 thing I was going to say, if I'd been allowed, was to
19 explain the document, to apologise to the Tribunal for
20 inconvenience caused by its late service.

21 **LORD CARLILE:** Can I say that we appreciate the work that
22 has been put into it. I know that there have been those
23 who have been working very hard at it. As to the
24 content, I've told you already, I don't think any of us
25 have read it yet.

1 **MR MORRIS:** I understand that, sir. I'm very grateful, and
2 those behind me and to the side of me are very grateful
3 for that recognition.

4 We have been working flat out, I can assure you of
5 that, and we have done everything we have in our power
6 to get this document to you as soon as possible. We had
7 hoped it would be ready by yesterday lunchtime, it was
8 in principle ready by yesterday lunchtime, and as these
9 things happen, technical glitches and the like arise,
10 delays of a few hours.

11 We understand that this is -- its production is not
12 ideal at this time, and we understand the inconvenience
13 it causes to you, and we also recognise -- and this is
14 why I wished to raise this at the start -- we also
15 recognise that it does put Tesco in a position and that
16 they should have an opportunity, subject to your
17 directions as to the best way of dealing with it, they
18 should have an opportunity to reply. That's the first
19 point.

20 The second point is this. We do not accept
21 Miss Rose's characterisation of this document as
22 a document with loads and loads of new points in it.

23 **LORD CARLILE:** I don't think we should get into that
24 argument because it's a long document. That's
25 a sufficient point.

1 (10.30 am)

2 JUDGMENT

3 **LORD CARLILE:** Can I say at the outset that there is
4 absolutely no criticism attaching to anyone, as far as
5 the Tribunal is concerned, underlying what we're about
6 to say.

7 We do recognise that there is a great deal of
8 material in the written closing submissions submitted by
9 the Office of Fair Trading, and also I was very dubious
10 in any event as to whether we were really going to keep
11 to our full timetable today, given this is a substantial
12 case and it's very important that we should be
13 completely fair to both sides.

14 What we've decided to do is this, we will hear you
15 today, Mr Morris, we will not hear Miss Rose today. We
16 will ask for a written reply to be submitted on behalf
17 of Tesco, hopefully none of it written on honeymoon by
18 anyone, by Friday 6 July, limited to 40 pages, in the
19 same formatting as the original closing submissions by
20 Tesco. We're not having any 6-point, thank you very
21 much, Mr Piccinin!

22 Thereafter, we will hold a one-day hearing maximum,
23 the intention being to hear Tesco's reply. Hopefully we
24 will not need a full day because we will have the
25 written document and repetition doesn't oblige. We will

1 do that on a day to be fixed through the usual channels
2 but it is almost certainly going to be in the second or
3 third week of July.

4 We're not able to offer you firm dates at the moment
5 because not all the Tribunal is able to give a firm
6 diary at the moment.

7 So it's Mr Morris today.

8 I'm sure we will hear from you at some point,
9 Miss Rose, frequently, but we're not going to hear
10 submissions from you today.

11 **MISS ROSE:** Yes. Can I just say that we really appreciate
12 it, and I do understand that it is inconvenient to the
13 Tribunal to have to come back and I appreciate very much
14 what you have done.

15 **LORD CARLILE:** So when you're ready, Mr Morris.

16 **MR MORRIS:** Yes, I'm ready.

17 **LORD CARLILE:** I think you're going to have plenty of time.

18 **MR MORRIS:** Yes, perhaps too much because I hadn't been
19 prepared to speak for all day, but there we are.

20 **LORD CARLILE:** Oh, no, please don't feel tempted in any way.

21 **MR MORRIS:** Can we see how we go, because what I don't
22 really want to do, given the time, is actually to read
23 the whole document to you. That's not the purpose.
24 Obviously I will take you ...

25 Can I, just before I continue my closing, can I just

1 on the specific issue of document 75, can I say that my
2 instructions are that we don't differ from the
3 explanation that Miss Rose has given.

4 Can I make one further point, though. If you look,
5 and it's for your notes, at document L033 [Magnum] which
6 is an annex to Lisa Oldershaw's witness statement, you
7 will see that there is an email which follows on from
8 that email that you've just seen which gives the real
9 prices. That completes the story.

10 If I may -- I don't propose taking you to it now,
11 but we don't demur from the explanation that has been
12 given.

13 **LORD CARLILE:** That's fine.

14 Choose your moment for a break around about
15 11.30/11.40.

16 Closing Submissions by MR MORRIS (continued)

17 **MR MORRIS:** Very well, sir.

18 If I can perhaps take you to the written document
19 just to show you how it's structured. It's in seven
20 sections, and if you go to the first -- you should have
21 dividers in it, and sections A and B are the substantive
22 law and the proof in evidence, and I have covered those
23 topics orally. Section C is some general facts about
24 the cheese market which contain some anodyne factual
25 details, we say --

1 **LORD CARLILE:** I don't think paragraph 143, which I've just
2 spotted, is necessarily anodyne.

3 **MR MORRIS:** Well, it's contested that the Mintel report
4 should go in, I understand that.

5 Can I just give you the background. It's
6 paragraph 154, is the factual information. We have
7 provided that information in response to questions that
8 were asked at the outset of the hearing. We've put it
9 forward to assist the Tribunal. We understand there is
10 objection to that material going in, we leave that for
11 the Tribunal, but we do submit that it is useful factual
12 background --

13 **LORD CARLILE:** Can I help you with that, and Miss Rose. The
14 Tribunal has obviously been apprised of the Mintel
15 report issue for a considerable time.

16 The Tribunal considers that we have enough material
17 on the cheese market without the Mintel report. The
18 Mintel report has been submitted late. We can see that
19 there might have been potential for challenge to some of
20 the figures so we do not propose to take account of the
21 Mintel report.

22 **MR MORRIS:** I'm grateful for that indication. Can I make
23 one response to that, sir? Sir, if I may make one
24 observation, to the extent that there was a suggestion
25 when you said a moment ago it was submitted late, we

1 would say that it has not been submitted in a sort of
2 advocacy sense by the Office of Fair Trading, it was
3 submitted in an attempt to assist the Tribunal to give
4 neutral factual information.

5 **LORD CARLILE:** Yes, that's understood.

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

7 Then if you go to section D, which is the major
8 themes, and I have dealt with orally and I don't propose
9 to go through those -- well, I've dealt with the
10 first -- you have the dairy team's KPI and basket
11 policy, then you have at page 61 the logic of the 2002
12 initiative and why retailers participated. Then you
13 have the issue of the £200 per tonne pass-through of
14 volume discounts and additional monies, and I had dealt
15 with all that in oral closing on Tuesday.

16 There is then one point which I'll pick up in
17 a moment, it's a point in response to Ms Potter, and
18 I'll come back to that in a moment.

19 Then we get two more headline topics which are
20 packing time lag and speculation. I wish to say a few
21 words about that orally in a moment but not a lot. Then
22 I was going to go into the main -- then you get section
23 E which is cheese 2002, and section F which is cheese
24 2003.

25 **LORD CARLILE:** Is there a separate section G?

1 **MR MORRIS:** G is just a conclusion, it's four lines, and its
2 content may not surprise you.

3 Then there are some schedules which I'll come to in
4 a moment, one of which is important.

5 So what I propose to do this morning, with that
6 background, is to address you orally, and I will dip in,
7 when there's a particular point that I want to take you
8 to, rather than follow it through.

9 Sir, I want to make some very short points on the
10 facts in general, then I'm going to deal with the facts
11 of cheese 2002 and then I'm going to deal with the facts
12 of 2003.

13 **LORD CARLILE:** Where are we starting?

14 **MR MORRIS:** We're going to start briefly at the stocking and
15 labelling point, which is paragraph 181.

16 **MS POTTER:** Can I just ask, are we likely to use the
17 authorities this morning?

18 **MR MORRIS:** I suspect not.

19 **MS POTTER:** Thank you. I'll put them away.

20 **MR MORRIS:** This is going to be the first of perhaps three
21 or four general points before I go to the facts. The
22 first point is this packing time lag, and we invite the
23 Tribunal to find that at all material times, where
24 random weight cheese was packed and labelled by the
25 processor, it took between one and three weeks from the

1 point in time of the decision by the retailer to
2 increase retail prices on random weight products to that
3 price change taking effect in the store, and that such
4 a retail price increase could not be affected in any
5 less than a week.

6 The reason that issue arises is because of the
7 subsequent evidence that you heard from Mr Ferguson and
8 Mr Irvine that it had happened in a very short space of
9 time. The point we make at 181.1 is that, until the
10 point in time when the OFT sought in this case to rely
11 upon documents 116A to 116C [Magnum], which, as you will
12 recall, are the documents which relate specifically to
13 strand 4 on cheese 2003 about the instruction coming
14 from Asda to change the labels on 3 October, but until
15 those documents were sought to be relied upon by the
16 Office of Fair Trading, there had been no suggestion
17 anywhere in this case that the time for a price change
18 or the time lag was anything other than one to three
19 weeks.

20 The point we make at paragraph 181, subparagraph 2,
21 is that Lisa Oldershaw's own second witness statement
22 made this point expressly [Magnum]. She went out of the
23 way to tell the Tribunal what is set out there:

24 "Retail price changes cannot be implemented quickly
25 for random weight products and PMPs because existing

1 stock has to be sold before stock at the new price is
2 placed on the shelves. When I was a cheese buyer, it
3 usually took one to three weeks for the existing stock
4 of random weight cheese or PMPs to be exhausted and for
5 stock label with new retail prices to become available
6 in store. The timing depended on the product supply and
7 any promotional activity."

8 Then she also told the Tribunal in her oral evidence
9 that three weeks wasn't a huge amount of stock for them
10 to carry.

11 Now, that evidence was her evidence and remained her
12 evidence and, at subparagraph 5 of our written, we then
13 refer to five documents in the documents in the case
14 which support that the period was one to three weeks.
15 I don't propose to take you to those documents, unless
16 that would be something you would be interested in. But
17 essentially the documents show that, where a processor
18 knew that a price change was coming in advance, he
19 consciously reduced stocks, but the documents show --
20 down towards the lower end of the scale one week, but
21 the documents show that it was one to three weeks.
22 Thirdly, or subparagraph 6, Mr Reeves was asked about
23 this and he agreed -- he was asked expressly about it,
24 and when it was put to him, one to three weeks, he said,
25 "Well, I thought it was about a fortnight".

1 So that is the position on the evidence, and then
2 what we have is that the OFT had identified further
3 material specifically in relation to the Asda price
4 change with the instruction having been given at 5.07 pm
5 on 3 October. Then we have the evidence that it was
6 given by Mr Ferguson and Mr Irvine, that oh, yes, this
7 would all have happened very quickly over the weekend.

8 It is our submission that the Tribunal should not
9 accept that evidence, that the hypothesis that both the
10 retailer and the processor carried almost no stock was
11 contrary to the flow and preponderance of the evidence
12 in the case, and that this was, with respect, an
13 explanation that was responded to to meet the point that
14 was plain on the documents, in our submission, that the
15 prices in relation to 3 and 6 October could not have
16 been in store by 6 or 7 October.

17 So that is the essential point and I don't need to
18 perhaps expand it. It's in writing. But the suggestion
19 that it could take less than -- or it could happen in
20 two to three days, we submit, should not be accepted by
21 the Tribunal.

22 The next point I wanted to go to was the point about
23 the speculation point in general. This is dealt with at
24 paragraph 182 to 188 of our written closing.

25 Rather than read that through to you -- essentially

1 speculation in a way goes to two issues, it goes first
2 to the question whether the information that the
3 processor was giving to the retailer was true
4 information or he was -- I don't -- "making up" is the
5 wrong word -- it was not actually information that had
6 been received. It goes to the question of the source of
7 the information. It secondly goes to the question of
8 what the recipient would make of the information that
9 was received.

10 As far as the first point is concerned, we would say
11 this, that regardless of what a processor may or may not
12 have done at various stages in normal commercial
13 negotiations, on the facts of this case it is clear that
14 in certain key instances what the processor was telling
15 retailer C was information that the processor had
16 received from retailer A. That is most clear,
17 obviously, we say, in the case of document 52 [Magnum]
18 where we submit that that plainly was not speculation on
19 the part of -- and I'm going to come back to it -- not
20 speculation on the part of Mr Ferguson. There may, in
21 other normal circumstances, be circumstances where the
22 processor might talk things up but, on that specific
23 instance, it is, in our submission, plain that
24 Mr Ferguson was not speculating but he was passing on
25 what he had been told.

1 You have also the general -- the evidence that
2 Mr Ferguson gave that he would not in general be wanting
3 to give the retailer false information because he would
4 get found out and because it would undermine the
5 relationship of trust. We suggest that in other
6 instances, where you find statements such as, "This will
7 be matched by", or a statement by a processor in the
8 context of the initiatives saying what will happen, in
9 our submission, given both what Mr Ferguson said and
10 what was going on in relation to the initiatives, we
11 will invite you to find, or we do invite you to find,
12 that that was not speculation.

13 There is, of course, the point that, if it had been
14 pure speculation, the information would have been the --
15 the fact that it was pure speculation, and if it were
16 wrong would have been found out very soon thereafter,
17 would have been very damaging to the processors' desire
18 for this initiative to go forward, because obviously
19 a false decision taken by the recipient based on
20 speculation could have very serious consequences for the
21 recipient, if they've made a false move in terms of the
22 market based on it.

23 Now, Lisa Oldershaw said she took no notice of what
24 she was being told, but we would say, if you look at it
25 from the processor's point of view, the processor must

1 be telling it on the basis that he wants the retailer to
2 believe what he's saying.

3 **LORD CARLILE:** Doesn't this amount to a sort of statement of
4 the obvious really, which is that you look at the
5 information being imparted and received on its merits,
6 and if there is some corroboration, all the better, and
7 you make a decision -- we have to make a decision as to
8 whether that information was believed or not.

9 If, in a case, I make you as counsel -- say to you,
10 "We will win this case, the damages will be enormous",
11 to quote FE Smith, that's just a poof (sic). But if
12 I say to you, "Well, we know we're going to recover
13 substantial damages and we really won't take less than
14 £130,000", that's something you'll pay attention to.
15 It's just life, isn't it?

16 **MR MORRIS:** Yes, but there are two elements really. It's
17 about -- whether C pays attention is one thing, and I'm
18 going to come to that in a moment, and you will make
19 your findings on that, about whether you accept that
20 it's information they would or would not pay attention
21 to, but I'm dealing with a slightly prior question about
22 whether, when it's coming out of the mouth of B, it is
23 puffery, or it's based on some --

24 **LORD CARLILE:** I meant "puff", not "poof".

25 Yes.

1 **MR MORRIS:** Whether B is making it up, lying, talking it up,
2 those are the various degrees, or whether what B is
3 saying is based on what A has told him. Our submission
4 is that, on that limb of speculation, in relation to
5 document 52, the evidence is overwhelming that
6 Mr Ferguson was not making it up but, equally, we would
7 say that, more generally, in the context of the
8 initiative, the 2002 initiative in particular, he wasn't
9 making it up and he wouldn't be because it would cause
10 all sorts of problems if he was making it up.

11 So the first question you have to decide in any
12 instance, when you're looking at a statement that B has
13 made to C, is did B get it from A? And we say, yes, he
14 did.

15 The second issue is the claim by the recipient
16 retailer, in this case in particular Lisa Oldershaw,
17 that when she heard this information she at all times
18 disregarded it as being unreliable, irrelevant and of no
19 interest. We do invite the Tribunal not to accept that
20 evidence. We submit that that evidence is implausible,
21 and it is implausible that Ms Oldershaw, particularly in
22 the circumstances of what was going on in autumn 2002,
23 would dismiss the information she was receiving as being
24 nothing more than speculation.

25 Obviously, the passages in the cross-examination

1 we've highlighted in our document, and I don't propose
2 to take you to them, but I do invite you to recall -- or
3 if you can't recall, perhaps to look at this
4 transcript -- the question that was asked of both
5 Mr Scouler and Ms Oldershaw: what would have happened if
6 you had been told by one of these processors that the
7 others were not going to take part?

8 That question was asked -- in time, it was asked of
9 Ms Oldershaw first and then Mr Scouler -- if they heard
10 from the processors that in fact one or more of the
11 retailers was not going to participate, that would have
12 been highly material, relevant information for them.

13 **LORD CARLILE:** Can you take us to that question with
14 Ms Oldershaw?

15 **MR MORRIS:** Can I go to Mr Scouler first?

16 **LORD CARLILE:** Yes, sure.

17 **MR MORRIS:** If you go to Day 11, page 116.

18 **LORD CARLILE:** 116?

19 **MR MORRIS:** 164.

20 This is where one hopes one's references are right.

21 It's 165, line 5:

22 "Question: Can I put this question to you: if Lisa
23 had come to you during this period and said to you --
24 if, this is if -- 'The information I am getting from the
25 processors is that it looks like the other retailers are

1 not going to participate, not going to raise their
2 prices by £200 per tonne', in those circumstances, you
3 would have put Tesco's participation on hold? Sorry,
4 you would have put Tesco's consideration of the ...
5 price increase on hold, wouldn't you?

6 "Answer: Yes.

7 "Question: And you would have then explained to
8 your senior management that you were not going to move
9 Tesco's prices?

10 "Answer: Yes, I may well have done."

11 So he accepts that, had that sort of information
12 been coming from the processors that would have been
13 pertinent information and, with respect, it is
14 blindingly obvious that it must have been, given what
15 was going on.

16 Now, if you go however to Lisa Oldershaw on Day 9,
17 and you start at page 9, and I'm asking halfway through
18 page 9:

19 "Question: What I'm suggesting to you is that you
20 must have realised at the time that you were in receipt
21 of information that it was at least potentially accurate
22 information ...

23 "Answer: As I keep telling you, any information
24 I received in that vein I treated as false, from any
25 supplier.

1 "Question: So you got the information and you said,
2 'I'm not looking at that, I'm going to take no notice of
3 it whatsoever because it's false'?

4 "Answer: I didn't even register it, I just move on,
5 because you get so much of that information I just move
6 on and -- take out the important bits of the email and
7 move on."

8 Then I put to her at page 10:

9 "Question: You don't go back to Tom Ferguson and
10 say, 'Tom, will you stop bothering me ...'

11 "Answer: No.

12 "Question: ... you didn't rely on [it] ...

13 "Answer: Yes."

14 Then 13:

15 "Because I didn't view them as important. They had
16 no importance, no significance. They were speculation,
17 somebody's views, so I didn't think -- think or need to
18 reject them."

19 Then this is the question:

20 "Question: Let me ask you another question about
21 this. Let's assume that the processors had told you
22 that none of the other retailers were going to comply
23 with the initiative. You would have told your bosses
24 about that, wouldn't you?

25 "Answer: Not necessarily, no."

1 This is where we submit that her answers become
2 really unrealistic and not credible, particularly in
3 light of what Mr Scouler said later.

4 "Question: Would you or would you not have told
5 them?

6 "Answer: Because there wouldn't have -- if nobody
7 had been asked for the cost price increase, there
8 wouldn't have been the pressure for Tesco -- from the
9 farmers for Tesco to accept it, so they wouldn't --"

10 Then I go back to the question, in line 8:

11 "Question: But instead of you receiving information
12 that other retailers were going to go along ... in my
13 hypothetical scenario, what in fact happens is that
14 [they tell you they're not going to move], 'I can tell
15 you that Sainsbury's are not going to move and that Asda
16 are not going to move'; are you seriously suggesting
17 that when you get an email to that effect you would have
18 ignored it as being false?

19 "Answer: Yes."

20 In our submission -- and then again she denies,
21 finally at line 9 on page 12. I put it to her that that
22 sort of information would have been highly relevant, and
23 she said "No", and I said "Very well".

24 Now, in our submission, that exchange gives the game
25 away. We would respectfully submit that this

1 information -- it cannot have been the case that, if she
2 had heard that nobody else was joining in, she would
3 have ignored it. If that is right, and you accept that
4 proposition, then it follows in our submission that the
5 information she was getting generally, yay or nay, was
6 information she would not have dismissed purely as
7 speculation.

8 That was all I was going to say about speculation.
9 There is obviously -- you're well aware of the issues
10 and the way it has been put. You have our submissions
11 in 182 and following.

12 There is a related topic or related suggestion which
13 in fact was picked up on by I think you, sir, it's the
14 related topic of confidentiality of information going
15 the other way. The answer of course that's given about
16 information going the other way, "Well, we trusted them.
17 Of course they'd keep it confidential". Well, as you
18 said, you trust them with your information going out but
19 you don't trust anything that comes in. That's the
20 obvious sort of jury point to make. But the more
21 specific point is that there is no express suggestion in
22 any document anywhere that processors should keep this
23 information confidential.

24 Now, you might say, as Mr Reeves said, that in the
25 normal course that may be the expectation, but you will

1 also recall Mr Reeves' evidence which was to the effect
2 that the circumstances in autumn 2002 were not normal
3 and that he wasn't so sure whether there was an
4 expectation on the part of Tesco that it would be kept
5 confidential without anything more being said.

6 We have no document anywhere that there was any
7 express request and, in the context of 2003, of course,
8 where, according to Tesco's evidence, this issue about
9 acting as a conduit was alive, and they were well aware
10 of it, of Mr Meikle's leakiness, if I can put it that
11 way, no express statement by Tesco, particularly when
12 you get to strand 5, "Don't pass this on". We would
13 suggest that actually, whilst there may have been
14 a general belief that, obviously, our relations are
15 confidential, that the suggestion that they could rely
16 when -- Tesco could rely, when passing their own
17 information, on the unspoken assumption that nothing
18 would be passed on, we would invite you not to accept
19 that as effectively a fact which negates the element of
20 knowledge in terms of passing on.

21 Can I then move on to another issue which is the
22 issue of labelling, price labelling. Right from the
23 outset, the issue of the price labelling of random
24 weight cheese has taken on a substantial degree of
25 importance and you are now well familiar with the

1 factual background about how that arises. At various
2 stages, Tesco and witnesses called by Tesco say that the
3 reason why Tesco and other retailers were passing on
4 future pricing intentions to a processor was because
5 that information was needed for the purpose of labelling
6 the product by the processor. That was, therefore,
7 a legitimate commercial reason for the passing of
8 information from A to B.

9 Now, as regards that, we say two things, we have two
10 main propositions. First, we say that where there is
11 a passing of future retail pricing information in
12 circumstances where the processor in question does not
13 need to price label the product in question, then, and
14 if there is no other legitimate commercial reason or
15 excuse for this retail pricing information having been
16 given to the processor, it is a fair inference, and
17 indeed the absence of a reason is good evidence, that
18 the retailer was passing it on with the requisite state
19 of mind that the processor would then pass it on to
20 another retailer.

21 So that's the point where there's no labelling
22 reason.

23 **MS POTTER:** This is a point of some interest, because
24 I think there is a passage in Toys and Kits on this
25 issue, isn't there, about the circumstances in which it

1 is legitimate for a retailer --

2 **MR MORRIS:** There is.

3 **MS POTTER:** Yes. Can we have a look at that, or you can
4 address us on it --

5 **MR MORRIS:** Can I address you on it in due course?

6 **MS POTTER:** Yes, that's fine.

7 **MR MORRIS:** I would just like to explain. There may be
8 elements about absence of reasons and burdens and this
9 sort of thing, but what I would say immediately is that
10 a reason has been proffered here. I would invite you --
11 if you wish me to address questions of burden of proof,
12 I will do, but a reason has been proffered. You must
13 accept -- I invite you, I mustn't say what you must do,
14 of course, at any time, but we would suggest that you
15 consider that reason and decide whether it is
16 well-founded or not well-founded.

17 If you consider it is not well-founded, and if no
18 other reason is being given, given that the positive
19 case has been averred that that's why it was done, we do
20 say that it would be legitimate for you in those
21 circumstances, once that positive reason advanced has
22 been not accepted, for you to take that into account in
23 deciding what the reason or what foresight or knowledge
24 A had when he was passing the information forward.

25 Now, there may be all sorts of tortuous issues about

1 burden of proof, and, as my learned junior says, if you
2 don't accept that reason, then it would of course
3 undermine the reliability of the witness' evidence. If
4 the witness says, "I did it for a labelling reason",
5 it's a matter really of finding -- a finding of fact of
6 the evidence. The witness says "It was for a labelling
7 reason", you say "Well, I don't actually accept it could
8 have been", in those circumstances, when it is put to
9 the witness that actually you were doing it because you
10 knew or foresaw that it was going to be passed on, and
11 it was part of the initiative, having not accepted the
12 witness' explanation, you may then conclude that the
13 witness' explanation is not correct, and I would invite
14 you to conclude that what was being put was actually the
15 reason.

16 I'm not sure it's a question of burden of proof, I
17 think it's a simple question of analysis of the
18 evidence.

19 **LORD CARLILE:** It's a straightforward question of fact,
20 isn't it?

21 **MR MORRIS:** Yes.

22 If I may come back, and this I think may be -- so
23 the first point is, if the reason isn't there what does
24 that mean? But I want to make this other point which we
25 have made throughout our written -- in our defence and

1 in our skeleton. We say this, that even in a case where
2 the processor would need to know future retail pricing
3 information in order to label the particular cheese in
4 question, for example, obviously random weight, that
5 does not mean that in the particular circumstances of
6 the particular disclosure the retailer did not know or
7 foresee that the information would also be passed on.

8 In other words, even where there was a labelling
9 reason, we would suggest that other factors established
10 that the information was being disclosed with the
11 knowledge or foresight that it would be passed on. The
12 most obvious example of that is the "disclosed, having
13 received" situation, and the clearest example of that in
14 this case is strands 4 and 5 of cheese 2003.

15 Let's assume for the moment that you were to
16 conclude that the information in strand 5 -- and we
17 don't accept this -- was all random weight information
18 being passed back and, therefore, that was information
19 which McLelland would use for labelling, we would submit
20 that even if that were correct, given the fact that, two
21 days previously, McLelland had passed on to Tesco Asda's
22 future pricing intentions, the fact that then Tesco send
23 equivalent information back to McLelland means, in our
24 submission, because of the "disclosed, having received",
25 that there was still foresight that it would get passed

1 back to Asda.

2 So the labelling reason doesn't preclude a finding
3 of knowledge or intent that they would be passing --
4 that B would be passing back to C.

5 Now, can I just in this connection invite you to
6 take up our written closing. You will recall that, in
7 your legal questions that you asked, and I can't
8 remember the date now, some time in April, and I
9 apologise, in the letter with the questions, you asked
10 for a schedule of information about labelling and we
11 didn't provide you with one at the time. What we have
12 done in the first schedule at the back of our written
13 closing is we've done a schedule called "Labelling
14 Information".

15 If I can just take a moment or two, it's there for
16 your assistance. It is, I should say, our very best
17 assessment based on all the evidence. We think it is
18 correct.

19 What you see, we've done it by strand, and in
20 respect of each strand, you have six columns. You have,
21 first, in column 2 who the relevant A is, who is passing
22 the information; in column 3 you have the relevant B; in
23 column 4 you have the identity of the cheese products in
24 respect of which the information is given; you then have
25 in column 5 a breakdown of column 4 into those products

1 which are labelled by B and those products which are not
2 labelled by B. We will come to it in a moment, but
3 obviously strand 3 in some ways is the most dense of the
4 strands because there's so much information given there.

5 Now, what I must point out is that column 6 is made
6 up of two -- well, there are two reasons why a product
7 does not require labelling and why it is included in
8 column 6. The product in question does not require
9 labelling either because the product in question is not
10 supplied by B to A at all. So if you go, for example,
11 to strand 3, column 6, stilton was not supplied by
12 Dairy Crest to Tesco and, therefore, it wouldn't require
13 labelling by Dairy Crest to Tesco.

14 But there's a second reason why a product might be
15 in column B and that's because, even if it is supplied
16 by B to A, it is a fixed weight or it is deli and it's
17 not a random weight product. So, for example, in
18 strand 5, column 6, you see "Fixed weight pre-pack". In
19 column 6, in relation to strand 3, the first cheese
20 product, "All branded pre-pack", that is made up of both
21 fixed weight which Dairy Crest did supply to Tesco and
22 fixed weight which Dairy Crest didn't supply. So that's
23 the dual reason.

24 Now, I don't propose to take you through that in any
25 more great detail, it's there to assist you in your

1 analysis of the strands and to understand, in respect of
2 each of the strands, whether the information was
3 information which was required for labelling.

4 I think the paragraph -- if I take you to
5 Replica Kit, the paragraph which Ms Potter was thinking
6 about, I think it's paragraph 106.

7 **LORD CARLILE:** Which volume?

8 **MR MORRIS:** Authorities volume 2, tab 9 [Magnum].

9 I thought there was another paragraph as well.
10 There was another paragraph about burden of proof,
11 I thought.

12 Is that the paragraph --

13 **MS POTTER:** Yes, that I think is the paragraph, and that
14 fits with, I think, the compliance material we were
15 looking at which was not saying that all discussion of
16 future prices, which I suspect was based on this, with
17 suppliers was a problem, but where it was likely to
18 affect retail prices.

19 **MR MORRIS:** Yes. Our position on this is -- I think there
20 was perhaps another paragraph that I'll come back to
21 which deals with burden of -- it may be 95. But just to
22 answer the point there, our position is this. The
23 Office of Fair Trading does not say that all discussions
24 about retail prices are inherently necessarily bad. The
25 Office of Fair Trading does resist the proposition that

1 you start with -- not a presumption -- that it's
2 perfectly normal in all cases to talk about future
3 retail prices, that there are specific reasons to do so
4 and that those specific reasons are in fact identified
5 in the compliance programme by Tesco where they say --
6 they identify four specific reasons, and in their
7 response to the statement of objections you will recall
8 that they say it's not normal except in certain limited
9 circumstances.

10 So we do say, and I'm not talking about
11 presumptions, but we do say that, of course, it will be
12 normal when it's promotions or when it's labelling or
13 where there's a reason, but that you can't go so far as
14 to go the other way and say it's part and parcel of
15 everyday life.

16 **MS POTTER:** I suppose the thing I'm struggling with a little
17 bit is that the documents do show that discussing
18 margins does seem to be very much part and parcel of
19 everyday life, and that's not just in the context of the
20 2002 initiative but in the lead up to the 2003
21 initiative and, therefore, to that extent, discussion of
22 the make-up of retail prices does seem to be part of the
23 everyday -- and I'm not clear whether the Office of Fair
24 Trading is saying that that is not legitimate.

25 **MR MORRIS:** Can I come back to you on that, because I think

1 that was an issue in Kit and Toys quite a lot, and
2 I think there was a suggestion, I mean, even in the
3 compliance, that one's got to be careful when one starts
4 talking about margins, because then you are getting
5 close, because if you're debating the cost price as
6 well -- I may need to come back to you on that.

7 Paragraph 95 I think is the other paragraph of Kit
8 [Magnum].

9 **LORD CARLILE:** I had taken it that, if one looks at
10 paragraph 106 [Magnum], what's described as Mr Lasok's
11 obviously characteristically succinct submission of the
12 normal exchange of information was accepted by the Court
13 of Appeal as being accurate, and it was determined in
14 this case, in the reported case, that:

15 "... the complaints did not have that aim, and the
16 discussions ... had a strong and unusual context."

17 That's a resonant phrase, isn't it?

18 **MR MORRIS:** Yes.

19 **LORD CARLILE:** If there's a strong and unusual context then
20 the Tribunal must cast a magnifying glass over it.

21 **MR MORRIS:** Yes, that's right, and we would obviously say
22 that there's a strong and unusual context here. But we
23 would I think also say that the general position, as
24 illustrated by Tesco's own compliance policy, is that
25 even generally you've got to be very careful and there's

1 got to be some reason to be talking about retail prices.

2 **LORD CARLILE:** Did you want us to look at paragraphs 95

3 or --

4 **MR MORRIS:** Paragraph 95 I think was the other one, which is
5 the paragraph which I think is about the burden of
6 proof. It's:

7 "Mr Lasok took up a sentence in paragraph 661 ...

8 "He said that this revealed a wrong approach to the
9 burden of proof; it was not for JJB to prove that its
10 purpose was legitimate, but for the OFT to prove the
11 opposite. On the face of that sentence alone, that
12 criticism could be justified. However, in the context
13 of the other material which was before the Tribunal [we
14 might say exactly the same here], the matter is to be
15 seen quite differently. There was ample evidence,
16 especially from the pressure brought to bear by JJB on
17 Umbro, that the purpose of the disclosure was
18 anticompetitive. Absent any basis for a suggestion that
19 there was some different and legitimate purpose ...
20 [now, that's where we get to what I was talking about,
21 about the proffered alternative], the OFT's burden of
22 proof has been discharged."

23 We would say that there was ample evidence in the
24 context of this case that -- to establish our case on
25 intent. They come back and give a different account.

1 It is for you to decide whether to accept that account
2 as a matter of evidence and if, as we urge you, you
3 don't, then that is our case that we would say is
4 established.

5 **LORD CARLILE:** Yes. I think I'm more assisted by
6 paragraph 106 [Magnum] which doesn't take us down the
7 road of illegal and evidential burdens, which is a bit
8 of --

9 **MR MORRIS:** That was what I -- yes. I have to say -- can I,
10 just while you're at 106, though, highlight a sentence
11 which of course has just been drawn to my attention
12 which, in our submission, supports the proposition I was
13 just making. In the middle of that sentence:

14 "Any party to such discussions on a vertical basis
15 needs to be aware of the risk and to avoid it."

16 There are risks involved, and Tesco plainly knew
17 that. It's all over their compliance material.

18 So that, I hope, addresses that particular point.

19 It has also been drawn to my attention, the
20 observations of the Tribunal in Kit in that regard. I'm
21 not going to take you, but paragraphs 659 and 660
22 [Magnum], there's a suggestion that:

23 "It seems to us that disclosure by retailers to
24 suppliers will rarely be legitimate."

25 There in the context of retail price maintenance.

1 But there were doubts expressed by the Tribunal about
2 the dangers of talking about --

3 **MS POTTER:** Indeed, but I think perhaps the Court of Appeal
4 didn't necessarily endorse the Tribunal's approach on
5 that, and I was just testing whether you were seeking to
6 roll us back towards the Tribunal's position.

7 **MR MORRIS:** That's a fair comment. It is the case that the
8 Court of Appeal didn't fully endorse that. I think
9 I have set out the Office of Fair Trading's position,
10 and it remains our position, that there are dangers,
11 that it is exceptional. We say that that is actually
12 aligned with Tesco's own internal position. If to some
13 extent that involves a little bit of a roll-back, then
14 so be it, I would be urging that upon you.

15 But essentially, when you come back to the facts of
16 this case, the essential point is you've had the
17 evidence, if you don't accept it, it's a matter for you
18 to find what actually was the requisite state of mind
19 when the material was being passed on.

20 Now then, two miscellaneous points.

21 I can't remember, did you suggest a break at 11.30?

22 **LORD CARLILE:** I did suggest a break at 11.30, but we're
23 very relaxed about it as always.

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

25 The first point is another point raised by Ms Potter

1 in relation to a document which is in relation to the
2 additional monies point, which I addressed, and the
3 document which referred to there being [REDACTED] per tonne.
4 That's document 112, Mr Meikle's document, [Magnum].
5 Perhaps we can have a quick look at that.

6 It's the passage at the bottom. I'm assuming it's
7 no longer -- is it red boxed? There's no boxes. But
8 it's the reference to the [REDACTED], and we've addressed
9 that at paragraph 179, subparagraph 1 of our written
10 closing, and it may be just as convenient to deal with
11 that by...

12 We make the point first that the witnesses were
13 never referred to this document in the context of the
14 other monies issue. Then it says -- Stuart Meikle says
15 that sales of Seriously Strong have been "promotion
16 driven" and then says:

17 "... our average price per tonne has only [REDACTED]
18 [REDACTED] ..."

19 You see the "promotion driven" sentence above. This
20 is all talking about Seriously Strong volumes and the
21 volumes going up and it has been promotion driven, and
22 that fact:

23 "This is further illustrated by the fact that our
24 average price per tonne has only [REDACTED] ... despite
25 the £200 per tonne [cost] increase ..."

1 This is not evidence of other monies flowing to
2 Tesco. What is being discussed is the practice of
3 promotional cuts in retail price which are, in turn,
4 normally funded by the processor. For that proposition
5 you see paragraph 37 of Ms Oldershaw's statement
6 [Magnum].

7 We would suggest, although it wasn't explored in
8 cross-examination, that it must follow that insofar as
9 this is talking about promotional activity that has
10 driven the cost price increase down, that does not
11 reflect any other monies flowing back to Tesco because
12 their price would have come down too.

13 **LORD CARLILE:** There's no blue box or red box on any of
14 these sentences, I take it?

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

16 **LORD CARLILE:** In which case I can ask these questions. Do
17 I understand those few lines to mean that the standard
18 business in cheese as a whole was up [REDACTED]
19 [REDACTED], but that on Seriously Strong, because of
20 promotion, it was up [REDACTED] on volume? That looks
21 to me as though it is the meaning.

22 I'm looking for someone in the Tesco camp to nod
23 helpfully.

24 **MR MORRIS:** The first sentence is volume up [REDACTED].

25 **LORD CARLILE:** That's for Seriously Strong.

1 **MR MORRIS:** Then it says:

2 "Drilling down into this figure shows that standard
3 business is up [REDACTED] --"

4 **LORD CARLILE:** I don't know what that sentence means.

5 I don't know whether "standard business" is business
6 right across the whole Tesco range, or standard business
7 in cheese. I don't know where it takes us because
8 I don't understand the --

9 **MR MORRIS:** What I would say is when you get to the [REDACTED]
10 [REDACTED] figure, that that is -- the reason that that is,
11 whether it is Seriously Strong or -- I think we think it
12 is Seriously Strong but I'm not sure. But the reason is
13 because of the promotional activity.

14 **LORD CARLILE:** And therefore a lower price per tonne is paid
15 than would otherwise have been paid.

16 **MR MORRIS:** Yes, and a lower retail price. You pull the
17 retail price down, that's the promotion, but the person
18 who is funding it is the processor, so --

19 **LORD CARLILE:** So you're buying a lot more cheese from him
20 so he's selling it to you at a lower price, to put it
21 simply.

22 **MR MORRIS:** No, no, that's a volume discount. This is the
23 funding of a promotion, a promotion being the sale by --
24 promotion driven, the sale by the retailer at a reduced
25 price.

1 There's lots of instances or cases where retailers
2 sell on promotion, they reduce the retail price, but
3 they're not taking the hit, it's the processor who is
4 taking the hit because they are reducing their cost
5 price at the same time.

6 In that instance, that is not an indication --
7 that's not the same as a volume discount, in fact in
8 some ways it's the opposite. It's not additional money
9 being gained by Tesco, it's about both moving down. So
10 to that extent it wouldn't be money being regained by
11 Tesco in the balance, in the context of the argument
12 that we were going -- a year earlier.

13 **MS POTTER:** Yes, I think at one point, where Ms Oldershaw
14 was talking about buy for less, it seemed to me that she
15 was identifying that some of these promotions would
16 drive volume so that her overall profit position,
17 I'd need to check back, but that was the sense to me,
18 that she was saying that, so that she was looking at an
19 overall marketing plan, and therefore promotional driven
20 volume might be an element of that.

21 **MR MORRIS:** Yes, it might be. We would suggest that -- this
22 is -- well, we say that promotion, if it's
23 promotion-driven in the main, it's not something that's
24 coming back, but to the extent that it was, you still
25 have our main point that this is not remotely going to

1 make up the difference of £200 per tonne across --

2 **LORD CARLILE:** So we can derive from all this that
3 promotions would be one of those areas where one would
4 reasonably expect there to be discussion about retail
5 prices between retailer and supplier?

6 **MR MORRIS:** Yes, absolutely, and that is in Tesco's
7 compliance material as one of the exceptions. We don't
8 dispute that.

9 Can I pick up just on one further point which was
10 the -- you were taken through at some length, by
11 Miss Rose, the various public statements and press
12 releases in 2002 and the suggestion that it was public
13 knowledge that there was going to be or there was
14 going -- there was going to be, or there was going to be
15 a retail price increase.

16 The position in relation to that is that, whatever
17 the source and the like, whilst they might disclose that
18 prices were going to go up, they don't disclose the
19 illegitimate mechanism by which that was going to happen
20 and was going to be achieved, namely what they don't
21 disclose is the fact that the retailers were exchanging
22 future pricing information. That, of course, is the key
23 element in the Office of Fair Trading's case. That
24 element was not public and, to that extent, to the
25 extent that it's relied upon by Miss Rose: oh, well,

1 it's all out in the open and therefore the documents --
2 you wouldn't have fragmentary evidence, we would suggest
3 that that is the answer to that point, that the
4 mechanism itself was not public knowledge. So to that
5 extent you would expect that evidence to be hidden or
6 not apparent and perhaps fragmentary. We actually say
7 it's not very fragmentary here because there's quite
8 a lot of information about passing of information, but
9 to the extent that it's incomplete, you would expect it
10 to be incomplete.

11 Those were my introductory points and I was then
12 going to go to cheese 2002. I think I'll start for
13 a few minutes, if I may. I'm just looking at the clock.

14 Sir, the background, obviously, to 2002 is familiar,
15 and very familiar by now. We pick it up at 189 of our
16 written submissions and, at page 77, we make two general
17 points. I've made them both and I don't really -- the
18 first one is the cumulative effect of the evidence which
19 is the point that, obviously, you are going to look at
20 individual aspects, but we urge you to look at the
21 entire picture to see what was going on. We say that
22 once you stand back in this way, it is clear from the
23 course of events, the continuum of events, that there
24 was an overall concerted practice that Tesco and the
25 other retailers were involved in, and that there is

1 a danger -- and I've made this point all along -- of, if
2 you take too atomistic a view of it, it's wood for
3 trees, I suppose, is the essential point.

4 Of course, we have to burrow down into the detail,
5 but you have to look at the picture. And the other
6 point is the cumulative effect; rungs in a ladder is
7 a phrase that has been used. If you get to the stage
8 where you're satisfied that, for example, strands 1, 2
9 and 3 are established, then that is very important
10 context for your assessment of what happens thereafter.

11 The second point is we make a general statement
12 about state of mind. We obviously make the point that
13 we are -- we put it all on the basis of the Kit case,
14 that is our case. On its proper analysis, we say there
15 was actual knowledge, actual foresight, but we then also
16 make the point about lesser states of mind.

17 If I may just make one retort to a point made by
18 Miss Rose this morning. It is not the case -- I mean,
19 it is the case that there may be expansion, but the
20 recklessness alternative is an alternative that we have
21 posited as an available alternative from the outset.
22 The lesser states of mind as an alternative case, as
23 a matter of law in fact, has been put to the Tribunal
24 and is not a new point.

25 What we then have is we then refer at paragraphs 192

1 to 194 to the background of what happened in 2000 and
2 the fact that Farmers for Action had been active at that
3 time, and we say the important point that Tesco had been
4 told that this raised at least -- I put it mildly -- at
5 least competition law concerns, that's the first point,
6 that they had gone to the Office of Fair Trading. The
7 second point at paragraph 194 of our closing is that the
8 senior commercial team had received additional guidance
9 as to the need to act with particular caution in its
10 dealings with the FFA.

11 You will recall that I put that to Mr Scouler, and
12 I hope I put it fairly in the sense that I recognised
13 that when the events of 2000 happened, he wasn't at
14 Tesco, so he wouldn't have necessarily seen those
15 letters which are at tabs, I can't remember, 1(a) to
16 1(f), but I put to him that he would have been one of
17 the dairy team that would have received the additional
18 guidance and he didn't demur from that, he didn't
19 necessarily recall it, and he would have been one of the
20 people who received the guidance.

21 We then go to the events of summer 2002, up to
22 13(?) September, and we have the familiar story that is
23 common ground, broadly, that the pressure was mounting
24 from the farmers again. There is this important point
25 about what was happening actually in the market in terms

1 of prices, and I would emphasise the sentence I have
2 highlighted in 195, that there was no likelihood that
3 the operation of the free market would cause dairy
4 prices to rise, and in particular cheese prices, and
5 that Mr Scouler accepted that in cross-examination.

6 That links into the suggestion that, we would say,
7 the natural free flow or force of competition, you would
8 expect prices to stay low, but in fact they did rise.
9 It is obviously our case that they rose because of the
10 concerted practice.

11 We then have the evidence about the farmers
12 picketing, and we conclude at 196 by saying that this
13 was a serious concern for Tesco and was costing Tesco
14 very substantial sums of money. You've been taken to
15 the evidence, set out in some detail in Tesco's response
16 to the statement of objections about how much it was
17 actually costing them, how much each of these blockades
18 was costing.

19 Before we break, can I just make this point. There
20 are suggestions, and I can't quite recall the specific
21 passage in Miss Rose's closing, where she talked about
22 the interests of retailers and processors not being the
23 same, not being aligned. We would accept, of course,
24 that in a normal commercial negotiation that would be
25 the case. But the key point to recognise about 2002 is

1 that both the retailers and the processors were at the
2 mercy of, that's perhaps too strong, but they were both
3 facing this same external pressure which is the farmer
4 blockades.

5 So to that extent, and it is in our submission
6 a very important part of the context of what happened in
7 2002, to that extent it was in both their interests to
8 get the farmers off their back and that meant it was in
9 both their interests to get 2p per litre back to the
10 farmers. That meant that this wasn't a normal
11 commercial negotiation.

12 That, we submit, is a very important part of the
13 picture for you in reaching a conclusion as to what was
14 in the interests of both parties and what they were
15 trying to do.

16 On that note, if I may, I will pause.

17 **LORD CARLILE:** Thank you. 11.45.

18 (11.30 am)

19 (A short break)

20 (11.45 am)

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

22 **MR MORRIS:** If I may, I just would like to answer a question
23 you asked before the adjournment and that is on document
24 bundle 2. It is the question that you raised about the
25 [REDACTED] and what it was referring to. I think I have

1 the answer for you. The answer is it is all
2 Seriously Strong, and you see that from document 110A,
3 which is the presentation that McLelland made to
4 Lisa Oldershaw on 4 September. If you go to the fifth
5 page of that, you'll see the heading "Seriously Strong".

6 **LORD CARLILE:** It only has one page.

7 **MR MORRIS:** Sorry, it's 100A [Magnum]. You will see the
8 figures there, this is all talking about
9 Seriously Strong and it talks about the year on year
10 volume growths. It says "Standard 3.75 per cent", so
11 that would be when it was not on promotion, "Promotional
12 180.7 per cent", so the 3.75 per cent match is the
13 [REDACTED] that you see at document 112 [Magnum].

14 Then you look at the average revenue per tonne and
15 you see the figures for 2002, [REDACTED], and they
16 match the figures that are in 112.

17 **LORD CARLILE:** So if you get your promotion activity right
18 you can absorb a cost price increase, is the message.
19 Isn't that what the last bullet means:

20 "Absorbed effect of £200 per tonne increase
21 in November 2002."

22 **MISS ROSE:** Exactly.

23 **LORD CARLILE:** I'm getting nods from the Tesco team.

24 **MR MORRIS:** I thought you might be. I don't know.

25 I was answering the factual question. I'll come

1 back if I dissent from that.

2 **LORD CARLILE:** Thank you very much.

3 **MR MORRIS:** But it was all Seriously Strong that was being
4 talked about.

5 I was dealing with the lead-up to the events of 2002
6 and I was at paragraph 196 of our written submissions.

7 Then at paragraph 197 and following we deal with the
8 discussions in late August with the NFUS, and then 198
9 we have the meeting between Terry Leahy and Mr Gill, it
10 was, on 3 September, and then we have the two press
11 releases at paragraph 199. And the important aspect --
12 one of the important aspects in the second press
13 release, this is the penultimate sentence of 199, is
14 that Mr Gildersleeve called on all milk processors to
15 pay farmers at least 2p per litre more.

16 We then, in 201, identify the kind of double aspect
17 of the effect of the press release. On the one hand it
18 was a publicity coup for Tesco, and from the senior
19 management's point of view that was very important. But
20 on the other hand, it boxed in the dairy team in terms
21 of what they could then do and they were put in
22 a difficult position.

23 The next stage of events is that there was a price
24 increase for liquid milk on 6 September, and then we
25 have the important point that there would need to be an

1 extension of the initiative to dairy products, other
2 dairy products, including cheese. And we say right at
3 the bottom of page 81 that this was because of the
4 pooling effect, and you will be well familiar with that
5 concept by now.

6 But the point to bear in mind about the pooling
7 effect is that not only does it apply to all retailers
8 but it applies to all processors too; in order for all
9 farmers to get 2p per litre it would be all milk that
10 was being bought by all processors.

11 Paragraph 205 indicates that it was accepted in
12 cross-examination that for there to be an increase in
13 the farmgate price in milk, there would need to be an
14 increase in price of all dairy products, and such an
15 increase would need to be made by all retailers. And
16 I would add in there, and by all processors too, total
17 industry movement, and Mr Irvine obviously recognised
18 that at the same time.

19 So that is the background, and then we get to the --
20 there are some passages where we deal with the evidence
21 from the processors about the negotiations and I don't
22 propose to take you to those.

23 We then get to the Tesco Dairy Supply Group meeting.
24 Now, let me just make some general propositions about
25 the Tesco Dairy Supply Group meeting. First of all, we

1 do say that it is a very important event in the
2 narrative of what happened in the story. It's an
3 important staging post. You will be familiar with the
4 lead-up, which is the milk price rise, and you will
5 remember the reference by Mr Hirst to the need to change
6 the agenda of that meeting following the milk price
7 rise. You will recall that the evidence was that,
8 actually, this was not the first -- you're going to your
9 bundle, sir, and I think --

10 **LORD CARLILE:** Yes, I just wanted to have documents, I think
11 it's 12 onwards, isn't it, in front of me.

12 **MR MORRIS:** Yes. Well, before we get -- you'll see in 8A
13 [Magnum], which is some file notes, that there's
14 a reference to Rob Hirst saying that they'd need to
15 change the agenda. It's the third bullet point up from
16 the bottom on document 8A.

17 You will see the bullet point from Friday
18 6 September, this is after the milk increase:

19 "Also said he would need to change the agenda of the
20 supplier meeting planned for the 13th to 'How we can
21 help the farmers'."

22 We would suggest that the agenda was changed --
23 there had already been a meeting fixed, the agenda was
24 changed and, actually, the main if not the -- in fact,
25 the predominant subject matter of discussion at that

1 meeting was not the milk price increase but how the
2 initiative was going to be extended to dairy products,
3 including cheese.

4 **MS POTTER:** Just looking at 8A, that doesn't seem
5 particularly to come out of that document, because it's
6 an Arla document, and over the page it does talk about
7 plans for farmer returns. So I think one needs to be
8 a little bit careful, presumably, about saying that that
9 "How we can help the farmers" is about extension into
10 cheese.

11 **MR MORRIS:** Yes -- well, I'm grateful for that correction.
12 I'll put it this way, if I may. The change in the
13 agenda was from a general agenda about discussing any
14 industry matters to the 2p per litre initiative to get
15 the farmgate price increased, generally.

16 **MS POTTER:** And the general problems that come out from the
17 notes, I would --

18 **MR MORRIS:** Yes. I don't suggest that that is saying "We've
19 now got to switch our attention to cheese".

20 **MS POTTER:** Right, thank you.

21 **MR MORRIS:** But what I do say is that it went from a general
22 discussion to the 2p per litre initiative, first step.
23 Second step, by the time you got to the meeting the
24 retail price -- this is a week later -- there had been
25 a move in the retail market, and that therefore when you

1 get there the topic of the discussion, within the "How
2 we can help the farmers", is the problem of getting
3 2p per litre back, and that necessarily involves going
4 to other dairy products.

5 So you're right that I probably elided the two in
6 what I just said, but that is what --

7 **LORD CARLILE:** Can I just be clear about the origin of this
8 document. My understanding is this is a document
9 prepared by Tim Smith at Express and it has been
10 obtained from Arla subsequently. It says at the top,
11 "Provided by Arla Foods".

12 **MR MORRIS:** Yes, I think the reason is because, in between
13 the events, Arla took over Express. At the time of the
14 relevant events Arla and Express were separate
15 companies, and by the time of the investigation, Arla --
16 is that right? Yes. So that's why. But I always call
17 it the Express document.

18 **LORD CARLILE:** It's an Express document.

19 **MR MORRIS:** Yes.

20 We would say that you can find the following about
21 that meeting. The subject for discussion was the
22 extension, or the principal subject was the extension of
23 the initiative from liquid milk to other dairy products.
24 That's the first point. The second point is many of the
25 main processors were present, in particular at least

1 Dairy Crest, McLelland and Kerrygold. And, thirdly,
2 that Tesco issued a challenge to the processors in
3 general to get the 2p per litre back to the farmers; it
4 wasn't a challenge just to Dairy Crest, it was
5 a challenge to all the processors.

6 We also further invite you to find three further
7 things, and it's familiar territory. One, that an
8 increase in retail prices was discussed -- retail prices
9 for cheese was discussed as part of the discussions for
10 cheese; secondly, that Tesco did disclose to the array
11 of gathered processors and farmers that it was
12 contemplating increasing its own retail prices for
13 cheese; and, thirdly, Tesco also disclosed that it would
14 only increase those prices on condition that other
15 competitor retailers also increased their cheese retail
16 prices. The third of those propositions is the
17 statement of conditionality.

18 We rely on the notes of the meeting to establish
19 those propositions, and we are conscious of the
20 observation made by the Tribunal: well, they all
21 discussed different things. But we would urge you to
22 look at those notes in some detail because we say that,
23 actually, they strongly support each other as to what
24 was discussed at that meeting. They are -- the three
25 notes are the three contemporaneous notes, and they are

1 contemporaneous records of each individual's recorded
2 perception of what was said. The reason we say that
3 they are cogent in particular is because of the
4 repetition of precise phrases.

5 Now, I said yesterday about how you assess evidence
6 and the like, and we say that this is an instance of
7 a tell-tale ring of truth. The very fact that
8 particular phrases are used in the same notes
9 cross-corroborate the fact that those phrases were
10 actually -- that is an accurate record of what was said.

11 So, for example, if you look at our written closing
12 at paragraph 213, subparagraph 1 -- I'm on page 86 --
13 you see in the first subparagraph a reference to
14 "challenge to the processors" occurring in all three
15 notes: "challenge to the processors to put back at least
16 2p; "challenge to the processors to return a better
17 price to farmers; "challenge to the processors was to
18 put 2p per litre on all milk but recognising that
19 supermarket milk was only 25 per cent".

20 So we say that establishes that Mr Hirst -- that
21 that challenge was issued, but it's the similarity of
22 the wording which is telling.

23 Similarly, in the next subparagraph, 2, we see
24 references to looking at other -- "taking initiative on
25 fresh milk" and "looking at other sectors", that's

1 Dairy Crest. And a reference to "other sectors being
2 more complex", Dairy Crest. Then the Express note,
3 "complex situation, Tesco now looking at other areas".

4 Again the "looking at other areas", "looking at
5 other sectors", is very similar wording.

6 Then again if you look at subparagraph 3 on the
7 other side of the page, you will see this phrase "mood",
8 which appears both in the Dairy Crest -- "mood to move"
9 in the Dairy Crest note, and in the Express note.
10 Similarly the phrases, in the Arla note, "cautiously
11 optimistic", and in the Express note, "cautiously
12 optimistic". Similarly, further down the page, near the
13 bottom -- actually the "mood" point.

14 So the "mood" word, the "cautiously optimistic"
15 words, they are repeated in different notes and they are
16 both statements relating, we say, to Tesco's indication
17 about what Tesco would do.

18 We do urge you to take that very much into account.
19 Of course we accept that they are in differing details,
20 and differing points will have occurred. I mean, if
21 we're all in a meeting, people make different notes.
22 But when it comes to key points, the fact that three
23 people take down precisely the same words we say is very
24 strong evidence of actually what was said at the
25 meeting.

1 We set out our submissions about -- paragraph 212 is
2 what we say happened at the meeting and what was
3 discussed. Then in 213 we set out at some length the
4 various analyses of those notes.

5 We have at page 89, in the third paragraph, the
6 "statement of the obvious" argument. Our submission
7 generally, and I can make this submission generally
8 about the statement of the obvious, that it was not
9 a statement of the obvious in any of these cases where
10 somebody gives an indication that they are going to move
11 up if others move up. That does not follow. It is
12 certainly the case, it would be a statement of the
13 obvious, that "I will move down if others move down",
14 that is a statement of the obvious because of the basket
15 policy. But it is not a statement of the obvious if
16 somebody indicates "I will move up if others move up".

17 The further point on the question of the statement
18 of conditionality, which is a word which doesn't trip
19 off the tongue perhaps that smoothly, the second point
20 is this, that what effectively -- there are two
21 statements being made at the Tesco Dairy Supply Group
22 meeting. One is Tesco is willing to move up, "We're
23 looking to move up", "We're contemplating moving up".
24 You then have the statement, "But we have to remain
25 competitive with Asda". When you combine those two

1 statements, what you get is, "We want to move up and
2 we'll only do so if the others move up too".

3 You then have two further points at 4 and 5 on
4 pages 90 and 91. One is the reference to "Customers
5 would pay" or "Consumer will pay", we submit that is
6 a clear reference to a retail price increase. Then we
7 have the observations or references to forms of market
8 management in the notes and that then links into the
9 point which I made at the outset: there would have to be
10 some form of market management because, absent it, the
11 market would keep prices low. Then at 6, the processors
12 being invited to come back with a plan.

13 **MS POTTER:** Can I just ... On these notes, one thing that
14 I think you haven't addressed, but is also in all three
15 of the notes, is the point about the price having
16 dropped 3.25p to 3.5p per litre which is equivalent to
17 £300 per tonne. I just wondered if you wanted to say
18 anything about that.

19 **MR MORRIS:** Yes. It is a touch of a mystery because I think
20 elsewhere in our -- that is I think -- let me just turn
21 it up. I'm looking at document 14 [Magnum] and I'm
22 looking at:

23 "The price since March has dropped 3.25p [per litre]
24 and processors are therefore expected to help in
25 achieving ..."

1 That is presumably a reference to the raw milk price
2 at that point.

3 **MS POTTER:** I think so. It's clearly in the one at
4 document 13 [Magnum], isn't it, at "Discussion"?

5 **MR MORRIS:** Yes.

6 **MS POTTER:** And then in the first one as well?

7 **MR MORRIS:** Yes.

8 Now, there is then the suggestion that cheese retail
9 prices have crashed, is perhaps also linked into that,
10 that cheese prices have gone down, selling at a loss.
11 That is something which is not consistent -- is that
12 right?

13 I think we accept -- if you go to paragraph 195,
14 just for your note, of our closing -- that cheese retail
15 and cost prices had been going down but what we -- the
16 suggestion there, possibly, is that at that point, this
17 is the absorbing point perhaps, that the processors
18 should absorb any increased price.

19 Now, it may be that that was at that stage being
20 discussed or raised, it may be, but nonetheless we do
21 say that he was also giving an indication that retail
22 prices would go up. But what we say is this, even if it
23 were the case that at that point in time, in that
24 meeting, it was being floated that some of the
25 2p per litre should be absorbed by the processors rather

1 than passed through to the retailers, we would suggest
2 that after that time that suggestion was never raised
3 again. I think I went into this on -- I've lost track
4 of the days -- Tuesday. The evidence is that, following
5 that meeting, there was never any suggestion that the
6 £200 per tonne would not be passed through. It is very
7 much our submission that you should find as a fact that,
8 from the Dairy Crest briefing document onwards, at no
9 point did Tesco or any of the other retailers go back
10 and say, "Sorry, chaps, you can absorb it". So if and
11 insofar as it was discussed there, it was a point that
12 got dropped.

13 You will recall that, in relation to milk, if you
14 look at the response to the statement of objections, the
15 narrative description of what happened following the
16 announcement on 3 September, all the way to the point of
17 raising the retail milk price on the 9th, was that --
18 I can't remember who it was -- Dido Harding or maybe
19 John Scouler, their initial reaction -- or maybe
20 Rob Hirst -- was the processors can pay, and they gave
21 up on that idea. I don't know if you want the paragraph
22 reference, I can give it to you in due course, but they
23 realised that there was no way they could do that and
24 that even on milk there was going to be no chance of
25 getting the processors to absorb it. So I think that

1 was a very long answer to your question. The short
2 answer is, if it was said there, it wasn't pursued.

3 **MS POTTER:** We'll probably come to this but the area where
4 it does seem to have been pursued to some extent is in
5 relation to the time lags and the stock pricing and the
6 suggestion that actually the processors should initially
7 pay and at what point the price rise should be
8 implemented, which does sort of float through the
9 documents.

10 **MR MORRIS:** That is what I call the staggering point rather
11 than the wave or stage point. That is the cheese
12 maturity point.

13 **MS POTTER:** Yes.

14 **MR MORRIS:** Indeed it is the case that there was a debate
15 about when the retailers should pay more because of the
16 milk maturity. I think the outcome was that the point
17 got dropped and was not pursued because Dairy Crest, at
18 document 29 [Magnum] -- well, you see the resistance
19 from Dairy Crest, that they couldn't afford to do that.

20 **MS POTTER:** Yes. I think at Asda, 1 October, they're still
21 pushing the point that they might not be wanting to pay
22 until they were actually buying cheese made with --

23 **MR MORRIS:** With that milk, yes.

24 **MS POTTER:** Yes.

25 **MR MORRIS:** That takes me on to the Dairy Crest briefing

1 document. What we have is, following the challenge --
2 and when I say "following", I'm using that both as
3 a matter of perhaps timing and cause, but anyway,
4 descriptively, following the challenge to the processors
5 issued at the Dairy Supply Group meeting, Dairy Crest
6 came up with a proposal and that is the Dairy Crest
7 briefing document. I would ask you to bear in mind in
8 this context that we also see that, quite soon
9 afterwards, other processors also came up with a similar
10 proposal.

11 Now, we deal with the Dairy Crest briefing document
12 at paragraphs 215 to 226 of our written closing. If
13 I may make this point, which I think I've probably made
14 before -- I've probably made all these points before --
15 the Dairy Crest proposal is not the infringement. The
16 infringement comprises the subsequent disclosure and
17 receipt of future pricing intentions. The Dairy Crest
18 proposal and indeed what other processors were proposing
19 is very important background relevant to the
20 infringement and, in particular, relevant to the
21 question of the state of mind of those who participated
22 in the subsequent disclosures and receipt.

23 Now, I'm going to make my submissions on this in
24 three parts. The first issue is, what was the
25 Dairy Crest proposal? It is most obviously the

1 document -- it was contained in the Dairy Crest briefing
2 document at tab 25 [Magnum]. I'm going to have it open
3 although I'm not going to go through it in great detail
4 but it's there. Let me just summarise what it was. It
5 was a proposal for an increase in both cost and retail
6 prices. It was a proposal for a uniform increase of
7 £200 per tonne in cost and £200 per tonne at least -- in
8 fact, not at least -- £200 per tonne in retail because
9 of the cash margin maintenance. It was for all cheese
10 lines and, from Dairy Crest's point of view, it was
11 a proposal for all retailers. It was a proposal for
12 those increases to happen at the same time and you can
13 see that from the paragraph "Timing". At that stage
14 a particular date was proposed.

15 It was a proposal for joint action which means, at
16 the very least, action, at the very least, by
17 Dairy Crest and all the retailers at the same time. You
18 see that from the sentence, "If however we jointly
19 change the competitive set of British dairy products";
20 though in fact we would suggest that, given everything
21 that was going on, jointly changing the competitive set
22 of British dairy products might well indicate not just
23 all retailers but all processors. In any event, we know
24 that later the other processors made their own
25 proposals.

1 Now, that is not surprising, that it was a joint
2 action, for two reasons. It was not surprising, first,
3 because of the terms of what had happened at the TDSG
4 meeting where the challenge had been issued to all
5 processors and, secondly, it's not surprising because of
6 the pooling effect. The objective of this whole
7 proposal was to get the market to enable an increase in
8 raw milk prices moving up towards the 2p. It does refer
9 to "in total between 1.0 and 1.5ppl". But because of
10 the pooling effect, it would be necessary for not just
11 all retailers to be involved but all processors.

12 The critical point is that the purpose of this
13 entire proposal was to meet or move towards the
14 objective of increasing farmgate price for milk for all
15 farmers.

16 **LORD CARLILE:** Sorry. Can I just ask you to look at
17 document 25 [Magnum], the Dairy Crest briefing. I would
18 just like you to explain to us how you submit we are to
19 read that sentence:

20 "If however we jointly change the competitive set of
21 British dairy products versus imports, damage would be
22 done to this initiative."

23 Because I'm not sure that I understand the meaning
24 fully of that sentence.

25 "We ask that you bear this in mind when considering

1 your retail price --"

2 **MR MORRIS:** I refer to the joint -- can I deal with this in
3 two stages. The first point I say of significance about
4 that is the joint change and that is also linked into
5 the top "Background", "Retailers and processors
6 alike..." Your point is a different point which is to
7 do with the problem of imports.

8 **LORD CARLILE:** No, it's not actually. If one reads the
9 sentence at face value in the context of that whole
10 bullet point paragraph, it seems to imply criticism of
11 jointly changing the competitive set, not to raise the
12 virtue of jointly changing the competitive set. Taken
13 possibly out of context, and this is why I would like
14 you to address the Tribunal on this, it seems to me in
15 ordinary English to say, although there is an initiative
16 which is driven by the 2p per litre farmgate price
17 increase that is now going to happen, jointly changing
18 the competitive set would do damage. Therefore you need
19 to bear in mind the damage which would be caused by
20 jointly changing the competitive set when considering
21 your retail pricing decisions. There is an
22 interpretation that you must all act separately, not
23 together.

24 **MR MORRIS:** Well, I would suggest that that's not the
25 interpretation to be given to that paragraph. I see

1 where you're coming from, sir. But you --

2 **LORD CARLILE:** I'm just reading it.

3 **MR MORRIS:** Yes, you're reading it but you read it, "If we
4 jointly change". The thing that's going to cause the
5 damage is the jointness of it, that's the way you're
6 reading it: "so please don't act jointly, act
7 individually".

8 **LORD CARLILE:** So we've got to appear to act individually
9 even if we're really acting jointly.

10 **MR MORRIS:** Perhaps but, in my submission, that's not what
11 this paragraph is about at all. This paragraph is, if
12 we together change the competitive set of dairy -- look
13 at the heading, "UK sourced dairy products versus
14 imports". The danger is -- I'm alighting on the word
15 "jointly" because I say that that illustrates what this
16 is all about, that this is parallel action amongst
17 everybody. But it is not the fact that we're jointly --
18 if it said: "If we jointly change the competitive set,
19 damage will be done but, if we don't do it jointly,
20 damage won't be done", because the thing that's going to
21 cause the damage is the problem of sucking in imports,
22 which was explained by Mr Reeves in his evidence, which
23 I can't immediately lay my hands on but you will recall,
24 that if you put retail price -- the danger is, if you
25 put British retail prices up, it will attract imports

1 and that, therefore, actually the damage will be done to
2 the initiative because there will be a switch to
3 sourcing from imported cheese and the milk won't get
4 back.

5 That's the damage that's being done to the
6 initiative, is the disparity between going up on British
7 cheeses alone and having foreign imports at a lower
8 price, switching supplies to foreign cheese, therefore
9 reducing the volumes of sales, presumably, ultimately of
10 cheese made with British farmers' milk. That's what
11 I say this is about and that is the problem that was
12 being addressed by the red tractor scheme to try and not
13 do damage to the volumes of sales of British cheese by
14 using the farm assurance quality tag to limit the risk
15 of people switching because of price. That is what we
16 say this paragraph is about, and not in the context of
17 saying, well -- because if I may say so, it's difficult
18 to see how the fact that it was joint or individual
19 would make any difference.

20 Reputational damage, that there was collusion, is
21 perhaps what you're suggesting, I don't know, but we
22 would submit that that's not really what this paragraph
23 was about. I don't know if that helps.

24 Essentially what I'm saying is that the initiative
25 is aimed at getting 2p per litre back to the farmers,

1 retails will be raised but you must make sure that it
2 works because if you raise retails by too much there's
3 a risk that it would be self-defeating if --

4 **LORD CARLILE:** Because people will buy foreign cheese.

5 **MR MORRIS:** Yes, that's the point.

6 **MS POTTER:** I think the other thing is, in the Dairy Group
7 Supply meetings, there's a comment that you if you get
8 up to £2,000 plus per tonne as a cost price, at that
9 level that's when you suck imports in. That's under
10 P Nicholson. So therefore it's a cost and a retail
11 price, seems to be the implication.

12 **MR MORRIS:** Yes, and the reference to Mr Reeves' evidence is
13 on Day 5, page 66, where he was asked about this by
14 Ms Smith:

15 "Question: So in effect you were asking the
16 retailers here to restrain their retail price increases?"

17 "Answer: Not necessarily, no. We were asking them
18 not to price British cheese uncompetitively. What we
19 didn't want to happen was that all the retail prices of
20 British cheese moved and the retail prices of Irish
21 cheese didn't move and therefore consumers switched to
22 cheaper Irish cheddar."

23 So you can read this in conjunction with the
24 recommendation across the page to go to cash margin. Of
25 course, the cash margin point goes to profiteering but

1 it is another reason to restrain the retail pricing
2 decision.

3 What we say in summary is that the Dairy Crest
4 briefing document was a proposal for a uniform, joint,
5 market-wide or industry -- I use the words "market-wide"
6 and "industry" interchangeably -- initiative.

7 Now, despite the persistent resistance from Tesco
8 witnesses, particularly in their witness statements and
9 even in cross-examination, Tesco now accepts that the
10 Dairy Crest briefing document was a proposal for an
11 across-the-board market-wide increase in both cost and
12 retail. That's Day 13, page 51, lines 1 to 9.

13 One might enquire why Tesco's witnesses had resisted
14 the proposition that it was a proposal for cost on
15 retail for so long. We would venture to suggest that it
16 is because, once it is accepted that this is a proposal
17 for an across-the-board, uniform -- across-the-board,
18 I mean all cheeses; uniform, same amount -- market-wide,
19 all retailers, increase in cost and retail price, that
20 provides very substantial support for the Office of Fair
21 Trading's case on states of mind when one comes to
22 consider later the actions of the retailers in
23 exchanging future pricing information. So that's what
24 the first -- what was the proposal.

25 The second limb is awareness of the proposal. It

1 is, in our submission, not even in dispute that Tesco
2 and each of the retailers knew of the contents of the
3 Dairy Crest briefing document but also, importantly, we
4 submit that Tesco at least, and all the other retailers,
5 knew that the proposal was being circulated to all the
6 other retailers. Ms Oldershaw accepts that in her
7 witness statement and Mr Scouler accepted that in his
8 evidence. It was known by all the retailers, including
9 Tesco, that the overall purpose of the proposal was to
10 ensure that the farmers received towards 2p per litre on
11 their raw milk.

12 Thirdly, what is the relevance of all this? I've
13 just given you the answer but we submit that the
14 relevance of all this is that these facts are of great
15 significance when one comes to assess what the retailers
16 did subsequently and they are facts which go to
17 establish that, when the retailers disclosed and
18 received future pricing intentions, they did so with the
19 requisite state of mind. As I've already said, the
20 Tribunal will bear well in mind that by the time of
21 those later events, the exchanges, other processors were
22 also proposing £200 per tonne increases.

23 Just for your note, you can see that from document
24 34 [Magnum] in relation to McLelland, 1 October, and
25 documents 31 [Magnum] and 33 [Magnum] in relation to

1 Glanbia, where Glanbia were by that time at least
2 contemplating making a similar proposal and we know that
3 Glanbia did take part. So that when it came to the
4 exchanges of information, each retailer would have known
5 not only that the processors and the other retailers
6 would be speaking to each other but that the processors
7 would have been interested in passing on the future
8 retail pricing intention information that they received.
9 That was to make sure that the initiative would work.
10 They were not simply discussing the fact that the
11 processors were seeking a cost price increase.

12 For the initiative to work, each retailer would wish
13 to have confidence that all the others would be taking
14 part because each had a basket policy and would not wish
15 to be out of line. The processors would know this and
16 in the circumstances and with the knowledge of the
17 proposal, when retailer A comes to pass on its
18 information to a processor, it would have known or
19 foreseen that that processor would pass that information
20 on to the other retailers in order to give the other
21 retailers the confidence that each of them needed.

22 Similarly, when a retailer received information from
23 a processor about future retail price intentions of
24 another retailer, we submit that, given the knowledge of
25 what was going on and the proposal, that retailer,

1 that's C in this case, would have known or appreciated
2 that it was in the interests of retailer A to have
3 passed that on to the processor and onwards back to C.

4 You have our submissions on that in our written
5 submissions. In the context of why it's relevant to
6 awareness, I just invite your attention, for your note,
7 to paragraphs 224 to 226 of our written closing.

8 What I was now going to do was to move on to the
9 events immediately following the Dairy Crest briefing
10 document and move towards what's described as strand 1.
11 This is from paragraph 227 onwards. The background to
12 this is seen in particular at document 28 [Magnum]
13 because document 28 is the origin of the waves or it's
14 the first mention of the waves. We submit it's a very
15 important document. Dairy Crest were having, by that
16 time, special meetings on the cheese price increase and
17 document 28 indicates the proposal that there should be
18 a first move, this is point 2 of document 28, on
19 20 October, followed by a three-week programme during
20 which the remainder of the cheese category moves.

21 Then you will recall that this document then sets
22 out a plan, proposal -- I don't know, there's so many
23 words used -- a framework of going to see each of the
24 retailers and having a meeting with them and discussing
25 it. Paragraph 3 is the point about making a press

1 announcement and getting each of the main retailers to
2 endorse the position. Paragraph 5 then is the point
3 about the invoicing on a monthly basis.

4 Then we see at document 30 [Magnum] the fact that
5 this proposal was put to Sainsbury's in a letter and
6 I believe that you can see that that letter at
7 document 30 tracks the action points from the meeting on
8 the 24th. What you then see at the bottom of that
9 action point document at 28 is the reference to
10 a meeting the next day between Colin Beaumont and Tesco,
11 on 25 September.

12 We also know, if we go back to document 25 [Magnum],
13 that there were discussions between Mr Beaumont and
14 Rob Hirst on 20 September, that's the "Following our
15 conversation on Friday..." There is also a suggestion
16 of discussions between Rob Hirst and Colin Beaumont, in
17 that same email, "tomorrow", which is 24 September.

18 We have the meeting of 25 September and we deal with
19 this at paragraph 228.3 on page 101 of our closing. We
20 invite the Tribunal to find that a meeting did take
21 place between Mr Beaumont and indeed Mr Allen of
22 Dairy Crest and Rob Hirst and John Scouler of Tesco. We
23 invite you to make that finding, (a), on the basis that
24 there's clear evidence it was proposed, (b), on the
25 basis that Dairy Crest itself confirmed in response to

1 the Office of Fair Trading that such a meeting had taken
2 place and confirmed who had attended. Mr Scouler's
3 evidence was that he couldn't recall the meeting but he
4 didn't deny that it might have taken place. His
5 evidence was vague on that, it's not a criticism --
6 well, it may or may not be. It may be that he didn't
7 specifically recall it but we do suggest that actually
8 that meeting took place.

9 We also suggest that, if that meeting did take
10 place, given the content of the -- both the content of
11 the action plan on [tab] 28, and the content of what had
12 been -- was sent to Sainsbury's on the 30th, we do
13 invite the Tribunal to find that those action points
14 would have been put to Mr Scouler at that meeting, in
15 particular the more detailed plan that Dairy Crest have
16 now worked out the waves, the fact there was going to be
17 a retail price increase.

18 We submit that this is one of the occasions where --
19 just a correction, I may have said on the transcript
20 that document 30 was 30 September. Document 30 is not
21 the 30 September, document 30 is 25 September which is
22 the same date as the meeting. That's probably the
23 transcript references rather than (inaudible) but I'm
24 grateful for that correction.

25 We invite the Tribunal to infer that at that meeting

1 Tesco -- amongst one of the places where they did this,
2 Tesco did indicate that it was going to participate in
3 the initiative, and that that is one of the sources for
4 Dairy Crest's statement, which you find at document 32
5 [Magnum], and this is strand 1. On 27 September, the
6 document records that Dairy Crest have told Asda:

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

9 The Office of Fair Trading's case on this is that
10 that information was information first of all imparted
11 by Dairy Crest to Asda at that meeting, that's the B to
12 C, so to speak, but also that that is information that
13 Dairy Crest had received from Tesco and, further, that
14 that information had been obtained from events at the
15 meeting on the 25th, from discussions between Rob Hirst
16 and Colin Beaumont on the 20th and 24th and from what
17 had been said at the Dairy Crest (sic) Supply Group
18 meeting.

19 **LORD CARLILE:** It looks from document 30 [Magnum], the
20 penultimate paragraph of the first page, as though
21 Dairy Crest intended proudly to announce to the media
22 that this agreement had been reached. Whatever they
23 admitted later, somebody at Dairy Crest seems to have
24 thought that making a public statement on the proposed
25 increases was perfectly acceptable.

1 **MS POTTER:** And similarly, document 36 [Magnum] seems to be
2 something on similar lines, an NFU statement about
3 confirmation.

4 **MR MORRIS:** Yes.

5 **LORD CARLILE:** There were various press releases.

6 **MR MORRIS:** There were, and that happened. And one cuts the
7 other way, but these press releases actually we submit
8 do confirm what happened. What they weren't making
9 public was the fact that -- was how everybody was given
10 confidence.

11 Sir, you pick up on the public announcement, but if
12 you go back to 28 [Magnum], I think when I first opened
13 the document, at some stage during the last month or so,
14 I made the point that you can follow through the points,
15 the action points in the letter at document 30 [Magnum].

16 So, sir, if you go to action point 3 on page (sic)
17 28, this is an internal note saying:

18 "Commercial directors [at Dairy Crest are going] to
19 clear with their senior contacts ["senior contacts"
20 means the senior contacts at the retailers] by no later
21 than Friday 4th October, Dairy Crest's intention of
22 making a public statement to the effect that farmers
23 could expect to see retail prices for cheese
24 increasing...

25 "... It would be helpful if some key individual

1 accounts ... could endorse such a statement."

2 Then that is reflected in the sentence "It is
3 Dairy Crest's intention" in the letter.

4 In fact, what we would suggest is that when
5 Paul Feery wrote this letter, he would have attended
6 this meeting. He was using the action points from the
7 meeting as his -- template is the wrong word; he was
8 following through on each of those action points in this
9 letter, because you get the three waves, you get the
10 public announcement and I suspect you also get -- yes,
11 you do, over the page, sir, you get action point 5 which
12 is the point about invoicing on a monthly basis.

13 In our submission, given what was going on, we do
14 invite the Tribunal to conclude that that same proposal,
15 broadly, was made by Dairy Crest to each of the
16 retailers, including Tesco, and that it would have been
17 done or was done at the meeting on the 25th with
18 Mr Scouler and Mr Hirst. That is how the logic of the
19 events fit together, we say.

20 So we deal with that at paragraph 228 of our
21 skeleton up to subparagraph 6, so that is where the --
22 the A to B. Then at 27 September, we deal with the
23 document which is the document at 32 [Magnum], which is
24 the record of the meeting two days later between
25 Dairy Crest and Asda, and the fact that -- the

1 statement:

2 "... JS/Tesco have agreed to move all sectors."

3 The other point to raise, of course, is that the
4 words "latest position" suggest this is up to date news.
5 It refers to JS, and we have got the letter on the 25th,
6 and to Tesco, as being the latest position.

7 It is, in our submission, plain that this document
8 is talking about retail price movements, not cost price
9 alone, and you see that most clearly from the reference
10 to the management of label stocks point, it's a point
11 I'll come back to.

12 A very important point to raise of course is there
13 is no need to be talking about cost price changes if you
14 are considering management of label and stocks.

15 What I'm going to do now is to move on to -- there
16 are a series of other points, and we answer the points
17 made by Tesco in our written closing on this element,
18 strand 1. Given the time, I'm going to move on to
19 strand 2 which is the events of 14 to 21 October. We've
20 now moved forward by a couple of weeks and, of course,
21 we've seen that the idea for the increases in waves has
22 been formulated.

23 It is I think worth drawing your attention to some
24 documents concerning Sainsbury's, not least in the light
25 of Ms Potter's question yesterday, I believe, in this

1 connection in relation to document 47 [Magnum]. I think
2 you asked me a question.

3 **MS POTTER:** Yes.

4 **MR MORRIS:** I think it's worth looking at some documents.
5 Document 41 [Magnum] is a document of 4 October and we
6 do rely on this document to demonstrate Sainsbury's
7 conditionality and Sainsbury's state of mind when it was
8 passing its information on. This is a letter to
9 David Handley of 4 October, and in the third paragraph
10 it says:

11 "With regard to cheese we are still discussing the
12 implementation of cost price increases with all our
13 processors."

14 So you note there by that time it's everybody.

15 "It is intended that we will pass on [and I've
16 scribbled -- I've got one of my many marks, "pass on",
17 that means retail] an increase in our buying prices by
18 £200 per tonne in approximately 3 weeks [so that's
19 getting -- three weeks, that's 25 October], for all of
20 our standard cheese range, provided other retailers also
21 accept this."

22 So that is a statement of conditionality.

23 "I must stress that if others do not generally
24 support this initiative, I will have to withdraw my
25 support for cheese, if I find I am uncompetitive in the

1 wider market place."

2 In our submission, "uncompetitive in the wider
3 market place" must be a reference to retail prices.

4 That is the first piece of evidence to support
5 Sainsbury's state of mind when it comes to strand 2.

6 **MS POTTER:** Can I just ask, interestingly, it looks as if
7 it's a suggestion that they might go back down again,
8 and therefore go back down with their cost prices, which
9 I think is something we felt is probably implausible.

10 **MR MORRIS:** Well, it does suggest that. But whether --
11 well, "I will have to withdraw my support for cheese",
12 it says:

13 "We are still discussing the implementation of cost
14 price increases with all our processors ..."

15 I'm not sure it quite says, "We have accepted it and
16 we will accept it come what may".

17 "It is intended that we will pass on... provided
18 other retailers [do it]."

19 "I must stress that if others do not generally
20 support this initiative, I will have to withdraw my
21 support for cheese..."

22 We would suggest they would have to withdraw their
23 support for the whole thing, but they haven't at that
24 point accepted it and it's a recognition of the
25 difficulty. But we would resist the suggestion that

1 they would contemplate accepting it and take the risk.

2 **MS POTTER:** This is a letter to David Handley so one has to
3 read it with some caution.

4 **MR MORRIS:** Indeed. I just wanted to pick up on one point,
5 and I'm just trying to find it in -- yes, if you go to
6 footnote 475 of our closing, this answers a question
7 that the Tribunal raised and I just wanted to pre-empt
8 a question about this document being -- what this
9 document was.

10 During the hearing the Tribunal, on page 113, raised
11 the question of whether this letter was sent to
12 Mr Handley, we submit that it's confirmed that it was.
13 First that it was signed and the CC to Ian Merton is
14 ticked. The natural inference is that Mr Merton's
15 handwritten concerns about the wording used were added
16 to his copy after it had been sent to both him and
17 Mr Handley. Both the SO and the decision record the
18 letter as having been sent to Mr Handley and Sainsbury's
19 have not suggested to the contrary.

20 Even if it was not sent, it reflects Sainsbury's
21 true position about conditionality. You will see that
22 reflected in the next document I was going to -- the
23 next but one document I was going to take you to, 48.

24 Can I take you to 45 [Magnum], we see the proposal
25 being made on 15 October by Dairy Crest to Sainsbury's.

1 This is the day before Sainsbury's tell McLelland, and
2 this is similar to the original proposal that was sent
3 to the others. Then at 48 [Magnum], which is an
4 important point in this context, we see that, as between
5 Sainsbury and Dairy Crest, Sainsbury's indicate that
6 they are on board with the movement in waves. You also
7 see that they've indicated that they will be maintaining
8 cash and not percentage, which is what's also recorded
9 as what they have told McLelland at the same time, and
10 significantly you will bear in mind that Sainsbury's are
11 here telling Dairy Crest their retail pricing
12 intentions.

13 We submit this is retail pricing intentions, not
14 least because of the £200 per tonne equals 20p per kilo,
15 but also the fact that the products that are included
16 here in that email include products which would not
17 require labelling by Dairy Crest. That is for two
18 reasons, one is because you will see it includes
19 nonDairy Crest products. If you look at wave 1, branded
20 cheese, Cathedral City was Dairy Crest, McLelland was
21 Seriously Strong, Pilgrims Choice was somebody else who
22 I can't now remember.

23 **LORD CARLILE:** North Downs.

24 **MR MORRIS:** North Downs, I'm grateful.

25 Here we have a record of Sainsbury's telling

1 Dairy Crest about other people's cheeses and also,
2 obviously, the branded are fixed weight so there was no
3 labelling reason.

4 We deal with this at paragraph 244 in our written
5 closing about Sainsbury's state of mind in relation to
6 document 47. I don't, again, propose reading that all
7 to you, but those are the key documents, or amongst the
8 key documents which we submit demonstrate Sainsbury's
9 state of mind in relation to these events of 16th to
10 21st.

11 Just to summarise strand 2, the key documents are
12 document 47 [Magnum] and document 52 [Magnum], just for
13 your note, I'll come to them in a moment. Also by this
14 time we have document 51A [Magnum], which contains
15 information, key information about Sainsbury's and other
16 retailers, which is the internal McLelland document. We
17 also have, we know, the fact that there was
18 a conversation some time between 16 and 18 October
19 between Tom McLelland (sic) and Lisa Oldershaw.

20 Now, this aspect of it, the transmissions, is
21 addressed at paragraphs 230 to 263 of our written
22 closing, and to summarise the position, it's as follows.
23 We say that the evidence shows that Sainsbury's told
24 McLelland of its future pricing intentions for branded
25 fixed weight, firstly, for random weight pre-pack and

1 deli, being 4 and 11 November, and it also told
2 McLelland that it intended to maintain cash margin.
3 Those are the three pieces of information.

4 Also, by that time, Safeway had clearly told
5 McLelland that it was going to maintain cash margin.

6 McLelland then told Tesco three things. First, they
7 told Tesco that other retailers were going to raise by
8 cash margin and not percentage margin. Secondly, they
9 told Tesco that Sainsbury was going to raise on the 4th
10 and the 11th for own label and pre-pack on the one hand
11 and deli on the other, respectively. They also told
12 Tesco that pre-pack Seriously Strong was going to go up
13 on 22 October.

14 The fourth thing that the evidence shows is that, as
15 regards Tesco, by that time Tesco had told McLelland it
16 would probably start on the 4th, and it had not made any
17 mention -- Tesco had not made any mention of any
18 movement by Tesco on the 11th. Now, the point about
19 Tesco having told McLelland that it would probably
20 commence on the 4th comes from document 51A, which is
21 the sentence under the heading, "Tesco will probably
22 commence moves from [REDACTED]".

23 What I propose to do is deal with those three bits
24 of information in turn and make my submissions. The
25 first piece of information is the information that other

1 retailers would be raising by cash margin maintenance.
2 If I can take you to document 52 [Magnum], which is
3 really the document to concentrate on in relation to
4 these events. We have the third sentence:

5 "As we discussed last week other parties are
6 confirming that they will protect cash margin on this
7 occasion but not % margin."

8 This was highly relevant information as to the
9 future retail pricing intentions of Sainsbury's and
10 other retailers, highly relevant for Tesco's purposes at
11 that time.

12 First, it was correct information and it had been
13 obtained from the other retailers, from Sainsbury's and
14 Safeway at least. We can see that from document 51A
15 [Magnum] from the two specific statements under
16 "Sainsbury" and under "Safeway":

17 "Intend to maintain cash margin."

18 It is -- and that is "other parties"; it doesn't say
19 "all other parties" are confirming, it says "other
20 parties".

21 It is the case, as correctly pointed out, that in
22 respect of Asda and Tesco there is not such a statement
23 and the statement is slightly different. In respect of
24 Tesco, it is saying Tesco is holding out for percentage
25 margin, and in respect of Asda it's saying, "Will

1 probably maintain cash position. No info on margin
2 position".

3 Just on that Asda paragraph there, we submit that
4 that Asda paragraph is based on information from Asda:

5 "Moving across the board on 4th November (tbc)",
6 does not mean "I've got no idea what Asda are doing, I'm
7 speculating". It's, "That's the indication I'm getting,
8 they're going to confirm".

9 "No info[rmation] on margin position, but will
10 probably maintain cash position."

11 That is less firm, and I point that out but, in my
12 submission, it's plain that he has got information from
13 Asda, and in any event the information from document 51A
14 indicates that there has been a clear -- state
15 indications from both Sainsbury's and Safeway that they
16 were going to maintain cash margin, cash margin rather
17 than percentage margin.

18 The suggestion that this information in this email
19 at 52 [Magnum] was in some way an indication of a price
20 reduction rather than a price increase is both wrong and
21 misses the point.

22 I should also submit that, in the light of my
23 submissions about what is referred to in the Commission
24 guidelines on horizontal cooperation, that -- the
25 suggestion that this is not individualised information

1 is also not correct. It is individualised because it is
2 referring to what individual companies are going to do.
3 It is not aggregate.

4 But the most important point about this statement,
5 and it is very important, is that regardless of whether
6 it is cash or percentage, this is information that other
7 retailers are going to participate. They are going to
8 raise their retail prices. That is a statement of the
9 future retail pricing intentions of the other parties
10 and the statement that they are going to raise those
11 prices. That is very important information.

12 Secondly, it is also important because it is
13 information that those other retailers are going to act
14 in accordance with what was being proposed in the
15 initiative. It is a signal or an indication because at
16 that stage Tesco knows that certainly the Dairy Crest
17 proposal is cash margin only and so the indication that
18 they are going to act in an exceptional way by raising
19 to cash rather than percentage is an indication to Tesco
20 that the others are on board with the initiative.

21 Thirdly, that was not information that was in the
22 public domain. There was a suggestion that the fact
23 that they would only go to cash was actually in the
24 public domain because it was in the press releases, in
25 our submission, that is not correct and we deal with

1 that in paragraph 250 of our closing, written closing,
2 and I don't propose in the time to say more than that --
3 more about that than is said at paragraph 250. It is
4 referring to all the extra cash being passed back, it
5 says nothing about the level of the retail price
6 increases.

7 The fourth point about the significance of this
8 information is this. This information as to what other
9 retailers were going to do in general was highly
10 material to Tesco's own decision at that time as to
11 whether it would go by cash or percentage. Now, we know
12 that that was a very important decision for Tesco at the
13 time for the following three reasons.

14 First, we know from Lisa Oldershaw's evidence, and
15 I believe also from Mr Scouler's evidence, that the norm
16 was to go by percentage margin. To increase only by
17 cash margin was a very important consideration for
18 Lisa Oldershaw, not least because of her margin KPIs.
19 Secondly, we know at the time that she was asking
20 certainly Dairy Crest to provide her with information
21 about how the figures would look on either basis.
22 Thirdly, we know from document 51A [Magnum] that at that
23 time Tesco looked as though they were sticking with
24 percentage margin.

25 So it would be of great significance to Tesco to

1 know that their competitors were only going to go by
2 cash rather than percentage because, of course, that
3 would also have an impact on basket policy issues.

4 The final point to make about the cash margin
5 maintenance element of the information in document 52
6 [Magnum] is that this information was plainly
7 information which was useful, which was capable of
8 distorting competition, and the -- I'll put it this way,
9 the defence raised by Tesco on use in relation -- which
10 I will come to, I suspect, after lunch -- on use in
11 relation to the specific issue of Seriously Strong can
12 have no application in relation to the cash margin
13 maintenance point. We deal with whether the information
14 about cash margin maintenance is capable of distorting
15 competition specifically at paragraph 262 of our written
16 closing.

17 So that deals with that part of the -- the three
18 parts of the information.

19 The second element of information in document 52 is
20 the information, the sentence relating to 4 November for
21 pre-pack and 11 November for deli. You will know by now
22 that the scope of dispute about that sentence is: is
23 that information about Sainsbury's or is it information
24 about Tesco?

25 If we go back to 47 [Magnum] we will see, and it is

1 worth comparing 47 and 51 (sic) [Magnum], we will see
2 the close match between items 2 and 3 at document 47 and
3 the dates of 4th and 11th in 52. Because at 47:

4 "Sainsbury own label and pre-pack brands will move
5 on the 4th ... allowing for the proper market
6 conditions...

7 "Deli and Taste the Difference will move on the
8 11th..."

9 And you've got the match of 4th and 11th for
10 pre-pack and 11th for deli.

11 So we can see from document 47 that Mr Ferguson had
12 been told that these were Sainsbury's dates for pre-pack
13 and deli, and we submit that the reference in 52 is
14 a reference to Sainsbury's moves and not Tesco's.

15 We say that it cannot be Tesco's moves for the
16 following reasons. There is no evidence to support
17 Lisa Oldershaw's assertion that these were Tesco dates,
18 and you will recall the passage in cross-examination
19 about this when I asked her about it and where she said
20 that these were Tesco's proposed dates. I put to her
21 that there was no evidence anywhere in the material that
22 by that time, which would be some time presumably in the
23 week of 16 to 18 October, Tesco had ever proposed that
24 it would move its 4th and 11th. She said, do you
25 recall, we had a break, I think, and she said "I need to

1 look at my document 64", and she looked at it, and she
2 came back and accepted that there was nothing in
3 document 64 [Magnum] which showed she was going to move
4 deli on the 11th because, in fact, document 64 shows
5 that deli was going to move on the 17th and 18th.

6 We deal with this at paragraph 252 of our written
7 closing. Given the time, I won't go into great detail
8 but, in our submission, there is no evidence at all in
9 this case that at that time Tesco had ever suggested the
10 11th for deli. Indeed, document 51A itself [Magnum]
11 indicates that Tesco was in a -- Tesco's plans were at
12 a more general state of evolution because it was "will
13 probably commence moves from the [REDACTED], staggered across
14 brand and own label".

15 So that is the point on the 11th.

16 The second point of course is that in the response
17 to the statement of objections, the alternative -- the
18 case was put less definitively. It was an unsure ...

19 So when they first looked at it, they thought it
20 could be one or the other.

21 We also submit, and this is my last point before
22 lunch, we also submit that the same information about
23 the 4th and the 11th was also probably passed on by
24 Mr Ferguson to Ms Oldershaw in their conversation the
25 previous week. We deal with that at paragraph 246,

1 subparagraph 2 of our written closing. We meet there
2 the objection made by Tesco that that point was not put
3 to Mr Ferguson. You can see there, when we say NB,
4 Tesco argues that although this specific aspect of the
5 conversation was put to Ms Oldershaw, it was not put to
6 Mr Ferguson.

7 This is incorrect, it was put to Mr Ferguson that
8 the email of the 21st recorded the conversation of the
9 previous week. He said he did not recall the
10 conversation but did not deny it took place. Further,
11 it is clear from the words "as we proposed" in the email
12 that the timescales issue had been discussed earlier.
13 The point was also put to Ms Oldershaw, which is
14 sufficient, and the OFT is entitled so to contend.

15 Sir, we do say that that information, the 4th and
16 the 11th, was discussed in the meeting earlier, and we
17 say in any event that that information is recorded in
18 document 52 and that that information must relate to
19 Sainsbury's.

20 On that note, that may be a convenient moment.

21 **LORD CARLILE:** No pressure or anything, but can you give us
22 an indication of how much time you will need this
23 afternoon?

24 **MR MORRIS:** Sir, I would like us to all sort of break up
25 early, if that's possible. I suspect it may not be that

1 possible. What I'm going to do is go to strand 3 in
2 some detail, and then probably I'm going to deal with
3 the remainder of cheese 2002 briefly, and then I would
4 wish to spend some time on cheese 2003. I would imagine
5 that I will be probably at least an hour, an hour and
6 a half. I will endeavour -- I may be a little bit more
7 and I'm going to try to finish early if we can. Sir,
8 I'm also in your hands on any indications you may wish
9 to give.

10 **LORD CARLILE:** 2.05.

11 (1.02 pm)

12 (The short adjournment)

13 (2.05 pm)

14 **MR MORRIS:** Thank you, sir.

15 I was just on strand 2, document 52 [Magnum], and
16 I was nearly at the end of that. I was dealing in
17 document 52 with the element, the 4 and 11 November
18 element, the second of the three bits of information.

19 I just wanted to round off what I've said about that
20 by making the further point that, as regards that
21 information, yet again there can be no possible argument
22 that that information wasn't useful or wasn't capable of
23 distorting competition. As you know, we don't accept
24 that that argument runs at all. This was 21 October and
25 they were looking forward hence to the 4th and the 11th.

1 So that takes us on to the third element --

2 **MS POTTER:** Just very quickly before we move on, just in
3 terms of dates, I think this came up the other day, but
4 document 62 [Magnum] just gave me some pause for thought
5 when I was going back through the documents in terms of
6 whether there was actually a clear date on which deli
7 was going to move, because the spreadsheet I think talks
8 about the 17th, and then we also have this suggesting it
9 was the 3rd. So it just struck me that there is some
10 inconsistency in the documents which might suggest that,
11 actually, as regards McLelland's understanding, at one
12 point it could have been that deli was moving on the
13 11th.

14 I just wondered what your case is, as to whether it
15 was always clear it was going to be on the 3rd --

16 **MR MORRIS:** No, it wasn't -- sorry, carry on.

17 **MS POTTER:** You carry on, that's fine.

18 **MR MORRIS:** Our case is the following, that once you got to
19 the 29th and the 30th, it is clear that the date for
20 deli that Lisa Oldershaw had decided upon was the 18th.
21 You get that from document 63 [Magnum].

22 **MS POTTER:** But what about 62 on that basis?

23 **MR MORRIS:** 62 doesn't mention deli at all.

24 **MS POTTER:** Yes, it does.

25 **MR MORRIS:** Does it?

1 **MS POTTER:** In the second paragraph.

2 **LORD CARLILE:** "On pre-pack and deli".

3 **MR MORRIS:** Yes, I hadn't spotted that, to be perfectly
4 honest.

5 **MS POTTER:** So it just makes you wonder whether she was
6 moving around a bit on her dates.

7 **MR MORRIS:** Possibly. It's an interesting response because
8 it's not something that...

9 **MS POTTER:** Don't worry, you can come back to it.

10 **MR MORRIS:** No, I would like to. The email which that's
11 a response on -- if I can go -- it's an oddity because
12 if we go to 64 [Magnum], take that as our starting
13 point, you've got her plan, which is what's in front of
14 her, and that shows deli on the 17th, I'll call that the
15 18th. She then, in order -- and I think I'm correct in
16 saying that any dates in the schedules attached, as far
17 as deli is concerned, at that point, would be the 18th,
18 17th or 18th.

19 You then get the email of the 29th where she says:

20 "The plan is for the following to be changed on the
21 3rd, brands, regionals and stilton."

22 That matches precisely document 64 [Magnum].

23 **MS POTTER:** Yes.

24 **MR MORRIS:** Now, I would submit strongly that from her point
25 of view, at that point in time, when she sends that

1 email on the 29th, she at that point in time, even
2 though she doesn't say it because she only does the
3 first of the three, is thinking of deli on the 17th.

4 **MS POTTER:** Equally you have the McLelland internal
5 spreadsheet, which is at 62A [Magnum], which has got
6 deli on the 4th, so obviously there has been a little
7 bit of movement.

8 **MR MORRIS:** Yes, but it may be -- 62A, yes, that is right.
9 It may be that there has been an earlier suggestion --
10 I mean, the reply from Tom Ferguson doesn't really match
11 the email is what I'm saying.

12 **MS POTTER:** No, so it's interesting, isn't it?

13 **MR MORRIS:** Why he mentions deli on the 3rd when it's not
14 mentioned in the email, and when her evidence is that
15 what she was saying in the email would have matched --
16 I suspect what you're suggesting is that either he's not
17 quite responding to what's been sent, or he, in his own
18 mind, has got something in his mind that deli was going
19 to move on the 4th.

20 **MS POTTER:** Which of course is not in any event in 52
21 [Magnum] so I accept it's --

22 **MR MORRIS:** It's not in 52 and, even if that were right, and
23 we're now -- I did ask Lisa Oldershaw whether there was
24 any -- I had suggested to her that it had never been
25 suggested by Tesco that deli would move on the 11th, and

1 I did give her the opportunity to look at the documents.
2 Even if that is right, it doesn't suggest that there was
3 at any stage a statement by Tesco, or suggestion, that
4 deli would go on the 11th. What we have got now, if --
5 the hypothesis that has been put forward now is
6 a possibility that deli would go on the 4th and it got
7 moved back to the 18th, but nobody has ever suggested
8 the 11th.

9 **MS POTTER:** But I suppose what it does possibly suggest is
10 that there was a little bit of movement around some of
11 these dates, but that's ...

12 **MR MORRIS:** I'm not sure I would contradict that, because
13 it's plain when you look at document 62A that there was
14 movement, and we know, for example -- 62A does not
15 match, as far as Tesco is concerned, what they
16 eventually decided and, plainly, that indicates that
17 some information was being given. But I do come back to
18 my point that there's no evidence that suggests that, as
19 at the 21st, the 11th had ever been suggested.

20 I would say this in addition, we have jumped ahead
21 now from the 21st to the 29th, and those discussions
22 about deli could well have happened in that period
23 rather than happened beforehand.

24 **MS POTTER:** Indeed. You sort of consciously -- it's the
25 17th on the spreadsheet attached to the one on the 21st,

1 and then it's -- so it did seem to be moving around
2 a bit and I just don't know.

3 **MR MORRIS:** Sorry, the 17th on the --

4 **MS POTTER:** Yes.

5 **LORD CARLILE:** Shall we move on?

6 **MS POTTER:** Yes, let's move on, absolutely.

7 **MR MORRIS:** Yes. Branded on the 22nd. This is the
8 element -- the last bit of document 52, I'm now madly
9 scrolling back.

10 This is "branded pre-pack ... Tuesday this week",
11 the 22nd. We submit that this is clear information as
12 to Sainsbury's future retail pricing intentions. The
13 main point we make, which is made at paragraph 253 of
14 our closing, page 118, two points we make there.

15 One is that this information was not needed for
16 labelling purposes because it's fixed weight and,
17 secondly, there is no explanation that has been given,
18 no plausible explanation, as to why this information was
19 sent on the evening before, the 21st, rather than
20 waiting until the next day when the information would
21 have been publicly available.

22 So even taking account of the proposition that -- or
23 even taking account of the argument about use, it still
24 doesn't answer the question about why this information
25 was being sent, even if it was the night before. We

1 submit that it was obviously being sent to indicate that
2 Sainsbury's were participating in the initiative to show
3 that they were going to move and that Lisa Oldershaw
4 would have realised that.

5 As to the use point in particular, we deal with that
6 at paragraph 261.3. What we say there is the
7 information about branded pre-pack, its importance was
8 not to tip off Tesco that Sainsbury's was moving the
9 next day, Tesco was not planning to move its competing
10 (sic) until the 4th, but instead to show that
11 Sainsbury's were intending -- were indeed complying with
12 the initiative, to demonstrate that McLelland was
13 getting information from other retailers and to enforce
14 Tesco's belief in the credibility of the information
15 McLelland had been providing. It therefore contributed
16 to the overall aim, which was the aim of Mr Ferguson, to
17 persuade Tesco to comply with the initiative.

18 That's what we say is the significance of the fact
19 that at that point in time that was future pricing
20 information.

21 Finally on strand 2, we deal -- the main argument
22 that is made in response to strand 2 is Lisa Oldershaw's
23 evidence that she dismissed all this as speculation.
24 I have dealt with that earlier today and I don't propose
25 to go back over it. The specific arguments we make in

1 relation to speculation in relation to strand 2 are set
2 out at paragraph 258 of our written closing. You will
3 recall that, in fact, when I -- it was when we got to
4 strand 2 that the main part of cross-examination about
5 speculation was introduced.

6 So that takes us on to the events of 29 and
7 30 October, strand 3, and that is dealt with in the
8 written closing from paragraph 264 onwards. I don't
9 propose to read -- I would rather, if I may, address you
10 orally about this.

11 We say that the events of 29 and 30 October are at
12 the heart of the events of cheese 2002, and we say that
13 they are at the heart of and demonstrate Tesco's
14 participation in the concerted practice.

15 We know by this time at the latest, and there is
16 some issue about whether it might have happened earlier,
17 but we know that by this time at the latest, Tesco has
18 decided to raise its cost and retail prices on all
19 British cheese by the equivalent of £200 per tonne. We
20 also know that they had decided to tell the processors,
21 at least six of them, that this is what they were going
22 to do.

23 The story is familiar. Lisa Oldershaw sent the
24 email of the 29th, she said she was going to ring round
25 on the 30th, and on the 30th she rang round at least six

1 processors. Amongst those she called was Neil Arthey at
2 Dairy Crest, and document 63 [Magnum], which we can turn
3 up and have open in a moment, evidences what she told
4 him in that conversation. We've looked at that document
5 many times before and I hope this may be the last time
6 that we look at it in detail for the time being.

7 The Office of Fair Trading's case is this, that
8 Lisa Oldershaw told Neil Arthey that Tesco was going to
9 raise its retail prices for cheese, that it was going to
10 do so in three waves, on 4, 11 and 18 November, and that
11 retail prices for different categories of cheese would
12 be raised on different dates, and that, when she did so,
13 she knew or intended or foresaw that Dairy Crest would
14 pass that information on to the other retailers. We say
15 that is exactly what in fact happened.

16 Lisa Oldershaw says, however, that what she told
17 Neil Arthey was about an increase in cost prices only.
18 My learned friend says that the distinction between cost
19 and retail is arid, but it is only arid if my learned
20 friend accepts that not only did the processors infer
21 that they were retail prices but that she,
22 Lisa Oldershaw, knew they would so infer. If, of
23 course, Tesco accepts that then there is no room for
24 debate but we would imagine that that's not accepted.

25 In any event, leaving the point about the arid

1 distinction to one side, the Office of Fair Trading
2 submits that the information she gave to Neil Arthey
3 included information that she was going to move on
4 retail prices.

5 We say that this is abundantly clear from all the
6 evidence and we say that, in this regard, the evidence
7 here is overwhelming. I am going to give you eight
8 reasons as to why that is the case.

9 The first is that the plain reading of the email
10 indicates that what she had told Neil Arthey was retail
11 price information, and we submit that that is both
12 a matter of impression when one reads it and we submit
13 in particular also the use of the words "go up" and
14 "move". The words "go up" and "move" are a reference
15 and immediately indicate an indication of Tesco's retail
16 prices. It is not particularly natural to say that,
17 when they say -- that she will say, if she's accepting
18 just a cost price increase, that prices -- their prices
19 will go up, "All branded pre-pack will go up, this line
20 will move".

21 We have seen in other contexts, particularly the
22 Dairy Crest briefing document, the use of the word
23 "move" was a reference to move both on costs and retail.
24 Now, of course they're different authors but, in our
25 submission, that is the plain reading of the email

1 itself.

2 Secondly, her evidence is that what is in this email
3 is what she had said and not that Mr Arthey had drawn
4 inferences from what she had said.

5 Thirdly, the very document which she had in front of
6 her when she made this and the other phone calls,
7 document 64 [Magnum], was her own cheese £200 per tonne
8 plan, and expressly stated -- and interestingly I hadn't
9 spotted this in a way -- "Cost and retail" and we see
10 the word "moves", and that goes back to my first point
11 of the use of the word "move" in the email. Of course
12 in the email this is Neil Arthey's language, but you
13 have them marrying, that she is using the word "move" to
14 refer to both.

15 Fourthly, her own evidence at paragraph 102 of her
16 witness statement [Magnum], that she was informing the
17 processors so that they could run down stocks only makes
18 sense if she was telling them about cost and retail
19 prices, because it is only retail prices that could be
20 possibly relevant to the level of stocks held by
21 a processor. So we submit that, in fact, in her witness
22 statement at paragraph 102, she gives the game away,
23 it's a slightly strong way of putting it, but she
24 reveals, we say, that she must have been talking about
25 retail as well.

1 Fifthly, and most critically, a very large number,
2 if not most of the product categories she told Mr Arthey
3 about in that conversation were categories of cheese
4 that were not supplied by Dairy Crest to Tesco at all.
5 We certainly know that that applies to stilton, branded,
6 regional, Speciality, sliced and grated, and own label
7 farmhouse at the very least.

8 She did not accept the position about cottage
9 cheese, if you look at the schedule, it depends upon
10 whether in fact Dairy Crest would have been interested,
11 were dealing with the --

12 **LORD CARLILE:** Sorry, can I just have that list again?

13 **MR MORRIS:** Stilton, branded -- actually, did I miss out
14 Finest from my list?

15 **LORD CARLILE:** I had noted: stilton, Finest, speciality,
16 regional, Tesco own label, farmhouse, sliced and grated.

17 **MR MORRIS:** Yes.

18 **LORD CARLILE:** And some of branded.

19 **MR MORRIS:** Some of branded at the top, because it's all
20 branded, and we know that all branded -- brands at the
21 top of -- "branded" refers to all brands and not just
22 Cathedral City. She is telling him that all the
23 branded, including Seriously Strong, would be going up.

24 **LORD CARLILE:** The Dairy Crest items were: WeightWatchers?

25 **MR MORRIS:** Yes.

1 **LORD CARLILE:** Some of mild, medium, mature, extra mature
2 and farmhouse?

3 **MR MORRIS:** No, not farmhouse. Farmhouse is --

4 **LORD CARLILE:** Not farmhouse.

5 **MR MORRIS:** No, not farmhouse. In fact you will find this
6 in our labelling schedule, and that is one of the
7 reasons we have provided the labelling schedule.

8 **LORD CARLILE:** Right. I just want to correct my note.

9 **MR MORRIS:** Now, in our submission there was no possible
10 reason to tell Dairy Crest of the fact that Tesco was
11 agreeing to pay higher cost prices for any of those
12 categories of cheese. If you accept that this was so,
13 then it follows, in our submission, that what she was
14 telling processors was about retail prices. That is the
15 essential submission.

16 Now, my fifth reason, which is in fact linked to
17 this, is that as to the only reason proffered by
18 Lisa Oldershaw, we submit that her evidence that she had
19 mentioned these categories through inadvertence or by
20 mistake should not be accepted. It is not credible
21 evidence for the following reasons. So I'm now in
22 sub-reasons effectively.

23 The first point she says is that she puts the
24 mistake down to the pressure of work. We would suggest
25 that Ms Oldershaw was and is a -- was a highly competent

1 senior buyer. She is and was plainly intelligent and
2 highly experienced.

3 The list in the Word part of the document at 64, so
4 this is page 2 of document 64 [Magnum], is a list for
5 all cheeses for all suppliers. It was her document and
6 she must have known, and she knew, that that was a list
7 for all cheeses for all suppliers.

8 We would submit that if she was genuinely wanting
9 only to tell each supplier that cost prices were going
10 on up on that supplier's cheeses, there was no reason
11 why she would just reel off the list on the Word
12 document covering all the cheese.

13 As a related point, we would suggest that, if that's
14 what she was really intending to do in her conversation,
15 she had the means readily available to her to identify,
16 in respect of each particular supplier she was talking
17 to, the cost prices she was going to raise. And you can
18 see that because, if you go over the page to the -- if
19 you go into the spreadsheets and you go to the --
20 I think Ms Potter is already there -- the blue tab, the
21 first tab behind the blue is a list of all that
22 information by supplier.

23 She had available to her the means, when she spoke
24 to Dairy Crest, of going to page 1 and running down that
25 list for Dairy Crest, and doing the same for each of the

1 others she spoke to, who were Heler, Kerrygold,
2 McLelland, North Downs.

3 So that's the first point, that the pressure of work
4 did not -- was not a reason for why she did this and
5 that she had the means to deal with it if that's what
6 she'd intended to do.

7 The second point is this, we invite the Tribunal to
8 consider carefully what sort of mistakes she says she
9 thinks she was making. In her witness statement she
10 says that she thought -- she says she made the mistake
11 at the time, but in her cross-examination at Day 9,
12 page 83 and following, it is less clear as to what she
13 says the mistake was. It's suggested that it was only
14 later she realised that she'd made the mistake and that
15 actually she may well have intended to do what she in
16 fact did.

17 I'll just take the passage up, if I may. 9/83/11
18 I've got in my notes. Yes, this is at page 83:

19 "Question: Now, you say that this was all an error;
20 I would suggest to you --

21 "Answer: In hindsight it's an error, at the time
22 I didn't feel it was an error. But in hindsight,
23 knowing the case and everything else, yes, it was an
24 error because of what suppliers did with the
25 information."

1 Then further down at [lines] 9 and 10, I say,
2 page 84:

3 "Question: So I think you're saying there that you
4 made a mistake at the time?

5 "Answer: No, I'm saying, when I've reviewed the
6 evidence, I can see now that it was a mistake, when
7 I was writing this witness statement.

8 "Question: You see, I would suggest to you that at
9 the time you were well on top of everything. You knew
10 all the detail, didn't you?

11 "Answer: If I was well on top of everything,
12 I think that spreadsheet might have been completed."

13 So the submission I make, sir, is that it's not
14 entirely clear whether she is saying there that she
15 actually did intend to do what she did at the time, and
16 she actually realised later, once she'd looked at the
17 case, that really she shouldn't have done it because of
18 the case -- everything she knew at the time.

19 The next point about mistake and pressure is this,
20 and I did put this to her. She was not under such
21 pressure that she was unable to pick out very clearly,
22 from all this information, one line that she had to
23 identify specifically for Dairy Crest, and which
24 Dairy Crest needed immediate specific retail price
25 information, and that is the WeightWatchers point. If

1 you go back to 63 [Magnum], of course she's picked out
2 the particular price from WeightWatchers. And
3 obviously, if you go back -- I don't need to take you --
4 to the schedules, she has picked out that one price.

5 Now, that was a piece of information about
6 WeightWatchers which was not on her Word document sheet
7 so she had obviously taken the care to go back to the
8 schedules to pick out that information.

9 **MS POTTER:** Sorry. Presumably, of course, she could have
10 been asked by Mr Arthey. We don't know.

11 **MR MORRIS:** That is the case, she could have been asked.

12 We would suggest that that was information that she
13 gave uniquely to Dairy Crest and there must have been
14 variations in the information she gave to each of them.
15 If -- subject to your point, Ms Potter -- if it was the
16 case that she'd picked it out specifically, then she was
17 able to differentiate between different processors as to
18 the information she needed.

19 The next point is this, when she was first asked by
20 Tesco's lawyers to explain what she had done on
21 30 October, she gave a different account. She did not
22 say, first time around, that all she had told
23 Neil Arthey about was cost prices. She didn't give the
24 explanations which she gave in her witness statement.
25 There was no reference to mistakes being made, and she

1 accepted in cross-examination -- she said -- I'm sorry,
2 it was put to her in cross-examination, but she would
3 not accept that her explanation now, that this was cost
4 only, was different from that given in 2007.

5 In our submission, it plainly was a different
6 explanation and, in our submission, her failure to
7 accept that it was a different explanation is an
8 indication of her refusal to accept what in fact
9 happened. In our submission, she knew that she had
10 passed on retail price information and she knew that
11 there was no legitimate reason for her having done so.

12 Now, I've got two more points to make on why this
13 must have been retail, and the first arises -- if you
14 pick up bundle 2B -- from one further piece of evidence
15 to which no express reference has yet been made in this
16 case.

17 If you go to tab O, this is Mr Reeves' witness
18 statement, and we see here what Mr Reeves says about
19 what happened on the 30th. If you go to paragraph 24
20 [Magnum], you will see his evidence, given to the
21 Tribunal, when he verified the contents of his witness
22 statement, and this is his witness statement to the
23 Tribunal, not an earlier document; he was asked about
24 this by Tesco obviously in the preparation of his
25 witness statement, and his evidence is, paragraph 24:

1 "This is an email that appears to have been sent to
2 the entire Dairy Crest sales team and other
3 recipients...

4 "25. Having studied this document in detail,
5 I believe the prices referred to in the email were
6 retail prices because Dairy Crest did not supply
7 regional cheese, stilton or cottage cheese, and because
8 of the specific reference to WeightWatchers at 8.19."

9 He then goes on to explain why he thinks that it
10 might have been forwarded, and I can read that as well.

11 "It's possible that Neil Arthey could have sent this
12 email in order to boast about getting the first price
13 increase secured from a retailer as this would have been
14 considered a big achievement. The sharing of such
15 a success was very unusual amongst the sales team at
16 Dairy Crest and in ordinary circumstances I expect that
17 Tesco would have been unhappy had it known about the
18 sharing of this information so widely within
19 Dairy Crest. However [and this picks up on a point he
20 made earlier], in the circumstances prevailing at the
21 time, I do not know what Tesco would have thought and
22 this is not clear from the email."

23 Now, the evidence I rely upon as further support for
24 the proposition that this was retail prices is his view,
25 I accept that it is his view, but given objectively,

1 independently, by a witness who was called by Tesco that
2 this was retail prices and not costs carries a
3 significant weight.

4 There is one further point on this being retail
5 pricing and it's this, it is connected with strand 6,
6 which I may or may not have time to go into in great
7 detail, but it's this. In our submission, strand 6 --
8 I'll go back a step.

9 It is accepted by Lisa Oldershaw that she also spoke
10 to Tom Ferguson on the same day. It is also accepted
11 that the information in strand 6 was information that
12 she says in her witness statement, at paragraph --
13 I think it's 119 [Magnum], that was retail pricing
14 information that she gave. In our submission, I'll have
15 to check, but she was asked whether it was likely that
16 that information was given in that conversation on the
17 30th, and I think she said -- I'll have to -- I think
18 she accepted it, I'll be corrected by somebody.

19 What we submit is that that shows that, when she
20 spoke to Mr Ferguson on the 30th, she was talking about
21 retail prices, and her evidence on strand 6 supports
22 that. If she was talking about retail prices to
23 Mr Ferguson, she was also talking about retail prices to
24 Mr Arthey.

25 Now, those are the submissions on why it's retail.

1 The final submission is this. Once it is clear that
2 Ms Oldershaw had in fact told Neil Arthey about retail
3 price increases, then you can safely conclude that when
4 she did this, she intended that this information would
5 be passed on to Dairy Crest, or foresaw that this
6 information -- sorry, passed on by Dairy Crest to other
7 retailers, or she foresaw that this information would or
8 at least might be passed on by Dairy Crest to other
9 retailers, and the reason why that is is because there
10 is no -- there was no legitimate labelling reason for
11 Lisa Oldershaw to be telling him this information in
12 respect of the vast majority of cheese categories listed
13 in that email.

14 In fact, and this is not the cost point, this is the
15 labelling point, of the cheese listed in that email,
16 only two categories involve labelling by Dairy Crest.
17 One was WeightWatchers mature, and that's why she told
18 him, and the other is some but not all of Tesco's own
19 label cheddars. The reason she didn't give a specific
20 price for the own label cheddars was because that was
21 too far in the future and it wasn't necessary or needed.

22 But all the other categories, not only were they not
23 supplied but there was no possible labelling reason.

24 Now, that really concludes what I wanted to say
25 about strand 3, save in relation to the position of

1 Sainsbury's as the recipient and their knowledge. If I
2 may, I just would like to point out one thing about
3 that. Paragraph 264, subparagraph 4.

4 The OFT's case in the decision has always been that
5 Sainsbury's had the requisite state of mind as recipient
6 of the information from --

7 **LORD CARLILE:** Just hold on a second, there are a lot of
8 subparagraphs.

9 **MS POTTER:** Which page are we on?

10 **MR MORRIS:** I'm sorry, 126. What I'm dealing with now is
11 document 67 [Magnum] in fact, because that's the B to C.
12 This is the pass on to Sainsbury's.

13 We would point this out, that the OFT's case has
14 always been that Sainsbury's had the requisite state of
15 mind. Until oral closing, that point was not challenged
16 by Tesco, it's unpleaded, and we would say
17 technically -- more than technically, this is a very
18 important point in the case -- and there has been no
19 amendment to the notice of appeal, it has not been put
20 in issue.

21 So the first point is, it has never been put in
22 issue before oral closing that Sainsbury's had the
23 requisite state of mind as C, and we invite the Tribunal
24 to note that point. We deal, however, with it in
25 substance at page 136, subparagraph 19. Then we

1 explain, for the avoidance of doubt, what the OFT's
2 position is on Sainsbury's state of mind, and that is in
3 19(a) to (d), but I thought I should address that, not
4 least because the point has never been raised before.

5 I'm just going to take a few minutes now to canter
6 through the remaining strands of 2002 by reference to
7 the document -- by reference to our written closing, and
8 then I'm going to move to cheese 2003.

9 So we have -- if you pick it up at paragraph 267,
10 strand 6. This is document 70 [Magnum]. This is the
11 strand that doesn't become a strand, if you know what
12 I mean, because there's no case made about Co-op as the
13 C. But nevertheless, the OFT contends it's a very
14 important finding -- some very important findings of
15 fact to be made there. The proposition is that Tesco
16 passed on information to McLelland, and McLelland passed
17 on information to the Co-op on 4 November, and that that
18 is recorded in document 70 under the heading "What
19 I believe will happen elsewhere":

20 "Tesco
21 "[11th] random weight McLelland retails.
22 "[18th November] all own label lines"

23 The important point, which is the point I just made,
24 that I wish to emphasise orally is paragraph 271 of our
25 written closing on page 140.

1 Tesco suggests that this information was not passed
2 on by Lisa Oldershaw to Tom Ferguson, or by Tom Ferguson
3 to Stuart Meikle, relying on passages in their
4 respective cross-examination. However, it is
5 implausible for Mr Ferguson to suggest that the
6 information might have come from McLelland's spreadsheet
7 at 62A [Magnum] and not from what Lisa Oldershaw had
8 said on 30 October, because it does not match 62A and is
9 plainly a later development. That, Ms Potter, ties in
10 with your point that 62A doesn't represent the final
11 position.

12 So far as Ms Oldershaw was concerned, Tesco ignore
13 her own witness evidence and the other passages in her
14 cross-examination where she effectively admitted that
15 the retail information in 70 had come from her on
16 30 October, and there are the references to her
17 cross-examination.

18 It is admitted that neither witness had any genuine
19 convincing recollection which can defeat the clear
20 inference from the documents. In any event, it is clear
21 from the match with Lisa Oldershaw's plan and the match
22 with what was said on 30 October that the derivation of
23 this information is as the OFT suggest.

24 What we do, you will see in the document, is, in
25 respect of each strand, we set out, as Miss Rose did,

1 what we say the case is and then we deal with the main
2 points, in fact all the points that have been made by
3 Tesco in respect of that strand, and we respond to them.
4 So for example on strand 6, you see that at
5 paragraph 270, but I wasn't proposing on taking you
6 through all those.

7 Then at 273 we deal with document 69 [Magnum], which
8 is strand 5, and this is the email from Neil Arthey to
9 Lisa Oldershaw on 4 November relating to Asda. At
10 paragraph 273.2, we summarise the contents of that
11 email, and Neil Arthey told Lisa Oldershaw two pieces of
12 information. And, sir, we would stress it is very
13 important to note that this email has two different
14 elements of information to it. It's a point we've made
15 in our pleading, but we do ask you to bear that well in
16 mind.

17 The first element is that Asda would be increasing
18 Smart Price by 20p per kilo. That, we say, is clear and
19 concrete information about Asda's future retail price
20 intentions. He also told her the suggested RSPs that
21 Dairy Crest had suggested to Asda following the price
22 increase. By the latter, he was indicating by
23 implication that Asda had agreed to raise its costs by
24 £200 per tonne.

25 The point that we make about this is that the two

1 are separate pieces of information, and you can see that
2 because the Smart Prices which are referred to in the
3 second paragraph of the email do not appear in the
4 spreadsheet which is attached over, and that the
5 statement:

6 "My understanding is that Asda will be applying £200
7 per tonne to RSPs of Smart Price."

8 Is a distinct piece of information, and it is an
9 absolutely clear piece of information. It is
10 Mr Arthey's understanding, it is not his assessment or
11 his opinion or his speculation. We submit that the word
12 "understanding" means understanding gained from
13 somebody, namely Tesco, and we also submit that it is
14 clear information as to what Asda will be doing. It's
15 not in any way conditional or speculative.

16 The reason that the Smart Price information is not
17 included in the spreadsheet is because, at the time,
18 Dairy Crest did not supply Asda with Smart Price. So
19 there's -- another and second point to make is of course
20 there was no legitimate reason for Asda to have that
21 information -- sorry, for Dairy Crest to have that
22 information about Asda's prices.

23 We then deal, at paragraph 276, with Asda's state of
24 mind and we deal with that in some detail. We then deal
25 at paragraph 277 with Tesco's state of mind on receipt

1 of this information. At paragraph 277.1, we point out
2 that Mr Reeves confirmed that the purpose of Dairy Crest
3 providing this information was to make sure that Tesco
4 did not pull out of a price increase that had already
5 been agreed.

6 It's also worth going back a stage to 276,
7 subparagraph 1. This was the piece of information that
8 Mr Reeves confirmed, that he believed this disclosure
9 was inappropriate, and I think it was a question from
10 you, sir, you asked him why he thought it was
11 inappropriate, and he said:

12 "We shouldn't be sharing one retailer's intentions
13 with another."

14 And he said:

15 "We knew that was anticompetitive."

16 I think probably I'm going to put bundle -- although
17 I had this problem before, I'm going to put bundle 1
18 away in the hope that I don't have to come back to it.
19 I broke my word on that I think several times, but
20 I think we're probably into bundle 2 now.

21 We're looking at document 73 [Magnum], which is the
22 Safeway -- this is strand 4. This is the internal
23 Safeway email and the passage:

24 "... we are about to execute a market wide RSP
25 increase ...

1 "We will be having to make changes to the range on
2 the 11th and 18th ... to show our support.

3 "Our indices will remain the same, as all players
4 will be moving by the same amount on the same day..."

5 We submit that the reference to "all players" there
6 includes Tesco. Ms Oldershaw said in her
7 cross-examination that Safeway was Tesco's key
8 competitor, and we say that "all players" in this email
9 has to include a reference to Tesco.

10 If we go to paragraph 279, subparagraph 5, on
11 page 147 of our written closing, we there set out why
12 the OFT's case is that this is a reference to Tesco
13 information given to Dairy Crest or McLelland and then
14 passed on to Safeway, we say that the inference -- the
15 evidence is sufficiently strong to support the
16 inference, and we would say those factors, all those
17 factors taken together make the inference overwhelming.

18 First, Dairy Crest had passed on essentially the
19 same information about Tesco to Sainsbury's on
20 31 October. Secondly, McLelland had passed on parallel
21 information about a range of retailers to the Co-op on
22 4 November, that's strand 6. Thirdly, Dairy Crest was
23 passing further information on about Asda's proposed
24 price increases to Tesco, that's strand 4, document 69
25 [Magnum]. And McLelland was passing further information

1 about Tesco's prices to Sainsbury on the 5th, and that's
2 document 71 [Magnum].

3 Paragraph 280, subparagraph 2, and I'm just picking
4 out points that I wish to draw specific attention. We
5 refer to Tesco's arguments on this, and they argue
6 that -- Tesco similarly argues that no retail prices had
7 been communicated to McLelland by this time. We say
8 that that is wrong, and the conversation of 30 October
9 with Tom Ferguson, Tesco's waves of cost and retail
10 price movements, were explained by Lisa Oldershaw.

11 Put in a nutshell, we know by this time that Tesco,
12 Lisa Oldershaw, had told both Dairy Crest and McLelland,
13 on the 30th, about their waves, and that would have been
14 the source of the information that's passed on then to
15 Safeway by either or both of them.

16 This is a point where, when I said earlier about the
17 cumulative effect, that one can see, if you pluck this
18 out as the only piece of evidence in the case, you might
19 think it was vague and not sufficient to support the
20 inference. But when you stand back and look at
21 everything that has been happening, and you look at it
22 in the way that I have given you the detail,
23 particularly about the Dairy Crest briefing document,
24 strand 2 and strand 3, we say that this inference is an
25 inference that is plainly there to be drawn and should

1 be drawn.

2 If we then go to strand 7, which is document 71
3 [Magnum].

4 **LORD CARLILE:** Where are we in your closing? Ah, I've got
5 it, page 152.

6 **MR MORRIS:** This is the Smart Price/Value issue, and this is
7 the sentence:

8 "Asda have moved all sizes of Smart Price mild
9 cheddar to £2.69 per kilo and Smart Price mature cheddar
10 to £3.69 per kilo. This will be matched by Tesco."

11 This is information being sent by McLelland to
12 Sainsbury. In our submission, the statement "This will
13 be matched by Tesco" is a clear indication of
14 information that McLelland has received from Tesco.

15 Our submission, and I'm now at 282.2, is that this
16 must have come from Tesco. It is expressed in a clear
17 and definitive manner.

18 The next point at (b) we submit is an important
19 point, because in her witness evidence she originally
20 said she was not sure whether she had told McLelland
21 this or not. We say that that amounts to her evidence
22 being that it was a possibility that she was the source
23 of that information, and she accepted in her witness
24 statement that it was one of two possibilities. You
25 will remember that the other possibility is the basket

1 policy, that he could have understood it, inferred it,
2 guessed it because of the basket policy.

3 You will also note, however, that she changed her
4 evidence in cross-examination on that point and denied
5 that the information had come from her because she
6 realised that there was no legitimate explanation for
7 her to have provided McLelland with this information
8 about Value prices because at that point those Value
9 products were not supplied by McLelland but were
10 supplied by Kerrygold. We submit that you shouldn't
11 accept the change in her evidence from the
12 cross-examination, and that her first evidence is
13 correct, that at least she knew it was possible.

14 We then go on to say that the other possibility,
15 that it was because he knew about the basket policy, can
16 be dismissed because knowledge of the basket policy
17 would not indicate that Tesco would match by going
18 upwards, rather than by going downwards. That is dealt
19 with in subparagraph (a) over the page.

20 We make the point in (b) that -- well, in (a), in
21 respect of lines where Tesco was below Asda, the basket
22 policy did not require Tesco to rise to match Asda.
23 Although Tesco might raise Value prices to match Asda on
24 those lines in order to make more margin, it could
25 equally choose to undercut.

1 Now, you will recall that there was a passage of
2 evidence where she said, "We would -- never mind the
3 basket policy, we would always go up quickly if they
4 went up on Smart Price", but then you will also recall
5 that that point was put back to her by reference to
6 document 10 [Magnum] in the bundle which showed that, in
7 fact, in relation to economy prices, there were periods
8 of up to 40 weeks where Tesco remained lower. We would
9 submit that her evidence that she would have gone up,
10 and everybody would know that she would go up to match
11 Asda, was not credible evidence and should not be
12 accepted for that reason.

13 That deals with, or that's what I want to say about
14 strand 7.

15 Strand 8 is document 79 [Magnum]. This is the
16 conversation between Lisa Oldershaw and Jim McGregor on
17 8 November. This is the part of the narrative where she
18 starts getting cold feet because she wants to be sure
19 that Asda are going to move.

20 The first bit of this strand takes us back in fact
21 to tab 70 [Magnum] and 4 November. The information had
22 come, we say the information had come from -- the
23 information about Asda had come from McLelland, and we
24 deal with that at paragraph 284, and that is based on
25 document 70, and I don't propose to take you back to it.

1 But you will recall that document 70 lists not just
2 Tesco but also Asda and the other retailers.

3 Then the passing on of that information from
4 Jim McGregor to Tesco was in the conversation on
5 8 November, and that is paragraph 286 of our closing.
6 We make submissions there as to why, in our submission,
7 what was happening is that she had -- that he reassured
8 her that Asda were participating in the initiative.

9 At paragraph 286.3, we record the fact that, in her
10 witness statement, she accepted that "Jim may have said
11 something about Asda being likely to move soon". In
12 cross-examination she then said she didn't recall even
13 this being said, so she stepped back again. We submit
14 that the reality is that even her witness statement
15 understated what was said. She has no reliable
16 recollection and the evidence of Mr McGregor's note
17 supports the best inferences as to what was said.

18 Finally, strand 9, that's document 83 [Magnum].
19 This is the coming back down on stilton issue, and it's
20 the bottom of the first page and over the page, "Others
21 have indicated". This is dealt with at paragraph 291 of
22 our closing submissions. And we say at paragraph 292
23 that the words:

24 "Others have indicated will move back down unless we
25 follow due to moving two weeks ago."

1 than for 2002. Tesco and certain other retailers,
2 including Sainsbury's and Asda, were faced with a cost
3 price increase request by McLelland which McLelland said
4 was necessary to stabilise its margin.

5 In order to make that cost price increase more
6 acceptable, McLelland assisted those retailers to
7 coordinate a common retail price rise and pass
8 confidential future pricing information between the
9 retailers. The retailers passing on that information
10 had the requisite state of mind. From the retailers'
11 point of view, the passage and receipt of such
12 information reduced the risks of unilaterally accepting
13 a cost price increase and raising retails. In essence,
14 it created mutual confidence that the other retailers
15 would also be raising cost and retails. This was
16 inconsistent with independent conduct in the market and
17 was an illegal concerted practice.

18 We then point out that there was no express
19 commitment to pass the money back to the farmers, and
20 Tesco expressed the desire that they would but as far as
21 we are aware that didn't in fact happen.

22 Then we set out at 298 our response to Tesco's case
23 that it makes no economic sense, and we make two
24 observations there.

25 Part of the context for the events of autumn 2003,

1 and I'm going back a page, is obviously a lot of the
2 evidence you have heard, and we'll come to this in
3 a moment, relates to the question of whether complaints
4 were or were not made about what was happening.

5 Now, I'll come to it in a moment, but we would say,
6 ultimately, when you get to strands 4 and -- whatever
7 happened, when you get to strands 4 and 5, regardless of
8 what happened in relation to compliance, there was
9 passing of information to Tesco and from Tesco without
10 any reference to that issue of compliance training
11 whatsoever. So in some ways, the whole of the issue
12 about compliance is, we would submit, slightly
13 tangential. I was going to say a red herring but
14 I think that's probably -- it's too strong, but it's
15 tangential to the issues.

16 But compliance is an issue, and we do point out at
17 paragraph 296 that Lisa Oldershaw had compliance
18 training, new compliance training, in -- I haven't quite
19 got the date because I can never remember it. She had
20 it in 2003 and somebody will give me a note of when it
21 was, I think it was 28 May 2003.

22 **LORD CARLILE:** We have the point.

23 **MR MORRIS:** You have the point. We do point out that that
24 compliance training was more detailed and it pointed out
25 the two propositions that we mention at 296, that if

1 inappropriate pricing information was received from
2 other retailers a written objection should be sent, and
3 any discussions should be escalated. That is important
4 context for the 2003 -- the events of 2003.

5 We then at paragraph 299 deal with the Tesco
6 briefing document, document 112 [Magnum], a document
7 which the Tribunal has expressed interest in and which
8 we urge upon the Tribunal that that is a very important
9 document in relation to cheese 2003.

10 It is not the only document, and it is a narrative
11 description of what was going on, but it's not -- the
12 OFT's case is not wholly dependent on it, and I'm not
13 saying that in any way to reduce the fact that we do
14 rely upon the importance of it, but it is important,
15 it's not the only document, and we make a number of
16 points at 299 there about it.

17 First of all, it is a near contemporaneous document.
18 It was written I think probably about -- we think, is it
19 4 October? It was 1, 2, 3, 4 October. It was an
20 internal McLelland document. It is corroborated by the
21 events shown by the other contemporaneous documents.

22 Tesco contends that it's a piece of advocacy from
23 Mr Meikle, but we would submit that this was a document
24 written for his bosses and it would be unlikely that he
25 would make up events in it. Now, it may be said that he

1 may wish to paint himself in the best possible light
2 but, in terms of making up events, we suggest that it is
3 unlikely, not least because it was prepared for
4 a meeting that Mr Irvine was going to go to, and
5 Mr McGregor, I think, within a matter of days and he
6 would have been found out.

7 As we say in the last sentence in 2, even if it was
8 advocacy or in some way putting his -- slant is too
9 strong a word -- putting his take on events on paper, it
10 doesn't support an inference that the events recorded in
11 that note didn't occur. You will recall that both
12 Mr Irvine and Mr -- well, Mr Irvine said that Mr Meikle
13 was credible and reliable, and they both said that he
14 would have been unlikely to include false information in
15 the briefing.

16 The next or final point that I make at 299 is this,
17 that large sections -- not only do large sections of it
18 actually marry with what happens, and just by way of
19 example, if you think about the point about
20 Lisa Oldershaw requesting an explanation for the
21 justification of the cost price increase, that matches
22 exactly with what happened in relation to the documents.
23 But large sections are unchallenged, and indeed we would
24 suggest that Lisa Oldershaw herself accepted large parts
25 of the account. We further say that, of those sections

1 that are challenged now, a significant number were not
2 challenged in the response to the statement of
3 objections or the response to the supplemental statement
4 of objections.

5 I would add one other point on this. If you go to
6 document 112 [Magnum], we have had the situation of
7 Tesco itself positively relying upon that document in
8 relation to the story about Seriously Strong. Now, I'm
9 not going to make arguments about what is sauce for the
10 goose is sauce for the gander, but it is evidence, we
11 submit, that should be accorded substantial weight. The
12 fact that Tesco themselves seek to rely upon it only
13 goes to support that proposition.

14 **LORD CARLILE:** The date of this document has to be at the
15 latest 3 October, doesn't it, because it refers to "next
16 Monday"?

17 **MR MORRIS:** Yes, I'm saying that's right.

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

19 **MR MORRIS:** That's the meeting next Monday, is it?

20 **LORD CARLILE:** So it comes probably after 111 [Magnum]?

21 **MR MORRIS:** I'm just looking at the --

22 **LORD CARLILE:** I'm just wondering if we can place it before
23 or after 113 [Magnum], that's why I was picking on the
24 date.

25 **MR MORRIS:** "This morning Lisa has scheduled a meeting with

1 her and John Scouler for next Monday", next Monday being
2 the 6th, is that right?

3 **LORD CARLILE:** Yes.

4 **MR MORRIS:** "Tuesday afternoon I spoke..."

5 **LORD CARLILE:** You see, if you look at 113 --

6 **MR MORRIS:** Yes, that's the 2nd, which is the Thursday.

7 **LORD CARLILE:** -- there is a basis, I suppose, for saying
8 that it would follow 112, isn't there?

9 I'm waiting for Mr Raphael to shake his head because
10 I know he's done a lot of analysis.

11 **MR MORRIS:** Yes. The first point he makes is it's probably
12 not the 1st, because he says:

13 "On Tuesday morning I had a discussion with Lisa..."

14 And he would have said "yesterday" rather than --

15 **LORD CARLILE:** So it's either the 2nd or the 3rd, isn't it?

16 **MR MORRIS:** I think we'd agree with that.

17 **LORD CARLILE:** Thank you. That helps me anyway.

18 **MR MORRIS:** That's the background. Then we have the five
19 strands, and you get to paragraph 300, strand 1, and we
20 actually divide strand 1 -- I never quite know in my own
21 mind whether the events of 4 September are strand 1.
22 But strand 1 essentially has two elements to it, it has
23 the conditional indication given by Tesco on 4 September
24 at the meeting that Tesco would raise its prices if
25 others did. That you get from the:

1 "We would work to increase retail prices across the
2 market to maintain retailer margin."

3 In fact, you get it clearest from 303, subparagraph
4 1, that in response to McLelland's proposal
5 Lisa Oldershaw, this is on 4 September, indicated that
6 Tesco would in principle accept a cost price increase
7 but that its willingness was conditional upon McLelland
8 working to increase retail prices across the market to
9 maintain retailer margin. This meant in context that
10 Tesco would accept a cost price [increase] if it had
11 confidence that other retailers would be increasing
12 theirs.

13 Subparagraph 2, Ms Oldershaw denied this was an
14 accurate record of what was said but it's suggested that
15 the contemporaneous documents are the more reliable
16 account.

17 That's the first part of the events of strand 1.
18 Then what we have is we had the explanations on
19 12 September. Do you see at paragraph 304 that, at the
20 meeting of 4 September, Lisa Oldershaw's initial
21 indication was accompanied by a request that
22 Stuart Meikle provide more detailed economic
23 explanations. This, we say, is a clear example of what
24 happened matching the account of Mr Meikle, because
25 that's exactly what he did at document -- is it 103,

1 106, where they gave the explanation. It's not 103.
2 Somebody will tell me the document number in a moment.

3 Yes, 110 [Magnum] is the explanation on
4 12 September.

5 Then you get to 26 September, and 26 September is --
6 this is the indication that Tesco -- that Asda would be
7 moving prices, and that is -- one gets from the Tesco
8 briefing document. I'm now at paragraph 308. On
9 24 September, Stuart Meikle emailed Lisa Oldershaw and
10 asked her to confirm new RSPs. In response she called
11 him on the 26th, that's Lisa Oldershaw calling
12 Stuart Meikle, and in that conversation he told her that
13 it was McLelland's understanding that Asda would move
14 retail prices from the 29th. That is then subparagraph
15 1 of 308.

16 A key point here is that that sentence in the Tesco
17 briefing has got two elements. One, it has the
18 statement that Mr Meikle told Lisa Oldershaw that Asda
19 would move, and then it's got the statement that she
20 said, that being the case, she would enter her new case
21 costs.

22 Subparagraph 2, Tesco does not deny that
23 Stuart Meikle transmitted this Asda future retail
24 pricing information to Lisa Oldershaw as recorded in the
25 Tesco briefing. Lisa Oldershaw accepts this and denies

1 only the second sentence. So that there is the passing
2 of the acceptance that Mr Meikle gave Lisa Oldershaw
3 information about Asda's future retail pricing
4 information.

5 What she did dispute was the second part, that's
6 subparagraph 3, where she denies in her witness
7 statement, she said that being the case she would enter
8 her new case costs. We submit that in that respect the
9 evidence in the briefing should be preferred, not least
10 because, as we say at subparagraph 3(a) on page 174,
11 this was a point she had not made in the RSO and RSSO.

12 Then you will see, I just invite you to note
13 footnote 740, you will remember that there was an
14 intervention by Tesco's counsel when that question was
15 put and it was suggested that she had denied the passage
16 in relation to case costs being entered in the RSO. We
17 submit, on the basis of footnote 740, that that was not
18 the case. The question was properly put and the passage
19 in the RSO was a different passage.

20 Now, 309 is the proposition that the information had
21 come from Asda, and we point out that Tesco now concede
22 in their closing that this is possible. We submit that
23 it had been passed on by Asda to Tom Ferguson on
24 24 September, and you see that from document 106
25 [Magnum].

1 Then we deal with Asda's intent at paragraph 310, or
2 state of mind.

3 Then we deal at 312 with Lisa Oldershaw's state of
4 mind as the recipient, and we point out yet again that
5 her continuing evidence that she paid no attention to
6 what other retailers were likely to do is not plausible,
7 and that goes back to the speculation point. We do
8 submit at paragraph 312.4, on the basis of what
9 Mr Meikle recorded, that being the case, that there's
10 a strong case to infer that she did, by making the
11 connection, she did have the relevant knowledge that the
12 information had been released by Asda.

13 That's all I wanted to say about strand 1. Can I
14 move on to strand 2.

15 Strand 2 is the pristine label point. I'm at
16 page 178, paragraph 314, and I'm at document 110
17 [Magnum]. In our submission, that email is an email
18 pointing out that copies of the labels have been faxed,
19 Sainsbury's Isle of Bute. Our submission, although we
20 don't actually have the labels, our submission is that
21 those were pristine labels and, as they were pristine
22 labels, this was future pricing information.

23 You will recall the distinction that pristine labels
24 is taking something off the production line, something
25 that's not in store, and that is an indication that it's

1 not in store. We point out that, at the outset, Tesco
2 admitted, and rightly admitted, that this was
3 inappropriate information from McLelland about
4 a competitor's future intentions.

5 Obviously we also know that Lisa Oldershaw's
6 evidence is that she believed they were pristine labels
7 and her evidence is it had put her on notice. It is in
8 respect of this, she says, that she complained. We will
9 invite you in a moment on the complaint issue not to
10 accept that evidence, but we do invite you to accept
11 that she recognised that these were pristine labels and
12 that that is an indication that these were not in store
13 but future prices.

14 315, we deal with Tesco's argument that the prices
15 were already in store. And at 315, paragraph 2, we say
16 that it is clear that on Thursday 25 September packing
17 had still not started for Sainsbury's random weight
18 cheeses because, on that date, Calum Morrison was still
19 chasing Sainsbury's for their retail prices. There is
20 no evidence that Sainsbury's responded before the
21 following week. Again, going to the general point about
22 time lag, we would suggest they wouldn't have been in
23 store by then.

24 315.4 is a point I just draw your attention to,
25 partly in the light of the question that -- that deals

1 with the question that the Tribunal asked in the course
2 of Miss Rose's closing about the meaning of "effective
3 from" in document 109 [Magnum]. I recall that, sir, you
4 asked Miss Rose and she said "effective from" means in
5 store. We submit that "effective from" doesn't mean in
6 store but probably means either the date from which the
7 packing starts or the date from which the price is
8 effective in the system, it doesn't mean the date of the
9 first delivery, and we would submit that "effective
10 from" -- yes, we go back to 106 [Magnum] and make
11 a cross-reference to 106 where it refers to "effective
12 from Monday 29th". On that document, the word
13 "effective", we would submit, cannot possibly have meant
14 the prospect of delivery occurring by the time of
15 Monday.

16 We would invite you to look at 109 in the context of
17 106 to reach a conclusion as to what "effective from"
18 means.

19 **MS POTTER:** Can I have one -- has anyone checked whether
20 there tended to be staggered increases, ie were all
21 shops getting the cheeses at the same time or were there
22 some that were priority over the others?

23 **MR MORRIS:** I have no --

24 **MS POTTER:** No idea?

25 **MR MORRIS:** No, I will get an answer, but you have stumped

1 me on that one. I'm not even going to --

2 **MS POTTER:** Don't worry, it's not that important. One
3 suspects that it probably is the larger ones that are
4 going to have a bigger through-put and therefore they'll
5 get it quicker, but I don't know.

6 **MR MORRIS:** Yes. I don't know.

7 **LORD CARLILE:** We just don't have evidence.

8 **MS POTTER:** We don't have evidence either way, that's fine.

9 **MR MORRIS:** I just wonder. There's certainly some reference
10 to these prices have been seen in particular stores,
11 isn't there?

12 **LORD CARLILE:** I can see a contrary argument, it might be
13 possible to deliver smaller amounts more quickly.

14 **MS POTTER:** Yes.

15 **MR MORRIS:** Paragraph 316 deals with the issue that -- or
16 the evidence of Ms Oldershaw that she complained to
17 Stuart Meikle about these labels by telephone, and that
18 she complained at the time, on the 30th or around the
19 30th.

20 Just let me rather go off piste and just make some
21 oral submissions and I'll come back to the points in
22 writing.

23 We submit that you should not accept that she did
24 actually make a complaint to Mr Meikle. First, there is
25 no written evidence that she did so and, given her

1 compliance training that she had recently had, one might
2 have expected that.

3 Secondly, neither Mr Irvine nor Mr Ferguson have any
4 recollection of receiving any complaint about these
5 particular labels.

6 Thirdly, no one other than Ms Oldershaw has any
7 recollection of the issue having been raised at the
8 meeting of 6 October. You will recall that her evidence
9 about what happened at 6 October is not merely that
10 there was the general push-back, if I can use that, the
11 general response of Mr Scouler, but her evidence was
12 that she specifically raised the issue of the labels at
13 that meeting, and you will recall that the witness
14 statement of Mr Irvine, who was specifically asked about
15 that, I think in his first witness statement, was that
16 he had no recollection of that happening.

17 The second observation on that is Mr Scouler, his
18 witness statement did not address it at all, which is
19 a bit odd given that it must have been live to those who
20 were taking the witness statements that it was an issue.
21 It was for that reason that I specifically asked him,
22 because I wanted to -- in cross-examination, an open
23 question about that issue. His evidence was that he had
24 no recollection of the labels issue being raised at
25 6 October. We would invite you to find that it wasn't

1 raised at 6 October.

2 I then asked him about whether he had any
3 recollection of her having raised it before the meeting,
4 and you will remember, and I haven't immediately got
5 that reference to hand, that he indicated initially that
6 he didn't think he had a recollection, and then there
7 was a long pause in the evidence and then he seemed to
8 suggest that he might have a recollection. Somebody
9 will give me the precise passage, I suspect it's...

10 We'll find the reference, but we would suggest that
11 actually not only did he have no recollection of it
12 being raised at the meeting, but he also had no
13 recollection of it being raised before the meeting.

14 The next point in this connection is, of course, she
15 carried on receiving information from Mr Meikle after
16 this, both in relation to strand 4 and in relation to
17 strand 3, and yet she never made any objection. Now, if
18 she had really, genuinely, rang up and complained and
19 said, "Do not send me these labels. What are they
20 doing?", in our submission, she would have at the very
21 least have recorded some objection to the further
22 receipt of information.

23 Now, that leaves the question of why Competition
24 Commission is mentioned in document 110A [Magnum], and
25 I'll come back to that if I may in a moment. Can I just

1 give you the reference to Mr Scouler's evidence about
2 that. It's Day 12, page 78. At line 5, that's after
3 I have asked about the meeting:

4 "Question: ... I've asked you about the meeting.
5 Do you recall Lisa Oldershaw mentioning anything about
6 labels?

7 "Answer: No, I don't, sir.

8 "Question: Do you recall her mentioning anything
9 about labels to you before the meeting?"

10 In fact, as Mr Raphael has just pointed out to me,
11 there was a pause then, first. He said:

12 "Answer: I can't fully recall, sorry.

13 "Question: Given that you thought for a long time,
14 I'm suggesting that you have no recollection of her
15 mentioning that?

16 "Answer: The reason why I may recollect it is that,
17 in the briefing document that I got to support that
18 meeting, there was a reference to competition training
19 which is very unusual ..."

20 Now, in our submission, both in the light of the
21 evidence given and the manner in which he gave it, we
22 would submit that he did not have any actual
23 recollection of it having been raised by Ms Oldershaw
24 before the meeting, and actually my learned junior
25 points out that I should draw to your attention the last

1 three lines of that answer:

2 "... I'm trying to understand why that may have come
3 from that basis [whatever that means], or it may not
4 have come from that basis, I just can't fully remember,
5 sorry."

6 **LORD CARLILE:** I've read those lines and I must say I was
7 puzzled as to their meaning. Whatever inference one
8 draws, I'm not sure we learn much except that they show
9 some uncertainty perhaps.

10 **MR MORRIS:** We would say two things in response to that. We
11 would say actually they show that he didn't have any
12 recollection of that happening.

13 **LORD CARLILE:** Maybe.

14 **MR MORRIS:** Secondly, we would say this, sir, that there
15 were a number of occasions when Mr Scouler did give
16 answers which were difficult to comprehend in terms of
17 the language used.

18 There was one answer where you asked him to answer
19 it again because you didn't quite understand what he had
20 said, and we would suggest that that was an indication
21 of somebody at least who had very little recollection,
22 or was not perhaps being as direct in the answer as he
23 might have been.

24 It's a matter for you, obviously, to make that
25 assessment. But these are important points, and this is

1 a point which has been flagged from day one, and it's
2 not as if it's a new point. It wasn't in his witness
3 statement. In those circumstances, we do submit that
4 there is insufficient evidence, and that's an
5 understatement, to establish that there was an actual
6 complaint by Lisa Oldershaw to Mr Meikle about those
7 labels.

8 We then go, if I may, to strand 3, and I should say
9 we deal with that in more detail at 316. We then go to
10 strand 3, and strand 3 is important. It's document 115
11 [Magnum]. Because this is the beginning of the
12 spreadsheets and the old/current issue, or the
13 current/future/old, my words are probably getting a bit
14 garbled by this stage.

15 If you go to 114 [Magnum], the reason it is
16 important is we have the spreadsheets sent twice, and
17 strand 4 is the second time, but the origin of this
18 spreadsheet. 114 is the request by Lisa Oldershaw
19 plainly asking for information about what retail prices
20 are currently at.

21 What you get at 115 is an email back on 2 October,
22 this is strand 3, which is:

23 "A matrix of our pre-pack and deli brands showing
24 the prices across the multiples. I have included the
25 old/current retail and the new retail price where

1 relevant."

2 Now, that sentence, and this is paragraph 322.4 of
3 our closing, is a very important sentence in our
4 submission, because what you have here is you have
5 a request at document 114 by Lisa Oldershaw for current
6 prices, and you have an answer where Mr Meikle gives
7 more than that, he gives current and he gives new.

8 The fact that in the narrative he describes the old
9 as current and the new not as current is, in our
10 submission, highly significant when you come to look at
11 the matrix that is attached, where you have old retail
12 and new retail.

13 **LORD CARLILE:** I find that proposition a little difficult at
14 first blush, Mr Morris, because we have the words
15 "become visible" in document 115, and we also have some
16 blanks which would suggest consistency with those words,
17 ie that they're not yet visible. I mean, at first
18 blush, visibility might be taken to refer to in-store
19 prices.

20 **MS POTTER:** And that you would have, yes, old and new --

21 **MR MORRIS:** I don't deny that that sentence -- I understand
22 why you say about that sentence, why you say what you
23 say, and you see what our case is about that, that
24 "visible" means updated, so the prices will be updated
25 in the store, the ones that are already in there; it's

1 not the filling in the blanks, it's those that are
2 already in there. As they become visible in store, we
3 will update what we've given you in the new column. So
4 the new column is new but not in store, future, and we
5 will update the column when things become visible in
6 store.

7 But I understand, I accept that the visibility
8 aspect, I see why you say what you say. But we say,
9 actually, the overriding point to be taken from that
10 email is the previous sentence about old, current and
11 new, and in interpreting those two columns on the next
12 page, where you have old retail and new retail. If you
13 ask yourself why he put old, current and new in that
14 email, in the context of the request that had been made
15 to him, we submit that he is there telling
16 Lisa Oldershaw that the old prices are the current
17 prices and the new are not yet current, and that he is
18 responding, "I'm giving you some old and some new in the
19 columns and I'm telling you that, of those two sets of
20 prices in the columns, the thing that is current, in
21 store, is the old column, and the other column is new
22 new, as in future, not in store".

23 We make this point in paragraph 322.4 and we make it
24 again in 322.7, and we also make the point that Tesco's
25 first response to this, this is at 7(d) on page 186, is

1 that the information transfer was inappropriate, and the
2 footnote refers to that 30 September, 2 October and
3 6 October. In our submission, there was a recognition
4 at that point that these were future prices.

5 We then, in the story, we go to the meeting of
6 6 October. I've already dealt with it in some respects.
7 We also go to document 110A [Magnum] which is at -- yes,
8 document 110A is at tab 110A surprisingly.

9 **LORD CARLILE:** We're all getting tired now, Mr Morris.

10 **MR MORRIS:** I'm sure you are.

11 If you just bear with me a moment. Document 110A.
12 At paragraph 323 we point out that there is uncertainty
13 about this document, that Tesco contends it's a single
14 document produced before the meeting, and we have
15 suggested that it is possible that it may have been
16 produced after the meeting or that the "Points" section
17 is a subsequent addition. We there make points about --
18 particularly about the Seriously Strong issue and the
19 fact that no decision had been taken before the meeting
20 that --

21 **MS POTTER:** Sorry, just one quick thing. 323, "Tesco have
22 recently produced 110A". My understanding is that it
23 has always been there in the bundles, so it was in the
24 original submission of papers?

25 **MR MORRIS:** Sorry?

1 **MS POTTER:** I understood that it was in one of the original
2 responses.

3 **MR MORRIS:** Yes.

4 **LORD CARLILE:** We know it was in a computer system anyway.

5 **MR MORRIS:** It was an annex to the SO, but nobody had found
6 it, but it was then added after the original appeal when
7 Tesco had another look through and --

8 **MS POTTER:** The documents that were annexed to the SO, so it
9 was in the OFT file.

10 It's just that saying it's been "produced" looks
11 a little bit odd.

12 **MR MORRIS:** Yes, my junior suggests that we perhaps change
13 the word to "have only recently been relied upon" rather
14 than "recently produced" to be more accurate.

15 **LORD CARLILE:** You will have to forgive an old hack's point,
16 Mr Morris, but it seems to me that, if this document had
17 been created in two parts, then it's pretty unlikely
18 that the manuscript amendments would have appeared at
19 the bottom of the sheet and not immediately after the
20 text, unless of course the manuscript was applied after
21 the document was changed, in which case... it's pretty
22 speculative --

23 **MR MORRIS:** It is speculative but we do suggest -- I'm not
24 going to labour the point, you have the points we've
25 made, and we've made them in submission, we've put them

1 in cross-examination. But it is not immediately -- it
2 is not clear on the face of the document --

3 **LORD CARLILE:** But to coin a phrase, this is not your very
4 best point in the case, to be frank.

5 **MR MORRIS:** Very well. I will hear the Tribunal's --

6 **LORD CARLILE:** And I think I speak for us all on this.

7 **MR MORRIS:** Let me then make this point about the reference
8 to Competition Commission training in it which is --
9 I said a moment ago I would come back to that point,
10 when you come to the labels point. We do strongly
11 submit this. If you are satisfied that this document
12 was a document before the meeting, it does not follow
13 that the reference to "Competition Commission training
14 required".

15 **MISS ROSE:** "Desperately needed".

16 **MR MORRIS:** "Desperately needed", indeed, that's what it
17 says. It does not follow that this is an indication
18 that Ms Oldershaw had made the complaint to Mr Meikle.
19 It may indicate a number of things, it may indicate the
20 code of practice point, and it may also indicate that
21 she had a concern about it because she'd noticed it was
22 future. But that does not establish that she had
23 mentioned the labels point directly back to Mr Meikle,
24 that she had complained about it.

25 Of course, Tesco rely very heavily on that one

1 sentence as substantiating the fact that a complaint was
2 made, and we say that just does not follow. She may
3 well have been -- she'd had her training, she knew she'd
4 received a label which was inappropriate, she may at
5 that stage have been escalating it internally. She may
6 have been. But it does not establish, and we do invite
7 you to consider carefully all the evidence about this
8 complaint about the labels in some detail, and we say
9 the preponderance of the evidence in the light of all
10 the points I've raised with the Tribunal should lead you
11 to the conclusion that no such complaint had been made.

12 It is stark that there is no reference by anybody
13 else to those complaints having been made, let alone
14 there's no documentary trail. One might have thought
15 that Mr Irvine would have been aware of it.

16 We then get to the meeting of 6 October which I've
17 largely dealt with because, to the extent that -- well,
18 I've mentioned the label point. The evidence suggests
19 that Mr Scouler said something about competition
20 training, we accept that, but the evidence, and we ask
21 you to find, that he said that because Mr Irvine said
22 something which put him on guard about it. He mentioned
23 something about the retail prices of others, and at that
24 point Mr Scouler said something in response about the
25 requirement to be cautious, the competition law issues

1 arose and it was inappropriate. But we do suggest, as
2 I've said a moment ago, that that is not the same as
3 a complaint on the labelling issue.

4 The other point we would make about that meeting was
5 we ask you to note that there was a change of position
6 by Tesco at the meeting in relation to accepting the
7 cost price increase, and that is perhaps one of the
8 mysteries in the case. I think, Ms Potter, you raised
9 it in questions of Miss Rose. Because what we have is
10 the evidence suggests that the two issues of
11 Seriously Strong and the cost price increase were
12 linked. Then you get to the meeting and they become
13 delinked and Seriously Strong gets put off to a later
14 date and the cost price is accepted.

15 We also have the fact that -- I'm trying to think of
16 the dates now -- 24 days earlier, the underlying
17 explanation for cost price increase had already been
18 provided. So something changed at that meeting, and we
19 know that, and the decision was made: we'll accept the
20 cost price increase and we won't -- we'll park the
21 Seriously Strong. It was because the Seriously Strong
22 issue was subsequently -- was parked, and all the
23 evidence says that, Mr Irvine says it, and Mr Scouler,
24 that I raised this possibility, and it was this that put
25 us on to it, that document 110A might have been

1 a subsequent document because that records a decision
2 having been made. I won't go back to it but that is how
3 the point occurred.

4 We then get to strand 4, and strand 4 is document
5 118 [Magnum]. In our submission, that is a very strong
6 document because it encloses a spreadsheet of Asda
7 prices, so it's somebody else's prices and, in our
8 submission they are future prices, and I know we have
9 got the same old thing about the columns old and new,
10 but we have a statement by Mr Meikle that these are new
11 retail prices that Asda will run. We make the point,
12 and we reiterate the point, that that email is to be
13 read in stark contrast with the email that he sent one
14 hour and 52 minutes earlier about other Asda prices
15 which are plainly in store or established prices because
16 he says:

17 "These prices are taken from the Asda website. We
18 will buy some product from store this morning and I can
19 fax through the receipts [that's till receipts] to you
20 as confirmation."

21 That is, in our submission, in stark contrast to the
22 information that he is sending at 118. We submit that,
23 if these prices were in store, he would have been saying
24 broadly the same thing: these are taken from the website
25 and in any event we'll get you some till receipts. But

1 he doesn't say that. The very fact that two emails sent
2 so close in time to each other say such different things
3 is additional corroborative support to the language of
4 the email.

5 It is also the case again that this is something
6 that, in the response to the statement of objections,
7 Lisa Oldershaw verified as being an inappropriate
8 communication.

9 We then have the whole issue about documents 116A to
10 116C [Magnum] which tracks the sequence of events from
11 the instruction from Asda to 7 October, and we do invite
12 you to consider documents 116A to 116C with some
13 particularity, and we submit, as we set out in some
14 detail at paragraph 337 of our closing, we submit it's
15 highly unlikely and perhaps impossible that those prices
16 could have been in store by the time of the 7 October
17 email at 118 [Magnum].

18 We have already invited you not to accept
19 Mr Ferguson's explanation and that the documents are
20 very powerful evidence that this was an instruction that
21 came on the 3rd and that there was practically no
22 prospect of those new prices being in-store prices by
23 the Tuesday morning at 10.47.

24 Documents 116A to 116C are powerful support for the
25 Office of Fair Trading's case on strand 4, and the

1 reason that this whole change of evidence emerged or
2 change -- new explanation emerged about the time it
3 takes to get things from an instruction to being in
4 store was because actually those documents show, quite
5 plainly, that that just could not have happened. We go
6 in some detail -- we would invite you to consider
7 paragraph 337 in all its detail.

8 That, I believe, takes us to strand 5, and that is
9 document 123. It is worth looking at document 121
10 [Magnum] first. You have 7 October -- also this is
11 "disclosed, having received" in its most obvious form.
12 7 October we have Asda's future prices coming from
13 McLelland, and then 8 October we have an email from
14 Stuart Meikle to Lisa Oldershaw which evidences
15 a conversation between the two of them. He then sends
16 an "updated attached spreadsheet on all the points we
17 discussed".

18 Now, there is an important point here in relation to
19 deli prices, and that is the point made at 343,
20 paragraph 4, that's on page 198. The point is this,
21 just working backwards, the point that's made by Tesco
22 in relation to document 123 [Magnum], and perhaps I jump
23 ahead, is that the spreadsheet that is attached to 123,
24 which is Lisa's agreement to the spreadsheet that
25 Stuart Meikle has sent her, has the words "on hold" in

1 relation to deli on it. You'll recall the point.

2 She says that that shows that -- she says that that
3 shows that "I didn't disclose anything about my
4 intentions in relation to deli". She also says that
5 this spreadsheet had been sent by Stuart Meikle and,
6 insofar as this spreadsheet included originally
7 information about deli, that could only have been
8 Stuart Meikle's proposition and nothing to do with her,
9 that she didn't impart information.

10 If you go back to --

11 **LORD CARLILE:** Before we go back to anything, can I just ask
12 you to remind me, and it may be the time of the
13 afternoon, in the middle of the page in 121, there's
14 a sentence:

15 "As discussed, I will inform Sarah the day before we
16 supply any of these lines at the new retail prices."

17 Who is Sarah?

18 **MS POTTER:** She's an admin assistant I think.

19 **LORD CARLILE:** I just wanted to check it wasn't another
20 Sarah, because there is a Sarah at Sainsbury's?

21 **MR MORRIS:** That's who I thought, but --

22 **LORD CARLILE:** It's not, right. I just wanted to be sure.

23 **MR MORRIS:** I'm going forward and then coming back because
24 I'm dealing with the point that document 123 [Magnum]
25 has in its spreadsheet attached, in the deli line, which

1 is in the middle of the page, a price for
2 Seriously Strong white, eight times 2.5 kilograms, with
3 a price of £6.83 and an "on hold" against it. Are you
4 following that --

5 **MS POTTER:** It's a very difficult document to read.

6 **MR MORRIS:** It is.

7 **LORD CARLILE:** It's very small.

8 **MR MORRIS:** It's the spreadsheet, and it is about just over
9 halfway down the spreadsheet. You'll see two
10 Seriously Strong, Ms Potter, Seriously Strong lines,
11 Seriously Strong coloured eight times 2.5 kilograms and
12 Seriously Strong white eight times -- that may be six
13 times rather than eight times.

14 I don't know if you have found the line.

15 **MS POTTER:** I have the column, I can't really see the
16 figures.

17 **MR MORRIS:** If you read across you will see that when it
18 comes to the "New Retail Price" column, you will see
19 that the Seriously Strong coloured has got nothing in it
20 and "on hold", but the Seriously Strong white has got
21 6.83 in it but "on hold".

22 The point that is made by Tesco is, first, the 6.83
23 was not something that Lisa had discussed but was only
24 Stuart Meikle's suggestion, and the "on hold" was
25 something that Lisa had decided, and she had decided,

1 "I'm not dealing with deli". The combination of those
2 two propositions supports Tesco's proposition that no
3 information at strand 5 was imparted about deli lines.
4 The reason that is important, so Tesco say, is that it
5 would mean that all the other information had
6 a labelling purpose.

7 Now, we say labelling purpose or no labelling
8 purpose in respect of the random weight lines, if you're
9 sending this information two days after you've received
10 Asda's information it's "disclosed, having received" in
11 any event, and that is sufficient to establish knowledge
12 or foresight that it would be passed back.

13 But dealing specifically with that deli point, we
14 rely on what goes on before that at document 121
15 [Magnum], because at document 121 you see the origin for
16 the proposal of that figure of 6.83, I think. This is
17 where, at this time of the day, I might think I'm right.

18 The origin of the figure for deli is a spreadsheet
19 that Stuart Meikle sends at 12.23 on the 8th, the day
20 before. That's the line I was -- just above the line
21 that you were looking at, sir:

22 "Following our conversation I have updated the
23 attached spreadsheet on all the points that we
24 discussed."

25 **LORD CARLILE:** That's three quarters of the way down the

1 page, isn't it? 683.

2 **MR MORRIS:** Sorry, are you looking at the spreadsheet or the
3 email?

4 **LORD CARLILE:** The spreadsheet. Is that the one with the
5 41.68 per cent beside it?

6 **MR MORRIS:** Yes, that's the one I think I'm looking at.

7 It says "Suggested new retail to maintain percentage
8 margin", and that's a deli price.

9 The point we make on this is that this is evidence
10 that they were discussing not just random weight but all
11 the prices and that, even though he had inserted it, it
12 was inserted after their discussion, and that they had
13 been discussing the prices in this spreadsheet on the
14 8th and that, therefore, she was discussing her deli
15 prices with Stuart Meikle on the 8th, and that that is
16 an indication that she was passing on or -- agreeing is
17 perhaps the wrong word, but she was discussing deli
18 prices when she had no labelling reason to do so.

19 So that is, we submit -- the other point we say on
20 that is this, if you go to 123 [Magnum], and this is
21 a point I put to her, she says:

22 "Costs on Seriously Strong pre-packs [on the dates]
23 with the exception of SS deli as I need to discuss."

24 So we say the "on hold" bit isn't a "I couldn't
25 possibly talk about retails with you on this", it's just

1 for some reason, which I asked her about but I'm not
2 sure I got an explanation, but for some reason the deli
3 discussion had been put on hold. It's not evidence that
4 the deli discussion never happened or would not happen.

5 In any event, sir, on strand 5, we say, for the
6 reason I've given, that this is perhaps a side issue
7 because we say the labelling justification for the
8 random weight is not such as to lead you to conclude
9 that she didn't have the requisite state of mind because
10 of what she had just received.

11 Can I just take instructions for one moment.

12 Finally on strand 5, there's one other point that we
13 mention, and that is in relation to the passing of the
14 information by Asda to McLelland, and this is -- sorry,
15 by McLelland to Asda, and this is addressed at
16 paragraph 346 and following of the closing submissions.
17 I am not going to take you through that but the point is
18 this, in Tesco's skeleton, there is an argument about
19 the average price. If you go to 346.2, you will see
20 that the evidence relied upon relates to Asda about
21 Tesco has now moved to increase retails on own label,
22 Value and territorials have moved 23p, cheddar has moved
23 on average 35p per kilogram.

24 Now, Tesco make the point that the average was not
25 35p in their skeleton, and in this, the remainder of

1 that document and those paragraphs, we respond by giving
2 some analysis of the data to show that it was or was
3 close to 35p. That becomes apparent when you consider
4 the materials that we set out there in our closing.

5 Mr Raphael is now going to tell me the following,
6 that as far as trickle-through into different stores is
7 concerned, there may be some hints at documents 81
8 [Magnum] and 82 [Magnum] but the position is not clear.
9 I haven't looked at those documents but you might wish
10 to note ...

11 **LORD CARLILE:** We have the point noted.

12 **MS POTTER:** Absolutely.

13 **MR MORRIS:** Sir, those are my submissions on strand 3 (sic)
14 and before I sit down I would just like to make some
15 closing remarks about the case as a whole.

16 In this case, in the course of these past few weeks,
17 you have heard evidence from oral witnesses. Each has
18 given their own account of events, and their account of
19 events are different and varying as to what in fact
20 happened at the relevant times. Ms Oldershaw and
21 Mr Scouler gave different accounts from that of
22 Mr Reeves, for example on confidentiality, and on the
23 meaning of document 63 even [Magnum].

24 Mr Ferguson and Mr Irvine gave varying accounts, for
25 example about who carried what stock at various times.

1 Even Mr Scouler and Ms Oldershaw appeared to disagree on
2 fundamental aspects of the case, for example the
3 absorbing of the -- the processors' absorbing of the
4 2p per litre, and about whether or not finding out that
5 others would not participate would be relevant and about
6 what happened at the 6 October meeting. Also individual
7 witnesses themselves gave differing accounts at
8 different times.

9 Now, these things, sir, you may think are not
10 surprising. We go further and suggest that in certain
11 instances they indicate the unreliability of particular
12 aspects of evidence.

13 But the issue is what is it that assists you most in
14 reaching your conclusion as to what did in fact happen
15 at the relevant times? Here we come back to where
16 I began. What assists you most, in our respectful
17 submission, is the documents. The documents are there.
18 They are, as objects, neutral. They speak for
19 themselves, we submit, and they speak from 2002 and
20 2003. They are numerous and we submit that, in the
21 context, they are strong and compelling. It is the
22 OFT's submission that when you consider all the
23 evidence, giving due and proper weight to the various
24 elements and types of evidence you have heard, you can
25 be satisfied that Tesco did participate in the concerted

1 practices relating to the cheese 2002 initiative and the
2 cheese 2003 initiative. In those circumstances, we
3 invite the Tribunal to dismiss the appeal.

4 Unless I can assist the Tribunal any further, those
5 are the OFT's closing submissions.

6 **LORD CARLILE:** No, thank you very much, and our thanks to
7 all counsel.

8 We'll adjourn now. Can I express the hope that
9 everybody enjoys a wonderful Jubilee. As the, I'm sure,
10 oldest person in this room, I would merely remind you to
11 reflect upon the fact that competition law had barely
12 been thought of, ITV had most certainly not been thought
13 of, and it occurred to me this morning that it was
14 60 years ago today that -- I was a very, very small
15 boy -- my parents acquired their first television so
16 that we could watch the Coronation, and it cost a great
17 deal of money.

18 So have a very good weekend, with those closing
19 thoughts.

20 (4.15 pm)

21 (The hearing adjourned until a later date)

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1 INDEX

2 Application by MISS ROSE4

3

4 Submissions by MR MORRIS8

5

6 JUDGMENT11

7

8 Closing Submissions by MR MORRIS13

9 (continued)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25