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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1008/2/1/02

Sheriff Court
Chambers Street
Edinburgh EH1 1LB

13th January 2005

Before:
SIR CHRISTOPHER BELLAMY
(President)

MR PETER CLAYTON
MR PETER GRANT-HUTCHISON

BETWEEN:

CLAYMORE DAIRIES LIMITED AND ARLA FOODS UK PLC

Applicants

and

OFFICE OF FAIR TRADING

Respondent

supported by

ROBERT WISEMAN DAIRIES PLC
ROBERT WISEMAN AND SONS LIMITED

Interveners

Mr Nicholas Green QC (instructed by Messrs. Ashurst) appeared for Applicants.

Mr Jon Turner and Mr George Peretz (instructed by The Director of Legal Services (Competition), Office of Fair Trading) appeared for the respondent.

Lord Grabiner QC, Mr James Flynn QC and Mr James Goldsmith (instructed by Messrs. Herbert Smith) appeared for the intervener.

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PROCEEDINGS
DAY TWO

1 THE PRESIDENT: Good morning, ladies and gentlemen.

2 MR GREEN: Good morning. I have spoken to Mr Turner and he said it is all right for me to deal
3 with Claymore's financial accounts – it will only take a minute.

4 THE PRESIDENT: Yes.

5 MR GREEN: If I can just hand up a very short note. There are three sets of accounts **there** for
6 2001/2002/2003. There is a summary of the position. There is nothing confidential in those
7 figures. For your notes the accounts for 1998/99 and indeed through to 2002 will be found in
8 supplementary volume 2 at p.1528 (that is there for the transcript reference). There is an
9 analysis of Claymore's financial position both before and after the acquisition of the
10 shareholding in the original Notice of Appeal at paras.5.62-5.67 at p.703-704 of supplementary
11 volume 1. The only other piece of information I need to add is that so far as the 2004 position
12 is concerned, the accounts are not yet published. The company has moved to a new accounting
13 end because of the Arla merger, they will be published in July, but they will not show
14 a materially different position so far as losses are concerned from the previous year.

15 THE PRESIDENT: But the company is still trading, albeit at a loss.

16 MR GREEN: It is trading at a loss. It is dependent, as the notes to the accounts show, on guarantees
17 from its parent company. Thank you.

18 MR TURNER: Sir, before I begin my address if I may make one or two limited remarks about the
19 financial material Mr Green has just handed up. It may be that Lord Gribner is better placed
20 to make further detailed comments about his position.

21 You will note from the first page of what you have received, if you look at the
22 operating losses, how they have been declining each year up to the period ending 31st March
23 2003.

24 THE PRESIDENT: Well as a proportion of turnover they are about the same, are they not?

25 MR TURNER: As a proportion of turnover, but the losses have been diminishing and moving
26 towards a break even position.

27 May I comment on this? If you turn inside the clip and go towards the end to the
28 Report for the period ending 31st March 2003, I am afraid you will find this on numbered
29 p.2 of the last thing in the clip.

30 THE PRESIDENT: Yes.

31 MR TURNER: There you have the Directors' Report for that period, it is dated 29th January 2004.
32 Under "Principal Activities and Review of the Business" - "The company continues to operate
33 in a very competitive market". That is the first point.

1 Secondly, the material we have given is, as Mr. Green says, not up to date. It may be
2 the case – I am sure it is – that the material has not been published for a later period but that is
3 not to say that the material is not available from Claymore.

4 Thirdly, and no doubt Lord Grabiner will elaborate on this, as indicated in Wiseman’s
5 skeleton, there is significant evidence of Claymore as part of Express now doing rather well in
6 the Scottish middle-ground market, and no doubt he will elaborate those points.

7 Sir, with that I move to the main part of the address. I have briefly adumbrated the
8 structure that I propose to follow yesterday. I depart from that in only one main respect which
9 is that Mr. Peretz will assume responsibility for following up any comments in relation to the
10 exclusionary contracting element of the case.

11 THE PRESIDENT: Please do not feel under undue time pressure, Mr Turner. If we go over until
12 tomorrow, we go over until tomorrow.

13 MR TURNER: I am obliged for that indication, Sir. May I begin then with an overview of the
14 approach taken by the Office to its investigation of Wiseman’s pricing practices? In my
15 submission it is very important to begin with an explanation for the Tribunal of how the OFT
16 saw its role, and what it did because that sets the context within which its decision to close the
17 file, and all of the host of Claymore/Express’s criticisms before the Tribunal have to be
18 understood. I begin with one of the first points that Mr Green made in his oral submissions
19 which was the allegation that the Office should have started out – it would have been natural
20 for it to start out – by investigating the pricing behaviour of Wiseman in relation to Claymore’s
21 former customers in the Highlands, because they were, after all, the focus of its complaint.
22 Mr Green said that orally. It is also, for your note, at para.3.67(a) and other places in the
23 revised Notice of Application.

24 The Office was carrying out an own initiative investigation and it was prompted by
25 the Competition Commission Report. That was the basis on which the basis began its work.
26 The Competition Commission Report, as the Tribunal was aware had looked at conditions of
27 competition in the whole market, and when you look at the Competition Commission’s
28 conclusions one sees that it was sensible to look at pricing from the OFT’s part in the market
29 as a whole, and I make two points in that connection.

30 First, the issue of whether it did actually make sense to look at pricing to outlets in the
31 Highlands of customers such as CWS in isolation from the position elsewhere in Scotland –
32 what has been referred to in some of the papers as an incremental analysis – or, on the other
33 hand, whether it was important to look at the market more broadly. Yesterday, you canvassed

1 with Mr Green the fact that the Competition Commission minority had picked up on this point
2 and in their view it was important to look at the market as a whole.

3 THE PRESIDENT: They looked at the United Kingdom as a whole.

4 MR TURNER: They looked at the United Kingdom as a whole.

5 THE PRESIDENT: A slightly different point.

6 MR TURNER: With respect, on this point no. They were confronted with the argument that it was
7 important to look at the incremental business let us say of the CWS outlets in the Highlands,
8 which had been won by Wiseman from Claymore and to see whether those had been won at
9 a loss. What they felt was that it simply was not an appropriate way to look at the problem
10 because the nature of competition had changed and that the only way in which an analysis of
11 the price and behaviour of Wiseman could be done was to look at it in more broad terms in
12 relation to the Scottish middle-ground market as a whole. May I just show you the relevant
13 passages – or at least some of them – in the Competition Commission Report?

14 If you would open the Report and turn to pars.2.129 and 2.130 at p.977. This forms
15 part of a discussion about the nature of competition between Wiseman and Claymore, and
16 whether the pricing practices were anti-competitive. At 2.129 we are reporting the views of the
17 minority members of the Commission. Just reading that:

18 “These members accept that an analysis of Wiseman’s own figures suggests that the
19 price at which the CWS stores that Claymore previously serviced were gained by
20 Wiseman was below ATCs and possibly below AVCs depending on how the contract
21 is viewed. However, as the contract was not for these outlets alone but for all CWS’s
22 stores in Scotland these members feel that that is the basis on which the contract
23 should be considered. From that point of view the price offered was above AVCs.
24 Wiseman told us that once a price for supplying all of Scotland had been offered to
25 CWS and competitive bidding was underway with Express/Claymore, there was no
26 going back to the status quo ante. It was clear to Wiseman that the competition was
27 as much about keeping its much more substantial contracts to supply the CWS stores
28 in the South of Scotland as it was about winning the smaller amount of new business
29 further North. As CWS was the sixth largest customer in Scotland Wiseman told us
30 that retaining the existing volumes was central to the overall efficiency of its Scottish
31 operations.”

32 and so on. Perhaps I would invite you just to cast your eye over rather than me reading the
33 remainder of that paragraph and paragraph 2.130 for a moment, and then I will direct you to
34 one or two points.

1 THE PRESIDENT: Yes, we are familiar with these passages.

2 MR TURNER: Yes, all right.

3 THE PRESIDENT: What are you telling us? That right from the outset the OFT agreed with the
4 minority view of the CC?

5 MR TURNER: No, what I am saying is that this was a possible and perhaps sensible way of looking
6 at the problem which made it sensible to gather data in relation to pricing practices relating to
7 an area more broad than the heartland of Claymore's activities in the Highlands.

8 THE PRESIDENT: Why did it make it sensible not to look at the particular customers about whom
9 the complaint was being made?

10 MR TURNER: Well I am coming on to that. It did not exclude that. The point is it does not exclude
11 that and that forms part of the analysis. For present purposes I just need to show you that the
12 pricing practices involved were not obviously and necessarily limited to behaviour in the
13 Highlands targeting customers of Claymore in that region.

14 THE PRESIDENT: That is what the complaint was about.

15 MR TURNER: As I say, I will come on to that in a moment because that was not in fact quite what
16 the complaint was about either. In relation to the Competition Commission Report, if I may
17 first of all just show you one further point which relates to price discrimination, and this was
18 mentioned by the Office of Fair Trading in its s.35 Notice relating to interim measures. If you
19 turn to figure 4.17 in the Competition Commission Report, which is just underneath paragraph
20 4.332 at p.1082, you will see there a scatter plot showing that there is price dispersal as I will
21 call it in relation to Wiseman's pricing for a sample of small middle-ground retailers, which is
22 not limited to the Highlands, but relates to Scotland as a whole and one of the concerns of the
23 office was that this might have included, for example, a pattern of high prices to customers
24 located outside the Highlands, supporting lower prices ----

25 THE PRESIDENT: That is perfectly clear.

26 MR TURNER: -- to customers in the Highlands. The Office wanted to look at the matter in the
27 round, and of course Claymore Express had urged on the Tribunal that it is essential under the
28 case law to look at an abuse in the round.

29 If I may then return, Sir, to the points that you were canvassing with me a moment
30 ago? It would not have been as useful in the Office's view just to look at former customers of
31 Claymore in the Highlands. I make five points in that connection.

32 First, it is not in fact the case that Claymore's complaint was limited to pricing in
33 relation to Claymore's former customers lost to Wiseman in the Highlands. If you would turn
34 back in the Competition Commission Report, for example, to para.3.111, which is on p.1011:

1 “It was alleged that Wiseman has been engaging in predatory pricing by Express
2 Claymore. Express Claymore submitted to us a number of key accounts which
3 Wiseman either gained volume from Express as part of securing Scotland-wide
4 supply arrangements, or retained existing business using pricing that Express alleged
5 was below Wiseman’s average total variable costs.”

6 THE PRESIDENT: Yes.

7 MR TURNER: So at the very least the allegation related to the retention of existing customers. That
8 is supported by what Mr Larg has in fact said in his witness statement before this Tribunal, and
9 if you would briefly turn to that – you will find it at tab 3 of the core bundle at p.210. In this
10 paragraph what he is commenting on is the assurances and their efficacy. If you cast your eye
11 down a few lines to the sentence beginning “It is also our experience...” in the middle of that
12 paragraph you will see that he said:

13 “At least in relation to independent customers, that is those not supplied through
14 a single group, that if one of them receives either a price increase or decrease then
15 that news is shared quickly with their fellow shopkeepers”.

16 That dynamic which seems entirely reasonable led to the view that a policy of just pricing low
17 to particular customers of Claymore in an area might not be sustainable because you would
18 need also to offer similar kind of prices to fellow shopkeepers, the existing business customers
19 of Wiseman.

20 Thirdly, if any unusually low prices to particular customers in the Highlands were
21 found on the Office’s broad analysis, which we will turn to in a moment, could then be studied
22 in more detail and thereby it would be possible to ascertain who the customers were and what
23 was going on. What we are considering at the moment is the first stage of the analysis,
24 creating the framework for the work that was to be done.

25 Fourthly, the sample did include major former customers of Claymore/Express, as
26 I will develop in a moment, it was anchored by CWS itself - that is the expression used in
27 Mr Lawrie’s statement, and it included other multiple outlet customers as well.

28 THE PRESIDENT: Can we just see where Mr Lawrie says that?

29 MR TURNER: I am sorry. I am told it is in our Reply document at para.8.4. That is in the core
30 bundle, tab 6 at 494, and at 496 if you turn to para.8 at the very top – I was going to take you to
31 this in a moment, you will see the OFT decided – this is the second sentence: “... given the
32 importance of CWS, to select CWS outlets as the anchor for the sample.” Then it included
33 pretty well all the CWS outlets with the exception of just one. So that was 231 of the outlets
34 altogether, and all runs on which a CWS outlet appeared were then listed.

1 So we were actually capturing one of the major customers in any event and
2 deliberately and which had been a feature of the Competition Commission Report.

3 THE PRESIDENT: It is a bit of a pity that this was not explained in Mr Lawrie's witness statement,
4 and it had to be extracted by a process of dentistry through the request for further and better
5 particulars.

6 MR TURNER: Sir, I understand that. On the other hand, this material has been available to
7 Claymore for a very long time and that is why I heard with some surprise Mr Green's comment
8 that he simply did not understand the basis of this analysis, because it has been sufficiently and
9 clearly explained. Mr Peretz points out to me, for your note also, that Mr Lawrie does actually
10 say in his witness statement at para.23:

11 “A sample of 1150 outlets were then selected representing 809 customers as at May
12 2001, including CWS as the largest in the range of customers.”

13 THE PRESIDENT: Yes.

14 MR TURNER: So that the only point that is clarified by the reply is the precise methodology
15 whereby CWS was used as the basis for anchoring the sample, and that is the point which is
16 explained in quite an important paragraph, para.8.4 of the Reply, and if there is one part of that
17 Reply that I would ask the Tribunal to read after this hearing it is actually that, because it is
18 informative and adds to Lawrie.

19 THE PRESIDENT: Yes.

20 MR TURNER: Fifthly, and perhaps I have already made this point, in view of the issue that there
21 could be problems with an incremental type of analysis that just looked at customer outlets
22 gained in the Highlands for the reasons that were given by the Competition Commission
23 minority, the Office did consider it was very sensible to look at the matter on a Scotland-wide
24 basis, and there was one other paragraph of the Competition Commission Report that perhaps
25 I should make you aware of at this stage, it is para.4.336 on p.1083. What you have at this
26 paragraph is Express's statement of its complaint about the uniform all-Scotland price. You
27 will see what is said there, that it in effect allowed Wiseman to set non-cost reflective
28 discounted prices in the Highlands under a disguise. But after that you get the Competition
29 Commission's own comment:

30 “We noted earlier that many customers now negotiate milk on the basis of a single
31 price across a single region and in the case of the larger supermarkets nationwide.
32 In many instances the purchasing company has determined that it is easier in terms of
33 management of accounts to deal with fewer suppliers and a single price than a
34 number of suppliers with different prices for different regions.”

1 So that this as it were supports the Competition Commission minority's perspective in that it
2 is a comment about the way the nature of competition had moved at the material time to
3 a system of wider scale contracting.

4 Sir, for those reasons the Office submits that it was perfectly appropriate and
5 reasonable for it to have adopted the approach to the investigation, the fundamental framework
6 that it did.

7 The second topic which I need to address is the issue of intent, intent to eliminate
8 a competitor and the importance of the evidence which had come out of the Competition
9 Commission Report, and from the information gathering by the Office in its unannounced visit
10 to Wiseman's premises and which Mr Green said to you yesterday was critical – indeed, he
11 went so far as to say that it was sufficient evidence of intent which, when mixed with the
12 evidence of the pricing practices which have gone on could found an infringement.

13 I begin with the case law. In summary, the case law says that pricing to customers
14 below total cost can be predatory and abusive practice if it is part of a plan to eliminate
15 a competitor. Sir, you are well familiar with the proposition. It was stated and the authorities
16 are conveniently summarised in *Aberdeen Journals 2* and just for the Tribunal's note that is at
17 para.352 of the Judgment. In his skeleton Mr Green advanced a more diluted proposition about
18 what needs to be shown. He says that it is enough if you can demonstrate an intention on the
19 part of a company such as Wiseman to hinder the rate of expansion of a competitor. That is at
20 footnote 91 of his skeleton. He says that that is an elementary proposition and he relies for it
21 on *Compagnie Maritime Belge* in the Court of First Instance at para.149. That is not our
22 understanding of the law and, if I may, I will take you to the paragraph referred to by
23 Mr Green, which is at tab 11 of the authorities' bundle. It is para.149 at p.1253. This is
24 reporting a submission that was made by the company in its defence.

25 "Thirdly the Applicants rely on the increase in [the competitor's market share] in
26 order to maintain that the practice complained of had no effect and hence that there
27 was no abuse of a dominant position. The court however considers that where one or
28 more undertakings in a dominant position actually implement a practice whose aim is
29 to remove a competitor the fact that the result sought is not achieved is not enough to
30 avoid the practice being characterised as an abuse of a dominant position."

31 You see from this that far from the passage bearing out Mr Green's proposition it reinforces the
32 well-established line of case law that an intent to remove a competitor is needed. The
33 paragraph is directed at the quite different issue of whether it is open to a dominant company to
34 defend itself by saying that that aim was not in fact achieved. In principle also it is readily

1 possible to understand why there should be an important divide between what is normal price
2 competition and what counts as abnormal abusive price competition; that in the latter case, the
3 abuse you should have a plan to remove a competitor. This is because it is a plan to remove
4 a competitor which will allow the creditor, shall we say, to recoup its losses afterwards by
5 charging higher prices once the competitor has gone. You also see that in the authorities
6 – I will just give you one reference, for example the Court of Justice in *Compagnie Maritime*
7 *Belge* at para.117 referred to the fact that selective price cutting in that case meant that the firm
8 could continue to require its users to pay higher prices for services which were not now
9 threatened by competition because a competitor has been removed.

10 THE PRESIDENT: I seem to remember that *Tetrapak 2* says recoupment is not a necessary
11 ingredient.

12 MR TURNER: That is true in this sense, that it is not necessary to show that recoupment was
13 a practical possibility, which I believe was one of the contentions advanced in that case. But it
14 did not take anything away from the underlying idea that the possibility of recoupment formed
15 part of the plan in relation to the hoped for elimination of the competitor, only that it was not
16 necessary to demonstrate that recoupment was either achieved or was practicable.

17 The second point, which is also made in some of the authorities, and urged on you by
18 Wiseman I should say, is that pricing which makes a contribution to a company's fixed costs –
19 it is above variable costs – it is very difficult to say that such pricing is not normal competition
20 and that is why you need the added ingredient of an intent to eliminate the competitor. In this
21 case, and before the Competition Commission Wiseman has said that pricing below total cost
22 in its case still allowed it to make a contribution to its fixed costs – it was not irrational, it was
23 not only explicable as being aimed at removing Claymore.

24 In passing of course the case law on abusive pricing above cost also requires a plan to
25 eliminate a competitor, and we have just been discussing the case of *Compagnie Maritime*
26 *Belge* which was the leading case, and the Tribunal has considered that case and its essential
27 findings in *Napp* and in *Aberdeen Journals*. To summarise, if there is selective discounting
28 which is above cost that can be abusive as well, at least (a) if you have what is now sometimes
29 referred to as a 'super dominant' firm, and market shares in the order of 85 to 90 per cent have
30 been characterised in those cases; and (b) there is a plan to eliminate a competitor. Again,
31 I will give you the reference in *Aberdeen Journals* at paras.214-215 of that Judgment. It is
32 worth noting that in his address Mr Green said to you repeatedly that Wiseman in this case has
33 a market share of over 80 per cent., but in fact that is incorrect and you may note that its
34 relevant market share of the Scottish middle-ground is estimated at 66 per cent.

1 THE PRESIDENT: Where do we find that, Mr Turner?

2 MR TURNER: In the Competition Commission Report para.2.58. I do not know whether the
3 Tribunal wants to look at that or to reference Mr Haberman's report to it, but for your note that
4 is where the proposition is – p.963.

5 THE PRESIDENT: Mrs Kingsmill and Professor Cave thought that Wiseman could exercise
6 substantial market power.

7 MR TURNER: Yes, broadly equivalent to a position of dominance.

8 THE PRESIDENT: Yes.

9 MR TURNER: The question here relates simply to the issue of super dominance in the sense in
10 which that term has been digested in cases such as *Compagnie Maritime Belge*.

11 THE PRESIDENT: The point we are on at the moment is opening up quite an important point of
12 principle, is it not, about what sort of intent you might need to establish in order to show
13 dominance in a situation when you are above AVC but below ATC and what room for
14 manoeuvre a dominant enterprise has to find it has actually got.

15 MR TURNER: Yes.

16 THE PRESIDENT: It is pretty important.

17 MR TURNER: As a matter of principle, and certainly if this were an infringement decision which
18 had been made by the Office that matter might be canvassed vigorously before this Tribunal. In
19 my submission given the sort of case which you have before you now it is sufficient to note
20 that the authorities consistently refer to an intent both in relation to the *Akzo* line of cases on
21 predatory pricing, and the *Compagnie Maritime Belge* cases on above cost pricing - an intent to
22 eliminate a competitor. That is really the touchstone.

23 THE PRESIDENT: Are you inviting us as the Tribunal to adopt a restrictive test for predatory
24 pricing in the context of UK competition law?

25 MR TURNER: No. I am certainly not asking the Tribunal to do that.

26 THE PRESIDENT: That is where it leads to, is it not?

27 MR TURNER: In my submission "no".

28 THE PRESIDENT: It is back pedalling very fast from the idea that this sort of thing could be
29 abusive, which would have major ramifications in other cases.

30 MR TURNER: I am sorry, Sir, in what sense is this back pedalling?

31 THE PRESIDENT: You are telling us that it is only if you can show a plan to eliminate on behalf of
32 a super dominant competitor that we get into the predatory pricing ----

33 MR TURNER: Oh no, no, no.

34 THE PRESIDENT: -- arena where its prices are above AVC.

1 MR TURNER: I am terribly sorry, Sir. In relation to predatory pricing, pricing below cost, I was
2 referring ----

3 THE PRESIDENT: I am talking about prices above AVC but below ATC.

4 MR TURNER: Yes, I refer to that also as predatory pricing.

5 THE PRESIDENT: Yes.

6 MR TURNER: And I am certainly not suggesting that in such cases super dominance is
7 a requirement. The issue of super dominance I was restricting only to the case of selective
8 discounting to customers above total cost, because there we have *Compagnie Maritime*
9 *Belge* ----

10 THE PRESIDENT: Above total cost?

11 MR TURNER: Above total cost, yes.

12 THE PRESIDENT: Come on, we are getting into very, very deep water here, Mr Turner. I want to
13 get this down. "Selective and discriminatory price cutting above cost ----"

14 MR TURNER: That is above total cost.

15 THE PRESIDENT: "-- above total cost only abusive if committed by 'super dominant enterprise'".

16 MR TURNER: May I correct or qualify that, Sir? I prefer the formulation – I do not have *Napp* in
17 front of me now, but perhaps I should get it in order to show you the way that the Tribunal
18 phrased its understanding of the position in *Napp*, and it is not to say that it is only an abuse in
19 those cases. What the Tribunal noted in *Napp* was that there will be abuse, having referred to
20 *Compagnie Maritime Belge*, at least in such a case. The Tribunal did not close off the
21 possibility that an abuse could be found in wider circumstances and in the context of other
22 cases.

23 THE PRESIDENT: And you are not closing that possibility.

24 MR TURNER: And I am not closing that possibility. All I am seeking to do is to draw the
25 Tribunal's attention to the core cases in this area.

26 THE PRESIDENT: You see, if I may put it colloquially, that the tightrope off which it is very easy
27 to fall, as it were, or the chasm that might open up on either side of the rope one is trying to
28 walk, the more you quite legitimately seek to defend the Office's decision not to take this case
29 any further, and the more one does that on broad points of principle, the more one runs the risk
30 of actually enunciating a rather restricted view of the ambit of competition law that might have
31 repercussions in other cases where one might actually want to press for some wider
32 interpretation than the one you are advancing. My concern at the moment is just to test what it
33 is that is being said and whether this is any more than something that is limited to the facts of

1 this case, or whether it is a more fundamental view that is being advanced that really we want
2 to cut down all this predatory business to as limited a scope as we possibly can.

3 MR TURNER: There is certainly and unavowedly no intention to do that. May I put the point in this
4 way? The Office has made a decision to close the file, and you will have seen that one of the
5 issues which is now under attack – vigorously under attack – is that there was sufficient
6 evidence of intent to found an abuse, and Mr Green’s case is that that amounts to an error of
7 approach or principle on the basis of which he is asking the Tribunal to set aside the decision to
8 close the file. What I am saying is in defence it is at the very least by no means clear that his
9 proposition that a mere intent hinder the rate of expansion of a competitor is enough, and we
10 will turn to the evidence of that directly, to found an abuse. It is at the very least a matter of
11 doubt, of uncertainty. He needs to establish that, as a point of principle and a point on the
12 authorities it is clear. He then needs to show you, as he was seeking to do yesterday, that the
13 evidence – the various matters that he directed your attention to – is sufficient to bear that
14 proposition out, so that when you look at what the Office of Fair Trading did you say well that
15 was a clear error, that was an error of principle.

16 What I am first seeking to do is to say that on the issue of what the rule is Mr Green’s
17 very broad understanding that all you have to find is an intent to hinder the rate of expansion of
18 another company if you are a dominant firm and you are in the region of committing an abuse
19 of dominance is not right, it is not what the established case law clearly says. I hope that is
20 sufficient because I fully understand now the point that you are making. The Office is not
21 seeking to say either that super dominance is required or that a very restrictive view of the case
22 law should be adopted willy-nilly and irrespective of the cases.

23 THE PRESIDENT: To give but one example, I thought it was fairly classic theory that allegedly
24 predatory behaviour can be an abuse if it is behaviour that is intended to discipline particular
25 companies or to give signals to other companies not to come into the market which might lead
26 to temporary reductions in prices or causing of losses, but might not necessarily actually mean
27 you are trying to eliminate somebody, you might just be trying to make life extremely difficult
28 for them to tell them to back off.

29 MR TURNER: We would need to look at those authorities in detail. I believe it is sufficient for
30 present purposes to make the point to the Tribunal because we are going to come on in a
31 moment to the context of this market which has to be borne in mind in this case. But it is
32 sufficient for present purposes to point out the difficulty in such a case of distinguishing
33 between what is normal competition and what is abnormal competition. There may be contexts
34 in particular markets where such disciplining enables the incumbent dominant firm to remain

1 sheltered from competition and to charge higher prices and maintain and exploit its position.
2 The context of each case would need to be looked at and we do not exclude that there may be
3 such cases. What I do say is that what Mr Green has referred you to comes nowhere near to
4 establishing that any of that is the case in the present context before you.

5 THE PRESIDENT: Can we just go back to Mr Lawrie's witness statement for a moment – 234,
6 I think it is para.50. I am assuming that this accurately reflects what the Office thought at the
7 time.

8 MR TURNER: It does.

9 THE PRESIDENT: He starts in the first line that what he needed was clear and compelling direct
10 evidence of intent by Wiseman to eliminate Express/Claymore. That is his starting point.

11 MR TURNER: This is in relation to making a finding of infringement

12 THE PRESIDENT: Yes. What he is saying is we did not find anything below AVC, we found
13 something below ATC but we thought anyway we would need intent and this is our view about
14 intent – para.50 first line. That is where he starts, and then he goes on to say that as the Office
15 interpreted the evidence it did not demonstrate exclusionary intent, it showed, as he says, that
16 Wiseman would want to keep a particularly close eye on Express/Claymore progress, and the
17 statement by Mr Wiseman to the CC simply showed that Wiseman categorised
18 Express/Claymore differently from its competitors. That is how this question of intent is
19 explained to us.

20 MR TURNER: Sir, may I make perhaps one thing clear about the first sentence that you have drawn
21 attention to? First, obviously it does need, as you were saying, to be viewed in the context of
22 the remainder of the paragraph in which Mr Lawrie explains the matters that were taken into
23 account. The word “direct” in the first sentence should not be interpreted to mean some
24 document which says “we intend to exclude Claymore from the market”.

25 THE PRESIDENT: Yes.

26 MR TURNER: It is meant to imply simply strong evidence of intent, sufficiently strong. If you
27 would keep this page open I would like to take you to some of the matters that Mr Lawrie is
28 referring to. Just before doing so, may I mention one other important factor which Mr Green
29 omitted to mention to you yesterday, that in the context of this case another thing that the
30 Competition Commission addressed was the sort of competitive situation in the market before
31 Express acquired its controlling interest in Claymore, which was in December 1998? The
32 situation before Express came into the picture had been found to be one of muted competition
33 and quite possibly with a market sharing agreement between Wiseman on the one hand and
34 Claymore on the other in relation to the Highlands. There was no competition there. It is

1 quite important for you to appreciate that point as well. If you would open the Competition
2 Commission Report and then we will turn to intent. I would ask you to turn to para.273, p.23,
3 and show you one or two points arising from it.

4 “Alleged market share and agreements with Claymore Dairies.” This is under the
5 heading of Wiseman’s behaviour in the main section.

6 “On 31st March 1999 Express/Claymore provided the Office...”

7 THE PRESIDENT: I do not have to read it, I think, Mr. Turner, just perhaps tell us what you want
8 us to deduce from it.

9 MR TURNER: If you look at the first half of that you will see that there was an alleged division of
10 supply of milk to middle-ground retailers in Northern Scotland, that was the allegation, and
11 how it was divided up. If you go forward to 2.77 ----

12 THE PRESIDENT: It went down the Great Glen as far as I remember, or somewhere near there.
13 I do not think it actually said there, but that is what I seem to remember.

14 MR TURNER: That may have been so. 2.77, you then have the discussion of the group about how
15 this relationship should be viewed and you will see at the very bottom of that page essentially
16 the point that there was at least little competition between Wiseman and Claymore during this
17 period. Then at 2.78 I draw your attention to the views of Mrs Kingsmill and Professor Cave
18 on who Claymore obviously relied for much of their argument in their case, where it is said
19 that they saw the existence of a rationalisation agreement as an indication deliberately muted to
20 competition and they refer to the failure to compete with Claymore in the period before
21 December 1998.

22 So that is the context and now if I can refer you to the evidence against that
23 background. Mr Green took you yesterday to a number of snippets from the joint hearing
24 before the Competition Commission and he placed quite considerable emphasis on those.
25 I shall not take you back through all of those laboriously. The short point I want to make is
26 that none of them – none of them – referred to an intent on Wiseman’s part to eliminate
27 Claymore. They referred to Wiseman’s view that Express’s entry in Scotland was a spoiling
28 tactic, that it could not be profitable and that Wiseman had responded to it with aggressive
29 competition. It said all of that. The gloves were off in the sense that there was going to be
30 vigorous competition, and there had not been before. But Mr Green made an illegitimate jump
31 in logic. It was not necessarily conceived of as part of a plan to remove Express – I believe he
32 said “at any cost” – it was difficult to say that what was being observed at least in the Office’s
33 point of view, and I am developing Mr Lawrie in para.50, it was not normal, vigorous
34 competition. What I would draw your attention to is Claymore’s view in the joint hearing, and

1 this is instructive, of what it thinks would have been a competitive, normal response, by
2 Wiseman to the new and aggressive entry that it had made into Scotland, because this
3 illustrates for the Tribunal the difficulty of trying to infer abusive intent from vigorous
4 competition which had not taken place beforehand. If you would pick up supplementary
5 volume 1 and turn to the joint hearing – tab 10, p.874, beginning at line 16.

6 This is now Mr Davidson, who is the businessman at Claymore/Express and he is
7 talking about what would be appropriate behaviour:

8 “Appropriate behaviour would be that we would expect somebody to defend
9 business, certainly, but is appropriate behaviour one where the dominant monopoly
10 attempts to see off the new entrant before the new entrant gets established?
11

12 “Q What would you call appropriate behaviour then? A. Well, appropriate
13 behaviour I think is one in which I would expect the dominant monopoly to respond
14 to market behaviour of the new entrant, not to pre-empt it?
15

16 “Q So wait until they see how heavy the competition is going to be and then
17 respond, as opposed to trying to take any steps to stave it off, for example? A. Yes.”

18 Then if you turn over the page the line of dialogue on this point is continued at line 10,
19 Mr Clothier continues asking him:

20 “Q Mr Davidson, when you come to the question of saying, okay, a person stands
21 back and waits until the new entrant makes their move, what is then a reasonable
22 response? Supposing you come in at 20 per cent. under, what do you regard as
23 a reasonable response? A defensive response, you do not put it 22 per cent. down is
24 that it? A. Well to put any actual figure on it is difficult, but a defensive, broadly
25 a defensive response which is going to retain business.”

26 I draw this to the Tribunal’s attention because it is obviously the businesses themselves at the
27 heart of this market trying to articulate what would be a competitive or an uncompetitive
28 response to Express’s aggressive entry and it is difficult for them ----

29 THE PRESIDENT: Why do you call it “Express’s aggressive entry”? Why do you use the word
30 “aggressive” in that context?

31 MR TURNER: Because the evidence had shown that Express came into the market and started
32 seeking, as from January 1999 these all-Scotland deals and suddenly offering competition to
33 Wiseman which had not previously existed. We had seen what the context was ----

34 THE PRESIDENT: From the Office’s point of view it had been presumably a thoroughly desirable
development.

1 MR TURNER: Yes, absolutely, thoroughly desirable, and the question is whether Wiseman's
2 response to that, because obviously then Wiseman retaliates, is legitimate normal, or whether
3 it is abusive.

4 THE PRESIDENT: It seems at times, Mr Turner, that we are actually getting progressively – as
5 sometimes does happen in hearings – more or less to what was really the heart of this case
6 and what really was the real issue, namely, whether the Office thought that it ever really was
7 going to be able to establish that Wiseman's response was “illegitimate” or
8 “disproportionate” – whatever word you want to use, tending to see this as much more of
9 a battle between two ultimately evenly matched companies – Express and Wiseman – than as
10 a battle between Wiseman and its smaller Highland competitor, Claymore?

11 MR TURNER: Yes, with one qualification which, Sir, you made yesterday. We are also looking
12 here at the picture in early 1999. All of this, and Mr Green's address was directed to this
13 period. You made the point that the position, as far as the Act is concerned, is after March
14 2000 when it comes into force.

15 THE PRESIDENT: Yes.

16 MR TURNER: It is quite true if conditions and the pattern of pricing does not change then you
17 might find an abuse at the later period but we should bear in mind also that we are looking at
18 evidence relating to the period when the Act is in force, and I just mention this now the
19 Office's analysis looks at periods of time, May 2000, November 2000, May 2001, after the
20 Act has come into force, to see what is going on in terms of pricing at that stage. What
21 Mr Green is doing is taking evidence of intent and carrying it through over time, and that is
22 also a point to be borne in mind.

23 That is the evidence from the joint hearing. He also placed before you yesterday quite
24 large significance on the hit list of Spring 1999, and may I invite the Tribunal just to return to
25 that document, or at least the document surrounding it, which is in the core bundle – p.284 is
26 where I would like to start. These are documents that were gathered by the Office of Fair
27 Trading in its unannounced visit to Wiseman's premises. It was gathered under a warrant.
28 Page 284, this is a page or two before the hit lists. What you are looking at is an internal
29 Wiseman document, which was part of the evidence before the Office – it gathered it on its
30 visit, anecdotal evidence of Express activity, and then the salesman's name is mentioned.
31 I would just ask you to cast your eye to the first entry, for example ----

32 THE PRESIDENT: Yes, I think we had better keep details out.

33 MR TURNER: Absolutely, quite so. I apologise. What you will see if you look at, say, the first and
34 third entries, is a record being kept of the former price by Wiseman, a quote by Express,

1 a new price being offered by Wiseman and then a statement of what has happened, whether
2 the account has been lost or won. You see that continuing further on to the page below.
3 What you see is certainly a concentration, an awareness of the particular competition which
4 has now been opened up with this other company. You can see the quotes and the sort of
5 prices that are being offered. What you are not seeing is vigorous undercutting or anything of
6 kind. It is not obvious when one looks at this sort of information that one is looking at
7 anything other than a normal competitive response by the dominant company. What you see,
8 by and large, is Wiseman either matching quotes or quoting slightly above them.

9 Then you turn to the hit list, p.288. Mr Green pointed out that there was a reference
10 to the potential customer, a Wiseman canvasser, and a progress report. What you see here is
11 certainly specific and conscious competition with Express. But in my submission again you
12 have this difficulty of trying to establish – Mr Green has said to you “here you have
13 sufficient evidence of abusive intent”. This is not intent to eliminate. It is difficult to see how
14 you can regard this – to use Mr Lawrie’s words – as “clear and compelling evidence of
15 abusive intent”.

16 Again, Sir, the point you canvassed yesterday is that all of this is over Spring 1999.
17 Mr Green said in riposte to that that the effects of the unlawful practice continue into the
18 period March 2000 and that the Act is concerned with effects rather than with a continuing
19 abusive behaviour. I would just wish to put down a marker that that is not absolutely clear by
20 any means. It is not clear under Community Law that mere offence continuing into the future
21 from abusive conduct represent continued abuse. In relation to the interesting situation where
22 this new Competition Act comes into force and you have to say whether effects after the
23 coming into force of behaviour before that time are abusive, I would suggest it is by no
24 means clear that that would be characterised as abusive conduct. As I have both Mr Green
25 and Lord Grabiner in the room, of course the President will remember in the replica football
26 kit case a similar sort of issue arising in relation to one of the parties there – JJB – albeit in
27 a quite different context of the Chapter 1 prohibition.

28 The conclusion from all of this, the point I seek to make ----

29 THE PRESIDENT: You are saying the Office either thought or could reasonably have thought that
30 in order to establish abuse after 1st March 2000 it needed some pretty clear evidence of
31 activity after 1s March 2000, rather than the run-off effects of activity that had actually taken
32 place before 1st March?

33 MR TURNER: Yes, and specifically, the Office’s work included looking at patterns of behaviour,
34 patterns of low pricing in certain areas, low pricing to certain customers. The gist of

1 everything that they did was to try to work out if there was some pattern with low margins or
2 low prices, and then they would take the individual outlets and customers, and look at them
3 in immense detail to try to see whether they could find anything that suggested Wiseman is
4 targeting these low prices, making losses in relation to customers that Express either has or
5 strategically would wish to have, and it drew a blank and that was critical. Once you
6 understand that that is the basis of its thinking the argument in this Tribunal moves to the
7 question of whether the OFT's analysis was in some way itself flawed, the data did not work,
8 the Office could not have reached that conclusion, but it is important to realise that that is
9 how the Office did view the question of intent, and the way it approached trying to see if
10 there was sufficient evidence in its work. (After a pause) I am told by everybody that
11 I should draw the Tribunal's attention just before leaving this ----

12 THE PRESIDENT: I think we are going to take a break in a minute or two, Mr Turner.

13 MR TURNER: It will be convenient just after this one point then. If you turn to Mr Lawrie's witness
14 statement and look at para.40 on p.231 – this is out of an abundance of caution in case
15 Mr Green pops up and says the Office appears to have thought that you need a document
16 saying we intend to get rid of that competitor – at the end of that paragraph he records that
17 his understanding was that you can find predatory pricing where there is direct evidence of
18 intent or where the facts lead clearly to an inference of such intent, so he is on to that. Sir, if
19 that is a convenient moment then we can break.

20 (The hearing adjourned at 11.42 a.m. and resumed at 11.55 a.m.)

21 MR TURNER: Sir, just before breaking you did mention to me quite a serious point, just as a
22 matter of competition policy it would be wrong to send out the wrong kind of message about
23 what could constitute the rule on abuse in a case of this kind. A point on competition policy
24 actually made to me by the relevant case officer is that what you have said is absolutely
25 sound. There is, however, to be borne in mind the point going the other way which is that it
26 is important not to send out a signal that dominant firms should not feel free to compete, and
27 to compete vigorously, because that is in the interest of consumers. A statement to that effect
28 is reflected in the case law – I will just give you the references ----

29 THE PRESIDENT: It is in *United Brand*, is it not?

30 MR TURNER: I was not thinking of that precise reference but Advocate General Fennelly in his
31 opinion in *Compagnie Maritime Belge* talks about how you should approach this sort of
32 problem with reserve, and makes the statement directly that dominant firms not only have the
33 right but should be encouraged to compete on price, and it is a salutary reminder ----

34 THE PRESIDENT: That is paragraph?

1 MR TURNER: Paragraph 117 – of the tightrope that you do have to walk.

2 THE PRESIDENT: Well we are just grappling with where on the line we are, what approach we
3 should take.

4 MR TURNER: It is as well to point out that on the cases as well there are these factors. So then one
5 turns to the gist of what the OFT did and now I am going to turn to the detail. You asked
6 Mr Green yesterday at an early stage in his address whether the Office’s analysis had looked
7 at prices to customers like CWS or Alldays, or to prices at outlets – for example, their outlets
8 in the Highlands. Mr Green said that he thought it was not clear. In my submission it is
9 absolutely clear, and it is clear on all of the information that he has. The Office set out to get
10 cost and price information for many hundreds of customers – over 800, 809 – and their
11 individual outlets across Scotland. By doing that the plan was that it could see whether there
12 were low or even negative margins earned on deliveries of milk to individual outlets in
13 particular areas, for example, such as the Highlands, or some other pattern. The idea was that
14 if it found low or negative margins it would then zero in on the outlets concerned, or the
15 customer to whom the outlet belonged and look for this pattern and if it found it, as we were
16 saying before the break, that would be real and substantial evidence of intent, because if
17 Wiseman was really going to target Claymore/Express one might reasonably expect such
18 targeting to manifest itself in exceptionally low margins or loss making business to particular
19 outlets or customers.

20 THE PRESIDENT: You are going to take us to the results of that in a moment?

21 MR TURNER: I am. Sir, you raised with Mr Green when he discussed some of the difficulties of
22 this particular industry, whether an analysis of that kind is actually capable of being carried
23 out given the circumstances. There was a lot of discussion yesterday about the special
24 features of this industry. There is no doubt, and it was clear from the outset really that the
25 cost of delivering fresh processed milk to outlets is very sensitive to the location of the
26 customers’ outlets, and moreover that is true in two respects. First, because in absolute terms
27 you could have two customers who are both taking similar volumes of milk but one of them,
28 for the sake of argument is located in a far flung area, and one of them is in a busy urban
29 centre bang close to the depot. The costs of supplying each of them will be likely to differ.
30 But there is a second dimension as well and that is that the cost of delivering milk to an outlet
31 also depends on its place in the supplier’s delivery network – the run to which it is assigned,
32 the other people on the run, proximity to them, who they are and so forth. That creates
33 additional complications of its own.

1 Mr Green took you yesterday to the letter from Mr Sweeney of Wiseman in which he
2 spelled this point to the Office (as he did on numerous occasions) and may I just remind the
3 Tribunal of that? It is at tab 4, one of the exhibits to Mr Lawrie's statement in the core bundle
4 at p.300.

5 THE PRESIDENT: Yes.

6 MR TURNER: This is the letter of 1st August 2001 and I notice from looking at my copy that the
7 part that I am interested in had lines through them, so I will just tell you, under
8 "Background" in the first scored out paragraph, if you look at that, he is referring to, as it
9 were, the absolute factors.

10 THE PRESIDENT: I cannot believe there is actually anything confidential in that first paragraph.
11 It is a rather helpful statement of Wiseman's position I would have thought.

12 MR TURNER: I do not understand why that is confidential either. Underneath that is what I call the
13 "relative position". If you look at the second sentence beginning "Estimating the cost", you
14 see the difficulty that is going to arise in this sort of case. Another point to be borne in mind
15 before we look at the detail of the analysis is that there is a huge variation in the kinds of
16 customers who were served by Wiseman on the delivery runs, because it ranges all the way
17 from major supermarkets to tiny corner shops and doorstep deliveries. It is with all of that in
18 mind that we come to the question, Sir, that you posed yesterday arising out of
19 Mr Haberman's report, paras. 4.18 and 4.19. If you turn to it with those considerations in
20 mind, in my submission you see that the position does make sense, and if I may invite the
21 Tribunal to do that it is at pages 127-8 of the core bundle. I am reminded again that this is
22 confidential, so I will speak in general terms. The point, Sir, that you made was that this
23 seemed quite surprising that you have a price for the cost per litre delivered which is about
24 50 times less in the first case than in the second.

25 THE PRESIDENT: Yes.

26 MR TURNER: At first sight that seemed a very surprising variation, and I would ask you just to
27 look at what was involved in each case. In the first case you have a very high delivery
28 volume on the run, and I think I can say that it is in the region of 50,000 litres of milk, and
29 you can see at the end of the paragraph Mr Haberman's comment that given the high volume
30 of milk supplied he thinks that there are supermarkets on that run as well.

31 Then you look at the second one in 4.19 and it appears that this is a doorstep round. It
32 includes deliveries to doorsteps. It covers a large distance, and you will see that it involves
33 only a fraction of the volume for the run that the other one did. This is only about

1 1,000 – 1,500 litres. Then if you remember that these customers can be tiny taking only
2 about – I will show you the reference in a moment - £10 of milk a week at the delivered
3 price, you appreciate how these large variations in cost can arise.

4 If you turn forward in the bundle to p.419 you will see that this was a point that was
5 urged on the Office (in case they forgot it) by Mr Sweeney in a fax of 20th March 2002.

6 THE PRESIDENT: This is shortly before the meeting at which a certain amount of light seems to
7 have dawned.

8 MR TURNER: This is actually a follow up to that meeting. He had made the point at the meeting
9 and if you look at the second page of that, 419 there is a paragraph which begins: “I was
10 reflecting on some of the figures quoted off the cuff at our meeting last week”. He is telling
11 the Office how there are a large number of small customers. I just ask the Tribunal to have
12 a look at the figure there. You will see extremely small deliveries, and in the last sentence,
13 the actual number of drops receiving £10 or less of liquid milk in one particular week was,
14 and you will see the figure. It is this kind of variation in all sorts of dimensions, the length of
15 the run, the type of customers involved which can lead to these huge variations.

16 THE PRESIDENT: That was beginning to lead me to wonder whether this exercise ----

17 MR TURNER: Could be done.

18 THE PRESIDENT: -- that had started in good faith and carried out, I am sure, very carefully was
19 actually a useful exercise at all because of the huge and rather arbitrary variables it was
20 absolutely bound to throw up, depending on what the configuration of the run actually was.

21 MR TURNER: Of course, Claymore/Express’s position is not just that the exercise can be done, but
22 that it should be done intensively and in lots of different ways. Mr Haberman’s report, for
23 example, tells the Office that it should have followed up countless points of detail and what
24 he refers to as “anomaly”.

25 THE PRESIDENT: Put the point the other way around. The Office finally decided to call a halt
26 because the exercise threw up results that were inconclusive, but the exercise by its nature
27 very probably was always going to throw up results that were inconclusive or were difficult
28 to interpret because of the arbitrary nature of the various factors affecting the runs and the
29 size of customers.

30 MR TURNER: We do have hard data on a lot of the material involved.

31 THE PRESIDENT: Yes, well you can take us to that in a minute, we will see what the hard data
32 shows.

33 MR TURNER: What I was seeking to show you was that the figures which you drew attention to in
34 Mr Haberman’s report are not surprising when you appreciate ----

1 THE PRESIDENT: No quite, they are not surprising at all, but it does raise the question as to what
2 reliance you can place on figures that produce such wide variations.

3 MR TURNER: Well the figures do produce results which can be relied on because all of the details
4 of the volumes taken by the customers, who they are, and so on and so forth, are known. The
5 main difficulty comes with what Mr Green concentrated on yesterday, namely this issue of
6 the run costs – joint costs of delivering, how you allocate these between different outlets on
7 the run – it is very difficult.

8 THE PRESIDENT: Just remind me where run costs are treated as variable costs for this purpose.

9 MR TURNER: Large parts of the run costs were treated as variable.

10 THE PRESIDENT: And how did the CC go about this particular problem?

11 MR TURNER: The interesting point is that the CC did not look at the costs of supplying different
12 outlets at all, and that is why the Office thought that its form of analysis was likely to be
13 superior in looking for issues such as price discrimination because the Competition
14 Commission never tried to work out costs relative to the location of the particular customer
15 outlets and so it appeared that they could not do the sort of exercise that would be needed in
16 order to bring out predatory pricing to particular customers or price discrimination. That is
17 why the Office felt it necessary to go down this line.

18 THE PRESIDENT: It always was the case, as I have understood it, that Wiseman did not actually
19 set its prices by reference to geographical location of particular customers – it may have done
20 to some extent but not by reference to any detailed analysis of what the delivery costs might
21 be.

22 MR TURNER: That is absolutely right. It appeared from, in particular, the meeting with Miss Pope,
23 that the way the prices were set was by reference to the peer group, as it were. If you were
24 supplying in a particular area of the Highlands a certain type of customer, and another type of
25 customer cropped up, quite apart from the fact that they may well come to know what each
26 other were being charged there would be a rough equivalence between them. The feature of
27 what we have found to be price dispersal in this industry and price discrimination partly
28 arises because of location of these other specific factors for individual outlets are so
29 important. I will come on in a moment to the question of whether this is an inherent feature
30 of the industry. The Office does not have a concluded view on that. The work that it did
31 showed that that could well be the case, that this could be an inherent feature of pricing in
32 this industry, that the only practical way to do it is in the way that Wiseman does do it, and
33 that as a result the sort of dispersal of prices that you see for customers taking similar

1 volumes and in the margins earned in relation to similar customers are likely to be all over
2 the place.

3 THE PRESIDENT: You have to distinguish, I think, because you have tended to have allied
4 together the idea of whether the prices are different, and the idea of whether price cost
5 margins are different, and they are quite different ideas.

6 MR TURNER: They are different ideas. In fact, there was dispersal or a wide scatter in relation to
7 both of those. The Office took the position, quite rightly in accordance with principle, that
8 looking at price cost margins for customers of similar volumes was the more important issue
9 when considering the possibility of abusive price discrimination. They went to look for
10 whether there was a pattern which might suggest a targeting of Claymore/Express in that
11 connection.

12 So then I return, as you say, Sir, to the thorny issue of the run costs and need to get
13 figures for the run costs. This would be an indispensable element of the inquiry and the
14 question is whether it could be done. The Office's position, in a nutshell, is that the
15 allocation that it performed was a reasonable and a useful way to go about it and it could not
16 be criticised by Claymore/Express. The run costs, as you say, Sir, would have to be estimated
17 – this is the cost for each of the runs along which the outlets were spread, because Wiseman
18 did not estimate those for its own internal business purposes. The Office set about doing that
19 work for itself and if I may ask you to turn to p.312 in the bundle – 311 is where it starts –
20 you have the first big information request which the Office sent out to Wiseman. At p.312, if
21 you look at question 1(iii) you will see that Wiseman were first of all asked for every
22 customer delivery point – that is essentially “outlet” in Scotland. They wanted information
23 on the run number, the assigned run number for that delivery point at a particular time so
24 they would have a full account of the runs. Question 3: “Please provide a complete list of
25 runs made in Scotland at the same date, and indicate the depot” and so on. So the Office
26 began by getting a complete list of the runs to which every middle ground outlet served by
27 Wiseman belonged. As it turned out, in fact, the information was provided for October 2001.

28 When it got it it had almost 11,000 middle ground outlets and there were more than
29 350 runs – the precise figures you will find in the reply at para.8.4(i). I am mentioning this
30 in particular because Mr Green has not abandoned his attack on the sampling and how the
31 OFT went about this part of its work. It would obviously not have been manageable to
32 examine the cost of serving all the 9000 middle ground outlets in Scotland and that is why
33 the OFT set about creating its sample. The way in which it did that is described in the reply,
34 again at this crucial paragraph, para.8.4, and perhaps if you turn up p.494 in the core bundle

1 you see the text. It begins on p.494 and then there is an account which runs over the next few
2 pages to 497 which explains how this sample was then created. The basic aim was to try to
3 reduce the number of runs in the sample which would have to be looked at to about a third of
4 the total number – the total number, as I say, was about 360, 359 in fact. So the Office said
5 “Right, let us take a third of those. How shall we do that?” As we were saying earlier CWS,
6 one of the largest customers taken from Claymore was used as the anchor. That is at para.8 in
7 reply 8.4. When they looked at all of CWS’s outlets, they found that it covered 95 runs, and
8 there were 231 of its outlets. As is explained here the second stage is that the Office then
9 added in other multiple customers if a large proportion of their outlets were on runs also
10 served with the CWS runs. That made sense, despite what Claymore/Express is urging on
11 you in the revised Notice of Application, because if you are going to have abusive pricing it
12 is naturally more likely to be directed at the more important customers, and not the customers
13 who are tiny, taking only £10 a week. What the Office did was to include all of the outlets of
14 these extra multiple customers and the result was that on top of the 95 runs another 40 runs
15 were added and 21 multiples came in. So now we have about 135 runs and the multiples.
16 The next thing was that the Office added in a great number of single outlet customers as well
17 into the sample, and they did that by taking every third such customer on their 135 runs. That
18 led to 466 single outlet customers being added now into the sample to join the multiples.

19 The very last matter addressed, which is in paragraph 10 on p.496 is that there was
20 one category of customers given an account code “Z” which turned out to be schools and
21 Education Authorities, which were added in if their outlets fell totally within the 135 or so
22 runs – there were 246 of them as well in the sample. The end result of all of this is that the
23 Office had a very respectable framework for its analysis. It had 135 runs, about one-third of
24 all of them. It had more than 800 customers, including these multiples, and it covered 1,150
25 outlets. In total, as is pointed out at para.11 in reply at 8.4, this covered 35 per cent. of all of
26 the volume of Wiseman’s middle ground sales.

27 In its revised Notice of Appeal in para.4.161 and I do not take you to it, Claymore
28 grumbles with this and attacks the adequacy of the sample. Because it does so only in the
29 most general of terms, because Mr Green has not addressed this in any detail yesterday
30 I shall not address that point further. What I will do is turn to this thorny issue of the
31 estimation of the run costs. Wiseman did not have data for the run costs for its business
32 purposes, but that does not mean that it is impossible to carry out a meaningful investigation
33 or that it would be wrong to do so. You can estimate the run costs, and that is what the
34 Office’s next request was designed to help them achieve.

1 THE PRESIDENT: Was the Office's view – that whether prices were above or below variable cost
2 in fact turned on what the run costs were? Was that the deciding factor?

3 MR TURNER: Yes, it was, because the run costs were important. They were important in reaching
4 the conclusion on average variable costs.

5 THE PRESIDENT: I do not want to take you out of your stride, Mr Turner. There is a very – I find
6 at least – helpful little table in Mr Bezzant's report at p.575.

7 MR TURNER: You see the variable run costs there at the top.

8 THE PRESIDENT: He, no doubt rightly, identifies a number of variable run costs – trucking,
9 normal packaging and processing, and then towards the bottom various fixed costs including
10 fixed run costs, depot costs, central admin and so forth, which one can see in general terms
11 a huge proportion of the costs of supplying milk are variable, they depend very largely on the
12 cost of the raw material ----

13 MR TURNER: Yes, they do.

14 THE PRESIDENT: -- and a substantial proportion for packaging costs, although some packaging
15 costs are probably overheads that are fixed. But this whole exercise seems to be proceeding
16 on the basis that it all stood or fell on whether you could find some way of allocating run
17 costs that would tell you whether you were above or below AVC.

18 MR TURNER: It was important to allocate all of the costs of serving a customer to the customer for
19 the purpose of applying the test, and the position is simply, I think, that run costs were a
20 significant ingredient in that and so they could not simply be left out of account in carrying
21 out this sort of exercise. It is pointed out to me, of course, those are the costs that vary
22 between the customers, the run costs are actually very important in that regard. The raw milk
23 costs, the packaging and processing costs at the dairy do not vary as between the different
24 customers, but the run costs are very sensitive as to who the customers are and their location
25 and so quite important to the analysis of whether you have a situation where Wiseman is
26 trying to oust the competitor.

27 THE PRESIDENT: That rather depends because, first of all, as you are explaining it to us they vary
28 according to random considerations like whether the particular customer happens to be on the
29 route that is already served by a lorry that is going on its way to a supermarket.

30 MR TURNER: Yes, absolutely.

31 THE PRESIDENT: In relation to what Wiseman's intentions were, whether Wiseman was trying to
32 drive out anybody or compete unfairly in some way, whatever else it may have had in mind,
33 did not have in mind variable run costs.

1 MR TURNER: This relates, Sir, to a point that you raised yesterday when you referred to the
2 randomness of the run costs.

3 THE PRESIDENT: It is a very interesting exercise, but I am still hung up at the moment on whether
4 it was ever going to tell one anything.

5 MR TURNER: Well it was. Can I perhaps address the example that you gave yesterday when you
6 were discussing this issue with Mr Green?

7 THE PRESIDENT: Yes.

8 MR TURNER: Because you said to him let us have two hypothetical examples, and in the first
9 example you posited a run which included one supermarket down the road, and then the lorry
10 goes on and delivers to a number of middle grounders further away. In your second example
11 you had a run where the small middle grounders – assume the same composition of outlets –
12 were bang on route to the supermarket and involve little additional cost of delivery to them.
13 You said this looks arbitrary because in one case you might say there should be a higher cost
14 to serve the middle grounders than in the other case, because in the first case you have to go
15 on specifically and incur this extra cost to serve them.

16 The underlying point which means that this is not random, and that it does make sense
17 is very, very important to appreciate and that is that the main driver, and this is common
18 ground of Wiseman's business and how it arranges these runs, concerns supply to
19 supermarkets – I will give you some references. Wiseman was going to incur the costs of
20 supplying to the supermarkets even without this middle ground business. It is generally and
21 typically the incremental cost. You are delivering on a run to the supermarket, you do not
22 have to deviate very much to drop off to the middle ground customers, they are not why the
23 run is there in the first place. As Mr Haddon points out this is plotted out not randomly, there
24 is software, it is thought about and that is why it makes sense to allocate in the way that the
25 Office did, and I am getting slightly ahead of myself in terms of the sense of allocating by
26 volume. What it does mean is that you can find a sensible basis for attributing run costs to the
27 middle ground customers.

28 THE PRESIDENT: So you do it on a marginal basis?

29 MR TURNER: It is not so much marginal, it is in recognition of the fact that the run is there to serve
30 the major supermarket typically, and that a small amount of additional cost is likely to be
31 involved in deviating or dropping off on the way milk to the middle ground customers. So it
32 does make sense to allocate the run costs by reference to volume because the big customer
33 who is causing you to engage in the supply of milk, taking the large volumes, is the

1 supermarket, and on the way there (or back) you are supplying milk to the middle ground
2 customers.

3 MR CLAYTON: Not all the costs are apportioned on volume? What happens if the small outlet is
4 beyond the supermarket and the lorry has to go 10 miles to get to the middle ground outlet,
5 do you still allocate on volume, even though there is a true incremental cost going beyond the
6 supermarket?

7 MR TURNER: The answer to that question, Sir, is that that actually is not the case, at least not
8 typically, at least not generally because the runs are arranged around the supermarkets and
9 therefore you would not (or should not) typically get this situation where you deliver to a
10 supermarket, and then you have to go miles out of your way just to deliver a small volume of
11 milk to middle ground customers.

12 THE PRESIDENT: Is this true for the Highlands as well?

13 MR TURNER: Yes, it is. It is generally and typically the case and it is common ground – I will give
14 you one immediate reference, if you look at Mr Green’s skeleton, footnote 50, on p.28. Here
15 he is actually himself referring interestingly to Mr Sweeney of Wiseman, and for your note
16 there is the reference to Mr Sweeney’s evidence. It says:

17 It will have been obvious to the OFT that numerous runs undertaken by Wiseman
18 would have included supermarket outlets: see Sweeney paragraph 6.1[639] where he
19 explains that Wiseman’s business is primarily geared towards supplying large
20 multiple retailers and supermarkets.”

21 This exercise, I agree, will not make sense if there is a randomness about how the run is
22 organised, but the point is that is not how the business is run. T he Office had had discussions
23 with Wiseman, they knew how the business was run, it is not disputed.

24 THE PRESIDENT: It does not have seemed to have dawned fully until the March meeting that this
25 was the reason for the difference in the figures which were all thrown up.

26 MR TURNER: That is a fair point, Sir, it is a fair point.

27 MR GREEN: I do not want to interrupt, but when we posed this question to Mr Lawrie, we asked
28 what information, if any, did the OFT have at any time about the other non-middle ground
29 customers served by the list of runs, one has originally shown up, or two after the customer
30 has been revised, and in particular we ask about doorstep or supermarket outlets delivered to
31 on the runs selected in the sample. The OFT’s answer was “none” [p.503] so the OFT had no
32 information about the balance of supermarkets or other outlets on the runs, and that was the
33 answer we got. That is 8.10(a).

1 MR TURNER: I am grateful for that interjection. It is misplaced because the answer related to
2 whether there was information about particular outlets or runs and the Office did not go into
3 that detail. We are talking about the typical configuration of the business, and that was not in
4 dispute and, as I understand it, it is not now in dispute. But at any rate that is the basis upon
5 which the OFT went about its work.

6 I am not going to be saying by the way that the allocation by volume was absolutely
7 perfect because it is the position of the Office that it is not, it is not absolutely perfect. It is,
8 and I am using the term “rough edged”, but the view that was taken was that it was
9 reasonable, it was absolutely good enough for this purpose in the professional judgment of
10 the case team, and that Claymore, as we will see in a moment, have failed singly to suggest
11 anything that is more sensible, or a better way of doing it. I would like to take you to what
12 Mr Haberman has to say about how this should be dealt with. He does not say it cannot be
13 done; he has his own ideas about how it should be performed.

14 THE PRESIDENT: Just to take a hypothetical, Mr Turner, not necessarily to deal with on the hoof,
15 as it were, if you have a dominant supplier who is supplying quite a lot of supermarkets and
16 some smaller outlets, and you have another supplier who is not a small supplier, who is not
17 supplying many supermarket but does supply small outlets. On this approach when you come
18 to look at costs you are saying to yourself it is all right for the dominant supplier to approach
19 the customers of the smaller supplier and construct his prices on the basis of marginal
20 running costs because it is quite legitimate to the larger supplier to simply charge the
21 incremental cost of a drop off on the way to the supermarket. But if you allocate costs on that
22 basis how difficult is it for the smaller supplier to compete because he does not have the
23 advantage of the supermarket deliveries that the dominant suppliers have?

24 MR TURNER: Can I give you an immediate response to that, and perhaps I will add to it as
25 necessary over lunch.

26 THE PRESIDENT: Yes.

27 MR TURNER: It is trite that competition law is not about protecting competitors but about
28 encouraging the process of competition and efficiencies which lead to consumer benefits. If it
29 is sufficient for the dominant firm to price in a particular way or for its business to be
30 constructed in a different way, and this delivers benefits to customers, it would be quite
31 wrong to say that it should in some sense be restricted in its activities in order to enable
32 a competitor to come through and for them both to compete against each other on some
33 suboptimal basis.

34 THE PRESIDENT: If that leads to a monopoly situation does that not matter?

1 MR TURNER: It may do but as a general proposition the efficient solution which leads to the best
2 outcome for consumers is what competition law should be aiming to achieve.

3 THE PRESIDENT: But is calculating everything on the basis of marginal cost the right approach in
4 this sort of situation? At margin the dominant firm will always win.

5 MR TURNER: I am told that we will discuss the term “marginal cost” and perhaps I will come back
6 to you on that over lunch in this context. But the fact remains in terms of business reality
7 rather than in terms of accounting for the particular costs, the way that the OFT went about it
8 and this process matches the commercial truth. The commercial truth is that you arrange the
9 run around the supermarket and that it costs very little to supply other people on the way
10 there or back.

11 THE PRESIDENT: But that is reality and what you call “commercial truth” is that prices are not
12 arrived at on anything remotely like this basis.

13 MR TURNER: The prices are not but if you are trying to work out whether ----

14 THE PRESIDENT: So if you are trying to work out whether somebody is being targeted by
15 particular prices this approach will not get you anywhere because that is not how it is done.

16 MR TURNER: What you will want to look at is to see whether the margins earned on the supply to
17 particular customers are loss making or not.

18 THE PRESIDENT: The defendant company will say “I haven’t a clue because I don’t do it like
19 that”.

20 MR TURNER: But then how is one to apply the standards set out in the case law in a case of this
21 kind? Can it be decisive that the dominant company does not happen to think of its pricing in
22 this way if it turns out that in relation to customers, and on a perfectly respectable basis it is
23 pricing above cost and not targeting anybody and, moreover, as there is not here any other
24 interesting indication of an intent to eliminate the competitor. I bear in mind by the way that
25 there are no business strategy documents that were uncovered – none which would throw
26 light on this issue. It should not be forgotten – that was a point that was also made in
27 particular in the case team’s submissions.

28 THE PRESIDENT: Yes.

29 MR TURNER: If I may come back on that point as so advised after the short adjournment.

30 THE PRESIDENT: Yes.

31 MR TURNER: So that you can see this, the way that the OFT then went into the issue of run costs
32 can be appreciated from the s.26 request it sent out on 25th October 2001, that is at p.315. If
33 you turn to p.316 and you look at (i) – for each run identified in table A, these are the runs,
34 the 135 in the sample – “please provide details for the cost of the runs” split between the

1 various headings. Then also at (vi) for each relevant customer, “please provide details of the
2 volumes of milk that were taken” and these then provide the building blocks for the
3 allocation that was carried out.

4 If you turn forward a page to table A on p.318 you then see, here is the list of the 135
5 runs and then you have the elements of cost relating to the runs. Those are the principal
6 elements of costs for the runs based on the OFT’s knowledge of the business. This
7 information, as we have said, is not kept and recorded by the company for its internal
8 purposes therefore the depot managers provided estimates, and that is indeed what Wiseman
9 went about doing. If you turn to p.338 and look at top left – this appears to be confidential
10 because I have a line through my page – if you look at the section beginning “A number of
11 assumptions were made in compiling the cost information...” you will see that Mr Sweeney
12 is telling the OFT how his depot managers then went about estimating these run costs. The
13 point I want to draw to your attention is what is actually involved in a process of this kind.
14 You have to make some quite important estimates, like the number of miles travelled, the
15 time spent at the outlets and so on and so forth in order to find these run costs. It is not at all
16 straight forward. As you will see in a moment what Mr Haberman, or at least what
17 Claymore/Express seemed to want is that the OFT should have investigated this in huge
18 detail itself rather than relying on the depot managers to do this sort of thing, and they wished
19 you to make an order that it was a failure in their approach that they did not do that.

20 Specifically, Mr Haberman says that the Office fundamentally failed in what it did
21 because it did not gather what he calls “raw data” and analyse the data itself. The short point
22 that I would wish to make is that there was no raw computerised data. You will see from this
23 that what we are talking about is records of drivers, perhaps vehicle servicing bills, petrol
24 bills, knowledge of what lorries are used on what runs, route maps and so on. The
25 suggestion that you find in the revised Notice of Application that what the Office should
26 have done is sit down with huge piles of paper relating to 135 runs and three monthly periods
27 and do all that work, is simply a nonsense. It could not have been done. This was the only
28 practical way to do it if you accept the premise that this approach is sensible.

29 THE PRESIDENT: Yes, speaking for myself one would be inclined to say that the criticism, or
30 possible criticism, or comment at least, is not that this was not done in sufficient detail but
31 that it was much too complicated an exercise to start on in the first place.

32 MR TURNER: That is not the criticism which is made. Given that you can find almost anything in
33 the revised Notice of Application it may be there somewhere, but it is not exactly at the

1 forefront of the detail when you wade through Mr Haberman and the revised Notice of
2 Application.

3 In the period before lunch I will just conclude this rather technical summary. The
4 Office had asked for cost data for three monthly periods which all followed the coming into
5 force of the Act, May and November 2000 and May 2001. The idea was that they would
6 then have three snapshot periods from the time the Act was in force within which they could
7 have a look at Wiseman's margins and prices. Sir, they knew well that there were rough
8 edges to this information. One good example to which Mr Green referred only very briefly
9 yesterday was that there was information about which runs the sample of outlets belonged to
10 which was information dated October 2001, and I will not take you to the letter to that effect
11 but that was the case. Therefore it meant that it was possible that some of the outlets in the
12 sample might even have been on different runs in earlier months, the months which were the
13 subject of the investigation. But the Office's position in short is that that difference was
14 unlikely to have been very significant at all. A point which is made in writing but which
15 Mr Green did not make orally is he says because Wiseman needed to re-organise its whole
16 delivery network at the end of September 2001 to comply with the assurances to the Office of
17 Fair Trading that it would cover its costs that meant that there would have been a re-jigging
18 which would have affected who was on what run. That is, in fact, quite wrong because
19 Wiseman did not have to make changes to its network by the date of the run information that
20 we have to 2nd October, under the assurances and, in any event, in the end they made only
21 very minor changes to the delivery runs. So there is basically nothing substantial in that
22 point.

23 The Office then estimated, it had all this data, it estimated the margins for every
24 single outlet and for every single customer to which the outlet belonged in this really very
25 large sample, and across a variety of different types of product. There were 10 popular
26 products taken as well, and the Office looked at every single dimension. Now we come to the
27 graphs which Mr Green laid emphasis on, which are exhibited to Mr Lawrie's statement. If
28 you look at annexes F and G first, on p.376 and 377, here you have, as it were, the starting
29 point of the analysis because they saw this wide variation in price cost margins for customers
30 who were taking similar volumes in the sample.

31 THE PRESIDENT: Just before we go to that, I am on p.316. 318 and 319 are the running costs.

32 MR TURNER: Yes, then table B is the depot costs.

33 THE PRESIDENT: Then we have the depot costs, then we have the trunking costs, and then we
34 have the dairy costs.

1 MR TURNER: Which is the packaging and processing and the ingredients.

2 THE PRESIDENT: We have not yet got, and just remind me when we get to it, at what stage it is
3 decided or the view is taken on how these various heads of costs are to be split between fixed
4 and variable. You are coming to that?

5 MR TURNER: I will do that. My next topic, which actually we have rather substantially covered, is
6 the allocation of the run costs. I would just like to respond first to a point which Mr Green
7 urged on you yesterday, which I hope I am not misrepresenting terribly, but he said it was
8 perverse to allocate the run costs by volume because everyone knows that the more volume
9 you take, the more milk you purchase the cheaper it is to supply. He cannot have meant that
10 it is actually cheaper in cash terms to supply a large supermarket than a small grocery store.
11 So what we believe he must have meant is that there are economies of scale in delivery.

12 THE PRESIDENT: On a per litre basis.

13 MR TURNER: On a per litre basis, and that the cost should be cheaper for a large supermarket
14 viewed in isolation. We would agree with that, but the whole point of this is that you cannot
15 view it in isolation. Again the supermarket is part of the delivery run along with a whole
16 range of other outlets and this is creating a situation of joint costs. That point is brought
17 home by the very paragraph in the CC Report to which he referred. If you look at para.5.67,
18 1029. What you see there is quite rightly the statement that the actual costs to serve
19 particular people will vary not just according to volume, but also drop density and distance
20 are mentioned. The first point is it is quite wrong to say that to have volume as a factor is
21 perverse because volume is mentioned as one of the factors. It goes on to say that this means
22 that other things being equal it is cheaper to supply supermarkets or big volume buyers than
23 stores or customers that buy in smaller volumes. It is obvious, but if you were to deliver
24 a quantity of milk to a supermarket and separately deliver a smaller quantity of milk to
25 a small corner shop in cost per litre terms it is obviously much more efficient to supply the
26 supermarket. But then the Competition Commission went on to make the qualification that
27 the costs of supplying such small volume customers can, to a degree, be mitigated by
28 delivering to a number in one delivery run so ensuring that the vehicles carry large volumes.
29 This just takes us back to the point that we are dealing with a sort of unified organism, the
30 run, which is a circuit and that you need to consider the costs as a whole.

31 MR CLAYTON: You are saying that all the runs are based on supermarkets, so you would not have
32 that situation where you have aggregated small customers into one zone, because that would
33 not serve the supermarket?

1 MR TURNER: No, typically you are going to have supermarkets on the runs. You may also have
2 on the run a range of other smaller people as well. But the point is that you look at the whole
3 thing as a round because the cost of the run is really a joint cost.

4 Mr Green referred to annex G, which we have just been looking at, to imply that the
5 cost of supplying customers somehow reduces as the volume goes up. I just make the point
6 that the core shows nothing of the kind. What it shows is a tendency for the margin earned to
7 go down as the volume goes up. But that is the margin earned and not the cost of supplying
8 the customers at all. I have made my point about the way in which the Office decided to
9 allocate run costs and the business reasons for doing it in that way.

10 Mr Green's claim yesterday was that the way to do this is to allocate runs by distance,
11 and he repeated on two occasions to you that it is not beyond the wit of an accountant to
12 work out how this might be done. Having said that, I would make three points before the
13 short adjournment. First, it is all very well to say "distance", but distance from what? From
14 the supermarket, which is the primary reason for the existence of the run, or from the depot?
15 Do you take the way to the supermarket or the way back to the depot? Secondly, what are
16 the practical issues involved in getting route maps for 135 or so runs, or in
17 Claymore/Express's view many more than that should have been sampled – more than 1000
18 outlets, studying their profiles and trying to allocate on the basis of what is called "activity
19 based" costing. It would not be practical.

20 The third point is that it is important to show you what Claymore's own accountant,
21 the expert, Mr Haberman has said in his report about this. If you would turn to p.169 of the
22 core bundle, starting at 168, he gives his view about all of this in para.5.90. Mr Haberman
23 says that once a run has been determined its cost is driven largely by the total distance
24 travelled. Much of that distance will be common to all the outlets to be served, and the nature
25 of runs is such that the total distance cannot be easily split between the outlets. That is what
26 he says.

27 "In my view, therefore, the most accurate approach would be to attribute delivery
28 costs, wages, to each outlet specifically according to time spent at each outlet..."
29 Pausing there, that involves its own enormous burden.

30 "... and then share travelling costs, wages and vehicle costs equally between outlets.
31 Or, for simplicity to share all run costs equally between outlets".

32 So what he comes down to is first the notion that allocating by distance is problematic; and
33 secondly the idea of simply dividing the run costs by outlet. So that if you have a
34 supermarket and a tiny corner store they should be allocated the same level of cost and that is

1 the thrust of the expert evidence which has been submitted to the Tribunal on behalf of
2 Express.

3 MR CLAYTON: That is perhaps on the basis that the amount of time spent at a small outlet and
4 a supermarket may not be dissimilar – the lorries have to drive up to it and then drop off the
5 goods and then drive on.

6 MR TURNER: It may be. He begins by suggesting that one should try to study the time spent at
7 each outlet, and he ends by saying “well, look, let’s just take the total run cost” – this is his
8 very last clause – “for simplicity, and share all the run costs just equally between the outlets;
9 just divide it”. For the reasons which we have already given in our skeleton that is not
10 sensible.

11 THE PRESIDENT: Is the reality not that run costs are, as you have just said, joint costs shared
12 between all the retailers on the particular route and, as a result, it is very difficult in any
13 sensible way to try to get at the cost specific to middle ground retailers because they are
14 simply joint with all other costs including supermarkets and hospitals, schools and other
15 outlets – it is just not a practical exercise.

16 MR TURNER: That latter comment is perhaps something that would be resisted on the part of the
17 Office.

18 THE PRESIDENT: If it is joint cost for competition law purposes how can you sensibly base any
19 working conclusions on it? I genuinely want help on this, I am not trying to be difficult.

20 MR TURNER: I understand and it is a serious point. First, to state that of course one consequence of
21 saying that you cannot do it might mean that in the case of an industry of this kind how one
22 would go about trying to work out costs of supplying particular customers for a competition
23 analysis becomes extremely unclear, if that were the case you simply could not do it.

24 THE PRESIDENT: You could at least sort of look at it on two or three different bases and see what
25 it threw up – “well, we will just allocate run costs by proportion to time or vehicles used, or
26 number of outlets or whatever and just see what difference it makes”.

27 MR TURNER: Well, it is possible, if you take ----

28 THE PRESIDENT: Just forgive me, what is not totally clear to me at the moment is how much
29 difference this makes, even if you had done it differently does that make the crucial
30 difference between whether you are above or below AVC or does some other factor come
31 into it? If, however you did it, you are still above average variable cost it may not change the
32 analysis very much, I do not know.

33 MR TURNER: Yes, well I think I will revert to you on that point. My suspicion is that it is actually
34 quite important. For example, if one allocates cost by outlet, which is Mr Haberman’s idea,

1 you will find out that a lot of the middle ground outlets on these runs with big supermarkets
2 suddenly end up with much bigger costs. The end result you might have many more outlets
3 appearing to be served at below variable cost – it might look that way. But the question
4 arises is that a reasonable, or useful thing to do? For the reasons that we have given in our
5 skeleton, we believe it is a nonsense to say that where you have a run designed around the
6 supermarket to just say that an equal amount of cost should be given to the little stores as to
7 the big supermarket. It just does not make any sense.

8 It may be that there are ways of doing this by reference to distance or time spent
9 absolutely, and the Competition Commission did point out that distance and drop density are
10 factors. It is important to bear in mind that the way that the Office did it in, I will call it the
11 first “cut” was a reasonable basis for the reasons I have outlined, because it correctly matches
12 the business reality and that to try to do it in some of these other ways, “activity based
13 costing” I will call it for convenience, might be useful in the results that they would give you
14 because you would then be able to compare these different measures and see if you got
15 a wildly differing outcome, but the effort involved in doing so causes one to baulk. I think
16 that is a very important consideration. One needs to say “Well how on earth would you go
17 about doing it?” It is simply not clear.

18 With that remark I was then going to move on to the assessment of the variable costs,
19 so this may be a convenient moment.

20 THE PRESIDENT: Yes, thank you. 2 o'clock.

21 (The hearing adjourned at 1 p.m. and resumed at 2 p.m.)

22 MR TURNER: Sir, before lunch we were on the issue of the allocation of run costs in the
23 circumstances of this case, which is obviously a very tricky issue. Now I have discussed with
24 Lord Grabiner that in the light of the remarks that you made at the outset of this hearing that
25 if the opportunity arose it might be sensible to hear some comments from the experts, it may
26 be sensible, certainly Mr Bezant, who is sitting here is happy, for him to give you some
27 comments. Mr Haberman is here as well. Obviously I am just a barrister and on this
28 issue ----

29 THE PRESIDENT: We are just a Tribunal! [Laughter]

30 MR TURNER: It may be helpful if they do just express a few short views on this point because it is
31 an important knotty point, and if it pleases the Tribunal that might be a convenient way of
32 proceeding. Just before doing so ----

33 THE PRESIDENT: Have you discussed that with Mr Green?

1 MR TURNER: I have not, it was Lord Grabiner's proposal. I ought to check whether Mr Green is
2 content for that to be done.

3 MR GREEN: I have not spoken to Mr Haberman about it and normally if an expert was going to go
4 in the box I would want to have time to prepare a cross-examination.

5 MR TURNER: We had something along the lines of *Genzyme* in mind.

6 THE PRESIDENT: It was probably not so much a cross-examination sort of situation, although
7 I imagine even if we had a sort of mini-hot-tub one side might want to ask their own
8 questions as well as the Tribunal. If we were to go down that route, let us think about it, it
9 might be more convenient to do it, say, tomorrow morning or something like that.

10 MR TURNER: I am relaxed about that as well.

11 THE PRESIDENT: I do not think we can just sort of jump people suddenly.

12 MR GREEN: It would have been more sensible if it had been raised at an earlier stage and so we
13 could have considered it. We did consider it at earlier CMCs and it was clear that neither the
14 OFT nor Lord Grabiner wished to cross-examine Mr Haberman.

15 THE PRESIDENT: They do not want to cross-examine.

16 MR GREEN: I might want to.

17 THE PRESIDENT: You might want to.

18 MR GREEN: I might want to cross-examine Mr Bezant and I might want to have an opportunity to
19 address questions to him having prepared cross-examination, I do not know – I do not know
20 what he is going to say. I am not ever certain of the scope of the hot-tubbing that is being
21 contemplated – I do not know whether we are all going to get into it! [Laughter]

22 MR TURNER: I think there is really only one issue, we were discussing the point that the OFT has
23 allocated these run costs between the outlets in terms of volume, and the practicality and
24 reasonableness of that and the implications. That is the point we were on, I had no other
25 intentions in mind, and had in mind a sort of hot-tubbing exercise of the kind the Tribunal
26 has used on other occasions.

27 (The Tribunal confer)

28 THE PRESIDENT: I think, Mr Turner, we are not completely sure at the moment. I think we would
29 not want to do anything any earlier than tomorrow on any view. I think we would like to
30 reflect on it and then give Mr Green an opportunity of making any submissions he might
31 want to make as to whether we should do it at all, and we will see how we go.

32 MR TURNER: Yes, I am obliged. In that case I will just make a few points by way of reaction to
33 some of the issues that were canvassed immediately before the short adjournment. The first is
34 a rather technical point which nevertheless is important and urged on me, that this is not a

1 case of marginal cost pricing strictly speaking – pricing to the small shops on an incremental
2 cost basis. This is working out all the run costs, an average cost per litre of milk delivered,
3 and if we add it all up it equates to the full total cost of the run. It just so happens that there is
4 a smaller level of costs allocated to the small business because the measure you are using is
5 allocating by the volume of milk.

6 The second point is that even a dominant company may legitimately enjoy what
7 I believe are called “economies of scope” in the case of joint or common costs. It is serving
8 the supermarket and it makes sense given the run that is necessary for that purpose also to
9 supply a group of nearby middle ground outlets. In commercial and economic terms the cost
10 of doing this is small. The run is there anyway for the supermarket, it is a given, and from the
11 point of view of the dominant firm it might make sense to serve the additional small shops,
12 the middle ground customers precisely because you can do profitably at a low price. The
13 point is that it cannot be right for another competitor such as Claymore/Express to come
14 along and say “We cannot compete with you if you are charging such low prices to the
15 corner shops. You have to raise your prices. You have to allocate more costs to these small
16 shops and then we are able to compete”.

17 THE PRESIDENT: It makes it quite difficult for the new entrant does it not – the new entrant who
18 has no supermarkets yet?

19 MR TURNER: That may be the case, but the question is whether it is sufficient competition for
20 someone to compete in the way that the dominant firm is doing here, and we say that it is not
21 obvious that this is illegitimate at all. It is a fair way of carrying on business. If one takes the
22 example of Wiseman supplying a supermarket in a particular area and then it turns out that
23 there are some middle ground outlets on the way which it can conveniently serve is one to
24 say that it is anti-competitive to serve them at a price which reasonably covers the small
25 additional cost of getting there and unloading the milk.

26 THE PRESIDENT: That is saying as long as the dominant firm is covering incremental costs
27 everything is all right?

28 MR TURNER: Well they are covering all the costs for the run. The way the exercise is done is to
29 work out the whole cost for the run and you simply dole out those costs by reference to the
30 volume which is taken by each of the outlets en route.

31 MR CLAYTON: So the marginal costs are not being taken, you are taking an allocation of the total
32 costs ...

33 MR TURNER: Thank you, yes. The Office’s view, in a nutshell is that because the supermarket is
34 the reason for the run, purely in view of its large volumes which it is taking, which after all

1 are the source of the revenue and the business that Wiseman operates that makes it sensible
2 to think in terms of allocating these run costs using volume as a key. It is not perfect but it is
3 reasonable.

4 THE PRESIDENT: Well you can tell us, but you have just explained that the supermarket is the
5 reason for the run, are we quite sure – particularly in relation to the Highlands – and bearing
6 in mind that the middle ground is almost as important as the supermarkets, even in relation to
7 Wiseman, it must be more important in the Highland area, but there always is a supermarket
8 that is the reason for the run ----

9 MR TURNER: I cannot say that it always is. My understanding is that that is generally typically the
10 case.

11 THE PRESIDENT: Where are these supermarkets – in Elgin and Nairn and all those places?

12 MR TURNER: Yes. The point that you need to bear in mind is that it is not the labelling of an
13 outlet as a supermarket that makes this a sensible way to do things. In the Highlands, as in
14 elsewhere there are large outlets categorised as middle ground outlets, which will be the main
15 reason why the run is configured.

16 THE PRESIDENT: I see, the run is centred around larger outlets?

17 MR TURNER: Yes. I am told that CWS as a whole is larger than Marks & Spencer to give some
18 flavour for the sorts of outlets, customers, milk requirements. Whether that plays down on
19 a run ----

20 THE PRESIDENT: They have quite a number of runs, 95 runs.

21 MR TURNER: That is fair comment. The essential point is the principle of allocating most heavily
22 by reference to the large customers who caused the runs to be there in the first place ----

23 THE PRESIDENT: I see, I follow that.

24 MR TURNER: There is one point of principle which I am asked to raise and this is the issue when
25 you have joint costs, such as these run costs you have an intractable position which means
26 that the job of competition analyst becomes impossible. The position is that it is at least not
27 uncommon for work to be done in allocating joint costs in many different circumstances,
28 industries, it is something that is done – I hesitate to use Mr Green’s phrase, but not beyond
29 the wit of an accountant might be expanded to not beyond the wit of an economist. The point
30 is that it just has to be done appropriately as, in our submission, it was done here using
31 volume. Nor does it need universally the adoption of a series of different sorts of approach to
32 allocation particularly if (a) one of these approaches or more might simply not be economic
33 sense, such as in our respectful submission Mr Haberman’s idea that you just divide it by the

1 number of outlets that you have; or (b) in a case where it is practically impossible, the idea of
2 the case of you having to sit down with roomfuls of tachograph records and models of routes.

3 The last point I desire to make is the importance of looking at costs, the inevitability
4 of the need to do so and not just the prices. It may well be that Wiseman does charge
5 different prices to people taking similar volumes up and down Scotland, but that may be and
6 indeed it was urged upon the Office by Wiseman, justifiable to charge these different prices
7 because the costs to serve the customers vary so much, and it could legitimately be said that
8 the costs to serve are different and that the business of supplying all these different outlets is
9 profitable.

10 If you are confronted with an allegation such as that made by Claymore Express, that
11 Wiseman is offering unprofitable, low prices to its customers in a bid to target them it is
12 necessary to look at costs, or at least the Office has not found a way around that particular
13 problem. So that is all I desire to say by way of closing the discussion this morning.

14 I then move to the assessment of the variable costs by the Office. Claymore
15 essentially makes one main point which is that the Office did not have a time period in mind
16 over which the variable costs should be assessed, and he gave the figure of two and half years
17 based on information gained from the Competition Commission Report. This issue has been
18 fully addressed in the Office's skeleton in paras. 25 to 32. I make some very short points to
19 reinforce what is said in the skeleton. Claymore mentions certain variable elements of cost
20 for depot costs, trunking, central costs, vehicle depreciation and matters of that kind, and says
21 that these were left out of account, but the point is that the Office's high measure of variable
22 cost, which is described in Mr Lawrie's statement included all the processing and packaging
23 costs for the dairy, even though some of these are fixed costs. When one appreciates that the
24 packaging and processing accounts for such a large fraction of the overall cost, respectively
25 that is up to 18 per cent., and up to 29 per cent. of all costs, one sees that it eclipses the
26 argument that the Office's measure of variable cost might be flawed because it has missed
27 out these other elements in Claymore's view.

28 If I may just direct you to what Mr Haberman has said about the proportion of
29 variable costs for the element of packaging and processing, that is at p.119 of the
30 bundle in a table under para.3.20 – quite conveniently there Mr Haberman has set out
31 his view of what elements of these different sorts of costs fall into the category of
32 fixed and variable, and if you look in particular at processing costs under the heading
33 "Dairy" you will see that he says:

1 “Testing costs normally fixed. Plant and machinery mainly fixed. Energy costs
2 mixture of fixed and variable. Labour mainly fixed.”

3 What the Office has done in the high measure of variable costs is to treat all of packaging and
4 processing as falling into the variable side of the equation. The net effect of that is that the
5 estimates of average variable costs used by the Office were likely to have been somewhat
6 overstated as opposed to the reverse, and the references are: the Office’s Defence paras.
7 63-71 and in Mr Lawrie at para.42 of his statement. Sir, you also referred before lunch to
8 Mr Bezant’s figure 1 – I do not know whether it is just worth looking at that briefly again, but
9 that does illustrate in the same way the relevant importance of the various categories of cost
10 at issue, so that one can see the importance of the elements which are urged on you as
11 decisive by Claymore Express (p.575). In our submission it is pretty clear from this very
12 helpful diagram that those are relatively small.

13 As for the time period, we endorse the very elegant way in which it is put actually in
14 Wiseman’s skeleton. The idea that there is a rule of law after the *Aberdeen Journals*
15 Decision under which it is necessary for a public authority to begin its investigation by
16 reference to a set period of time for assessing variable costs is simply wrong and that is not
17 what was suggested in *Aberdeen Journals*. In this case it was entirely reasonable for the
18 Office in the first phase of this investigation to make a general assessment of the costs of
19 supply as it did looking at matters from the most variable sorts of cost to the least variable,
20 and to form a view as it did. Mr Green acknowledges that the Competition Commission
21 itself, which conducted a fairly similar exercise, did not estimate the timescale in its analysis
22 over which prices were variable. What it did was to take estimates and a series of rough
23 sensitivities – the reference, which I will not take you to now, is para.3.87 of the Competition
24 Commission Report. What I do say is that it would be quite wrong for Mr Green to say that
25 what the Competition Commission did would have been an unlawful way to do things under
26 the Competition Act 1998.

27 In any event, the key point on this aspect of the case is that the high measure of
28 average variable cost was reasonable and it was robust. Had the analysis actually shown
29 some significant examples of pricing below variable cost, what would have happened is that
30 the case team would have gone on then to refine its estimates. It would have wanted to form a
31 view then about matters such as the particular time frame over which this below cost pricing
32 was taking place. It did not get there because it did not find anything that was suspicious.

1 At one point Mr Green said that the Competition Commission had established that
2 there was below cost pricing by Wiseman for two and a half years, and I return to that figure.
3 That was incorrect. The Competition Commission considered pricing to CWS in two
4 years - 1998/99 and 1999/2000, year ending May. You see from para.4.340 of its
5 Report – again I shall not go to it now for reasons of economy.

6 THE PRESIDENT: I would just like to go to it, if I may.

7 MR TURNER: 4.340, p.1086. This is the section dealing with CWS and half way down para.4.340,
8 the Commission says:

9 “Therefore in the year to May 1999 Wiseman made Xp net profit on every litre of
10 milk sold to the CWS. In the year to May 2000 when Wiseman began serving the
11 additional Highlands and Islands CWS stores...”

12 Then there are the hidden figures.

13 “Therefore, according to Wiseman’s figures in the year to May 2000 Wiseman lost
14 Xp on every litre it sold after accounting for all costs, both fixed and variable.”

15 It forms part of the discussion in relation to the anti-competitive nature or otherwise of the
16 supply to CWS. If you turn over to the following page, 437, you will see the view of the
17 minority members coming in: “It may be argued that the CWS account should not be viewed
18 in this way” and so on.

19 THE PRESIDENT: What was the majority conclusion on CWS? I seem to remember that the
20 majority thought that Wiseman was not covering its costs on CWS?

21 MR TURNER: Yes, that is right on at least an average total cost basis.

22 MR GREEN: CWS is 3.112 and the conclusion is 2.126.

23 MR TURNER: I am obliged. Yes, that is right, 2.117 is really the right starting point under the
24 heading “An Analysis of Costs”, because that is where we begin discussing the position in
25 relation to CWS. At 2.118 we start with the views of Mrs Kingsmill and Professor Cave.
26 Then in the paragraphs which I took you to right at the beginning of the morning, 2.129 and
27 2.130 is the guts of the views of the other two Members, Mr Clothier and Mr Mackay.

28 THE PRESIDENT: Just so that we can follow this, in relation to CWS what was the Office’s
29 conclusion – there was no conclusion, or the situation had changed because costs had gone
30 down, or the prices had gone up or something; or that the costs were legitimately calculated
31 on some different basis which gave a different result?

32 MR TURNER: Well the latter is certainly true. The costs were calculated on a quite different basis
33 because, as I say, the Office looked at all the specific outlets of CWS and the costs of serving
34 each of those outlets which the Competition Commission had not done, so it had approached

1 it on a different basis. Then on its analysis one thing that is clear is that it did not find that
2 any of these individual outlets, or looking at the customer – CWS as a whole – there had
3 been pricing below variable cost, that was ruled out. If you turn to the annex to Mr Lawrie’s
4 statement and look at the table at annex I, which is p.379. This is a table for the main
5 account groups and you will see the margin that is stated there.

6 THE PRESIDENT: That is variable cost?

7 MR TURNER: Yes, the high measure of variable costs.

8 THE PRESIDENT: Is there a comparable table for total costs?

9 MR TURNER: Yes, if you turn the page. What you observe when you turn the page is that there are
10 a few negative figures there below CWS, and you will see from the initials against their
11 names those are actually hospitals and Health Boards for the most part, and this accounts for
12 the statement in Mr Lawrie’s statement that where they did find below cost pricing it was
13 most obvious in relation to the customers in the health sector and outside the Highlands, as it
14 turned out. They could not say that this was sufficiently good evidence with intent to
15 eliminate Claymore express.

16 THE PRESIDENT: I think we would be interested, and it may not be right to try and do it on the
17 hoof again, to tie down why we think the result arrived at by the OFT on p.380 in relation to
18 May 2001 was apparently different from the result arrived at by the CC in relation to May
19 2000. Is it a difference in price? Is it a difference in cost, or is it a difference in methodology
20 – or some or all of those things, or some other factor?

21 MR TURNER: We cannot on the hoof, Sir ----

22 THE PRESIDENT: No, I do not want to do it on the hoof, but you might just see – not necessarily
23 even in the course of the hearing but perhaps soon.

24 MR TURNER: Yes.

25 THE PRESIDENT: Can you tell me whether Aberness figures in that list, **there**, p.380?

26 MR TURNER: Aberness does not in terms of its managed stores, AC Grey, some of the stores – you
27 will see “MNN”, Morning Noon and Night, that is a customer which was a former customer
28 of Claymore. It is a multiple, it comes under the Aberness umbrella and you see that there.
29 I am sorry, correction in relation to that, Morning Noon and night (MNN) it is still, as
30 I understand it Claymore/Express’s customer. The business is divided. There is a dispute
31 about Morning Noon and Night but if we can power through that?

32 THE PRESIDENT: Yes, then I have one other question just to leave you before we leave the
33 annexes to Mr Lawrie’s witness statement.

1 MR TURNER: I am not intending, by the way, to leave them because I am now going to move to
2 total cost and issues of pattern.

3 THE PRESIDENT: Fine, I will come back to the questions I have, you go on.

4 MR TURNER: If you turn to annex G – Mr Green’s favourite page – you have the plotting of the
5 volume against total cost margin in that scatter diagram, and you do observe under the zero
6 line, on the horizontal axis, a range of customers served at below total cost. Sir, that was
7 detected by the Office’s work. What happened was that wherever this occurred the case team
8 looked up who the customer was, where he was, and they sought as the gist of their work to
9 try to find out some common factor which might suggest an intent on the part of Wiseman to
10 target Claymore/Express.

11 THE PRESIDENT: So they looked at customers below the line.

12 MR TURNER: And outlets.

13 THE PRESIDENT: It was done on both bases and they tried to find whether there was something
14 common to these individual outlets or customers which might suggest that there was
15 a targeting against Claymore/Express. For example, they looked at geographical dimensions
16 and at particular products. If you turn to annex R, which is on p.388, you have quite a good
17 figure, partly because the colours are brighter on my copy. You are there looking at a price
18 cost margin by postcode for what was the most popular product type – 2 litre semi-skimmed
19 milk. The red indicates a relatively high price cost margin, the yellow- low. If you look at
20 the map of Scotland, what you observe is no clear pattern, for example, in relation to that
21 particular analysis. One point that was made by Claymore and also I believe by
22 Mr Haberman is that the Office may have failed to carry out a multiple regression analysis
23 which would have enabled it to ensure that particular factors were not averaged out, came out
24 in the wash. But the Office did do so and indeed that was expressly mentioned to
25 Claymore/Express in the letter closing the file, the Decision letter of 9th August 2002. I do not
26 ask the Tribunal to turn that up unless you are interested, but it specifically states there that
27 that was one of the methods used in analysing all of this data. So in conclusion there really
28 was, so far as the Office could see, very thin evidence of an intent to eliminate Claymore in
29 this work. I have gone through with you what the additional evidence was.

30 Mr Green said that some costs have been left out of the Office’s estimate of total
31 costs, and he pointed to cost of capital in particular. His submission was that this was
32 a fundamental error of approach, because it could have made a big difference. Our position is
33 that he is correct to say an element of cost of capital is not included, was not included in the
34 Office’s work on total costs of supply. The OFT’s submission on this point is at paras.57-59

1 of the skeleton. Mr Green sought to address what we had said by simply saying that our
2 argument was that it was an unnecessary exercise and too complex, but that does not do
3 justice to our point. Our point is that if you add a fixed percentage, or some fixed amount per
4 litre to the costs of all the customers in the sample, then on Mr Green's annex G you will see
5 that line for the X axis moving up, as he says. But there are two points. First, it would not
6 take anybody below average variable cost – the Office's high measure of average variable
7 cost remains robust – and it would make no difference to the pattern of price cost margins
8 that the Office was examining. So if you think, for example, of the figure we were just
9 looking in annex R you would not see a difference in the pattern, or something that would
10 change the picture on intent to eliminate.

11 MR CLAYTON: The pattern is not really the important thing, is it? The critical thing is where the
12 line falls, the pattern will not change, the shape of the scatter dots, but the "break even line" –
13 if you can call it that – would rise.

14 MR TURNER: Yes, that is right.

15 MR CLAYTON: You would have more sales going into a negative margin.

16 MR TURNER: That is absolutely right, you will have more outlets and customers now going in to
17 a negative margin. But the points that the Office was making was first, they are not going to
18 be going down below average variable cost, so then we are in the realm under the case law of
19 looking for an intent to eliminate, because they are still making a contribution to fixed costs.

20 THE PRESIDENT: If we are just looking at 377, where on the Office's case do average variable
21 costs kick in?

22 MR TURNER: You will not be able to tell from that figure. If you look at "F" (on the facing page)
23 you have volume plotted there against the price "Low variable cost margin" and because, for
24 the reasons that I have given, the way in which the Office calculated variable costs ----

25 THE PRESIDENT: The left hand vertical axis is in what – in pence per litre? 0.1, what is that?

26 MR TURNER: It is a percentage. There is a table at the beginning of all of these graphs, which
27 gives a guide to them, 368 – mine is heavily scored through and I cannot read it out if it is
28 cored through but, Sir, you can see what is said in the second box along. You will see it is
29 "mark-up" in the "Y" axis. The "X" axis is "logarithm of volume"; the "Y" axis is mark-up,
30 i.e. price minus cost divided by price. So it is expressed therefore as a percentage.

31 THE PRESIDENT: Mark-up as a percentage of the price.

32 MR TURNER: Yes, as it were, the profit – price minus cost divided by the price.

33 MR CLAYTON: ".1", just to be absolutely clear, does not mean .1 of a per cent. margin?

34 MR TURNER: It means 10 per cent.

1 MR CLAYTON: It means 10 per cent., thank you.

2 MR TURNER: I am sorry, the scatter graph is for the low variable cost margin. The high variable
3 cost margin is perhaps the more informative measure, and that has been presented only in the
4 tabular format at annex I.

5 There was only one further point I was going to make about cost of capital which is
6 that Mr Green also urged on you, as is reflected in his written submissions, that estimating
7 the cost of capital for a total cost figure to be allocated specifically to Wiseman's middle
8 ground business in Scotland is the stock in trade of a competition authority and would have
9 been straightforward, or at least that the Competition Commission's figure for cost of capital,
10 which was 0.92p per litre should have been used. The problem is that the Competition
11 Commission's figure for cost of capital was not the cost attributable to the middle ground
12 business in Scotland. It included the capital attributable to supplying supermarkets as well as
13 the middle ground and it was based on an assumption that Wiseman's assets were distributed
14 between Scotland and England in proportion to the volume of production in each country.
15 The Office would have wanted to conduct a more sophisticated estimation of cost of capital
16 had it been necessary to do so. As I say, at this stage of the analysis it was not thought
17 necessary to do so to produce a meaningful result when you were looking for evidence of
18 intent. I do not know whether the Tribunal wishes me to address the cost of capital on cream?

19 THE PRESIDENT: No.

20 MR TURNER: The next topic is price discrimination.

21 THE PRESIDENT: Just before we go to that, Mr Turner, a couple of questions. I am on p.312

22 – I am sorry, I am looking for the letter that asks for depot costs ----

23 MR TURNER: That is the following letter at 315, and the request is at 316, with the tables after that.

24 THE PRESIDENT: In relation to a number of these items of cost, for example depot cost – this may
25 sound a silly question but I will ask it anyway and take it on the chin if it is silly – is there
26 any split between middle ground customers, supermarkets and doorstep, or is it total depot,
27 or what is it?

28 MR TURNER: It is the total depot which serves all of these people, and an invariant cost per litre of
29 milk delivered is allocated to the customer.

30 THE PRESIDENT: So you take the total cost and you allocate to such-and-such a middle ground
31 customer again on a volume basis?

32 MR TURNER: Yes, and this I believe to be uncontroversial because at that level it is difficult to say
33 that there are different costs attributable to different people.

1 THE PRESIDENT: I am sorry, just one other question, and you may not want to answer on the hoof,
2 but you may want to give me the answer later. Under (viii) on p.316, it says:

3 “For each customer in (v) above provide details of any rebates or other financial
4 incentives which are not reflected in the invoice price which were applicable in June
5 2000, December 2000 and June 2001.”

6 My question is, as a matter of fact, did that pick up the payment to Aberness that had
7 apparently been made at some point in 1999?

8 MR TURNER: It did not because Aberness was not in the sample.

9 THE PRESIDENT: Aberness is not in the sample?

10 MR TURNER: No. And the payment related to the stores of Aberness which were not in the sample.

11 That is an important request, actually, but it is right to observe that it relates to the customers
12 who formed part of this sample, and therefore it did not catch everybody, but it is informative
13 to note that the answer to that question is that there were none, there were no incentives or
14 rebates apart from what was reflected in the invoice price. You see that on p.336 in
15 Mr Sweeney’s answer. He is using the same numbering so it is (viii). It is obviously a large
16 sample, but there is the answer.

17 THE PRESIDENT: And Aberness is not in the sample for some random reason, or for some other
18 reason?

19 MR TURNER: Yes, I have nothing really to add to the explanation which is given in the reply about
20 the way it was done. First of all take CWS, then see whether you have multiples, a lot of
21 whose outlets fall within the CWS runs, and they catch 21 other businesses but Aberness was
22 not one of them.

23 THE PRESIDENT: Yes, I see, thank you.

24 MR TURNER: Price discrimination. We can see from annex G again, that there was widespread
25 price discrimination. The point that was canvassed with the Tribunal yesterday was that
26 there was also in the Office’s view about this some evidence that this scattering that you
27 observe, prices and margins, may just have been an inherent feature of pricing in this
28 particular industry because of the special characteristics of the delivery networks involving
29 groups of customers and the importance of location. So now we come to the discussion about
30 the implications of all of this which was canvassed yesterday.

31 THE PRESIDENT: The importance of location and the delivery characteristics.

32 MR TURNER: Yes, the network effect. Sir, you canvassed the question whether if price
33 discrimination is an inherent feature of this industry might that meant that the market itself is
34 inherently uncompetitive? The Office’s position is that price discrimination is not certainly a

1 universal sign of an uncompetitive market, or ineffective competition. Price discrimination is
2 not in itself abusive. What is important is the context and whether the discrimination is
3 exclusionary or not.

4 In a market of this kind involving these joint costs of serving members of the network
5 and so on, the Office did come to the realisation, particularly when it saw the Lordswood
6 figures that we are going to be looking at in a moment, that perhaps one might expect price
7 dispersal, and price discrimination in this sort of industry. That may well be entirely
8 compatible with healthy competition in the industry – might be – certainly it is appropriate to
9 note that that was the view of the businessman in particular at Claymore/Express. If I may
10 direct you to what Mr Davidson said at the joint hearing before the Competition Commission
11 for a moment, I will do so. That is at p.933 of vol.1. At the top of the page, line 6,
12 Mr Davidson is talking about the differences between middle ground prices in the central belt
13 of Scotland, say, and middle ground prices in England. He says:

14 “I think the middle ground prices in Scotland are probably marginally lower than
15 they are in England, because there is a fully competitive market in England’s middle
16 ground prices.”

17 THE PRESIDENT: That does not make sense to me.

18 MR TURNER: We think he might have meant “higher”, rather than “lower”. He goes on to say that
19 he is talking about England being a competitive market, a market that in his view works well
20 and he talks about them being similar in some respects. He goes on (line 12):

21 “The middle ground market has got a range of prices in Scotland as it does in
22 England. In Scotland we are less than X per cent. of the market, in England we are
23 not dominant in any one market sector, and we respond to competition in various
24 parts of the market. It is a fully competitive market in England and Wales.”

25 I draw that to your attention just for illustrative purposes, because certainly one of the
26 important businessmen is of the view that the differences in prices that one observes, at least
27 the pattern, may be similar in England and in his view there is a competitive market there.

28 THE PRESIDENT: I thought the point Mr Green was making was that the comparison between
29 annex G and the Lordswood and Express prices was an apples and pears’ comparison.

30 MR TURNER: Yes.

31 THE PRESIDENT: One of them is comparing prices and the annex is comparing the Office’s
32 calculation to price cost margin.

1 MR TURNER: Yes, he was completely wrong about that. If you turn to annex L and just look at it.
2 What you will see there is it is not just Lordswood's prices that are on the table – I hope you
3 have a colour version?

4 THE PRESIDENT: Yes.

5 MR TURNER: What it is plotting it against is Wiseman's prices, so it is prices against prices. The
6 point was not to compare this with annex G at all. The point about this, the similar one that
7 you have over the page, which is annex M – the comparison of Express and Wiseman's
8 prices – is that it is comparing the pattern of pricing between Wiseman on the one hand and
9 these other firms on the other. So it is not apples and pears at all, but a direct comparison
10 with the price dispersion.

11 What Mr Green did say was that this was meaningless, because Lordswood is just
12 a small dairy in a totally different situation from Wiseman, it is somewhere in South West
13 England. But in our submission that is actually part of the point because the very difference
14 in the situation suggested, when you saw the similarity in the patterning, that the price
15 dispersal might well be an inherent feature of the industry.

16 THE PRESIDENT: That cannot be due to the network effect and the importance of location,
17 delivery characteristics?

18 MR TURNER: It can be due to the second of those, certainly.

19 THE PRESIDENT: Well it might be but all the evidence is that the prices are not set by reference to
20 those sorts of factors.

21 MR TURNER: The evidence is that the prices are set by reference to what is being charged to the
22 peer group, if you like, in the locality. Given that the costs of delivering to customers might
23 vary significantly from place to place one might well see that a customer who is taking
24 a certain volume in place A could be charged a different price from a customer taking a
25 similar volume in quite a different place.

26 So far as cost is concerned, I am reminded also that the salesmen who actually
27 negotiate the prices with the customers also do have a local knowledge which is used in
28 a rough and ready manner of the rough costs of supplying the characteristics of the run and
29 so on, although it is not a scientific exercise. So although the Office is not sure about this
30 and certainly has not reached any firm conclusion on it, what it did see was some additional
31 reason to suppose that the price discrimination that it had found might not be the result of
32 uncompetitive practices by Wiseman.

33 Mr Green relies on case law at this stage. He refers to two cases in particular,
34 *Michelin 2* in the Court of Justice and the *BA Virgin*. He relies on these cases for the strong

1 proposition that differential prices by Wiseman, because it is a dominant firm are treated as
2 abuses automatically unless they are cost justified. Those cases, however, are very different
3 as is immediately obvious from a glance at them, because they concern situations where the
4 dominant firm has offered some discretionary financial inducement to its trading partners –
5 there is some special scheme or rebate system which tends to lock in the trading partners.
6 I am not saying “customers” because I believe in the *BA* case it is the travel agents who were
7 providing travel agency services for the airline. This makes it difficult for the dominant
8 firms’ competitors to gain access to those trading partners. I do not believe Mr Green took
9 you to the paragraphs but he did refer to them and say which they were, and if I may just
10 draw the Tribunal’s attention to some of those paragraphs in the *BA* case (authorities bundle
11 tab 13) The first of the paragraphs which Mr Green referred to began at para.231 on p.22 of
12 the version that we have in the bundle. That reflects the Commission’s view of what the
13 abuse consisted in, and the Commission thought that *BA*’s performance reward schemes
14 created unlawful discrimination between travel agents because they were based on the extent
15 to which a travel agent met or improved on its sales of *BA* tickets in the previous reference
16 period, and were not based on a different volume of ticket sales by the travel agent, or on the
17 level of service provided by it to *BA*.

18 There one sees the Commission’s view that the vice of the situation stems from the
19 fact that the additional business from the travel agent is to some extent locked into British
20 Airways because, under the rebate system – the performance reward scheme being operated –
21 this was calculated by reference to all of its sales of *BA* tickets in a large reference period. If
22 you go to para.244, I will just ask the Tribunal perhaps to read paras. 244-248.

23 THE PRESIDENT: Yes. It is true that all those cases are largely rebate cases of one sort or another.

24 I am not sure *Irish Sugar* is in the same category, is it?

25 MR TURNER: That is a border rebate case and it did share exactly the same characteristics whereas
26 here we are talking about simply a pattern of pricing rather than particular schemes or
27 inducements which have the effect of locking you in for incremental purchases if you are
28 a customer or dealing with the dominant firm.

29 At paras. 272-276 you see some key reasoning under the findings of the court, and
30 perhaps again if you would read that to yourselves. You will see that it relates to the fidelity
31 building character of the schemes in question, and that is not the circumstance that we are
32 faced with in this case.

33 THE PRESIDENT: Yes.

1 MR TURNER: I am going to touch briefly on one final topic before Mr Peretz addresses
2 exclusionary contracting and I will do so very shortly. It is the allegation that the Office
3 made an error of approach by not approaching its investigative work on a “top down” basis,
4 but building up costs for its outlets and customers in the sample on the “bottom up” basis.
5 This is covered in the Office’s skeleton at para.16-24 and I take it very briefly because
6 Mr Green did not add significantly to what had already been said. In a nutshell there is no
7 advantage at all where you are trying to assess the costs of supplying a sample of individual
8 middle ground customers in this top down approach. You have the need in the top down
9 approach to make important assumptions – very difficult assumptions – about how to allocate
10 costs between different parts of the business, the supermarket side and the middle ground
11 side, and then still between the different customers. Mr Green said yesterday that you could
12 have used the statutory or management accounts of the company had you approached matters
13 in that way as a benchmark, and that was a fatal error. But Wiseman’s accounts, either the
14 statutory or the management accounts would not show the cost of supplying individual
15 middle ground outlets or customers, and it would not help in the estimation of the run costs
16 which, as we have seen, the company did not estimate for its internal business purposes, and
17 nor could the Office have simply added up all of the costs of supply for these customers in
18 the sample, and then reconciled that in some way with the management accounts.

19 If Express operates in such a way as to say actually, by reference to the way we do
20 our management accounts that is perfectly possible or sensible then we would have expected
21 it to bring such concrete evidence before the Tribunal in this Appeal, but it has not done so.

22 MR CLAYTON: It is perhaps surprising on this that there was no “reconciliation” – is probably the
23 right word – back to the management accounts to ensure that the information had all been
24 included. It is very usual practice if you take an individual cost that you relate them back to
25 hard evidence, if I can call it that, to management/statutory accounts.

26 MR TURNER: I understand that. May I make three points? The first is that by the nature of the sort
27 of information that the Office was gathering it related to individual customers in a sample,
28 and a lot of this was allocated. So the idea of being able to reconcile it back to the overall top
29 line figures was very difficult. Secondly, the information that was being supplied by the
30 company was supplied in response to formal notices by the Office which carried criminal
31 sanctions if you supply misleading or false information.

32 The third point is that in an exercise of this kind had the Office gone forward with
33 this investigation, yes it would have started to tie up these loose ends, and it would certainly
34 have wanted to make sure that its financial data were copper bottomed.

1 MR CLAYTON: So your point is that had the job been completed then these costs would have been
2 reconciled back, or been related back?

3 MR TURNER: Yes. The first of my points is that where that was possible that would well have been
4 done, but for a lot of these costs, when you are dealing with the costs of individual samples --
5 --

6 MR CLAYTON: I understand that.

7 MR TURNER: Yes, you would not have been able to do that.

8 MR CLAYTON: If you are allocating costs you are starting off with the total level of costs ----

9 MR TURNER: You are absolutely right.

10 MR CLAYTON: And then exploding those costs into individual – so you can actually start with
11 something ----

12 MR TURNER: In that circumstance you absolutely can.

13 MR CLAYTON: It was not done in this case because the exercise was not taken that far.

14 MR TURNER: That is right. If I may, I will now pass over to Mr Peretz.

15 MR PERETZ: As Mr Turner said, I am going to deal with the issues of exclusive contracting, or
16 exclusive dealing. Mr Green suggested in his submissions that the act of offering a single
17 price, even absent a tie or exclusivity, so that the customer remains free to accept or reject
18 a price in respect of any of his outlets is in itself abusive – absent any element of timing or
19 exclusivity, and absent any element of predatory pricing. One sees the point put shortly in
20 his written skeleton at para.175 where he said:

21 “... the vice concerns the price applied (i.e. a flat price regardless of distance; or a
22 “delivered price”).

23 In our submission there is no authority whatsoever for that suggestion, apart from an extract
24 from a learned work. I do not know what the rule is in Scotland, but the traditional rule in
25 England and Wales used to be that you could only cite from a learned work if the author was
26 no longer living. I am delighted to say that on that basis Mr Green is not entitled to cite the
27 authority, that the author of it is very much alive and indeed, sitting over **there** – Mr Green’s
28 own book.

29 THE PRESIDENT: I thought, Mr Peretz, that the core argument was a bit more sophisticated than
30 that. The core argument was that although Claymore in the Highlands could offer highly
31 competitive prices to Highland outlets it could not offer an all of Scotland price on the same
32 basis and if Wiseman, the dominant supplier, offers an all of Scotland price, including the
33 Highlands, thus concealing within a single price the significant cost differences of servicing
34 the different parts of the country, and the customer is attracted to that price, Claymore would

1 not be able to compete, and that would be the end of Claymore's business but for the fact that
2 Express has chosen to hang in there pending the outcome of these proceedings, and that in
3 normal circumstances the inevitable result of permitting that kind of activity would be to
4 knock Claymore out and give Wiseman a monopoly of the whole shooting match. That is the
5 essential argument.

6 MR PERETZ: That is the point Mr Green was getting at by referring to there being – I think he used
7 this phrase – “an anti-competitive cross subsidy” from the Central Belt to the Highlands, put
8 somewhat crudely. One has to remember what the situation is here and at the moment I am
9 looking at the situation absent conditionality – a situation where a customer in respect of
10 each outlet remains free to take the all of Scotland price being offered or if they so wish to
11 go elsewhere. In that situation, the situation is in a sense that the same customer is both
12 receiving the benefit of the cross subsidy and paying the penalty of the cross-subsidy. Let us
13 assume for the moment that the prices in the Central Belt are somewhat higher than they
14 would otherwise be in order to subsidise the somewhat lower than they would otherwise be
15 prices in the Highlands.

16 THE PRESIDENT: Why should we make that assumption?

17 MR PERETZ: Well, as I understand the point ----

18 THE PRESIDENT: Put it round the other way, upon what evidence in our papers should we make
19 that assumption?

20 MR PERETZ: I am trying to deal with a point I think put as a matter of principle.

21 THE PRESIDENT: As a matter of principle?

22 MR PERETZ: As a matter of principle. On the basis that costs in the Highlands are somewhat
23 higher than costs in the Central Belt, put somewhat crudely, but that is the broad assumption.
24 As I understand the suggestion being put, because Claymore is less able to supply in the
25 Central Belt but can supply in the Highlands, it has to supply at a price that covers its costs in
26 the Highlands which is going to be a particular price. Wiseman, because it supplies in the
27 Central Belt as well, is able by offering a single price across Scotland, to offer a lower price
28 in the Highlands at the expense of perhaps a slightly higher price than it would otherwise be
29 in the central belt, but the single price being somewhere between the Central Belt on its own
30 price, and the Highlands on its own price. That is the situation that we are dealing with and,
31 as I understand the suggestion, if Wiseman does that it involves some element of cross-
32 subsidy from the Central Belt to the Highlands. It seems to us that the problem with that
33 analysis is that it ignores the fact that one is talking about the same customer. So the same
34 customer is paying more in the Central Belt than they would do were there a separate Central

1 Belt price being quoted, and paying less in the Highlands than they would do were Wiseman
2 simply supplying them in the Highlands.

3 THE PRESIDENT: But why should we make that assumption? Where is the evidence that we
4 should base that assumption on? Where is the evidence that the prices being charged to the
5 customer in the Central Belt ----

6 MR PERETZ: That is the allegation that is being put to us, that there is something in principle
7 wrong with there being a single price offered. At the moment I am assuming that there is not
8 an issue ----

9 THE PRESIDENT: It could be the same price they are just taking a lower margin in the Highlands,
10 on the same marginal basis.

11 MR PERETZ: I am not dealing with the issues of predatory pricing, or whether the all of Scotland
12 price actually covers overall the cost of supplying that customer. As we understand it the
13 point being made is even independent of there being any element of predatory pricing or
14 below cost pricing, there is something wrong in principle with Wiseman in its position
15 offering a single price. The short point that I want to make to start off with is that for that to
16 be problematic, the offering of a single price to be problematic there must be some element
17 of conditionality or a tie, or exclusivity. It cannot simply be that the price being offered is
18 one that in respect of any outlet the customer is free to accept or reject. That is because
19 unless the customer is tied in some way, it can choose simply not to take single price, to
20 choose Claymore in the Highlands if it can offer a price that beats Wiseman's Highland
21 price, once account is taken of the savings that that customer will achieve by reverting to
22 Wiseman and saying "I do not want an all Scotland price any more for the Central Belt, I just
23 want a Central Belt only price." So the device only arises if Wiseman is making the offering
24 of the Highlands' price conditional on taking the Central Belt price. So what one is looking
25 for is some element of tying or exclusivity. Before moving on to that it is important to note in
26 which single pricing deals arose. If I can take you to the relevant passages in the CC Report,
27 and one will see that a significant element of the background against which they arose was
28 requests by customers when about half way down that paragraph the CC said they noted:

29 "... many customers now negotiate for milk on the basis of a single price across
30 a single region ..."

31 With trepidation, but up here I would suggest that in a "single region" the CC were intending
32 to include Scotland.

33 "... and in the case of the large supermarkets nationwide. In many instances the
34 purchasing company is determined that it is easier in terms of management of

1 accounts to deal with fewer suppliers at a single price than a number of suppliers at
2 different prices for different regions.”

3 So that is an initiative coming from the customers themselves to ask for single pricing
4 arrangements. A further element in this is that of course Express/Claymore in the period
5 1999 was approaching a number of retailers and offering all Scotland proposals. One finds
6 a reference to that at para.2.130. So at least part of the context of the single price that is
7 being offered is a response to customer requests and to Express offering single prices as well.

8 Is there an element in this case of conditionality, exclusivity, or time? Against that
9 background that was rightly a question which the OFT was asking itself. In that regard the
10 OFT had to start against the background of the facts as set out in the Competition
11 Commission Report, to which Express/Claymore, during its fairly extensive representations
12 added essentially nothing. We will come to why I say “essentially” in due course.

13 The Competition Commission recorded that 97 per cent. of retailers had said there
14 was no exclusivity or conditions attached to their purchases of milk. I think you were taken
15 to that by Mr Turner at the end of yesterday. The reference is para.4.266 of the CC Report.
16 No further evidence of such agreements emerged during the investigation. One can see that
17 from para.73 of Mr Lawrie’s witness statement.

18 THE PRESIDENT: Who was asked about that?

19 MR PERETZ: First of all the OFT, when conducting the dawn raid on Wiseman’s premises, one of
20 the things it was looking out for was some evidence of exclusive dealing arrangements.

21 THE PRESIDENT: Yes, and it did not find any.

22 MR PERETZ: And it did not find any. As you can see, you have been taken to the letter of
23 Mr Sweeney, Wiseman was also asked about rebates that it was adding and you have seen
24 the answer that he gave.

25 THE PRESIDENT: Yes.

26 MR PERETZ: It is perhaps helpful to look at the position in relation to two retailers in particular –
27 again going back to the CC Report. The first one is CWS, and if one looks at p.1127 at
28 para.6.106. One notes first of all para 6.110 that CWS itself favoured the use of a single
29 supplier on the basis that this provided it with greater efficiencies of cost. So there is no need
30 to invoke some form of exclusivity or conditionality agreement on its decision to ask for
31 a single supplier, that was something it itself wanted to do, according to what it itself told the
32 Competition Commission. One finds in the previous paragraphs a little bit of background
33 that CWS had been supplied in the Highlands by Claymore, apparently at some point it
34 considered that Claymore had let it down. It started getting into contact around then with

1 Wiseman, about Wiseman taking over Claymore's contract, and then in 1999 Wiseman
2 offered an all of Scotland price.

3 There is certainly no evidence anywhere here that CWS could not, at the drop of
4 a hat, have decided to switch its custom, all or in part, to Express/Claymore and indeed –
5 although it is not relevant to the OFT's Decision, it happened afterwards – you will see from
6 Mr Sweeney's witness statement (p.640, para.6.7) that according to him in October 2002
7 CWS in the Highlands did switch to Express/Claymore. It is also relevant to note that views
8 of third parties, the reference is para.71 p.239 of Mr Lawrie's statement was precisely that
9 CWS, a very important customer, remained entirely mobile. That is the position in relation
10 to CWS.

11 In relation to Aberness, which has been very much the focus of Express/Claymore's
12 attack, there is no evidence of any constraint on Aberness's ability, if it so chooses, to source
13 elsewhere at will. Again, if I take you back to what the CC said about Aberness's evidence
14 (p.972, para.2.103). Aberness showed the Competition Commission a letter from Wiseman
15 dated in July 1999, so before the coming into force of the Act, that proposed an agreement
16 under which there would be a one-off loyalty payment in return for Aberness becoming the
17 sole supplier. The Competition Commission then asked Aberness what he thought the
18 position was as a result of that letter. Did it think that the agreement was exclusive? Aberness
19 said it was clear that it was not. Although it had accepted the payment it said it would regard
20 the agreement only as one under which Wiseman would remain a main supplier of fresh milk
21 and cream to Aberness's company stores, and in passing, negotiation concerning Aberness
22 relates essentially to its own company stores. Aberness also negotiates on behalf of Morning
23 Noon and Night chain and the Mace chain, but this issue relates to its 27 AC Grey stores.

24 Further down the page one sees what sort of agreement, using Aberness's phrase, it
25 thought it had entered into. It said it saw the deal with Wiseman as very much a gentleman's
26 agreement that was open ended and easy to get out of. It was not backed by any formal
27 contract documentation that was legally binding. The consequence of that of course is that
28 Aberness at any moment could have said "We would like to source elsewhere".

29 THE PRESIDENT: How likely is that as a practical proposition given the size of the payment made
30 for loyalty?

31 MR PERETZ: It depends on whether there would be any way of getting that payment back if there
32 is no contractual protection. It may be a matter on which Wiseman wishes to
33 comment – what it made the payment in return for, I cannot even say "contractual
34 obligations", there do not appear to have been any.

1 THE PRESIDENT: It is described as a loyalty payment.

2 MR PERETZ: According to Aberness it was free to walk away.

3 THE PRESIDENT: Not wholly convincing, Mr Peretz.

4 MR PERETZ: That is the situation. One has a situation in which Aberness, on its own account, it is
5 difficult to think of any reason why it should not have been entirely frank with the
6 Competition Commission about what the situation was. On its own account it was free to
7 walk away at any moment, and there is no evidence to the contrary that that is the position.
8 That is what Aberness said.

9 THE PRESIDENT: Can I just ask one question on Aberness? If you go a little bit further down that
10 page, 972 to 2.104, Wiseman tells the Commission that it apparently had the practice of
11 amortising the cost – I think it is referring back to the loyalty payments, but I will be happy
12 to be corrected if I am wrong – over the life of the contract. It seems to be a three year
13 contract. If you regarded the loyalty payment as a kind of price reduction, amortised over the
14 life of the contract which will apparently run until 2002, it rather looks, on the figures that we
15 have seen, that there would be a considerable question mark over whether Wiseman was
16 covering even ABC in relation to Aberness over the period up to 2002, it seems to us as the
17 information has progressively emerged in various bits and pieces. It is quite a substantial
18 payment and Aberness represents a very substantial chunk of Claymore’s business.

19 MR PERETZ: Yes. One has to remember that one is not talking about a substantial part of
20 Wiseman’s business here, one is talking about ----

21 THE PRESIDENT: No, we are talking about a very substantial part, if not the heart of Claymore’s
22 business.

23 MR PERETZ: We are talking about 27 shops, it is certainly not a substantial part of Claymore’s
24 business – 27 shops, it is very small.

25 THE PRESIDENT: Well let me just see if I can put that right, because I thought we were told
26 somewhere – I do not know if I can put my finger on it immediately – that the payment, the
27 details of which we have in Mr Larg’s statement ----

28 MR PERETZ: Yes, and Mr Flynn has helpfully pointed me in the direction of some figures given in
29 their submission. On p.51 of their submission they pull out the relevant figures.

30 THE PRESIDENT: It represented about 10 per cent.

31 MR PERETZ: What is said there is:
32 “... the Aberness volumes lost by Express amounted to approximately 2.5% of the
33 Claymore volumes and that the entire Aberness account constitutes less than 2% of
34 the Scottish middle ground customers...”

1 THE PRESIDENT: We are told in a letter of 15th October 2004 that the amount of the payment
2 equated to between 10 per cent. and 15 per cent. of the revenue generated by Aberness in the
3 first year of supplies by Wiseman. If we put that together with the figure given by Mr Larg,
4 we get a calculation – and it may be that I am completely on the wrong track ----

5 MR CLAYTON: Page 207 of the core bundle.

6 THE PRESIDENT: I am talking a bit in code so as not to mention anything in open court. We may
7 be completely on the wrong track.

8 MR PERETZ: Of course, these figures were not in front of the OFT at the relevant time coming
9 from Mr Larg, and there are noises coming from behind me from those who ought to know
10 that those figures are in fact wrong. It may be best to let Wiseman deal with that particular
11 point.

12 THE PRESIDENT: Yes, we will leave it until we get there.

13 MR PERETZ: These figures were not figures that we had in front of us at the time.

14 THE PRESIDENT: The point on margins – well I do not know, the OFT has presumably seen the
15 confidential version of the CC Report. It is the figure which is excised from para.2.103 of
16 that Report, the same figure that is mentioned in paras. 50 and 51 of Mr Larg’s statement.

17 MR PERETZ: I would need notice of that. We need to check that.

18 THE PRESIDENT: We can get Wiseman to deal with all this, and put us all straight, I am sure.

19 MR PERETZ: The short point in relation to these 27 Aberness stores is that they are pretty
20 insignificant as a proportion of Claymore’s sales. Combined with the fact that one is talking
21 here about an “arrangement”, and I use the word very loosely, which is not legally binding
22 according to Aberness, who ought to know, and so easy to get out of, one is also talking –
23 and this is again plain from the face of what the CC said at para.2.103 – the agreement is not
24 exclusive in the sense of all or most, it relates to Wiseman being a main supplier or, and I am
25 going to take you to this letter, as from July 2002 the word used is a “principal” supplier. If
26 I take you to the letter at 1390 of the supplementary bundle.

27 Mr Green took you to that yesterday, and I draw your attention to two points. First,
28 “Wiseman is our principal supplier of milk to our own stores”, and then the final paragraph:
29 “Current trading arrangement will continue as normal for our independent stores”, that is the
30 Mace and Morning Noon and Night chain which Express continue to supply. It makes it
31 clear one is talking about 27 stores, and the obligation is to maintain Wiseman as a principal
32 supplier.

33 Now standing back, one has to look at whether this agreement was on its own –there
34 being an absence of evidence of any exclusivity or conditionality in any other agreement –

1 was an abuse? We say it fell below – if I can put it this way – the competition radar in two
2 senses. It fell below in the first sense in that it was simply too insignificant to be regarded as
3 tending to prevent or restrict competition for the purposes of Article 82 or Chapter II. I refer
4 briefly in that context to what the CFI said in the *BPB* case at tab 7 of the Applicant’s
5 authorities’ bundle, and para.68, where the CFI discussed what was the rationale for the
6 general principle that it is abusive for a dominant supplier to enter into exclusive supply
7 contracts, and it referred to that rationale as being that:

8 “The conclusion of exclusive supply contracts in respect of a substantial proportion
9 of purchases constitutes an unacceptable barrier to entry.”

10 What we would say, to put it at its lowest, is that it is highly arguable that a contract of such
11 insignificance in scale simply fell below the competition radar in the sense that it is not an
12 abuse at all.

13 Secondly, even if we are wrong about that the Aberness contract fell below the
14 competition radar in a second sense, namely that the OFT has a lot of things to investigate
15 and this particular contract, and the absence of sufficient evidence of other abuses lying
16 around in this case which need to be taken forward, this particular “abuse” on its own was
17 simply too insignificant to be the subject of action by the public authorities at public expense
18 on the basis that in reality it was unlikely to have any substantial damage on Express’s
19 prospects, or to threaten to damage competition. It simply implausible that by entering into
20 this contract, whatever its precise terms were, relating to 27 stores under which Wiseman was
21 to be simply the main supplier rather than the exclusive supplier, there was likely to be any
22 real exclusionary effect on Express/Claymore. That is essentially the reasoning in
23 Mr Lawrie’s witness statement and in the briefing note.

24 THE PRESIDENT: What turnover is Mr Lawrie assuming in that argument is affected by the
25 Aberness’ arrangement?

26 MR PERETZ: Mr Lawrie’s statement does not refer to a particular figure, but at para.73 of his
27 statement at p.239 of the core bundle he refers to the point that it related only to the AR Grey
28 Stores and that it was the principal rather than the exclusive supplier.

29 THE PRESIDENT: Yes.

30 MR PERETZ: Unless you have any further questions, that is all I was going to say.

31 THE PRESIDENT: It is quite a lot of money to pay for 27 stores if we are right on what the figure
32 was, if we accept Express’s evidence as to what the figure was, but I think it is easier to
33 pursue this with Wiseman.

1 MR PERETZ: It is, and also, Sir, if I can remember the OFT had to proceed on the material before it
2 at that time.

3 THE PRESIDENT: Well the figure was in the CC Report.

4 MR PERETZ: Yes, we will have to come back to you on what the figure is in the CC Report.

5 THE PRESIDENT: Yes.

6 MR TURNER: Sir, that concludes the survey of the substance of what the OFT was looking at and
7 we have gone through the nature of the exercise because now you are in a position the better
8 to appreciate the decision that was taken by the Office and to decide how to deal with it. The
9 evidence that confronted the Office at the end of its work did not, in its view, show that there
10 was an abuse of dominance but nor, in the case team's view, did it establish that there was no
11 abuse, that that could be ruled out. This is an important point.

12 THE PRESIDENT: Why did it not establish that, Mr Turner?

13 MR TURNER: Because the way that the Office approached this aspect of the exercise was to ask
14 itself, and this of course was before the analysis and the admissibility Judgment, it thought
15 that if it were to make a formal Decision it would want to establish to a high standard that
16 there was no abuse, that what Wiseman was doing was, in all respects, legitimate
17 competition. The admissibility Judgment, of course, proceeds on the basis that if one says
18 that the standard required to prove an abuse is not hit on the basis of the evidence, that is also
19 an appealable Decision and that is why we are here.

20 THE PRESIDENT: Yes.

21 MR TURNER: But the position is this, the information which had been gathered and analysed in the
22 Office's work was not precise enough to reach a firm conclusion that an abuse could be ruled
23 out. What it was was strong enough to make the Office feel that it was unlikely that greater
24 precision in the data would lead to a finding of an infringement. That is why it closed the
25 file at that point and the team moved on to other ongoing cases in the Office – certain of
26 those are mentioned in Mrs Boys's note.

27 If I may ask you now to take up the case team's submission, which has been so far
28 absent from my address, it is tab 9 of the correspondence bundle. What you can now see,
29 particularly if you look at para.14 on p.6 of the submission, is the nub of the thinking in
30 relation to pricing and, in particular, a great deal of further detailed work would be needed on
31 both ATC and AVC before a firm conclusion could be arrived at either way – that is as to
32 infringement or not.

33 "However, in our view, the prospect of a conclusion of infringement is not
34 sufficiently high to justify the expenditure of these resources.

1 This ties in to the points which I have been making that if the OFT had wanted to press on
2 with the case because this analysis had shown, for example, evidence of a pattern that might
3 be targeted at Claymore, what it would have done would have been to have firmed up on its
4 analysis, for example to ensure that all of the sampled outlets belonged to the runs whose
5 costs were actually being allocated. I mention that as a point of imprecision. It would have
6 firmed up on the estimated level of total costs by adding in after calculation a figure for cost
7 of capital. It did not, however, think – taking that latter point in particular, that adding in
8 a figure for cost of capital could produce a pattern where none so far existed.

9 THE PRESIDENT: When it said in para.14: “A great deal of further detailed work would be needed
10 before a firm conclusion could be arrived at”, what sort of further detailed work are we
11 talking about?

12 MR TURNER: In relation to average total cost, for example, they would have wanted to estimate
13 cost of capital, and to allocate it. They would have carried out an exercise to estimate cost of
14 capital attributable to the supply of milk in the middle ground in Scotland. So far as variable
15 costs are concerned, you have seen there that the Office took two measures at this stage,
16 a low measure and a high measure, and that it accepted that it was leaving out certain details
17 in relation to the higher measure of some elements, but on the other hand adding in all of the
18 packaging and processing costs, some of which were fixed. It would have wanted to fine tune
19 these estimates to make them as robust as possible, that is the sort of work that is meant, and
20 that is the source of the reference in Mr Lawrie’s statement to the expression “rough-edged”.

21 It is right to say that in our view this involves a change in emphasis at least from the
22 finding in your admissibility Judgment in one respect, because in the Judgment, and in light
23 of the very limited information that was then available, you formed the view that the
24 investigation had been exhaustive. In a sense that is correct, the information was thorough,
25 and we have gone through just how much work went into it but, for the reasons I have given
26 about the fine tuning that would be needed, certainly if they were to proceed to an
27 infringement Decision they have not in that sense reached the end of the road. I say that only
28 to point out that change in emphasis, but I would wish to make clear that we are not seeking
29 in any way to reopen the issue decided in the admissibility judgment, and would make five
30 short points.

31 First, we are obviously not contesting jurisdiction at this stage. Secondly, the
32 essential basis for the admissibility Judgment was rightly that the Office had formed a view
33 on the substantive merits in this case and has decided that the evidence before it did not show
34 an infringement, and those matters are not contested and they are certainly the case.

1 Thirdly, the reference in the admissibility Judgment to having carried out an
2 exhaustive investigation, if that is understood in a strong sense, was not essential to the
3 Tribunal's conclusion.

4 THE PRESIDENT: You had been looking at it for two years, Mr Turner. You had done this
5 enormous exercise and you went out of your way to tell us in the admissibility case what an
6 enormous job it had been, and how much extra staff you had had to hire, and the software
7 you had had to bring in and all the rest of it.

8 MR TURNER: That is absolutely right, and if "exhaustive" is understood as reflecting those
9 considerations then there is nothing wrong with the use of that phrase. All I seek to do now is
10 to point out, as I hope is clear, that in certain respects, had the Office taken the case forward
11 it would have fine tuned, for example, these estimates of cost.

12 The question then arises of how the Tribunal should deal with this understanding of
13 the case and, in my submission, there is a key point to grapple with which is set out in the
14 defence, para.55, which I will briefly address. You do not need to open it. This is but an
15 investigation by the Office, it is not a single state process, in which you gather as much
16 information as you might usefully be able to obtain and then make a once and for all
17 definitive Judgment about it. In taking you through how the work was done in this case
18 I have sought to show what the process is, that it is a process of which the public authority
19 has built up a picture gradually and in which it assesses its work at periodic intervals to
20 decide whether or not it is going to continue. What happened in this case is that the Office
21 built up the working picture of Wiseman's pricing practices which it considered to be robust,
22 and decided then whether it was worth taking the case forward by asking in particular for
23 additional data.

24 The fifth point I desire to make in this connection is of course that there is no
25 prejudice to Claymore Express in any of this. No one has been deceived about the nature of
26 the exercise at all. Indeed, it forms a central part both of the revised notice of application in
27 what is said there and in Mr Haberman's report. Mr Haberman kicks off in his report at para.
28 1.2 (p.101 of the bundle) with the remark that:

29 "The Office closed its file on the complaint without reaching a definitive conclusion
30 as to whether Wiseman had indeed used its dominant position contrary to the Chapter
31 II provision of the Act."

32 Then perhaps if you just turn to the revised Notice of Application and look at p.39,
33 para.3.106, you will see from the first sentence:

34 "The Respondent now confirms it had not reached the stage at which it was in

1 a position to make conclusive findings.”

2 That is picked up again, and indeed deployed as part of the case against us in 4.144/5 (p.78).

3 “We have indicated the key aspects were explored to a level of detail sufficient to
4 enable the Office to assess whether it was worth investing further resources in the
5 investigation.”

6 So there is no prejudice. That was the decision that was taken ----

7 THE PRESIDENT: You say there is no prejudice, but they made a complaint and the file on the
8 complaint was closed, the complaint got nowhere, and that is prejudice.

9 MR TURNER: Yes, I understand that. I am using the term only to mean that they are under no
10 illusion that a final and definitive decision was made in a sense with which I have been
11 grappling. They fully appreciate, and the case has been fought on the true basis.

12 This then leads to the issue of how the Tribunal on Appeal deals with a Decision of
13 this kind. Certainly the Office formed a view on the merits of the case, even if not a
14 conclusive view. This Tribunal is, of course, thoroughly well placed to say whether the
15 Office misunderstood the law in some way, or else committed some error of approach which
16 has undermined the basis of the view that was arrived at. For example, “top down”, “bottom
17 up”, “allocation of run costs by volume”, “the time period for variable costs” that sort of
18 thing. I should say in that regard that my point at the disclosure, recovery and inspection
19 hearing about the materiality of errors by the Office of Fair Trading in its work, concerned
20 errors of principle or approach. The point that I desire to make was that if you find that in
21 some fundamental respect, for example, the Offices’ results were rendered wholly unreliable,
22 because you cannot allocate by volume, or because approaching it on a “bottom up” basis is
23 just wrong, we cannot seek to say that that would have made no difference.

24 However, if there is no error of approach or principle in the Tribunal’s view, then in
25 my strong submission the Tribunal should not accept Claymore/Express’s invitation simply
26 to decide whether this case was more promising on the facts than the Office of Fair Trading
27 thought so that the Office of Fair Trading should have kept on investigating it. To take
28 a simple example, could or should the Tribunal rule that in its view the hit lists, as they have
29 been termed, are more suspicious, better evident of intent than the Office thought, with the
30 result that the Office should be told to continue its investigation into these matters? We say
31 that would be wrong because unless the Office has simply misunderstood the documents,
32 which is a possibility, the result would be that the Tribunal is in effect reviewing the
33 discretion of the Office to continue to investigate or not. This is not a matter of artificial self-
34 restraint which I am urging on the Tribunal in relation to this Appeal, it is a matter of relative

1 institutional balance, and what Lord Bingham, in the recent House of Lords *Belmarsh* case in
2 a completely different context, referred to as “institutional competence” as between a Judicial
3 Appeal Tribunal on the one hand, and an investigative public authority.

4 Much of Mr Haberman’s report, which we have not gone into on either side in this
5 oral address, is extreme because he says that the Office should have followed up any
6 anomaly in the data – we see that (we need not open it) at 3.34/5 of his Report, and certain of
7 the lengths that he suggests the Office should have gone to are extreme. Those are illustrated
8 in para.5.108 of his Report. In our submission none of that sort of approach, which forms
9 a large part of what we have been dealing with prior to this hearing, is an appropriate sort of
10 criticism in this case. It amounts to saying that Claymore Express would have devoted
11 considerable resources to looking under every stone, but the Office has a discretion to
12 investigate, and to continue to investigate and to decide whether to proceed to an
13 infringement Decision or not. The Decision with which you are confronted, to close the file
14 in this case, was a judgment made in part in light of the need to assign the resources of the
15 case workers to the most promising cases. This Tribunal quite properly has not been given,
16 does not have details of the Office’s overall case work or resources at the time before it. So
17 in a nutshell, if there was no error of principle in what the Office did, we say there was not,
18 then this Appeal is misguided in principle.

19 This is a point of considerable practical consequence for the Office of Fair Trading
20 because there is a concern about the tying up of resources in a moribund case which, in
21 a sense defeats the entire purpose of trying to close an unproductive case in order to move on
22 to work that can yield real results in the consumers’ interest. In our submission parliament
23 could not have intended such a scheme in relation to the Competition Act.

24 Those are my submissions about the way in which the Tribunal should approach its
25 task in this case which, as is indicated in the recovery and inspection Judgment, is to look for
26 errors of approach or principle.

27 I turn with that to the implications and status of this case team submission.

28 THE PRESIDENT: Just before we get on to that, Mr Turner, can I think aloud for a moment about
29 what you have just been saying. This is a personal and non-binding view on the basis that
30 work would be needed in order to refine it, as it were.

31 MR TURNER: Yes.

32 THE PRESIDENT: The first and obvious question for the Tribunal is whether the “Decision” that
33 we found in the admissibility Judgment to exist should be set aside? That is the first question.
34 We are obviously not in a position to come to any view about that, so for present purposes

1 the rest of the discussion is hypothetical. But supposing hypothetically we did say for one
2 reason or another that we should set aside, the next question is what, if anything, the Tribunal
3 should do. So far as I recall the schedule, which I have not in fact got in front of me, one
4 thing we could do is simply set it aside, full stop – end of story – with whatever
5 consequences that may or may not have.

6 The second consequential possibility is to set aside and “remit” the “matter”. Exactly
7 what is meant by “remitting the matter” might in itself be the subject of further discussion.
8 One might just remit the matter leaving it to the OFT (as it now is) to decide what it was
9 going to do with the matter having been remitted. Or, and this is the third possibility, one
10 might remit the matter accompanied by some directions or indications as to what we thought
11 should happen next. The issue of whether there is jurisdiction to remit accompanied by
12 directions is under consideration at the moment in another case. But it is a jurisdiction that
13 we have exercised now on a number of occasions, for example, as far as the Office is
14 concerned, in quite different circumstances in I think both *Aberdeen Journals* and in *Toys*,
15 we set aside, or made an order equivalent to that effect, but said that this case should actually
16 go on and what you should do is do this bit again and come back within three months,
17 whatever it was. That is not the sort of order that one would necessarily want to make in
18 every case or indeed in the majority of cases, but it may be an order that one may want to
19 make from time to time. I am not at all saying it is the sort of order that one would wish to
20 make in this case given, as I think is self-evident to everybody, a great deal of time has
21 passed since the events with which we are immediately concerned.

22 MR TURNER: Yes.

23 THE PRESIDENT: But that is the range of options.

24 LORD GRABINER: You could dismiss the Appeal! [Laughter]

25 THE PRESIDENT: I am sorry, Lord Grabiner?

26 LORD GRABINER: It occurred to me that one other possibility is that you could dismiss the
27 Appeal.

28 THE PRESIDENT: Of course, that is taken as read as a possibility.

29 LORD GRABINER: It is the time of day, Sir!

30 THE PRESIDENT: Quite, I appreciate it is late and I am probably whittering on unnecessarily but
31 that is the structure, and I think there is a distinction between what the jurisdiction is and how
32 the institutional balance, which I think is a very important and reasonable point to make, is to
33 be achieved within that structure, and how the institutional balance is to be achieved may

1 well involve the Tribunal abstaining from saying too much about what should happen next in
2 particular cases. Those are the procedural options, I think.

3 MR TURNER: May I react to that briefly. First, Claymore/Express are obviously now not asking for
4 an infringement decision to be made by the Tribunal.

5 THE PRESIDENT: Yes, that is obviously out of the question.

6 MR TURNER: That has gone. We see a major advantage in this kind of case, that if the Office has
7 made an error of approach or principle, the Tribunal is there to put it right, and that is
8 a salutary condition. On the other hand, in relation to remission of the matter, we see little
9 alternative, certainly in this sort of case, to consider that the matter is the subject matter that
10 this case has been considering which, for all kinds of reasons that Lord Grabiner will no
11 doubt develop in more detail than me, is both historical and of dubious value. Certainly,
12 I urge upon the Tribunal the point I was making a moment ago that this is after all, a case
13 where the Office formed a view that was rough edged in order to be able to move on to other
14 work, and there would be a real problem if the result was that it was fixed with a moribund
15 case for a long period of time.

16 THE PRESIDENT: Well that is a very relevant consideration that we need to bear in mind if and
17 when we ever get to that stage. In terms of the Court of First Instance there is certainly case
18 law in staff cases, though I cannot recall a competition case offhand, which says that
19 a finding that there was an error is sufficient to deal with the complaint that the Applicant has
20 made to the court – end of story.

21 MR TURNER: In the domestic context as well I certainly have had experience of, as he now is,
22 Lord Justice Laws pointing out that one of the benefits in the context of a Judicial Review is
23 that the Judgment itself puts the Authority right, and it corrects an error of approach and that
24 then stands.

25 Sir, with that I move to the implications and status of this document, the case team
26 submission. The first point that I need to make is to pick up on an issue, Sir, that you raised
27 right at the outset of the hearing about whether at an earlier stage, which you could not put
28 your finger on, you had been given an assurance that there was no such document of this kind
29 in existence.

30 THE PRESIDENT: I had in mind the hearing of 27th March 2003, p.5-7.

31 MR TURNER: That is what we have found. I do not know whether the Tribunal has its own copies
32 of that.

33 THE PRESIDENT: I should think we do, yes.

34 MR TURNER: Obviously you must have – but your colleagues?

1 THE PRESIDENT: It is T3 144. This is the transcript and we have found the same points that no
2 doubt you were referring to. Page 5 at lines 20-23 you said:

3 “It may be that there do exist contemporary documents that do largely contain the
4 issues of fact and law and so forth that were before the Director which might, with
5 some suitable precautions, actually contain the reasons – or more of the reasons –
6 than were first there, that is just one point.”

7 Then there is a gap and on p.7 Mr Peretz, on instruction, at line 10:

8 “We had it in mind to produce a long witness statement. It is also the case that there
9 are not actually any detailed case summaries sitting around in the form that you
10 hypothesise, Sir.

11 “The President: Well that would be a matter for the Director.

12 “Mr Peretz: I make the observation simply in the context of the amount of work that
13 needs to be done because, of course, if there were a detailed case summary sitting
14 around one could simply say that was it. In fact, the relevant officials are going to
15 have to go back to the files which they have now been free of for a few months, go
16 back to them, look through them again and refresh their memories as to exactly
17 where they were when they took the Decision.”

18 THE PRESIDENT: Yes.

19 MR TURNER: Those are the material paragraphs. In relation to that I would make the following
20 points. First, that was certainly not a statement made in bad faith on anybody’s part. It was
21 not in the forefront of the mind of the relevant members of the Office of Fair Trading at the
22 time and this is because, and we will turn to the document in a moment, they did not see this
23 as equivalent to a detailed case summary setting out all the reasons for taking a decision on
24 the merits. It was an important internal document on the file but it was not a complete case
25 summary. The Lawrie witness statement is (and was intended to be) a full statement of the
26 reasons. There is one important difference between the two which makes this point. The
27 case team submission does not either fully or correctly explain the high measure of average
28 variable cost. The Lawrie witness statement which was compiled by reference to the full file
29 within the Office was intended to absorb properly and completely all of the reasons and, as
30 I say, that was done by reference to the case file as a whole.

31 The case team submission to then the Deputy Director General was an internal
32 document which certainly did set out in quite some detail quite a lot of the reasoning but in
33 some respects was loose or incomplete as in the instance that I have just mentioned. It
34 therefore was not in itself a simple statement of reasons that could have been handed over.

1 We have handed it over now because we have reviewed the file in preparing for this hearing
2 and saw that there were certain aspects of it which, as a result of an oversight, should have
3 been included at the very least in the Lawrie witness statement.

4 THE PRESIDENT: What sort of oversight are we talking about?

5 MR TURNER: There is really only one, in paras.38-39 which was a matter that prompted us to think
6 that disclosure needed to be made in conscience. Paragraphs 38 to 39 are the paragraphs
7 which Mr Green also focused on. This comes right at the end of the document. In my
8 submission, standing back for a moment, although Mr Green did make a lot of play about
9 this document there really is just this one additional area and there is nothing else. We were
10 quite careful to look through and make sure that that was the case. Mr Green has referred to
11 certain matters of nuance but there is nothing other than this particular issue which is a matter
12 of significance.

13 We sought to explain in the skeleton the point, and did so only in brief terms, but as
14 Mr Green has referred to, and indeed grappled with the issue of Stackelberg-warfare, and the
15 substance of para.38 if I may I will just make one or two brief observations in relation to that.

16 THE PRESIDENT: I think, from our point of view, Mr Turner, it is very difficult for you at this
17 stage of the case to introduce in support of your Decision new things that are not in the
18 existing evidence. However, whether it is an omission or not, what concerns me is that
19 certain references in this document, including the paragraph 38 to which you referred,
20 suggest that one of the considerations the case team had in mind was the particular feature of
21 this case that Express is a major competitor of Wiseman and had entered the Scottish market,
22 and that one was dealing with a particular situation of what is described here as mutual
23 aggression which did appear to be having an influence on the conclusion that the case team
24 came to when deciding what should happen next, and I for one would have expected that
25 some statement to that effect would have shown up in Mr Lawrie's witness statement, since
26 what that witness statement was intended to do was to explain to us in comprehensive terms
27 what the actual reasons were for coming to the conclusion that they did and although it very
28 fully explains the situation as regards the relationship between prices and costs there is
29 apparently this additional idea that was part of the reasoning. It is a pity that did not show up
30 at the time.

31 MR TURNER: Sir, it is more than a pity and I offer our apologies, because it was an oversight
32 which should not have occurred. All I can say was that it was not a matter of bad faith. You
33 have it there before you. Mr Green has indeed to deploy it in the hearing. What I would say is
34 this, that it would be wrong, in my submission, to say that this document having come to

1 light at this point – it was served with the skeleton on 15th December – that Mr Green should
2 be entitled to rely on it to attack the Office and we should be entitled to say nothing about it
3 in defence. On this particular point in para.38 we are looking at a possible alternative
4 explanation for the sort of pricing behaviour that had been observed in Scotland at the time.
5 It is a matter of theory and I am in a position to explain, should it be necessary, the details of
6 what was meant. The problem is that Mr Green, in his opening, made a number of points.
7 For example, he said “They are confusing an oligopoly with dominance” and so forth and so
8 on. If that is going to be treated as a point against us now, and which you intend to consider,
9 then in my submission I ought to be allowed to say something about that. I will bear in mind
10 Mr Green did not ask for any adjournment or anything of that kind, nor did he even indicate
11 to us he was going to make that point before we heard him utter it at the hearing yesterday.
12 But he has made it, he submitted it to you, and I can give you an answer to it in the same
13 vein. But if we are not entitled to do so I would say that that would not be right.

14 THE PRESIDENT: I think we need to have a word.

15 (The Tribunal confer)

16 MR GREEN: We do not object to the OFT saying what they wish to say.

17 THE PRESIDENT: I think we agree with you, Mr Turner, that you should be entitled to reply to
18 what Mr Green said about this document. I think it is getting a little bit late to do that tonight.
19 I think we would ask you to do it briefly tomorrow morning. The only question in my mind is
20 whether – and I look across now to Lord Grabiner here, I wonder whether we should sit at
21 10.15 instead of 10.30, but I am inclined to think we do not need to.

22 LORD GRABINER: I am sure we will not need to. Can I try to assist everybody involved? In
23 anticipation of the time bind, we prepared for circulation in effect what would have been my
24 speaking note, and we are very happy to distribute it now, and I apologise in advance for
25 giving you some homework, but it will save time tomorrow. It is double spaced and it is in
26 large print and in headline form. It covers pretty well all the points. What I would like to do
27 tomorrow is to address some headline points independently of that and a number of other
28 matters and then come to that, but I think we will be able to deal with that quite quickly, and
29 it will also save your pen because you will have a full note in front of you of what it is we say
30 is the case.

31 THE PRESIDENT: Well in that case I think we will sit at 10.30 tomorrow. We will not need to take
32 more than 10 or 15 minutes at the most ----

33 MR TURNER: That is right, very little time.

1 THE PRESIDENT: And then we will proceed with Lord Grabiner, and I think at the stage of reply,
2 Mr Green, we will need to explore with you in a bit more detail and entirely hypothetically
3 what you are actually asking us to do in this case, assuming at this stage on the wholly
4 hypothetical assumption that we were with you on at least one of the nineteen points that you
5 have made.

6 MR GREEN: Yes.

7 THE PRESIDENT: I think it is important to consider that on a hypothetical basis without prejudice
8 to a possible decision on the merits which may equally be against you. I am not saying that
9 we have reached any decision at all, but even if the decision on the merits is against you it is
10 useful, I think, for us to hear argument on these points, because the institutional balance and
11 the system of the Act is very important and we must try and make sure it all works as
12 a system.

13 MR GREEN: “Hot-tubbing” – should we address hot-tubbing?

14 THE PRESIDENT: Yes, hot-tubbing, now what do you want to do about that?

15 MR GREEN: I have not seen any great need for further evidence. The position is set out in
16 Mr Haberman and Mr Bezant quite fully, it seems to focus on the question of run costs.
17 I have clear submissions I shall make in reply about that. If the Tribunal feels that it would be
18 educated by speaking to Mr Haberman he will be here to assist you.

19 THE PRESIDENT: The issue as I think I followed it is whether taking volume as the sole parameter
20 in allocating run costs was a reasonable course for the OFT to take, or whether, for one
21 reason or another, it was not a reasonable course.

22 LORD GRABINER: I would like to say something about this. At the beginning of the hearing you
23 did invite us to use this mechanism, and we are very keen to use it.

24 THE PRESIDENT: Yes.

25 LORD GRABINER: I am not concerned whether Mr Haberman wishes to participate or not, or
26 more to the point perhaps, if his clients want him to, and I certainly have no interest in asking
27 him any questions. The object of the exercise is to provide an opportunity for the Tribunal to
28 be satisfied that it understands these issues which were the subject of some very interesting
29 questioning earlier today, particularly in the relationship between volume, time and distance,
30 and there are accounting questions. I could play the role of the monkey, but it may be very
31 much better if you heard it from the organ grinder and that is partly why Mr Bezant is here.
32 I am very keen indeed that you should hear what he has to say. It can be done very briefly
33 and, as I say, in terms of a clear understanding of what may turn out to be rather important
34 questions you might feel that that is a very sensible way of proceeding.

1 THE PRESIDENT: I am sorry, Mr Bezat, to be discussing this, as it were, through Lord Grabiner.
2 Does Mr Bezat – it is a “does he take sugar-type question” – does Mr Bezat have some
3 written notes?
4 LORD GRABINER: I have not discussed the fine details, he literally thought about it over the short
5 adjournment and I have not seen what it is he is going to say, but I know the gist of what he
6 is going to say and what he is going to say is not going to take anybody by surprise.
7 (The Tribunal confer)
8 THE PRESIDENT: Our view is this, Lord Grabiner, if your clients through Mr Bezat are anxious
9 that Mr Bezat should address us we will not stop Mr Bezat from addressing us. From what
10 you say I gather we are talking about a 10 or 15 minute presentation.
11 LORD GRABINER: That is all we are talking about, and they are matters from an accountant’s
12 point of view, I think, very, very simple, short points.
13 THE PRESIDENT: This is not, I do not think, in any sense evidence that needs to be sworn or
14 anything of that kind.
15 LORD GRABINER: No, absolutely not, it is a submission.
16 THE PRESIDENT: Well it is a submission but on the other hand Mr Bezat is an expert in the case
17 and he has given evidence in the case, so it is a bit more than just a submission I think, it is
18 an expert view – put it that way – and (a) there may be questions from the Tribunal ----
19 LORD GRABINER: Which I am expecting and I think he is.
20 THE PRESIDENT: -- and (b) there may be an application by Claymore to cross-examine.
21 LORD GRABINER: I have no difficulty with that at all.
22 THE PRESIDENT: It may also be that what he says may raise further issues that one may not
23 necessarily immediately spot which may necessitate a further ----
24 LORD GRABINER: It is possible but, as far as I am aware, exceedingly unlikely.
25 THE PRESIDENT: It may be very unlikely. It may also be the case that if we allow Mr Bezat to do
26 that then if Express wishes we should allow Express perhaps, through Mr Haberman, to do
27 the same.
28 LORD GRABINER: To which there would be no objection.
29 THE PRESIDENT: And he may or may not be in a position to do it tomorrow.
30 LORD GRABINER: I understand.
31 THE PRESIDENT: So we may have to arrange for something to be done in writing or at some later
32 moment in London, or whatever.
33 LORD GRABINER: Absolutely, and I am not going to take any technical objection to any ----

1 THE PRESIDENT: So that everybody feels that they have got time, and they have had chance to
2 reflect and they have thought about it. Subject to those caveats I think, Mr Green, that is how
3 we propose to proceed. Does that sound fair to you?

4 MR GREEN: That sounds perfectly reasonable. This seems to be an organic process – like cream!
5 Mr Bezant will therefore speak for 10 or 15 minutes as I understand matters.

6 THE PRESIDENT: Yes.

7 MR GREEN: We will reserve the right to put Mr Haberman in for 10 or 15 minutes, and it would
8 then simply be short presentations and on that basis I would not expect to cross-examine. If
9 something arose which we thought we needed to prepare a cross-examination for I would
10 have to raise it with you tomorrow but I would not expect to do it tomorrow.

11 THE PRESIDENT: If you need more time, or Mr Haberman needs more time you would just need
12 to stand up and say “I have listened to Mr Bezant, it is very, very interesting, but actually
13 I cannot deal with it today”, or “I cannot deal with it this morning, I will deal with it this
14 afternoon”, or whatever.

15 MR GREEN: If we budget for two shortish presentations tomorrow that will probably be sensible
16 for time budgeting purposes.

17 THE PRESIDENT: At what point do you want to do this, Lord Grabiner? Do you want to open
18 first?

19 LORD GRABINER: Probably first thing in the morning, we can start with that.

20 THE PRESIDENT: First thing in the morning we will have what Mr Turner has still to say about the
21 briefing note and then we will hear from Mr Bezant and then we will see how things develop
22 thereafter.

23 LORD GRABINER: Thank you very much.

24 . (Discussion as to timetable)

25 THE PRESIDENT: Very good 10.30 tomorrow.

26 (Adjourned until 10.30 a.m. on Friday, 14th January 2005)