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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1008/2/1/02

Sheriff Court
Chambers Street
Edinburgh EH1 1LB

14th 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 THREE

1 THE PRESIDENT: Good morning.

2 MR PERETZ: Before Mr Turner continues, just one point hanging over from my comments
3 yesterday was your question relating to the £250,000 figure given by Mr Larg at p.207 of the
4 bundle. Of course, we had in front of us at the time a figure which is not disclosed in this case
5 even into the confidentiality ring, which is the CC Report, para. 2.103. We have not been able
6 to track down overnight a confidential version of the CC Report containing that actual figure.
7 In any event, we think that the point should be dealt with on the basis of Wiseman's letter of
8 15th October 2004 which, you will remember, compares the figure with the revenues from the
9 Aberness contract.

10 THE PRESIDENT: Is the figure in the CC Report different from the evidence that we have?

11 MR PERETZ: Because we have not been able to track it down overnight I cannot confidently say
12 that, but it is unlikely to be the case.

13 THE PRESIDENT: It is unlikely?

14 MR PERETZ: It is unlikely to be the case that it is different from what Wiseman has in its letter.

15 THE PRESIDENT: We may need to get to the bottom of it. We may need to actually have the
16 figure.

17 MR PERETZ: Yes, the difficulty was it was left at the end of the hearing in September that it was
18 not to be disclosed into the confidentiality ring.

19 THE PRESIDENT: Lord Grabiner may be able to help us.

20 LORD GRABINER: I will deal with this.

21 MR PERETZ: I was going to say it is probably best for Wiseman to deal with this point anyway.
22 The key point, of course, is that the Aberness contract accounted for a tiny proportion of the
23 market and a tiny proportion of Claymore's turnover, but that contract was the only contract
24 referred to by Express/Claymore in its submissions and I just wanted to give you a couple of
25 references to Express's submissions to the OFT to demonstrate, and I would invite you to look
26 at Ashurst's memo of 19th June 2002 to the OFT, which is at volume 1, tab 20 and in particular
27 pages 1302, 1304 and the subsequent letter of Dr Park referring to the July 2002 arrangements
28 between Wiseman and Aberness which is at volume 1, tab 21.

29 THE PRESIDENT: We will check those in due course. Yes, Mr Turner?

30 MR TURNER: The last area that I wanted briefly to cover is the case team submission. You will
31 remember that Mr Green began by placing emphasis on the differences between that and
32 Mr Lawrie's statement. I am dealing only with the area that he concentrated on. May I invite
33 the Tribunal first, as the starting point, to see what is added by the case team, to look at

1 Mr Lawrie's statement, para. 50? This is on p.234. It is a paragraph that we have already
2 looked at dealing with intent. I would ask the Tribunal just to look at the part of the paragraph
3 beginning with the sentence "However..." about six or seven lines down from the top.

4 THE PRESIDENT: Yes.

5 MR TURNER: Which continues:

6 "...it is hardly surprising that Wiseman should categorise the competitive challenge
7 from Express. One of England and Wales' major dairies, with which it has been
8 waging a fierce battle for market share in England and Wales rather differently from
9 established competition from smaller local competitors. In short, it is hardly
10 surprising that Wiseman would want to keep a particular close eye on
11 Express/Claymore's progress."

12 Then, towards the end of that same paragraph Mr Laurie says:

13 "We did, of course, take account of the statement of Alan Wiseman, made to the
14 Competition Commission at the joint hearing..."

15 which is where he said that the purchase of Claymore was, in his view, illegitimate. You will
16 remember Mr Green laid emphasis on that in the context of evidence of intent, abusive intent.
17 Sir, those are the two points that I would ask the Tribunal to bear in mind from Mr Lawrie's
18 statement. Just before turning to the case team submission, there are two final passages in the
19 Competition Commission Report, one of which is directly referred to in the case team
20 submission which are relevant and I will ask the case team just to look at. The first is
21 para.2.134 in the "Conclusions" chapter. I should say that this is in the section dealing with
22 effects on competitors you will see at the top of the page, of Wiseman's behaviour, and this is
23 a particularly important paragraph of what we are about to read:

24 "The Nairn plant had been meeting the needs of Highlands and Islands' customers,
25 and of the dairy farmers who owned it with reasonable success. But it is clear from
26 Express's Board paper setting out its strategy for Scotland, that it did not take its
27 stake in Nairn simply to continue with the traditional business."

28 Then there is a cross reference to the paragraph which you will see in the case team
29 submission.

30 "It had understood from the start that the larger supermarket and middle ground retail
31 chains North of the border required an all Scotland supplier, and that success
32 depended on being able to meet orders in the Central Belt as well as further North.
33 On the basis of figures which Express gave us it appears to these Members

1 [Mr Clothier and Mr Mackay] that the Scotland-wide operations which
2 Express/Claymore sought to mount from Nairn, having failed in its attempt to acquire
3 its area in the Central Belt, would have been barely profitable even at the prices
4 achieved in 1998. Claymore would have been profitable had it continued to operate
5 in its traditional area, supplying its traditional customers and using its own raw milk.
6 The decision to supply customers further afield, which required Express/Claymore to
7 buy in additional raw milk from elsewhere, added unprofitable new business. So
8 while the price cutting competition with Wiseman has made Express/Claymore's
9 profits worse, its profitability would have been under pressure, even at the earlier
10 price levels."

11 You may just want to look at para.6.13 directly which, as I say is ----

12 THE PRESIDENT: And this is all the minority view?

13 MR TURNER: This is the minority view, yes.

14 THE PRESIDENT: That rather reinforces what I think we said yesterday, that the flavour of the
15 briefing document is that at the end of the day the case team preferred the minority view?

16 MR TURNER: That is correct. I am sorry, I am corrected, it is not that they preferred it, found that it
17 was correct, but they thought that it was a plausible explanation at that stage and that
18 convinced them that it was right to discontinue the investigation. 6.13, which is on p.1110, is
19 the paragraph which is digested in that conclusions' paragraph. I do not ask you to read the
20 entire paragraph, but only to note the specific point which is then developed in 2.134 in the last
21 sentence. These form part of Express's submissions to the Competition Commission and in the
22 last sentence you will see that:

23 "Express's chief executive noted in a Board Paper of July 1998 that Express had
24 already had a UHT factory at Kirkcudbright and that one market nuance in Scotland
25 of which we are aware is that the middle ground chains, and the multiples, i.e. the
26 larger supermarkets, require an all Scotland supplier."

27 So that was the factual underpinning for what you have just seen in 2.134. It is against that
28 background that you turn to the points in the case team submission that Mr Green was
29 interested in, and I would ask the Tribunal now to turn to the case team submission.

30 MR GREEN: I am sorry to interject. We do not have the non-confidential parts, and there are about
31 three paragraphs which follow that which put it in context.

32 THE PRESIDENT: Yes.

33 MR TURNER: That is a fair point. If we now turn to the case team submission, the copy that I am
34 using is at tab 9 in the correspondence bundle. The first paragraph in sequence on which

1 Mr Green focused as containing an error of approach by the Office was para.34, which you will
2 find on p.11. This was one of the references to the oligopolistic setting, and Mr Green said that
3 this did not seem compatible with the state of the market in Scotland. First, I would ask the
4 Tribunal to note that this is part of a commentary on the issue of exclusionary contracting, if
5 you glance up the page. It follows on from para.33 to which I drew attention at the outset,
6 which spoke to the fact that the Competition Commission's survey of middle ground retailers
7 had revealed that 97 per cent. had said that there were no conditions attached to milk
8 purchasers, and that only Abernethy seem to have accepted exclusivity terms, albeit there is
9 some qualification.

10 When you come to para.34 this records that the all Scotland contracts were actually
11 Express's strategy to enter the market, and you will see footnote 29 there giving the reference
12 to para.6.13 to 6.14 – two of those paragraphs, as Mr Green said remain redacted. Those
13 follow through to the conclusions' paragraph 2.134 which we have also read. Then comes the
14 comment that the all Scotland deals – if you look at the middle of para.34 – could only be
15 a response to an aggressive move by a competitor in an oligopolistic setting. There is the
16 footnote referring to Dodgson. I should explain that the person who wrote this was not a native
17 English speaker and that does read “The all Scotland deals “ not “could only” as in “necessarily
18 were” but “might only be a response ...” is the way it should be read “... to an aggressive
19 move by a competitor in an oligopolistic setting.”

20 THE PRESIDENT: It is difficult to give the document a meaning other than the meaning that comes
21 from the words.

22 MR TURNER: That is the meaning from the words which we say is the natural meaning of it but,
23 Sir, I cannot take that matter further.

24 THE PRESIDENT: Yes.

25 MR TURNER: Mr Green's argument is that this reference to competition in an oligopolistic setting
26 betrayed a confusion or an error on the part of the Office's case team, because this is not
27 a market with an oligopoly, this is a case of an incumbent dominant company, Wiseman, in
28 Scotland, and a new entrant. In fact, the basic confusion here does not lie with the Office but
29 with Express. Academic economists sometimes think of oligopoly as just a situation in
30 between the two extremes of perfect competition on the one hand and monopoly on the other,
31 in which the companies concerned can keep an eye on each other's strategies. May
32 I demonstrate this simply by passing up ----

33 THE PRESIDENT: That is almost every market you can think of.

34 MR TURNER: It is almost every market you can think of in the real world.

1 THE PRESIDENT: It rather removes any meaning from the word “oligopoly”.

2 MR TURNER: This was the way in which the language was used, and if I may show you the text
3 book on micro-economics which simply explains the term a further point follows from it. This
4 is an intermediate textbook. This is a text book authored by Hal R Varian.

5 THE PRESIDENT: What is the date of this?

6 MR TURNER: I will have to ascertain the date of this chapter in the book.

7 THE PRESIDENT: This is American?

8 MR TURNER: It is American.

9 THE PRESIDENT: Now, Sir, I wish to show you only two very short parts of this. On first page, if
10 you read the first chapter there is a reference to two important forms of market structure:
11 “... pure competition, where there are typically many small competitors, and pure
12 monopoly where there is only one large firm in the market. However...”

13 Sir, as you have observed:
14 “... much of the world lies in between these two extremes. Often there are a number
15 of competitors in the market but not so many as to regard each of them as having
16 a negligible effect on price. This is the situation known as oligopoly”.

17 Then if you turn over the page at the bottom ----

18 THE PRESIDENT: That is what I thought as a layman that is what an oligopoly was, a small
19 number of competitors often of roughly equal importance. It is not everything between the two
20 extremes.

21 MR TURNER: This was the definition which was adopted, and indeed that is the definition
22 – a small number of competitors in the market – which applied in this case. It is not
23 inconsistent with dominance, as you see if you turn the page and look at the heading at the
24 bottom, “25.2 Quantity Leadership”, where Stackelberg comes in.
25 “In the case of quantity leadership, one firm makes a choice before the other firm.”
26 This is in terms of increasing your supply.
27 “This is sometimes called the Stackelberg model in honour of the first economist to
28 systematically study leader-follower interactions.
29 “The Stackelberg model is often used to describe industries in which there is
30 a dominant firm or natural leader. For example, IBM is often considered to be
31 a dominant firm in the computer industry.”
32 Then there is a reference to the commonly observed pattern of behaviour whereby smaller
33 firms wait for IBM’s announcement of new products and then adjust their own decisions
34 accordingly.

1 So you are correct, Sir, that the position which is described as an “oligopoly” in the
2 case team submission does describe the case you often find in the real world and it is consistent
3 with the notion that one of the competitors in the market is a dominant firm.

4 The final point on para.34 is this: the Office drew attention to the difficulty, as you
5 see, from the last two sentences in 34 of distinguishing between all Scotland contracts which
6 are normal competition – the response to some aggressive move by a competitor in an
7 oligopolistic setting and Express’s vociferous allegations of exclusionary effects in practice.
8 Ultimately it is important to note from the last sentence that the case team did not resolve this
9 issue with finality. They said “On balance it is doubtful that further investigation would lead to
10 a conclusion that there has been an infringement.” So that is the paragraph which Mr Green
11 first concentrated on. We then turn to the conclusions paragraphs on which he also placed
12 emphasis, paras. 38 and 39 over the page. Just before looking at them directly, again those
13 must also be read in context, and you should look at para.35 under the heading “Intent” in
14 which the case team records Mr Wiseman’s testimony before the Competition Commission,
15 which Mr Lawrie referred to, that he did not view Express as a legitimate purchaser. The case
16 team say:

17 “This unfortunately would be the only proof of intent so far. No business strategy
18 documentation corroborates any of the alleged abuses above.”

19 Paragraph 36 then is viewing the issue of possible abuse in the round, which Express counsels
20 the Office to do. It points out the difficulties of reaching a final and definitive view on the
21 matter, in other words that the case team did not think it was possible to rule out to a high
22 degree of confidence anti-competitive conduct on the basis of the evidence before them. They
23 did not think that it was worth pursuing the investigation further on balance.

24 Paragraph 37, a question was raised while Mr Green was on his feet about what was
25 meant by Express’s interpretation of the Competition Act provision being one-sided, which
26 undermines its argument. I am told by Mrs Pope that this harks back to the very point that we
27 were discussing yesterday, and which I discussed after lunch, and this is that it is correct that
28 you must not take too restrictive a view of the law on abuse in case the sanctions for anti-
29 competitive behaviour are too lax and harm to the public results.

30 On the other hand, as the case law recognises it is one-sided because dominant firms
31 should be allowed to compete and encouraged to compete on the merits. The competition
32 authorities, this is saying, have to be equally careful not to damage legitimate competition by
33 imposing artificial constraints on dominant firms. If I may just take the example of the all
34 Scotland prices, the single price for all of the outlets of a big customer. The evidence suggests,

1 as you have seen, that this was something that was wanted by the major purchasers and it was
2 wanted because it gives them efficiencies [Competition Commission Report 4,336] It was
3 engaged in generally by the milk suppliers, not just by Wiseman. You have seen Express's
4 strategy for entry was itself to offer all Scotland prices, but if for the sake of argument Express
5 had wanted just to offer prices for delivering milk to the Highlands outlets the point is this, can
6 it be the case that Wiseman can be compelled to stop offering all Scotland prices just to make it
7 easier for Express to do that. It is not obviously pro-competitive; it could be a seriously
8 artificial distortion of normal competition in the market which could damage the public
9 interest.

10 THE PRESIDENT: Supposing in this case Express just had said "Claymore has now gone into
11 serious loss, we are not going to support these losses any longer, we are just going to back off",
12 and Claymore had, in fact, disappeared, would the analysis be any different?

13 MR TURNER: This relates to the question you posed yesterday and whether the analysis changes if
14 you leave a monopoly in place, which is then able to exploit customers, and ultimately the
15 public. Sir, that is a situation which is, in theory, possible. All however this analysis was
16 addressing was the question of whether competition on the merits was being conducted at an
17 all Scotland level. If you leave Wiseman in place because Claymore cannot compete only for
18 the Highlands' outlets, let us say, but would need – or any competitor would need – to compete
19 on an all Scotland basis, that is not to say that the barriers to entry are such that other
20 competitors cannot come in and compete on an all Scotland basis, as Express sought to do in
21 this case. The case team's analysis is only that what it was observing was not clearly anti-
22 competitive and in view of the points which you have just seen might have been a feature of
23 normal competition.

24 THE PRESIDENT: The only way to get into this market is either to buy an existing dairy or build
25 a new one.

26 MR TURNER: Yes.

27 THE PRESIDENT: It is quite a considerable barrier to entry.

28 MR TURNER: That may or may not be the case, Sir. It may be that other people can come in. It
29 may be that they cannot, but that was not the point which the case team were addressing here.
30 They were addressing the point that this form of competition might well have been normal. It is
31 that sort of consideration that led the case team to leave the case, after their analysis – the work
32 that we discussed yesterday – and to move on to other cases where they felt there was good
33 evidence of infringement that they could pursue. Two of the cases mentioned in Mrs Boys'
34 note back to the case team the Tribunal knows have since resulted in infringement Decisions

1 that the Tribunal has actually upheld on Appeal – the *Hasbro* and *Genzyme* case. Both of them
2 required hard work in difficult cases and both Mrs Pope and Mr Lawrie each went to one of
3 those cases – Mr Lawrie to *Hasbro* and Mrs Pope to *Genzyme*, and in each case there was of
4 course determined and quite ferocious opposition by the companies concerned.

5 Sir, I did not draw your attention yesterday to a paragraph in *Tetra Pak 2* on a legal
6 proposition which I had notified the Tribunal we considered to be relevant, and I will just
7 mention this. At para.160 of the Judgment – we have given the reference in the note – the court
8 recorded this:

9 “In *United Brands* the Court of Justice stated that Article 86 did not preclude an
10 undertaking in a dominant position from setting different prices in the various
11 Member States ...”

12 That was a case of obviously pricing throughout the Community.

13 “... in particular where the price differences are justified by variations in the
14 conditions of marketing and the intensity of competition”.

15 That simply is a point in the case law underlining the fact that dominant firms can also compete
16 on the merits according to the intensity of competition. If all Scotland pricing was a feature of
17 this market that may have been a normal feature of competition.

18 The last issue then, if we turn to Mr Green’s specific criticisms in paras.38 and 39 of
19 this submission. In those paragraphs the case team is referring back to the finding in the
20 Competition Commission Report when it is talking about Express’s mistaken strategy – you
21 see that in para.38 – and that this was confirmed by the Office’s own conversations with other
22 people in the industry. You will see the sentence that begins: “Views in the industry have
23 tended to find Express’s strategy suboptimal.” Pausing there, that might bear on the question
24 you were just raising with me because, of course, the Office spoke to other major dairies
25 – I cannot remember whether the identity of these is still confidential – one of them was Arla,
26 which I know is not confidential, the other one may be confidential. Those were two major
27 dairies ----

28 THE PRESIDENT: I do not think its identity is confidential ----

29 MR TURNER: It is what was said, yes. But the question of what has happened since in the market
30 in relation to those two dairies and what they felt about how easy it was to get back into the
31 Scottish market might be an answer, Sir, to your question on that point, because both of them
32 said things that led the Office to believe that it was possible for major dairies to repeat on that
33 basis. Lord Grabiner will deal with the Question of Arla.

1 The point is that when you understand that, and you look now at the last sentence of
2 para.38, the reference there to “illegitimacy” (in inverted commas) of Express in Scotland
3 could stem from its location in Nairn” is harking back to what you see at the top of the page
4 about Mr Wiseman’s comment to the Competition Commission about not viewing Express as
5 a legitimate purchaser of Claymore. What is being said is that this comment might have
6 referred to this mistaken strategic move which could not have been profitable.

7 Finally then Stackelberg-warfare. Stackelberg-warfare in fact is not a term invented
8 by Stackelberg. I understand it was coined in a paper in 1991 by another academic economist,
9 and that all that it means is that in this situation where you have a leader and a follower, the
10 follower may decide to take on the leader and compete vigorously for market share. That then
11 leads to mutual aggression, a form of normal competition, until somebody backs down. That is
12 Stackelberg-warfare. The Office was not saying that there was Stackelberg-warfare but, as
13 you see in this paragraph, it was speculating that there might have been an alternative
14 explanation for the pricing behaviour in the market which was being seen apart from abusive
15 behaviour by Wiseman.

16 The reference in the footnote to the bus market, which Mr Green referred to, was to an
17 investigation that the Office had conducted in relation to predatory conduct in circumstances
18 where one company did have market power. In that case, as it happens the Office did find that
19 there was predatory behaviour by the company with market power. What is being said is in
20 a later article about the matter an academic called “Dodgson” suggested that that behaviour
21 could have been analysed in a way that was different, that was compatible with ordinary
22 competition. Sir, those are my remarks in relation to that aspect.

23 Finally, certain conclusionary comments. There can be no doubt of the capabilities of
24 the officials at the Office who dealt with this case, or that they are prepared to take a bold
25 decision on infringement where they feel that the case merits it. This is not a case of craven
26 cowardice. We accept fully, as I mentioned yesterday, that any error of approach or principle
27 by the Office which you find should be capable of being reviewed by the court and corrected.
28 That is a part of how the system should work and we welcome it.

29 I do not say that you should treat this case as if it were a Judicial Review. I am not
30 sure either that Lord Gribner would go that far. Our essential point is that questions of
31 institutional balance and competence – relative institutional competence – are at stake in this
32 case.

33 THE PRESIDENT: You explained all that yesterday.

1 MR TURNER: Yes. So our point is that the Tribunal must look for an error of principle or approach
2 but otherwise recognise the discretion of the investigative authority.

3 A final point that I will make is that the essence of the attack that has been brought is
4 in the conclusion to Mr Haberman's report – may I ask you just to look at that? It is in core
5 bundle, tab 2 p.182, para.6.3. He summarises why he thinks the Office's investigation was
6 fundamentally flawed. What he says is that the investigation required detailed analysis of the
7 cost structure of Wiseman's business, and how those costs apply to various customers. He
8 criticises the Office's work in the way that you have seen as based on insufficient data,
9 inappropriate analysis and so on. Similarly he says the investigation of discriminatory pricing
10 required the analysis of price patterns over different customers, and so on and so forth, which
11 was not done, insufficiently detailed and failed to take account of all the factors. Finally, that
12 the investigation of exclusionary contracts failed to consider Claymore's business at all and so
13 it could never have identified whether the effect of certain of Wiseman's contracts as
14 exclusionary. As to the last we are not entirely clear what is meant, but we do say that it cannot
15 perhaps be being said that it is not right to have a deal engaged in by Wiseman, perhaps an all
16 Scotland pricing deal, which captures some of Claymore's customers in the Highlands, because
17 this alone would then make it uneconomic for Claymore/Express in that area. If that is what is
18 being said we deny it for the reasons that I have outlined.

19 Finally, I say with some diffidence that this litigation has seen some of the worst
20 excesses of the well-resourced applicant which is dedicated to pursuing its grievances through
21 litigation in the Tribunal, although it has not been bold enough to pursue a case of private
22 action for damages for breach of the Competition Act. It does remain unclear to us what
23 Express hopes to achieve at the end of this, and Mr Green will shortly speak to that. As
24 Wiseman points out in its skeleton there is little or no evidence of any continuing problem and
25 Lord Grabiner will no doubt deal with that.

26 Finally, the way in which Express has gone about matters in this case procedurally
27 with 18 grounds of appeal, an attempt to carry out a full scale audit of every minute detail of
28 the Office's investigation into its major competitor and then finally its 17 key authorities for
29 this hearing are regrettable, because they undermine procedural economies that in civil
30 litigation the Woolf Reforms are intended to bring about. Nor, in my submission has any of
31 this been informative for the Tribunal. The result of Express's approach to this litigation has
32 been, in my submission, that until this very hearing the main issues in the case were obscure,
33 and that does not conduce to effective litigation.

1 Sir, what the Office would be grateful for from the Tribunal in this case, quite apart
2 from anything else, would be some indication, perhaps with an indication about how costs
3 consequences might apply in this sort of case, designed to minimise the risk that this approach
4 to litigation should be repeated in the future.

5 Sir, those are my submissions.

6 THE PRESIDENT: Thank you, Mr Turner. Yes, Lord Grabiner?

7 LORD GRABINER: Sir, would it be convenient for Mr Bezant to do his piece now? Just for
8 absolute clarity, the only reason I am inviting him to address you and in turn any questions that
9 you may wish to put to him is simply to address the question of allocation by volume. The
10 suggestion is that he should go into what I think we pleasingly call the “witness box”.

11 THE PRESIDENT: I think it is probably easiest, Mr Bezant.

12 MR BEZANT: Thank you for your time. I just want to make a few observations, again solely on run
13 cost allocation, allocation by volume because I knew there were some questions going
14 backwards and forwards yesterday. I am actually going to cover four things. I want to spend
15 a little time on why I devised figure 1 and it might be helpful to have that with you – that is at
16 p.575 of your core bundle.

17 THE PRESIDENT: Yes.

18 MR BEZANT: I want to talk a little bit about the different ways you might allocate costs, because
19 that came up in yesterday’s conversation, and also questions of marginal or incremental
20 approaches, because that also was aired yesterday, and a brief reference to practice. On the
21 subject of practice I do have experience of dealing with these questions of cost causation and
22 cost allocation. Most pertinently I did a great deal of work for one of the major supermarket
23 chains a few years ago and they were interested in allocating costs to outlets, products and
24 customers – not unlike this situation – and then struggled for some time with the questions that
25 are being aired today before they asked to see them to try and assist them with the problem. So
26 I am in the hot tub today but I have been up the deep end before.

27 Just to set the scene we are dealing with Wiseman’s attempts to maximise the
28 efficiency of distribution because of their business, in an area depending on factors such as
29 order size, delivery requirements and locations. Now there are situations where a big run or
30 a few big runs will be dealt with by a single large delivery lorry, and there are situations where
31 there are a number of small runs and that will be a smaller lorry. I think much of the discussion
32 reflected the fact that, in the main, the distribution runs cover a mix of larger and smaller
33 customers and I think that was really what yesterday was mainly about.

34 THE PRESIDENT: Yes.

1 MR BEZANT: So I want to talk to you about figure 1. I put figure 1 in because it tells you
2 something about the cost structure of a business like Wiseman's, and it tells you something
3 about the way those costs are influenced or affected by the activities of the business. In truth,
4 in the situation before the Tribunal you are trying to allocate costs on certain measures,
5 customers or outlets, and certain of those measures of costs are total costs of the business, so
6 this is all of the costs of the business and in some situations the OFT and others have been
7 wrestling with how do you allocate those total costs.

8 The point I would observe from figure 1, the illustration of relative costs is that
9 a great deal of the costs vary by volume, that is not in dispute, that is the middle chunk of
10 figure 1. The costs at the bottom of figure 1 are fixed costs, depot costs, dairy costs, and
11 processed costs. I am not aware that it is materially disputed that this should be done by
12 volume either between Mr Haberman and I – or anyone else for that matter. So you have
13 something of the order of 90 per cent. or more of the costs where we are allocating those costs
14 on a volume basis. Now, I do not think that is determinative, when you come to look at how
15 you should deal with run costs, but I think that is worth bearing in mind.

16 The main point on costs I want to talk about is allocating common costs across the
17 runs, and this is really a costs' causation problem. I think there is no dispute that there are
18 theoretical and practical problems in allocating common costs, they are not unique to this
19 situation. It is understood by the regulation authorities, understood by the experts, understood
20 by some of the economists that people have cited. When you deal with common cost problems
21 you find yourself going in a number of directions. You can try and come up with a complex
22 solution to the problem, or you can try and come up with a simple solution to the problem.
23 The difficulty with the complex solution is that it may not actually shed any further light and it
24 may actually be extremely difficult in practice either to create it, implement it or monitor it.
25 The trouble with simple solutions is that they may not be very meaningful. The reason
26 I flagged that is I suspected, hearing the Tribunal yesterday, there was perhaps a temptation to
27 say "Shall we look at this on a number of bases, and see if we can triangulate into a superior
28 result.

29 THE PRESIDENT: The problem that I have in mind is the first one that you mentioned, that you
30 may try to devise a relatively complex solution which may not, in fact, shed much light on
31 anything

32 MR BEZANT: Well I was going to say you may be better informed but none the wiser and that is
33 really what I wanted to bring to your attention. Let me talk about possibly the four keys that
34 we discussed yesterday – volume, distance, time and outlets.

1 THE PRESIDENT: Yes.

2 MR BEZANT: And why, in my view, allocating common run costs by volume is what I would call
3 an economically meaningful basis of cost allocation. I say this because it is the volume a
4 customer orders that influences or causes much of the cost of the run, namely, the size of the
5 delivery vehicle and its running costs. So the underlying costs of the run are – not entirely but
6 substantially – determined by the volumes that are being shipped to the customers, and I had
7 some comments on that in para.8.28 of my report – I do not want to take you there, I just want
8 to reference it. I should say there are some suggestions about whether smaller customers were
9 cross-subsidising larger customers which is, I think, the wrong way round, because it is the
10 large volumes that drive the costs of the run overall by and large.

11 I have therefore identified volume because there is a relationship between the
12 underlying drivers of cost, the cost causation, and one of the measures that is in use here,
13 volume, and I do not think that the other measures provide meaningful information – or as
14 meaningful information – to allocate the costs of the run, and I will just illustrate that if I may.
15 If you focus on something like distance, or some measure of distance – in itself it is a problem
16 which measure of distance – total distance, average distance, extra distance – distance does not
17 tell you anything about what is being taken to the customers and therefore the costs that have
18 been incurred, i.e. the size of the lorry, the running costs of the lorry. Time equally gives you
19 these problems. It takes as long to drive the same distance broadly speaking irrespective of how
20 much you are shipping, so simple measures around some of these simple keys I think will
21 throw up anonymous results which do not tell you anything about what is driving the costs.

22 MR CLAYTON: The amount of time spent on a small delivery could be quite large in proportion to
23 the amount of milk which, in this case, is being dropped off.

24 MR BEZANT: The amount of time dropping off may have some basis on volume because of the
25 time it takes to unload the bottles or however it is done. I am not saying volume is perfect I am
26 just examining if you plucked – let us do it on time, or let us do it on some other basis, and we
27 have four different ways of looking at the problem, would you be better informed, and that is
28 the thing I am just airing some thoughts on.

29 If you went to outlets that does not tell you anything, the number of outlets does not
30 tell you anything about the costs incurred in delivery because there is no link between the
31 number of outlets and the size of the orders and the costs incurred, so you must choose your
32 averages with care. You could go to more complicated measures, and a number of them have
33 been suggested but not actually put forward in any great way, but I think some of these
34 problems would remain or even multiply and then you get into some of the measurement

1 problems. So really, with common costs you are talking about finding some way of taking an
2 average measure to spread common costs across the participants, if I could call it that. But if
3 you are going to choose an average measure you need to choose something which, to a greater
4 or lesser extent has the bearing on the underlying costs, or can be tied to the underlying costs,
5 which is why I come back to volume, because of the delivery vehicle size point.

6 There were some questions yesterday, and everybody understood that there were
7 some challenges, and there were some questions yesterday about can we go to a marginal view,
8 what does the incremental customer do for us? Again, I would observe that this is where you
9 begin intense practical problems in measurement and monitoring. I think you have a more
10 fundamental problem which is when you have an existing run, how do you unpick it? How do
11 you say what is the first one? What is incremental to that? That is the curse of common costs.
12 You do not necessarily know how to unbundle them. I suspect were you to try you would
13 probably find yourself appealing to things like volume that tell you something about how the
14 overall run costs have been influenced. You can look at “we are adding an extra customer or
15 an extra outlet, can we do something to that extent?” – I think that was one of your questions
16 yesterday, if you are not careful you may have very anomalous results because there may no
17 incremental distance if it is a drop off on way, or minimal incremental time. Again, it does not
18 bear any resemblance to how much milk has been ordered by this new customer, and what
19 therefore has happened to the cost of the run. So you will find there is a danger of a lot of
20 anomalies in an incremental approach. The curious thing about volume is that there is always
21 incremental volume, if you add an extra customer you must be adding more milk. That is in
22 a sense a stable and systematic way of deciding what to do with allocating the costs of a run,
23 and is, I think, superior to some of the “happenstance” of how you might drop off. I do not
24 want to make it sound random when it is not, but you can understand the point. I think volume,
25 even if you were attracted to an incremental basis, has some things going for it.

26 Run costs – they do reflect economies of scope, and that is essentially what I have just
27 said, given the overall objectives of trying to maximise distribution efficiency. Allocating run
28 costs by volume does result in all outlets, and then henceforward customers, being allocated
29 a share of total costs. You might think that was helpful if you are trying to determine the extent
30 to which the prices charged to customers cover or contribute to the total costs of the business.
31 Those are my theoretical comments and observations about alternatives available to you.

32 One of the things that has not really surfaced in the discussions is what might be
33 going on in practice in this industry, and the observation I would make is that if there were
34 alternatives that were either readily available, easy to carry out, or readily available and yielded

1 helpful and useful information, you would expect to find them in place in practice because it
2 would help you run your business, but I am not aware that there is any evidence before the
3 Tribunal from Wiseman, Claymore, Express or Arla that suggests there are easy solutions to
4 this problem and I just make that point. So I do not think allocating run costs by volume would
5 be said to be perfect, it is not perfect, but I think it is superior given the theoretical and
6 practical issues and considerations to the alternatives that have been put to you.

7 Thank you for the time. I hope that I have helped you locate the signal and not added
8 to the noise, but I felt that it was important just to try and tie some of these things together.

9 Thank you.

10 MR CLAYTON: If I could ask one question? Taking all your comments about the complexity of
11 taking incremental costs and marginal costs and all the variants in the drivers, just taking
12 a purely commonsense suggestion, if I can put it that way ----

13 MR BEZANT: Yes.

14 MR CLAYTON: Taking the volume is the sensible way of allocating costs, would it not also be
15 sensible to have some sliding scale of volume so that the small volume drops have a larger
16 percentage cost allocation to them which would reflect the fact that the lorry is having to go to
17 that perhaps smaller outlet, drop off to that smaller outlet? So you would have very similar
18 costs of the driver getting the document signed, of having to leave the lorry, stopping, finding
19 his way to the shop in which ever street it was, and you would have the supermarket. So it
20 seems intuitively almost, unfair to give all the benefits of the higher volumes to the smaller
21 outlet. It would seem that the smaller outlet should bear some degree of the cost “penalty” – if
22 that is the word to use – the costs of dropping to that small outlet?

23 I am really suggesting the question to you, whilst you take volume as the allocation
24 basis would it not be at least reasonably sensible that you put in some sliding scale, or some
25 “loading” – if that is the word to use – towards the smaller outlets?

26 MR BEZANT: Part of my response is I am back to figure1. You have allocated the vast, vast
27 majority of costs already by volume, and are you dealing with a very small nub at the end, the
28 driver’s wages, or something like that.

29 MR CLAYTON: I am not just saying the driver’s wages, I am saying if you are going to allocate all
30 the costs by volume why do you not allocate all the costs by volume but with some sliding
31 scale to reflect the additional cost proportionately which had been incurred by the smaller
32 outlets?

33 MR BEZANT: I think the difficulty is I am not sure what is meant by the “additional costs”. If you
34 have taken a decision to maximise distribution efficiencies and you have a cost which reflects

1 the run that is configured and the customers on that run, and the overall cost of meeting the
2 delivery requirements and so on, I do not know that I quite see that smaller customers
3 somehow ...

4 MR CLAYTON: The smaller customer perhaps is taking only 100 litres, the lorry is having to go
5 there, it is having to stop, it is having to get a documentation signed – probably a very similar
6 documentation to the drop-off which is 1000 litres.

7 MR BEZANT: I think the issue, if you were saying the smaller customer, then you have all these
8 problems about the location or the run where you drop, so it would be difficult to think of it in
9 distance terms – what you might really be talking about is the small piece at the end, as you
10 say, where the man gets out of the cab and says here is the milk? Now, to the extent that we
11 have recognised that the volume of the drop off may influence the time taken to do that,
12 volume may be a proxy and I admit that, taking into account some of those time costs, and
13 I realise that there is always lump – it takes 15 minutes whether you drop off at a small corner
14 shop or you drop off at a Tesco, is a very, very small part. You could do it like that but I think
15 it is a very, very small part of the costs and some of the bigger considerations still come into
16 play as to the size of the lorry that is involved which is the core driver in many respects of he
17 cost. So yes it is not perfect, and you could tinker and I do not mean that pejoratively ----

18 MR CLAYTON: Not at all, there is an arguable case?

19 MR BEZANT: Yes.

20 THE PRESIDENT: Mr Bezzant, can I just try to take it just one step deeper? In your previous
21 experience you have been working with supermarkets and others who have been struggling
22 with cost allocation problems as between outlets, products and customers and one can imagine
23 a business doing that for the purpose of maximising efficiencies and making sure that it is
24 covering its costs and all the rest of it. I think we have to start here – the Tribunal has to start
25 with reminding itself of the purpose in this cost application, what is the purpose of the exercise
26 in the first place? In this particular case, the purpose of the exercise is not, or only very
27 indirectly, to work out what management efficiencies are. The purpose of the exercise is to see
28 whether there is evidence that an allegedly dominant undertaking has been breaching what may
29 or may not be the rules that govern behaviour by dominant enterprises, and in particular to see
30 whether there is on some sensible basis an argument that this particular enterprise has been
31 pricing below its “costs” or that have been charging prices that do not reflect costs, or has been
32 charging different prices to different customers that are not cost based, or have been charging
33 the same price to different customers, even though there are different costs of supplying – those
34 are some of the issues. The question, I think, for us is whether the particular exercise that the

1 OFT undertook was or was not likely to throw any light on any of those questions when it
2 came to deciding how to treat the run costs, or whether – to use your phrase a moment ago – it
3 was an exercise that may have left the OFT, as it were, better informed and none the wiser?

4 MR BEZANT: I would say to that that the allocation of cost by volume is the methodology, subject
5 to whether you want to make modifications and the debate as to whether they are material,
6 etc., is the methodology that comes closest to allocating a pool of costs to a participant in that
7 pool of costs. I would tell you that irrespective of this situation because that is what we are
8 dealing with. Therefore, if the question is: did the OFT choose a methodology which was the
9 best under the circumstances, or appropriate under the circumstances and I do not want to get
10 into your domain, then I would say “yes”, I would say this is a sensible way to proceed in the
11 round, given the challenges faced of theoretical, practical limitations, and given the dangers of
12 choosing alternatives which do not actually provide a better answer, for example, some of the
13 things I discussed. So I do not know if that helps answer your question.

14 THE PRESIDENT: I just want to go on just a little bit. I think there are two questions for us,
15 whether the OFT could safely base any conclusions on what it arrived at, and was there some
16 alternative or other method that perhaps involved either not these allocating costs at all and
17 simply treated them as costs to be allocated on some very simple basis, or what? The particular
18 question in my mind that illustrates some of the problems is in the particular passage in
19 Mr Haberman’s Report that we have already looked at.

20 MR BEZANT: 4.18 to 4.19.

21 THE PRESIDENT: 4.18 to 4.20.

22 MR BEZANT: I am familiar with it.

23 THE PRESIDENT: From which one sees, and we just take this as illustrative of the problem and
24 discuss it in perhaps those terms, in which one sees that in relation to a particular run in the
25 Highlands, because of the volume on that run the run cost is 1.5p per litre, and in a different
26 run because of the configuration of the run the run cost is up to 50p a litre.

27 MR BEZANT: But this is a situation that was dealing with certain extremes that called for ----

28 THE PRESIDENT: Yes, well let us take it, just for argument’s sake. At the extreme you could
29 theoretically argue that on this basis the customer, who was generating – let us take 35p which
30 is a figure there – a customer generating 35p per litre in cost should be paying a much higher
31 price that reflects that cost because otherwise the price to that customer is below cost, or the
32 price is not properly reflective of the cost of serving that customer – that would be the
33 argument that would be right. Now, other evidence, particularly Mr Sweeney’s evidence is
34 that just is not a realistic way of doing it because the way these runs are organised there are all

1 kinds of anomalies of that sort if you go down this road. Basically, when it comes to setting
2 prices you set the price to the customer on a broad brush basis, broadly depending on what
3 other customers of that kind and type tend to be paying, and that is how you set prices. So that
4 it would be, according to Mr Sweeney, not at all fair or appropriate to place any allegation of
5 abuse of dominance on this sort of exercise?

6 MR BEZANT: I think any exercise, and this is partly coming back to one of your questions, any
7 exercise of allocating common costs on a key is going to throw up what might be termed
8 anomalies or an extreme in the range. The question is if one is trying to investigate whether
9 prices covered certain measures of costs, for example, total costs, then in truth you have to try
10 and find some way of doing it otherwise you are left stranded.

11 THE PRESIDENT: Yes.

12 MR BEZANT: That is what has been going on here, trying to find a way of allocating total costs and
13 in this case it is the nub of the costs, a little bit above 8 per cent., 10 per cent. of the top of the
14 cost hierarchy in a sense, that one is trying to allocate so all the costs are in.

15 I come back to the fact that, yes, you will find a range of outcomes depending on the
16 specifics of a run. That is the way the business is configured, but in the specifics of a run we
17 are trying to allocate those costs as best you can, and volume is a method that helps you
18 allocate those run costs as best you can, given that it is the volume that has one of the biggest
19 influences on the overall costs of the run. I am sorry if I sound a little repetitive, but that is in
20 essence the heart of it.

21 THE PRESIDENT: That is as far as you can take it?

22 MR BEZANT: So volume has things going for it. Volume ties back to the costs of the run and if
23 you are trying to allocate the costs – that is what I am saying.

24 MR CLAYTON: But there could be refinements of that volume approach?

25 MR BEZANT: There could be some minor refinements.

26 MR CLAYTON: I was only suggesting a minor refinement.

27 MR BEZANT: Yes.

28 THE PRESIDENT: Thank you very much, Mr Bezant. Do you want to ask any questions,
29 Mr Green?

30 MR GREEN: I am just going to allow Mr Haberman to make any responses that he wishes, and
31 answer any questions that you have for him.

32 THE PRESIDENT: Thank you very much. Yes, Mr Haberman, good morning.

33 MR HABERMAN: Good morning, perhaps the first point to make is like Mr Bezant I have been
34 involved in a number of cases around issues to deal with allocation of cost, it is a very familiar

1 thing to deal with. One of the cases I am dealing with at the moment is concerned with a
2 response to a European Commission Statement of Objections. One of the interesting there of
3 allocation of costs is to recognise that not all costs need to be allocated in the same way. The
4 fact that a large number of costs are allocated by volume does not really have any influence
5 over how the rest of costs should be allocated.

6 It seems to me that when we are talking about run costs the most important thing to do
7 is, first of all, to think about the part of the country we are talking about. The Highlands is an
8 area which represents 40 per cent. of Scotland by area but carries only 5 per cent. of the
9 population. The distances are enormous. The furthest customers from Claymore's dairy are up
10 to 200 miles away and that is along roads which are in many cases single track roads going
11 through difficult terrain. What really matters is the time and the distance that it takes to get to
12 these outlets – very few of them are supermarket size. Once one gets any substantial distance
13 beyond Inverness there are very few substantial outlets. If I could point you to one section of
14 my report (p.167 of the bundle) at para.587 at the bottom of the page, I talked about the
15 relationship that one might expect to see between volume and cost if volume was truly the
16 driver of costs. The graph at the top of p.168 shows there is no discernible relationship at all
17 between the volume carried on a run and the cost of that run and that is emphasised again if
18 one looks at table A in Mr Lawrie's statement at p.346 of the bundle. Looking across the
19 categories of cost that are listed here one can see that runs of very different sizes, if I could just
20 take the first two on that list, have very similar levels for cost of wages. The smaller one has
21 a higher cost for fuel, and for other vehicle related costs. So to suggest that volume is a driver
22 of the costs of the run seems to me to be, frankly, absurd.

23 THE PRESIDENT: I am sorry, you are pointing out in relation to the second line you have a cost in
24 fuel of 2312 which is approximately double the first line ----

25 MR HABERMAN: That is right, we are recognising these are approximations.

26 THE PRESIDENT: -- and you have the volume and that is very, very much lower than in the first
27 line.

28 MR HABERMAN: Yes, so clearly what has caused these costs to rise is not the volume carried, but
29 going a long way.

30 THE PRESIDENT: It would appear to be going a long way, yes, and similarly in relation to tyres
31 and things like that.

32 MR HABERMAN: Yes, because the costs of a run are mainly vehicle costs plus the driver who has
33 to take the vehicle on the run.

34 THE PRESIDENT: Yes, I see.

1 MR HABERMAN: If I could just mention briefly there is an example taken at para.47 of the OFT's
2 skeleton (p.14), and there is reference here to a very simple example of a run serving one
3 supermarket and adding on a middle ground customer located en route. Of course, the reality in
4 the Highlands in particular is that it is more likely to be the opposite way around, namely, that
5 the run may serve a supermarket but the middle ground outlet that is added is probably five or
6 ten times the distance to the supermarket rather than on the way to it. So adding that middle
7 ground outlet causes an enormous increase in the total costs of the run. It is an equally extreme
8 example, but it demonstrates that to attribute the run cost by volume to a supermarket in a
9 situation like that would create a result that meant nothing at all.

10 You yourself have pointed out that allocating run costs by volume results in ignoring
11 the economies of scale. It means the costs of delivering to two different size outlets is taken to
12 be the same per litre if one of them is taking 10,000 litres and one of them is taking 100 litres
13 which again does not reflect commercial reality.

14 The other thing that concerns me about the use of volume is, again as you pointed out
15 on Wednesday, it results in the cost allocated for a particular outlet being more dependent on
16 what was happening on the rest of the run than on that outlet itself. So it is very susceptible to
17 changes over something which bears no relationship to the particular outlet concerned.

18 I believe that the correct approach in a situation like this, which is clearly difficult, is
19 to start off and again if I could take you back to my report (p,169), as I pointed out at the
20 beginning of para.592, the best place to start is with some real facts of what is actually
21 happening on the ground, what these runs look like. Although it sounds very complicated to
22 say that we have to look in great detail of each run, I do not believe we are talking about a large
23 number of runs. There is no need to go back to it, but table A on p.346 shows something of the
24 order of a dozen runs out of the Keith depot. So just focusing on those runs which were serving
25 the ex-Claymore customers would be sufficient, one would not have to deal with all of the runs
26 from all of the other depots. I understand Mr Lawrie (para.22 of his statement on p.225)
27 indicates that the OFT had that information because it had asked for that to use as a basis for
28 selecting the sample of outlets which it ended up analysing.

29 Having found out where the outlets are, what the runs look like, I think one of the key
30 pieces of information to find out would be to discover how the runs had been put together in
31 the first place because it has been suggested that it is very difficult to calculate the costs of
32 individual runs. At para.589 of my report I mention the existence of software, and I know for
33 example that Express uses software called "Paragon", there are various other sorts of software
34 around. I discovered on my researches that Wiseman uses something similar for its milk

1 collection – it is on a press release issued by the software house. I do not know how Wiseman
2 plan deliveries, but I would expect them to be using some sort of system because what these
3 software packages do is to look at the total run costs of all of the runs and try to optimise that
4 total, to keep it down to a minimum. As the range of outlets changes the software can re-
5 programme the suggested runs with a view always to minimising cost. Now if that software is
6 available to the OFT it could use that software as a mechanism for calculating the costs of
7 individual runs because that comes out as a by-product of the software itself. Or, if that is too
8 difficult one can do the job, it is not too complicated to work out distances simply from the
9 internet – there are lots of mapping sites that will give precise distances from one location to
10 another and give an idea of how long it takes to travel the distances.

11 From my discussions with Express and Claymore, my understanding is that runs,
12 particularly in the Highlands do not look like a circle. We have been discussing runs and have
13 been talking about them as though a run starts at a depot, goes round a circle and comes back to
14 the depot. The reality is that runs, particularly in the Highlands, look more like a lollipop.
15 There is quite a long run from the depot, along a single road to the first drop off point, and then
16 there may be a small number of drop off points within a relatively close proximity relative to
17 the total distance and then a long run back again. So clearly, when one thinks of a run in those
18 terms that very long journey up the stick of the lollipop and back again the benefit of it is
19 shared equally between the customers at the other end, hence my suggestion that a reasonable
20 rule of thumb for allocating the cost is to simply split it equally between the outlets. What has
21 driven the cost is the distance travelled and the time.

22 THE PRESIDENT: In the context, you say, of the particular geographical characteristics of the
23 Highland runs?

24 MR HABERMAN: That is right, and it may be that in other parts one may wish to look at allocation
25 on a different basis, but that makes more sense.

26 THE PRESIDENT: You mean central Glasgow is a different sort of situation?

27 MR HABERMAN: It could well be, yes.

28 THE PRESIDENT: You mentioned Table A a few minutes ago, and you said you thought there
29 were about a dozen runs from the Keith depot, do you happen to recall offhand – or perhaps
30 someone could tell me – which the Keith depot runs are?

31 MR HABERMAN: Yes, those are the ones for which the code is “ABER” at the beginning.

32 THE PRESIDENT: It is just those first ones?

33 MR HABERMAN: Yes, those are the Keith depots. There is one other point which relates to the
34 way to my mind the inquiry should take place, which is that given the distances to be travelled

1 and the difficulties of delivering to outlets in the Highlands, the greatest incremental cost
2 occurs when delivering to the first of those outlets.

3 MR CLAYTON: It is almost a pure chance which is the first of the placements, and that would be
4 the software or whatever which would determine which was the first one, it could be ----

5 MR HABERMAN: Well no, by “first” I mean actually the first in time, when the first new customer
6 in the Highlands’ area is obtained.

7 MR CLAYTON: I am sorry, I thought you meant on the drop.

8 MR HABERMAN: No. So when that first new customer is obtained that will require a change in the
9 delivery rounds, and that first additional drop off to new outlets in the Highlands would be
10 relatively very expensive. By the time we get to November 2000 and May 2001, because
11 a number of customers have been obtained by Wiseman, the runs that are serving the
12 Highlands have now settled down and have a cost shared between a lot of outlets, but that
13 would be masking the effect of the cost initially when those outlets were first acquired.

14 There is just one final point I would like to make.

15 THE PRESIDENT: If I may interrupt you – this is a very much off the cuff impression, just quickly
16 looking through this document, it does appear at a quick look that on the whole the fuel costs
17 and tyre costs for the Keith depot tend to be on average higher than for most of the other depots
18 as far as I can see. That is just a quick impression, but that may be misleading.

19 MR HABERMAN: So the runs serving the Highlands, if there is an outlet earlier on those runs then
20 proportionately a large amount of that cost is being attributed to that outlet when the allocation
21 is done by volume, which is not reflecting where the true cost lies.

22 THE PRESIDENT: Yes.

23 MR CLAYTON: Perhaps the supermarkets and the big drops would be concentrated in the
24 Inverness area for instance ----

25 MR HABERMAN: They are likely to be, yes.

26 MR CLAYTON: And the others are wider ranging customers, and almost by definition are small
27 drops?

28 MR HABERMAN: Yes.

29 THE PRESIDENT: Yes, you wanted to make a last point?

30 MR HABERMAN: Yes, my final point is again just to go back to something earlier on in my
31 Report. If I could take you to para. 516, p.155 – this is just my overall logic check and it is not
32 trying to do anything too clever, but the overall logic check – from Wiseman’s statutory
33 accounts one can pick up a figure for the average cost per litre of the entire business. Logically
34 one would expect, because about 50 per cent. of Wiseman’s business is servicing supermarkets,

1 that broadly the cost of serving middle ground outlets is likely to be higher than the cost of
2 serving supermarkets and so the ATC of serving middle ground outlets is likely to be higher
3 than that average.

4 THE PRESIDENT: There is the complication of cream.

5 MR HABERMAN: Yes, I will come back to that one. Also, the Highlands, because of the distances
6 involved are going to be more expensive to service than other parts of the country. So again
7 generally one would expect the ATC of servicing outlets in the Highlands to be rather higher
8 than the average. Then, as you correctly say, one could make an adjustment for cream and that
9 would give a benchmark, and one would expect ATC to be above that benchmark. That is
10 where it appears to me that no such check was done, because it would have suggested that there
11 must be something missing from the OFT's calculations of ATC which seem to be from what
12 I can tell (and I have only one number quoted) rather below where these numbers would come
13 out.

14 THE PRESIDENT: Yes. I think you are saying in your view at least they could usefully focus much
15 more closely on the actual situation in the Highlands?

16 MR HABERMAN: Absolutely.

17 THE PRESIDENT: Rather than trying to do as it were whole middle ground all over Scotland, or at
18 least if they did that they should also look quite closely at the Highlands and take into account,
19 you say, the differences between the Central Belt, the Highlands and so forth from the point of
20 view of working out what the real cost drivers were?

21 MR HABERMAN: That is right.

22 THE PRESIDENT: Yes, thank you. Do you want to ask any questions, Lord Grabiner?

23 LORD GRABINER: No, thank you.

24 MR GREEN: Can I just give you a reference for your note? The description of ABER as the Keith
25 depot is set out in Wiseman's letter of 13th December, which is 337, and it is dealt with at 339.

26 THE PRESIDENT: Thank you. Lord Grabiner, I think we may take a short break to allow everyone
27 to stretch their legs.

28 (The hearing adjourned at 11.57 a.m. and resumed at 12.12 p.m.)

29 THE PRESIDENT: Yes, Lord Grabiner, at long last?

30 LORD GRABINER: I do not know what the Edinburgh equivalent is for "tail end Charlie" – it may
31 be "the second" – but I will try not to repeat matters.

32 THE PRESIDENT: Well we have had the chance to read your most helpful written submissions,
33 thank you.

1 LORD GRABINER: Essentially we adopt the submissions of the OFT. Could I try to deal with this
2 by addressing some headline points. Needless to say, Mr Haberman's observations to you
3 before you rose are regarded as being rather controversial in certain respects and I am going to
4 want to say something about them. It is not going to extend the exercise greatly, but probably
5 I will want to deal specifically with one or two matters at 2 o'clock. If I can just take some
6 headline points.

7 First, there was a point raised yesterday in relation to reconciliation to management
8 accounts – I think it was a point that Mr Clayton raised with Mr Turner, namely, whether the
9 OFT had reconciled the information received to Wiseman's management accounts. My friend,
10 Mr Turner, indicated that it had not done so at the stage by which it decided to close the file.
11 Mr Turner said that if the investigation had continued the OFT would have considered the
12 matter as part of the refinement of the calculations and the exercise that it would have to have
13 completed. All that I would say about that is that any such reconciliation would have had to
14 take into account the fact that there were a large number of runs, 350 runs, a very large number
15 of middle ground customers – I think the figure is around 9000. A full reconciliation would
16 also have had to consider the overall business of Wiseman, including supermarkets at one end,
17 and doorstep deliveries – or "retail" as it is called – at the other end, which were served from
18 the same depots and dairies, and the OFT's sample considered the middle ground which was
19 not the entirety of Wiseman's business. So it is rather complicated – it is not simple.

20 Perhaps this is a more practical point in the context of this discussion, if the numbers
21 have given any concern to the OFT, the OFT were certainly in a very good position to make
22 a judgment about that because they had available to them all the historical information from the
23 Competition Commission Report. They also had available to them the voluntary assurances
24 information, which itself had been subject to the independent review by Wiseman's auditors,
25 backed up by the penal provisions that we are familiar with, which backed the requirement of
26 the provision of that information. We deal with that point and I am not, so to speak, going to
27 read it out to you, but just for your note we deal with that point on p.12-13 of the document that
28 we gave to you last night.

29 Can I go on to another headline point, "Costs understated". Mr Green invokes his
30 famous annex G and says that if costs were higher more of the business done by Wiseman
31 would have been loss making, that is below ATC, but in truth Express puts forward no material
32 which supports the premise of the argument, namely, that the costs were higher. The whole of
33 the argument on the other side is based upon Mr Lawrie's observation in para.47.

34 THE PRESIDENT: Footnote 8.

1 LORD GRABINER: Footnote 8, precisely – you have it well in mind – tab 4 of the core bundle; I do
2 not invite you to turn it up, you have obviously got it well in mind, he says that possibly up to 5
3 per cent. was left out of account. We deal with this at the top of p.7 and over the top of p.8 in
4 yesterday’s document. In essence, the point we make is that Mr Lawrie’s remark has rather
5 been corrupted or spun into “the costs must have been omitted”, or “costs must have been
6 omitted”, that is the practical effect of the submission, but in our submission that will not wash.
7 In this business it is not difficult to capture the total costs of the business. That is because the
8 business is essentially a simple business. You collect milk from the farms, you process and
9 package it at the dairy, you truck it to depots and then you distribute it to your customers. All
10 this was well understood by the OFT – this is how Wiseman’s accounts are done – and there is
11 no reason to believe that the information which was provided was other than absolutely
12 accurate; still less is there any reason to believe or imagine that the OFT misunderstood the
13 information. The only other issue under this heading is the cost of capital – my friend,
14 Mr Turner, dealt with that yesterday and I am not going to say more about it. We do address
15 the point in full detail on p.11-12 of the document we gave you yesterday and obviously we
16 rely upon what we say there.

17 So far as cream is concerned, you indicated that you did not want to hear from
18 Mr Turner about that, and I imagine that your views have not changed on that subject since
19 then.

20 THE PRESIDENT: I think it is very difficult for us to reach any conclusion adverse to you on the
21 cream issue.

22 LORD GRABINER: There are many, many reasons why that must be so, we would suggest but in
23 the circumstances I am not going to try and push at an open door.

24 The next cross heading is that AVC is too low. This point was also dealt with
25 yesterday with Mr Turner and in our submission this is simply an example of the OFT, if
26 anything, erring on the side of caution. It ought not to provide any basis for any complaint
27 against the OFT. The reason I say that was because the measure included processing and
28 packaging costs.

29 THE PRESIDENT: The high measure.

30 LORD GRABINER: Precisely the high measure of AVC included processing and packaging costs,
31 and those elements contained a significant fixed cost element which was retained and not cut
32 out. We agree with what Mr Turner said – the only additional point we would make under this
33 heading – is that in the Arla Express merger, Express told the Competition Commission that all

1 its processing costs were fixed costs and I will give you a reference on that, it is p.168 of the
2 Arla Express Merger Report. So it looks as if it is not actually a controversial point.

3 On cost allocation, and that has been the subject of some of the points that were made
4 this morning by Mr Bezant and Mr Haberman, I want to say something about this but I do want
5 to reserve my point until 2 o'clock because I want to say a few more things about it.

6 THE PRESIDENT: Yes.

7 LORD GRABINER: But if I can go as far as I can go now for the moment it might be helpful. First,
8 Mr Green makes two points. He says that volume is the wrong way to do it, because it allocates
9 run costs to larger customers; and secondly, he says the exercise should be done in part by
10 reference to distance. That incidentally appears to be a bit of a moving feast at the moment so
11 far as Mr Haberman is concerned. It starts at outlets, it then moves to distance, now it has to do
12 with something different in the Highlands and I want to come back to talk about that. But if we
13 can just bear in mind the progress of the argument and the twists and turns in it, it might give
14 you an indication of the validity or underlying quality of it. Secondly, he says that the exercise
15 should be done by reference to distance, and the argument is that distance is the key driver of
16 costs. We accept, as I think Mr Bezant said, and I think the discussion this morning with him
17 revealed, that it is not an easy problem to resolve, not least because of the number of customers
18 and the number of the rounds. Mr Green assumes, we suggest, that it is really rather a simple
19 matter.

20 So far as volume and distance are concerned, in our submission it is quite important to
21 remember a rather basic fact of life which is that the horse normally comes before the cart, and
22 you have to assume in this story that some considerable care has been undertaken on the part of
23 Wiseman, which is an experienced and sophisticated performer in this industry, that it plans its
24 rounds carefully and understands what it is doing, and understands what its capacities are for
25 vehicles, and what the requirements are of its customers before it determines what the scope,
26 structure or configuration of some particular round or set of rounds may be.

27 The runs primarily service the volume requirements of Wiseman's major customers,
28 that is the real cost driver of the runs and when planning the runs to the area the most sensible
29 thing to do is to use any surplus capacity on the delivery vehicle to deliver milk to other
30 customers en route, and that is merely the essence of it. It does require careful forethought and
31 planning, but it is not rocket science. What this shows is that the costs are driven, or
32 determined by the bigger customers, and the result of that is that smaller customers will benefit
33 from the lower costs of serving the bigger customers. The smallest customers, as I think

1 Mr Bezant said today, are not cross-subsidising the bigger ones for that reason. Yesterday the
2 Tribunal asked about marginal cost approaches in this context and the only point I would want
3 to make about that is that even the smallest customer makes a contribution to fixed costs.

4 As to Mr Green's distance based argument, he said that it was common ground that
5 distance was the driver of run costs. That, with respect, is simply not right. It was certainly not
6 the approach adopted by the Competition Commission, and in order they referred to the three
7 factors – volume, drop density and distance. You get that from their Report at para.4.67. They
8 settled upon a volume based measure, and the point about the volume based measure is that
9 even if you are talking about some distant or remote part in the Highlands (and for the most
10 part we are not) it just sounds good to continue to give that example, but it is not a
11 representative example, you would still pick up all the costs in the process.

12 The other point worth mentioning perhaps at this moment is that the effect of what
13 Mr Haberman told you a little earlier today is that in his opinion the Competition Commission
14 got it all wrong, because their conclusion was volume based measure, and his view is that is
15 not the right way to do it. Well he can have that debate with the Competition Commission but
16 in our submission you ought to get a lot more comfort from the fact that the Competition
17 Commission took that position and at the same time it gives you a view, possibly, about the
18 validity of the propositions that Mr Haberman has been putting before you in the different
19 order in which he has put them before you.

20 The OFT did not say that volume was the only cost driver and I cannot overstate that
21 point, we respectfully agree with that, but they rightly recognised the difficulties in applying
22 other alternatives. Mr Haberman identifies volume, distance and time and he says there are
23 difficulties with a distanced based measure and he proposed at that stage time and outlets.
24 Mr Turner showed you para.5.90 of his Report and that is extremely important – at least as
25 important now as it was before he spoke to you a little earlier, because of what he had to say
26 today. Have you got it well in mind or do you want me to remind you of it again?

27 THE PRESIDENT: Just let us quickly glance at it. It is p.168-169.

28 LORD GRABINER: That is exactly right, 168-9. It is rather an important paragraph. It says:

29 “This suggests that once a run has been determined its cost is driven largely by the
30 total distance travelled, much of that distance will be common to all the others to be
31 served, and the nature of runs is such that the total distance cannot be easily split
32 between the others. In my view therefore the most accurate approach would be to
33 attribute delivery costs, wages, to each outlet specifically according to time spent at

1 each outlet and then share travelling costs, wages and vehicle costs equally between
2 others or for simplicity to share all run costs equally between outlets.”

3 What he is doing in that process is rejecting everything else, distance in particular because of
4 the difficulty and then alighting upon outlets as the preferred solution.

5 In our submission that is a thoroughly unsatisfactory approach, not least because it
6 tells you nothing at all about the size of the customer. The point is that the outlet may be
7 a single outlet, it may be one of a very large number of multiple outlets owned by one
8 customer, or somewhere between the two. So the number of outlets, we suggest, tells you
9 nothing about the cost of supplying the customers at those outlets, and that is really the point –
10 the number of outlets tells you nothing about the cost of supplying the customers at those
11 outlets. Whilst we are on the point, still less does time assist, time does not help and – apart
12 from the positive elements of volume which were eloquently spoken to by Mr Bezan – that
13 does, I would respectfully suggest, from a practical point of view drive you to the conclusion
14 that volume is the most useful mechanism.

15 There are also difficulties in relation to time not least because Wiseman did not
16 maintain detailed records which would allow the calculation of distances travelled or time
17 spent at premises. We deal with this point at the top of p.21 of the document I gave you last
18 night. That is not particularly surprising, but it is also a statement of the true position. As
19 I say, I may want to come back to that, but for the present those are the points I wanted to make
20 about that cross heading.

21 The next cross heading is the supposed mystery, as I think it was at one stage in
22 course of Mr Green’s opening submission, associated with 4.18 and 4.19 when he said they had
23 no understanding of how the difference between the 50,000 and the 1.5 had come about. This
24 is a short point. Mr Haberman is talking about the total costs of the run and what he does not
25 make clear, although I think it is probably clear now is the fact that the Highlands’ run was for
26 about 35 times the volume of the other run, which is why you get the higher total cost. The
27 other point again that was made by Mr Bezan is that the exercise was directed at identifying
28 the extremes of run costs, and you do not get a lot from extremes. The important point about
29 extremes is to remember that they are extremes.

30 The conclusion, in our suggestion, from all this is that the costs were correct and the
31 cost allocation method was appropriate and reasonable in all the circumstances, and moreover
32 the OFT found no evidence of below cost pricing either at all or in relation to the matters that
33 are complained about.

1 Could I go next to say something about the remarks made by Mr Alan Wiseman to the
2 Competition Commission which have also been referred to? Mr Green referred to – and I will
3 just give you an example of one of the remarks but I know there are others – “Express was not
4 a legitimate purchaser of Claymore as shown” and what he said was that this revealed an
5 intention on the part of Mr Wiseman, and therefore on the part of Wiseman itself to eliminate
6 Claymore as a competitor. In my submission this is the sort of thing that would be said by any
7 party keen to compete lawfully in the market place. It might be said by somebody who was
8 actually on some unlawful experience as well, but it is equally consistent with somebody
9 behaving entirely properly. What had happened was that Wiseman’s then very small
10 competitor, Claymore, was being acquired by Express which was then the largest dairy in
11 Gt. Britain. Express had been the heaviest loser after Wiseman had decided to expand into
12 England, and Express was three times the size of Wiseman. Those circumstances were quite
13 distinct from a supposed acquisition of Claymore, for example, by a small Norwegian
14 Co-operative, that would be an entirely different case, and the reason it would be a different
15 case is because with the clout of a Norwegian Co-operative you would not have expected
16 Claymore to take on major clients or customers of Wiseman. But with the clout of Express you
17 would anticipate that is precisely what could happen, and that is really the difference between
18 the two scenarios. All that Mr Wiseman was saying, I respectfully suggest, and if I may
19 I would adopt the words of Sir Christopher at an earlier stage in this hearing, “the gloves are
20 off”, and we submit that that is fair enough. There is nothing offensive about that and it is
21 a statement of what was actually happening.

22 A feature of the circumstances, and again it is an important part of the context for us
23 all to understand, and sometimes as I think the President did indicate at one stage in the
24 discussion which amused me personally – I do not know why it did but it did – that actually we
25 might be coming to the heart of the commercial reality, at least not so much in terms of
26 competition but of the unpleasantness between the parties to this dispute. A feature of the
27 circumstances surrounding Express’s acquisition of Claymore was that it did not appear to my
28 clients (Wiseman) to have any business logic associated with it, unless for “business logic” you
29 would say that the mere damaging or attempting to injure a competitor was itself a justified
30 end. There was an aggressive sales’ campaign by Express to service the whole of Scotland
31 from Nairn – you get that from the Competition Commission Report at 2.130 and in the same
32 report Express themselves admitted that it was not a cost effective strategy. That is pretty
33 astonishing stuff. That is in the report at 6.30.

34 THE PRESIDENT: I think we ought to just glance at that, Lord Grabiner.

1 LORD GRABINER: Yes.

2 THE PRESIDENT: 1115.

3 LORD GRABINER: 6.30 at the top left hand side.

4 “Wiseman’s practice of offering low prices, the initial onset was an all Scotland deal,
5 was further abuse of its dominant position. Such practices were abusive because they
6 had the effect of denying other processors access to important customers in the
7 market. As a local processor the Express/Claymore facility was not a cost effective
8 supplier for the whole of Scotland and had no interest in placing itself at
9 a competitive disadvantage by trying to be one whereas it was very competitive in
10 Northern Scotland and the Aberdeen area.”

11 That is very, very strange and it drives you to the unanswered question – except obvious
12 commonsense would give you the answer – why did they do it? They did it because they were
13 determined, if they could, albeit by a rather crude mechanism, and no doubt a great wasteful
14 expenditure, to damage Wiseman.

15 MR GREEN: Would you just read on, please.

16 LORD GRABINER: Yes, sure.

17 MR GREEN: Well perhaps the Tribunal can just read the whole passage.

18 THE PRESIDENT: We will just quickly skim read to the end of the paragraph.

19 LORD GRABINER: Perhaps we could all read it to ourselves.

20 THE PRESIDENT: We can all read it together. (Pause for reading) Yes.

21 LORD GRABINER: Just on that point, on the balance or part of the balance of that paragraph, their
22 evidence was rejected by the Competition Commission as you see from 2.130, the summary of
23 conclusions on p.179. This is the minority view, I accept. It is a bit difficult to talk about the
24 minority view because ----

25 THE PRESIDENT: Yes, I know, it is 2:2, and one had a casting vote.

26 LORD GRABINER: You can see there just a few lines in:

27 “As is clear from its strategy paper Express recognised from the outset that winning
28 all Scotland contracts of this sort would be a key ... it is not surprising that the
29 initiative for all but one of these deals [CWS] came from Express/Claymore
30 approaching the retailers in question. The exception is CWS where Wiseman was
31 responding, albeit belatedly to a request from the”

32 and so on. Then if you go over to 2.134, the Nairn plant had been meeting the needs of the
33 Highlands and Islands’ customers.

1 “It is clear from Express’s Board paper setting out its strategy for Scotland that it did
2 not take its stake in Nairn simply to continue with the traditional business. It had
3 understood from the start that the larger supermarkets in middle ground retail chains
4 North of the Border required an all Scotland supplier and that success depended on
5 being able to meet orders in the Central Belt as well as further North. On the basis of
6 opinions Express gave us it appears to these members that the Scotland-wide
7 operations which Express/Claymore sought to mount from Nairn, having failed in its
8 attempt to acquire a dairy in the Central Belt ...”

9 Just pausing there incidentally, it is something that they have now managed to do through the
10 merger with Arla, they have set it all up but I will come back to that in a different context.

11 “... would have been barely profitable, even at the prices achieved in 1998.

12 Claymore would have been profitable had it continued to operate in this traditional
13 area, supplying traditional customers and using its own raw milk. The decision to
14 supply customers further afield, which required Express/Claymore to find additional
15 raw milk from elsewhere, added unprofitable new business. So while the price
16 cutting competition with Wiseman has made Express/Claymore’s losses worse, its
17 profitability would have been under pressure even at the earlier price levels.”

18 So, as I say, it is very difficult to put a sensible spin on what the thought process was at the
19 Express end of the story when it decided upon this strategy.

20 THE PRESIDENT: Just on 6.13, which is on p.1110 – just to remind ourselves ----

21 LORD GRABINER: If you would just bear with me, Sir? Mr Green, I do not know how relevant
22 any of this is, but I imagine that the details are omitted from 613 thro’ 615 because they are
23 thought to be confidential to you?

24 MR GREEN: I really do not know I am afraid. I can try to find out.

25 LORD GRABINER: That must be because it is their case.

26 MR GREEN: It may be something we will have to investigate after today if it is confidential.

27 THE PRESIDENT: Well, we do not know what is in the rest of the paragraphs and I quite like to
28 have a balanced view, basically.

29 MR GREEN: Yes. We will make inquiries.

30 LORD GRABINER: Just to come back to the substantive point, which is the point about whether
31 that observation, or similar observations by Mr Wiseman to the Competition Commission
32 provide a proper basis for the charge that the requisite intent was satisfied as a matter of law.
33 What we do suggest is that those remarks by Mr Wiseman really constitute the only “evidence”
34 and I use the word “evidence” in quotation marks, along I suppose with the hit list document,

1 which is weak for the reasons which Mr Turner examined with you yesterday, and I do not go
2 over, and that is essentially the material identified by Express. The argument did not persuade
3 the Competition Commission and in my respectful submission it should not persuade you.

4 The only other point I want to make in this context is the passage in the *Compagnie*
5 *Maritime Belge* case, the reference in para.137 of the Opinion of the Advocate General
6 Fennelly to the effect that it is not the function of the Regulator to protect a weak competitor.
7 This is a point which Mr Turner has already made. We know that Express was an inefficient
8 competitor. They made a virtue of that fact in support of their argument to the Competition
9 Commission when they contended that the Arla transaction should be permitted to
10 proceed – that was their case.

11 THE PRESIDENT: You mean the second Competition Commission?

12 LORD GRABINER: Yes, they got clearance on that basis.

13 THE PRESIDENT: Have we got **that** Report? Can somebody just check that we have it, we
14 probably have. Do not worry, Lord Grabiner, it can be checked.

15 LORD GRABINER: We can get it.

16 MR GREEN: We do have copies of the Arla, if you would like them.

17 THE PRESIDENT: If you let the Registry have a copy.

18 MR GREEN: We have them **here**. [Document handed to the Tribunal]

19 THE PRESIDENT: Thank you.

20 LORD GRABINER: The reference continues to be under the heading of “Situation in the absence of
21 the merger”, and it is discussed at para.2.65 onwards, 2.66 and 2.67 in particular deal with the
22 point I have just been making.

23 So the position is that they got clearance on that basis – p.15. Their position was
24 immediately improved, and we know that they now have more than 10 per cent. of Scottish
25 sales of processed milk, and they have achieved that through the Asda contract. I will come
26 back to say something about the Arla position as well later, only I have heard now that Arla –
27 as you probably know – is the biggest of the European Dairy companies, the biggest.

28 Could I just say something briefly about the accounts? Mr Green helpfully produced
29 the accounts for us. Unfortunately they were only the accounts in respect of the three years
30 2000 to 2003. We have no up to date figures, though presumably those figures are known to
31 Mr Green’s clients. I take his point that they have changed their accounting arrangements for
32 an 18 month period to some later time this year, but the fact is that they presumably do have
33 available management accounts at the touch of a screen, but they have not provided us with
34 that information.

1 The only point I would like to make by way, so to speak, of comment on the accounts
2 that were produced is simply this: you will remember that the frontispiece was a sheet that
3 summarised the turnover and reduction in figures ----

4 THE PRESIDENT: Yes, I have them in front of me.

5 LORD GRABINER: All I would say is this, that if you have a declining turnover that would
6 generally imply increasing losses over time if you assume fixed costs of the business. Here, the
7 figures that have been disclosed show reducing losses, and what that suggests is that things are
8 perhaps not quite as bad at the Claymore end of the story as you might otherwise be led to
9 think. Certainly, all of that, that is to say the figures in those accounts down to and including 93
10 all pre-dates the acquisition or award of the Asda contract. They are also going to be opening
11 a new large dairy to service the Central Belt, and that is one of the points that is going to come
12 out of the merger.

13 I would like to go on to another point, and say something about the all of Scotland
14 Aberness issue, and a convenient way into that is if you were to take up our submission that we
15 gave you last night and if you would be kind enough to go to p.34 under the heading
16 “Exclusive Exclusionary Contracting” where we deal with the background to this point. I am
17 not going to read it out, but I will just identify the key points before we get to the Aberness part
18 of the story. In the second bullet we say that Wiseman did not enter into agreements of an
19 exclusive nature – as is clear from the face of the CC Report and was confirmed by the OFT’s
20 investigations. The position is that 97 per cent. of the customers said that there was no
21 exclusive deal with Wiseman, or indeed anybody.

22 Then, leaving aside the high tones of the late night drafting and just concentrating so
23 to speak on the facts, the position is that it was Express who initiated all but one of the all of
24 Scotland negotiations and we just saw that from the passages in the Competition Commission
25 Report. As part of those arrangements it is clear that Express offered one-off payments, for
26 example, in relation to Aberness, where Claymore offered two and a half hours in where
27 Claymore offered £2,500 per Mace or MNN stores. Mr Larg deals with this.

28 THE PRESIDENT: I just think I need to glance at that.

29 LORD GRABINER: Yes, indeed. MNN is Morning Noon and Night, and the figure is at the top of
30 p.207. The position is that Aberness have 27 own company stores.

31 THE PRESIDENT: Just hold on there, Lord Grabiner.

32 LORD GRABINER: I am sorry, you want 206-207.

33 THE PRESIDENT: Yes I am there now.

34 LORD GRABINER: And you want to just look at that.

1 THE PRESIDENT: (Pause for reading) Are you testing the figure that is given in paras.50 and 51 of
2 Mr Larg's affidavit in relation to what you argue?

3 LORD GRABINER: Yes. That figure is challenged. We say that he guessed that figure, the actual
4 figure is significantly less, but he did guess that figure.

5 THE PRESIDENT: Are you able, not necessarily by saying it in open court, but perhaps by writing
6 it down, what figure we are talking about?

7 LORD GRABINER: Yes, I can and I will, and I will do it now. It goes forward, of course, on the
8 basis that it is confidential and it goes to my friend on exactly the same basis, lest there be any
9 misunderstanding about that.

10 THE PRESIDENT: And can you confirm that that is the figure omitted from the Competition
11 Commission Report?

12 LORD GRABINER: Yes, the answer is "yes", and I am happy for my friend to see that on the usual
13 basis. [Document shown to the Tribunal and to Mr Green]

14 MR GREEN: I can show it to my instructing solicitor?

15 LORD GRABINER: Yes, of course. There were 27 own company stores at Aberness, that was AJ
16 Grey. There were 160 MNN and Mace Stores and those figures are derived from the Report at
17 6.79, p 1124, but I do not invite you to turn it up.

18 THE PRESIDENT: That payment was in respect of the total stores, which would be ----

19 LORD GRABINER: Only the 27.

20 THE PRESIDENT: Do we know what the sales to those stores are? It sounds rather a lot of money
21 for 27 stores?

22 LORD GRABINER: I do not want to give you the figure, you can do the sum, you can see what the
23 sum comes out to by dividing that figure by 27. This might be a helpful way of doing it, would
24 you forgive me just for a moment.

25 THE PRESIDENT: Of course, Lord Grabiner.

26 LORD GRABINER: Yes, that might be a helpful way of doing it [Note handed to the Tribunal and
27 Mr Green] Same terms! This is justice in action. We summarise the legal points on p.35 and
28 we say that there have been misinterpretations of the OFT statements, and we say that the OFT
29 did not distinguish arrangements exclusive and ----

30 THE PRESIDENT: Just before you go on to that I think in a recent letter from Herbert Smith you
31 were told that the figure that was written down represented some 10 to 15 per cent. of turnover
32 with Aberness in the first year.

33 LORD GRABINER: Of the first year, yes.

1 THE PRESIDENT: Does that mean turnover with the AJ Grey stores, or does that mean some other
2 turnover?

3 LORD GRABINER: It is the 27 stores, the AJ Grey Stores. The three legal points are there and we
4 deal with them, and if you could just glance at those. The Aberness Agreement is only in
5 respect of their own stores, those 27 stores. Then we deal on p.36 with the way that all this
6 originated, through the fact that the initiative for all but one of the all of Scotland deals came
7 from the Express/Claymore side of the story and I have essentially made those arguments, but
8 you can glance at them and there are one or two quite helpful references and quotations. The
9 third bullet at the foot of the page: the retailers then approached Wiseman, given that:

10 “...the balance between the two dairies was such that Wiseman was defending much
11 more business [non-Highland outlets] than it was seeking to gain [Highland outlets]
12 and Express/Claymore was seeking to gain much more business [non-Highland
13 outlets] than it was defending [Highland outlets]”

14 For example, Alldays negotiations were in respect of 122 stores (most of which were in
15 Northern England) 12 of which were previously supplied by Claymore and 110 by Wiseman.

16 Then we deal with the one possible exception, which was the CWS business identified
17 in the Competition Commission Report. It was serviced by Wiseman predating all of this in
18 1996 whilst Claymore addressed quality related problems. It was the subject of discussions
19 initiated by CWS in 1997 and 1998 with a view to CWS changing their suppliers, in respect of
20 which CWS informed ACC that were it to enter the Scottish market it would regain the CWS
21 business almost immediately, irrespective of any agreement with Wiseman. It was then
22 terminated in October 2002, and the Highland stores reverted to Claymore.

23 Mr Green says that the profitability of the CWS contract should be assessed solely on
24 the incremental basis as per Mrs Kingsmill and Professor Cave. But Mr Clothier and
25 Mr Mackay concurred with Wiseman’s view, that the profitability of the arrangement should
26 be assessed as a whole. Even if it were correct to assess profitability on an incremental basis
27 and we then make those points.

28 THE PRESIDENT: What are we to do, Lord Grabiner, procedurally with the point made at the
29 bottom of p.37 where you submit that those factors weighed heavily with the OFT. If,
30 hypothetically, that submission is correct they are not factors that actually turned up in the
31 Decision letter or in Mr Lawrie’s affidavit.

32 LORD GRABINER: It is a point that appears in both. I have just been shown the 7th August
33 attachment, and the point is dealt with in para.31, for example.

1 THE PRESIDENT: I am on a slightly different, possibly technical procedural issue. What is said in
2 the 7th August internal submission did not show up in the 9th August Decision letter or in
3 Mr Lawrie's witness statement.

4 LORD GRABINER: We will need to have a look at Mr Lawrie's witness statement.

5 THE PRESIDENT: Now I look more closely at what this is all about, I think parts of it perhaps do
6 show up.

7 LORD GRABINER: Paragraph 71 is Mr Lawrie, if you look in the middle of that.

8 THE PRESIDENT: I was more on Stackelberg-warfare point.

9 LORD GRABINER: Paragraph 71 of Mr Lawrie, which is referred to in the main body in the
10 middle of the page, I think might be helpful.

11 THE PRESIDENT: Yes, let me quickly look at that. (Pause for reading) Yes. When you get to
12 a convenient moment, Lord Grabiner.

13 LORD GRABINER: I have come, so to speak, to the peroration on this issue, so this might be a very
14 good moment to stop because it is also related to something I want to say about
15 Mr Haberman's evidence.

16 THE PRESIDENT: Well that may be a bridge into what you want to say.

17 LORD GRABINER: A very good moment, yes.

18 THE PRESIDENT: Very well, 2 o'clock. Thank you very much.

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

20 LORD GRABINER: May it please you, Sir, I was just coming to look at the concluding couple of
21 pages in our submission in relation to Aberness (p.38). Our submission is that the Office was
22 right to conclude that Wiseman's dealings with Aberness, which was of all the arrangements
23 the most formal – no contracts whatsoever, did not give rise to any competition issues. Then
24 you can see the position was clear in front of the Competition Commission. It was described as
25 a "gentleman's agreement". It was not exclusive and only covered Aberness's 27 stores
26 (Competition Commission Report 6.87). It was terminable at will or short notice, if there is
27 a difference, which was driven by considerations of service and not price. You can see the
28 points there. We then deal with the position in the case of *Van den Bergh*, and we identify the
29 features of that and I would not try to teach your Lordship about that. But we identify some
30 rather important distinguishing features, until the second bullet on the top of p.39: it had the
31 actual or realistic potential effect of foreclosing 40 per cent. of the market – that was in *Van*
32 *den Bergh*. By contrast the entire Aberness account amounted to only 2 per cent. of volume of
33 middle ground. The agreement with Wiseman related only to about 8 per cent. of Aberness's
34 own stores, etc. – 14 per cent. of the total stores for which Aberness negotiated. As such, there

1 was a total potential foreclosure, and that figure of 0.23 per cent. is not accurate. I think it
2 would be much safer simply to say “under 1 per cent.” – we think it is between 0.5 and 1 per
3 cent., but “under 1 per cent. is good enough for my purposes.” Perhaps you could make that
4 correction.

5 THE PRESIDENT: Yes.

6 LORD GRABINER: And we submit that that cannot, on any view, give rise to any foreclosure
7 concerns.

8 Sir, could I just contrast that small picture with the big picture. I think it was you who
9 said in the course of argument before the adjournment, before I got up, and it may have been
10 to one of the experts, that the only ways in were either to buy or to build a dairy, and obviously
11 that is right.

12 THE PRESIDENT: I suppose you could conceivably supply from Northern England in some
13 circumstances.

14 LORD GRABINER: Yes, in theory. But what has happened here is that Express have done both.
15 They bought Claymore out and they now are building (or have built) a £16 million provider in
16 the Central Belt, which has the capacity to service Scotland. The answer to the question
17 whether all Scotland prices keep out competitors, because I think that is an issue, is that Arla
18 Express are now vigorously competing, and on that basis so are other smaller dairies, and an
19 example is Grahams. There is a little bit of evidence on this point. First of all, in relation to
20 Grahams can I give you a couple of references in the Competition Commission Report 2.154
21 and 2.156? Then there is just a small reference in the evidence of Mr Lawrie – could I invite
22 you to turn it up, in para.51. You should have a recently unredacted version. of this. I am
23 looking at a redacted version. Can I just point your attention to the first three and a half lines?

24 THE PRESIDENT: (Pause for reading) Yes.

25 LORD GRABINER: Can I next turn to say something about the point that arose in the course of the
26 discussions this morning with the two experts? Before I do, I think there was one point you
27 left me with just as you rose, that is the status, so to speak, of 7th August submission. Our
28 submission on that is that of course it would have been better if it had been available earlier,
29 but there it is. It is a given fact now, and we do suggest that it is a given fact, and it is
30 unavoidably so. We know that that is what happened and to that extent and for that reason it is
31 part of the story, and must be taken into account.

32 THE PRESIDENT: Yes.

33 LORD GRABINER: Could I say something about these points that arose, in particular through

1 Mr Haberman. His position has been (and is) that volume is the wrong approach because of the
2 presence of big customers which produce the result that the picture is distorted. That is
3 essentially his position. But the emphasis now, that is so to speak as of today, is not on
4 supermarkets, which was the previous emphasis. The emphasis now is on distance. He said
5 “The Highlands are different”. He did conclude, and you should bear this in mind when
6 considering the credibility of what he said this morning – to be perfectly blunt about it – that he
7 had, after careful analysis, concluded that outlets was the correct test in 5.90 that I showed you
8 this morning.

9 I am not going to invite you to turn it up but I will give you the reference for your
10 notebooks, Mr Bezant’s response to the 5.90 is 8.23 to 8.25 and his conclusion in essence is
11 that it was not a meaningful exercise to do it through the outlet process. It goes through to 8.29
12 apparently; it does not stop at 8.25.

13 The next point, and I am certain that those who are, so to speak, in the know on the
14 Tribunal – or the one who would be because of his local origin – and the rest of us only
15 because we perhaps spent a little bit of time travelling there on holiday, we know that the
16 Highlands are not as far flung as some would have us believe. You get the “Brigadoon” image
17 from some of the remarks that were made this morning. The impression you might have got
18 was that up there there are single track roads accessible only by Rob Roy and a few of his
19 followers. That is not how it works. The roads are in excellent condition – this is not the wrong
20 side of the world. Could I invite your attention to Mr Sweeney’s evidence at para.9.5.2, p.651?
21 Mr Haberman made this point this morning again. But what Mr Sweeney says is that
22 Mr Haberman’s description of the customers at the Keith depot being far flung outlets in the
23 Highlands of Scotland is misleading. The population in the Highlands area, as defined by the
24 OFT, is concentrated around the Inverness area. Inverness is approximately 55 miles from
25 Wiseman’s Keith depot. In 2001 more than two-thirds of all deliveries from the Keith depot
26 were made in this area, from Keith to Inverness and the surrounding area and that the specified
27 number of runs operated six days a week from Keith, only a few of them serviced the areas
28 outside the area from Keith to Inverness in the surrounding area. Wiseman used
29 a subcontractor to make deliveries to the Western Isles. You can perhaps read the rest of that
30 to yourselves. I would emphasise the point he makes in the last sentence which is that no one
31 can have a better understanding of the position than Claymore itself, obviously – I will come
32 back to that point in a moment in a slightly different context.

33 The OFT had to look (and did) the Central Belt, even on Mr Haberman’s approach,
34 and the reason for that is that he accepts that if you looked at the Highlands in order to evaluate

1 it you would have to look at the position in the Central Belt. He says that in para.6.33, which
2 is at p.182, and this is in part of his “Conclusions.” He says:

3 “In my opinion the OFT’s investigation of Wiseman in relation to the supply of fresh
4 milk in Scotland is fundamentally flawed.”

5 And then in (b):

6 “The investigation of discriminatory prices required the analysis of price patterns of
7 the different customers acquired from Claymore, and the comparison of the results
8 with the rest of Wiseman’s middle ground customers. The price analyses carried out
9 were especially detailed.”

10 So even on his approach you would have to have an understanding of what the Central Belt
11 position was, and that is what the OFT did. What that shows is that you cannot focus on the
12 Highlands alone, and we also know that the OFT’s analysis was weighted towards the
13 Highlands. (Para.8.4.11 of the Reply)

14 THE PRESIDENT: Which is where, Lord Grabiner? It is tab 6.

15 LORD GRABINER: 496:

16 “...all runs from the Keith depot were included in the sample of runs” and the point is that the
17 Keith depot serves middle ground outlets, and all the runs serving the middle ground outlets
18 from the Keith depot were sampled.

19 We deal with this in a little bit more detail in our submission from last night at the
20 foot of p.2. Under the “Predatory Pricing” heading at the foot of p.2, the last bullet point: the
21 sample was appropriately focused for these purposes, contrary to Mr Green’s oral submissions
22 to the Tribunal. The OFT in fact focused on ex-Claymore customers by (a) including all runs
23 in the Highlands (where Claymore was previously the only supplier; and (b) by focusing on
24 multi-outlet retailers who were the subject of Express’s complaint with respect to all of
25 Scotland deals, and in particular CWS and the major ex-Claymore account lost to Wiseman,
26 and so we reached the conclusion that is there spelled out.

27 If I can just look at a different point now. Mr Haberman, when he spoke to you this
28 morning, referred on one or two occasions, I think, to 5.92 of his evidence (p.169) in relation to
29 incremental customers. If you would just have a look at that I would be grateful. All I want to
30 say about that is this, that his approach, with respect ignores the practicalities, namely, which
31 customers were incremental, and the associated costs when they were added to the run. We do
32 not know. He also does not deal with the existing runs and existing customers, and this was
33 Mr Bezant’s point you remember – one of the points he made this morning. The result of his
34 approach which, as I say, is impracticable is that it would have been necessary for Wiseman to

1 have recast everyday. Mr. Haberman, with respect again, must have realised that. He must
2 have realised the consequences of what he was suggesting. It was a wholly impracticable
3 suggestion.

4 Next he seemed to have a very great belief in software as a solution to the problem.
5 This was purely speculative and our response to that, as a result of my inquiries over the short
6 adjournment is that in practice the software is extremely difficult and, on the whole, not nearly
7 as efficient – and this I think you will probably find unsurprising as somebody sitting there
8 with a very experienced eye, knowing the customers, and knowing the geography – far more
9 efficient than a piece of software which actually would have to be highly sophisticated in order
10 to be at least as impressive as the efficient person doing the job. That is one of those
11 occasions where human beings are more efficient than machines. But the point goes a little bit
12 further than that, because if software is the answer it is, in a way, rather surprising that
13 Mr Haberman did not think it appropriate to use software to model Express’s own
14 performance, for example in relation to the Claymore business. If this is the way to do the
15 business why have we not seen this produced by the other side? No one knows the Highlands
16 better than Claymore. Is the inference not clear, that the software does not work for them
17 either, which in turn reverberates and suggests that the point I was making just a few moments
18 ago is absolutely right.

19 He ought to have used it if there was force in the argument, and he did not. The other
20 point is that he was, in any event, rejecting distance and that was his concluded view and we
21 come back again to the same point in 5.90, in the end he goes for outlets and does not go for
22 distance for the reasons we have already discussed.

23 He said at the end, when he was giving his evidence, that you should somehow adjust
24 the average overall costs – he might not have used those precise words, but words to that effect
25 – which was all rather vague, all rough and ready and, you may have thought, rather
26 unconvincing.

27 Just one or two more points. The graph at p.167, you will remember this is the one
28 with the cost in the vertical axis and the volume in the horizontal, where what is revealed
29 simply is that different runs have different characteristics, that is all that is revealed, including
30 their volumes. What he is doing is comparing costs between runs which, of course, differ by
31 definition. In our respectful submission what he should have been doing is asking how to
32 allocate costs within a given run, and that is what he does not do, no doubt because he cannot
33 and it is a bogus comparison, and you get no help from it.

34 Then there was what we call the “lollipop” theory ----

1 THE PRESIDENT: What I am struggling with still, Lord Grabiner, is why or whether it is
2 appropriate to try to allocate costs within a given run in circumstances where that information,
3 when obtained has nothing to do with the pricing decisions that the supplier makes, i.e.
4 Wiseman's prices are not, as far as I can see, related to this particular cost allocation exercise,
5 or indeed any cost allocation exercise within a given run, because that is just not how the
6 industry works, for very understandable reasons.

7 LORD GRABINER: All we can say is that when you do examine the relationship between the price
8 and the customers, we have done nothing wrong.

9 THE PRESIDENT: You are still in the clear.

10 LORD GRABINER: Yes. Now that is not a wholly satisfactory answer, so to speak, intellectually,
11 but it is a good answer in my submission. The lollipop theory is disputed. It is unsupported
12 factual evidence and it was not perhaps appropriate for Mr Haberman to be giving factual
13 testimony, but the purpose of the example, no doubt, was to simplify the features of the runs in
14 order to arrive at a simple formula, but it cannot be done. It is certainly not an accurate
15 description of what goes on out there. What we do say is that allocating costs by output
16 certainly means, and it is very difficult to argue with this and, if it is true, it is a forceful point
17 in my submission. If you allocate costs by outlet you do not know the volumes for each outlet.
18 Therefore, you do not know what has determined the cost of the run. So what we do, with
19 respect, say is that even if the lollipop theory had some connection with the facts it would all
20 be rather artificial and you may think not terribly helpful for your purposes.

21 I just have a very few remaining points which are really concerned with the approach
22 to this hearing. I do not want to say anything that would in any way detract from the very clear,
23 if I may say so, submissions that have already been made by my learned friend, Mr Turner, and
24 he in a sense is in a much better position than I am to make these arguments. But if I could just
25 make a few of them and in nutshell form.

26 In essence, what is happening here is that Express have applied to the Tribunal for
27 a remittal of this case back to the OFT. The way they have done it is to make a barrage, we
28 would say, of low level criticisms of the OFT's approach to the investigation and, in essence, it
29 is an attack on the methodology which has been adopted by the OFT. The question for the
30 Tribunal is was the OFT's approach a reasonable one? We also suggest that there is no single
31 right way of approaching this kind of investigation. There is no one true methodology which is
32 to be preferred over any other. So we say that the OFT asked itself the right questions. Its
33 reasoning sufficiently identified the basis of its decision and I think Mr Green's position now is
34 that he does not challenge that reasoning process.

1 So far as the approach of the Tribunal is concerned, our submission is that there are
2 no hard and fast rules. What matters essentially is that it is to be dictated by the justice of the
3 individual case, bearing in mind the overriding need for fairness, speed and the saving of costs,
4 and I would emphasise that – particularly bearing in mind, perhaps, the extraordinary history of
5 this particular piece of litigation.

6 THE PRESIDENT: We have not done very well on the last point, have we?

7 LORD GRABINER: Well I think that is an understatement. That is the approach adopted in
8 *Freeserve* as you know, (paras.101 and 111-114). But here the Tribunal has said that the
9 primary purpose of the Appeal is to determine whether the OFT made a material error of law,
10 carried out a proper investigation, provided adequate reasoning and/or made a material error of
11 appreciation. That was in your Recovery Judgment at para.109.

12 THE PRESIDENT: Yes.

13 LORD GRABINER: There are, in our submission, a number of relevant considerations which
14 should inform your approach to this, and I want, if I may, just to highlight four features in your
15 approach, or which would figure in your approach to the questions. First, that you would take
16 account of the nature of the Decision under Appeal. I think that it is common ground that when
17 the OFT decided to close the file it did take a decision of non-infringement on the part of
18 Wiseman – that is the established position and that is the result of your Decision in March
19 2003. But we do say that the Tribunal should conduct the appeal by reference to the content
20 and context of the Decision which was actually taken. You summarised this very succinctly,
21 and I will quote, that the Decision was that there was no infringement could be established on
22 the evidence. Or, put the other way around, there was insufficient evidence to establish an
23 infringement, is a crisp and accurate, in my submission, description. So this is not a case
24 where the OFT pursued an investigation, got some way through without reaching a view, and
25 then simply decided to down tools. It is not that kind of case at all. What happened here is that
26 the OFT took a layered approach, they did it in phases, and where it found that issues that
27 required further investigation or analysis arose, it followed them up we would suggest in
28 a diligent and proper manner. A key feature of the argument put forward by Express is that the
29 OFT's Decision is defective because it does not contain the in depth analysis that an
30 unequivocal decision of infringement might contain. That seems to be the way it is put, or one
31 of the ways it is put. All I would suggest is that the Tribunal cannot evaluate the decision on
32 the footing that it was something that it never purported to be. What we do say is that it was
33 not that kind of Decision so that that type of criticism has no foundation.

1 The second consideration which we would respectfully suggest you should take into
2 account is the relief sought. Now, this Tribunal recognises, and has recognised, that its
3 function is different on this occasion from Appeals brought where there has been an
4 infringement. This is different from *Akzo* and *Aberdeen Journals*. In addition, and we would
5 disagree with the other side on this point, there is a materiality threshold. It is not the case that
6 the simple identification of an error will justify remission to the OFT – that can hardly be
7 consistent with the principles laid down in the *Freeserve* case. We know that Express are not
8 directly challenging the correctness of the OFT Decision, that no infringement could be
9 established on the evidence before it, that is not an issue before you, and they are no longer
10 asking you to decide whether or not Wiseman abused its dominant position. It is only asking
11 you to decide whether or not the OFT was in error, and the relief sought is remitting the matter
12 to the OFT for, and I quote: “Proper consideration and investigation.” Now, the implication
13 from those words – “a proper consideration and investigation” is that this is a prayer for
14 remittal with a direction that the matter should be reconsidered in its entirety. One only has to
15 say that to produce an inward groan – if not an outward one – from many people in this room,
16 especially those who have been engaged in the exercise for the last several years.

17 THE PRESIDENT: I sketched out with Mr Turner yesterday, three possibilities and this is all
18 completely hypothetical. One, you simply set aside, secondly, you remit without saying
19 anything else, you simply remit – whatever that means; and thirdly, you remit with a direction
20 of some sort.

21 LORD GRABINER: Yes. Now, can I deal with that? We agree with Mr Turner’s answer, which
22 was that remitting with a direction would not be appropriate. At least a reason for that would be
23 that it does involve, or might involve, an abrogation on the part of the OFT of its discretionary
24 powers.

25 THE PRESIDENT: This is the institutional balance point?

26 LORD GRABINER: Yes, that these powers are granted to the OFT by statute and the Decision
27 whether or not to take up or pursue some investigation involves making a judgment about the
28 current state of their book, and to impose upon that through a direction, in my submission,
29 would not be appropriate. That is not to say that it would never be appropriate, but in my
30 submission only a major error of approach or principle, vitiating the investigation in some
31 fundamental way could justify such an approach. Even then in my submission there would
32 have to be a serious reason, as a matter of public interest, justifying the reopening of these
33 matters. What we have here is all stale porridge. This is wholly inappropriate for such
34 a reopening, or any such direction, in my submission.

1 Perhaps, also by way of an analogy, which may not be wholly applicable, but the
2 point I think is clear, I could make this point. It is possible for the court to make a declaration,
3 I am not talking about this court, I am saying the courts that we are familiar with. You go
4 along to the court, you have a complaint and the court makes a declaration, and sometimes it
5 will do so even though it will not have any practical effect, necessarily. I think you have
6 similar arrangements under the Human Rights Act and the convention, that it is then a matter
7 for Government as to how it is going to react to the view expressed by the Court.

8 There is also quite a lot of learning to the effect that there is not much point in making
9 a declaration in the abstract, and there is not much point in making a declaration which has
10 only academic value. That is quite distinct from the point that it is possible for a Judgment to
11 be given which expresses views about the rights or wrongs of the debate, but without saying
12 “I am going to remit it”, or I am going to remit it with or without a direction, because you have
13 the Judgment and there it is. All that I am suggesting is that from a practical point of view
14 there is no point in remitting it if the point that is sought to be made can be made in the
15 Judgment without more. I hope that that really explains at least our position.

16 THE PRESIDENT: Yes.

17 LORD GRABINER: The next factor which we would suggest should be taken into account, and it is
18 the third of the four factors, is the nature of the challenge made by Express to the OFT
19 Decision, and the challenge made to a very large extent is a criticism of the way that the OFT
20 exercised its discretion. Now, the trouble with making a challenge of that kind is that you are
21 dealing with a statutory body which is highly expert and which has very wide discretionary
22 powers. It can decide whether and, if so, how to conduct an investigation – that is why it is
23 given those powers. What has happened here, and we saw more examples of it this morning
24 through Mr Haberman, is that the exercise of the discretion by the OFT has been tested by
25 Express in the form of profit alternatives, which are insupportable, or unprincipled or
26 unrealistic in our submission. Or else they impose – or would impose if they were
27 accepted – of serving high standards or unrealistic standards – a council of perfection. All that
28 is happening here is that we are simply inundated with a number of suggestions as to different
29 ways of doing it. You did it by using method X, you should have done it by Y. If we had done
30 it by Y, you should have done it by X. This is all rather low level. This is the barrage of low
31 level criticism that I referred to a little earlier. In my submission it does not really add up to
32 very much and, at the end of the day, it is not good enough to say to the OFT “You could have
33 done it a different way, and the fact that you failed to do it a different way gets me home.
34 It gets you nowhere actually.

1 In *Freeserve* and indeed in this stage, the OFT has intimated that the OFT enjoys
2 a margin of appreciation as well, which has to be taken into account in the context of this
3 discretion, part curly where there is scope for reasonable people to disagree. On the question
4 of how the OFT conducted its investigation, in my submission the margin of appreciation is an
5 important consideration. At the outset of his submissions, a couple of days ago now, Mr Green
6 suggested that in a merits Appeal there was no scope for that. In our submission that is not
7 right. *Freeserve* is para.121, and in the CMC, where the same point was made we suggest by
8 this Tribunal on 3rd September 2003, it is at p.70, tested by the correct standard and not by
9 some council of perfection, what happened here, what was done here should be upheld in our
10 submission, and I will not go through the detailed consequences of that. In a nutshell, the
11 position is there that Wiseman has set pricings that reflect its costs and the OFT's investigation
12 showed that it did. So even if you could have done it any number of different ways, at the end
13 of the day that is a critical point you make there.

14 The fourth point of the factors which we would suggest you should take into account
15 is the expertise and prior knowledge of the OFT itself. They had a good understanding and
16 experience of the dairy industry, and the business of Wiseman. They understood how
17 Wiseman operated its runs, and they understood that the run configurations changed over time.

18 That is all I really wanted to say about those matters. There are a couple of other
19 points I want to make. The next substantive point is that we do respectfully say that Express is
20 not a reliable critic of the Office and what I am concerned about here is that you should be
21 aware of taking at face value many of the propositions or statements, or assertions that you are
22 presented with in the Express material without being very sure that they are accurate. The case
23 that has been made is long and diffuse and repetitive. They have tossed in the kitchen sink and
24 a lot more beside. There are 450 pages of pleadings including submissions and expert report,
25 and nowhere do you get a summary of the principle or the essential points that are being relied
26 upon. What Express has failed to do is to clarify its position with any sufficient degree of
27 certainty so that you know what the target is that you are aiming at. We have been aiming at
28 a moving target throughout these proceedings. Perhaps the clearest statement, to be fair to him,
29 was through Mr Green's opening submissions. One ought to have been able to deduce all that
30 at a much earlier stage in the exercise. We do say, as I say, that there were inconsistencies,
31 there were basic errors of fact, there are exaggerations and there are unrealistic criticisms in the
32 materials that you have been presented with. If I may I am going to give you some examples,
33 but I will come to that in a moment.

1 In summary, Mr Haberman does not advance any meaningful alternatives to the
2 approach adopted by the OFT. He abandons principle in favour of what we would suggest is an
3 irrational alternative. He does it, for example, in relation to the outlets' argument that we
4 addressed a little earlier. Also, Express has not identified any material category of cost which
5 was omitted from the OFT's calculations and no positive case has been advanced as to why
6 those calculations were wrong, and a good example of that is the 3 per cent. figure for
7 financial, administrative, and central selling costs. Mr Sweeney confirmed that the 3 per cent.
8 figure can be derived from Wiseman's statutory accounts. He said that in 8.5.1, but they still
9 have not come up with any substantive argument to the contrary.

10 The other point, of course, and only we really, I suppose, can make the point, but it is
11 nevertheless a powerful point, is because their purpose I am afraid is simply to damage our
12 position commercially. They are inevitably *parti pris*, their submissions are self-serving, and it
13 is just a little bit unfortunate that they have been willing to go perhaps rather further than they
14 should have done in making points, arguments and propositions which are not entirely
15 supported by the underlying material.

16 If you would forgive me just for a moment, Sir.

17 THE PRESIDENT: Of course.

18 LORD GRABINER: (After a pause) If I could just make some concluding observations shortly as
19 follows. We say you must be looking for clear and compelling evidence that the OFT made
20 a serious error of approach before remitting the matter. There have been two lengthy and
21 inconclusive investigations. The original complaint was made within three months of the
22 purchase of Claymore by Express and has taken six years since then. We are certainly not
23 responsible for the length of time that it has taken. We have complied fully with the OFT
24 inquiry – just as we did with the CC. We have always behaved in an open and honest way with
25 the Regulators, and we have been through the mill at great cost, both in financial terms, in
26 terms of management time, and expense, professional advisers and so on and so forth – it has
27 all been appalling. That time and money would have been better spent devoted to the business.
28 We say that it would be unfair and wrong in principle for all this to go back again, and unfair
29 and wrong in principle as far as Wiseman is concerned unless, as I say, that you are absolutely
30 satisfied that the OFT went wrong in material respects. Our simple plea is that there must be
31 an end to litigation and if ever there was a case where it should be brought to an end it is this
32 one, and that is why we say that the correct course would be for you to dismiss the Appeal.

33 I am asked to make one other comment in relation to run costs – why do it? The
34 answer is because you have to allocate run costs to get to total costs if you want to investigate

1 total costs to compare them with prices. But in any event prices need to be cost reflective, and
2 we say that allocation by volume reflects in cost causation and so is cost reflective, and
3 Wiseman do take costs into account when they are setting prices and their prices are cost
4 reflective, and that is what the OFT at the end of the day found to be the case – we covered our
5 costs.

6 THE PRESIDENT: When you say you have to allocate to get to total costs in order to compare with
7 prices, which we understand, forgive me for going back possibly over old ground, but what we
8 are talking about is prices and costs as regards middle ground customers. Is there any
9 allocation? In relation to the run costs have we not been told that the supermarket delivery
10 costs are still in? Has any effort been made to isolate the middle ground customers within the
11 run costs allocation?

12 MR TURNER: Sir, the answer is no, because they form part of the common run, and it is part of the
13 commercial common run.

14 LORD GRABINER: And that is the reason why you have to allocate.

15 THE PRESIDENT: yes.

16 LORD GRABINER: Sir, those are our submissions. There are a number of examples, some of
17 which I have averted to, there are a number of other examples of, as I say, inconsistencies,
18 inaccuracies, contradictions, errors of fact that I really do not want to weary you with, but you
19 know what the thrust of our submission is.

20 THE PRESIDENT: You have covered the ground very fully, thank you, Lord Grabiner.

21 LORD GRABINER: I am grateful and those are our submissions.

22 THE PRESIDENT: Mr Green, just before you start, because I think it is now your chance to close,
23 we are just going to rise for a few minutes. I am conscious that we now have to try to deliver
24 a Judgment in this case. It would be very helpful, I think, if you could tell us when we come
25 back what you now think your three or four best points are so that we could really focus on
26 what the heart of the Express case is when we are considering how we are going to construct
27 this Judgment. If we just rise now until just before 3 perhaps, I would hope that we could draw
28 stumps and/or declare that bad light stops play around 3.30, but certainly no later than a quarter
29 to four.

30 MR GREEN: Possibly quarter to four.

31 (The hearing adjourned at 2.49 p.m. and resumed at 3.01 p.m.)

32 MR GREEN: First of all some housekeeping matters. We have been asked to provide some up to
33 date figures for Claymore, can I give you some financials?

34 THE PRESIDENT: Yes.

1 MR GREEN: First of all, pre-tax loss in the 18 months to 30th September 04 - £2.284 million.

2 THE PRESIDENT: 18 months?

3 MR GREEN: 18 months to 30.9.04. I do not have an exact figure for turnover, but I am told it is not
4 materially different to the previous period, but I have not been able to work it out as a 12 or 18
5 month. It is effectively operating at the same continuing level of turnover.

6 THE PRESIDENT: Yes, I see.

7 MR GREEN: Best points. It is extremely difficult at this stage to try and identify which of my very
8 good points are better than the others. [Laughter] If I can assist you this way, what we would
9 be saying in terms of relief, were you to be with us on the Appeal, is that we certainly do not
10 want the OFT to re-engage in a broad sweeping exercise reviewing the conduct of Wiseman on
11 the Scottish market. We would be inviting you to require the OFT to consider a focused
12 review, as indeed we made the subject of our first complaint, namely that they examine
13 Wiseman's conduct towards Claymore's customers, including the prices and the terms and
14 conditions of contract to see whether or not they were abusive.

15 THE PRESIDENT: What is the point of doing that?

16 MR GREEN: Because that is the incremental approach. It enables one to determine whether or not
17 those customers were targeted in a manner which was contrary to Chapter II – were they
18 supplied at below cost? I do not really care what happened in other parts of Scotland which are
19 not germane, or relevant to Claymore. It is those customers that were taken away from
20 Claymore and the prices and the terms upon which they were supplied because those contracts
21 with Wiseman have in large part been renewed, you have seen that in relation to Aberness, and
22 the restrictive effects of the taking away of those customers has persisted over a number of
23 years. That was the exercise that we urged upon the OFT, and the OFT decided, as it was put
24 earlier today and yesterday, in effect, to replicate the Competition Commission investigation.
25 But it is the conduct of Wiseman, consequential upon the acquisition of the shareholding in
26 Claymore by Express, which triggered the problem and it is that which we would invite the
27 OFT to focus upon.

28 We have seen, because you have had a lot of submissions about it, that the OFT did
29 not focus upon that precise issue, and that is where we submit a fundamental in the OFT's
30 approach occurred. If you want me to go further than that, and to work my way through the
31 index to the skeletons and mark them out of 10 I would have to do that later, but it is really
32 everything revolves around that. I am not certain I can be very much more help on that.

33 I will try and be as brief as I can, and I will certainly aim to finish by quarter to. First,
34 last points first, the attack on Mr Haberman's credibility. It is of course for you to decide upon

1 what view you form of each of the accountants. It was most unfair of Lord Grabiner to describe
2 Mr Haberman as “unprincipled”, “unrealistic” as someone who “abandoned principle”. Lord
3 Grabiner did not wish to cross-examine. His complaints are, with respect, feeble.

4 Mr Haberman gave evidence to assist the court and responded in measure to Mr Bezant. You
5 will recall that Mr Bezant gave evidence that volume drives costs and indeed Lord Grabiner
6 repeated that. He said that the Competition Commission accepted that volume was the driver
7 of costs. He cited para.4.96 (p.1033). You will see that that is not the case. Nothing in that
8 paragraph establishes that volume was the driver of costs. What you will see from the report is
9 that Wiseman said to the Competition Commission, and repeated in the Arla inquiry, that the
10 opposite was true.

11 THE PRESIDENT: I think there is a comment in the Arla Report to the effect that it is volume,
12 distance and something else.

13 MR GREEN: Absolutely. In the Competition Commission, yes, in Scottish Milk. You now have
14 Arla, for your reference 6.35, p.117. I will read it to you, I do not think it needs to be turned up.
15 This is Wiseman’s submission:

16 “The amount of milk sold to a customer influenced the price charged. Generally, the
17 higher the volume the lower the price the customer would be offered, because higher
18 volumes resulted in increased efficiencies in processing and distribution.
19 Supermarket customers required higher overall volumes and higher volumes per drop
20 which resulted in more efficient distribution and influenced the price Wiseman
21 charged.”

22 And they made a very similar point at para.4.287(C) of the Scottish Milk Inquiry.

23 THE PRESIDENT: Just let me mention it so that everybody knows we have actually read it, 6.39,
24 which is slightly further down the page you have just been reading from, Mr Green:

25 “With regard to distribution Mr Wiseman submits you should drop density, i.e. the number of
26 stores dealt with in a particular area, the overall distance covered is important. Wiseman sought
27 to operate its ... to maximise the loads they carried. It was inefficient to service a single store
28 with a low volume of milk, that is why delivering to a number of stores in one area was able to
29 spread the cost of distribution. Wiseman also sought to maximise deliveries made from the
30 depots, covering longer distances also resulted in a ... of costs.”

31 MR GREEN: Precisely, cost is a function of distance.

32 THE PRESIDENT: You can come back on that, if you want to, Lord Grabiner.

1 MR GREEN: If it is therefore a matter of credibility of witnesses that is something you can take into
2 account. The only other point which I think Lord Grabiner mentioned, because his was more
3 submission by insult, was Rob Roy.

4 THE PRESIDENT: You need not deal with the Rob Roy point.

5 MR GREEN: The Rob Roy point. The Rob Roy point was that in fact it is not really that expensive
6 to supply anything in the Highlands, because frankly the Highlands are just not that difficult to
7 access. Well, Mr Haberman showed you p.346 which was Wiseman's submission to the Office
8 of Fair Trading, that was the data they supplied to the OFT and Mr Haberman pointed out to
9 you that you could see it from their own evidence that that was the case. Then you made the
10 point that you could see that the relationship between distance and cost in the Highlands
11 appeared, at least at first blush, to be slightly different to that elsewhere. Again I think this is
12 possibly more a point for the record than to develop now, Lord Grabiner referred to Mr Bezant
13 9.5.2, p.651, it says, and I will quote it to you rather than ask you to take it up:

14 "More than two-thirds of all deliveries from Keith were made in the area from Keith
15 and the surrounding areas."

16 But it is clear that when they said two-thirds of all deliveries it included not just middle ground
17 customers, but supermarkets and it therefore is not inconsistent with Haberman, and the fact
18 that Keith served supermarkets is evident from Wiseman's reply skeleton, p.18, first paragraph.
19 That is all I wish to say about Lord Grabiner's points. There are one or two other points which
20 he addressed which I will deal with in the course of submissions.

21 THE PRESIDENT: I think that Lord Grabiner just wants to deal with the passage from Arla.

22 LORD GRABINER: No, I do not actually. I just want to say that I certainly do not remember having
23 said that Mr Haberman was unprincipled, that would be a very unfair thing to say. If I gave that
24 impression I apologise. What I hope I had said was that the points he was making were
25 unprincipled.

26 MR GREEN: There we are. There were two types of warfare in this case.

27 THE PRESIDENT: At least!

28 MR GREEN: At least. Before I get down to the meat of it I am going to respond to Mr Turner's
29 final "stick in the mud" warfare point, and just remind the court of one or two matters arising
30 in this case. Our case on this side has been criticised for having 18 grounds of Appeal and 17
31 authorities undermining procedural fairness. You will bear in mind that this case started off on
32 a very bad foot and we spent the best part of a year dealing with admissibility. We sought
33 disclosure of such matters as a meeting, which turned out to be pivotal apparently, of 14th
34 March, no records were kept, even though Parish Councils keep records. There has been

1 produced to us on Christmas Eve a document which should have been produced earlier. We
2 were provided with no reasons to the decision Mr Lawrie's statement was not very detailed.
3 We asked for particulars. One particular is demonstrative of the rest, and if you would look at
4 this, please.

5 THE PRESIDENT: Yes.

6 MR GREEN: Core, 490.

7 THE PRESIDENT: Yes.

8 MR GREEN: Request 7.6:

9 "On what basis did the OFT (i) understand Wiseman itself to allocate its costs
10 between those markets; and (ii) understand that such costs arose in those markets
11 with particular regard to packaging, administrative costs, selling, finance, depot
12 distribution. As to (i) it is irrelevant to any issue in the present case how Wiseman
13 itself may have allocated its costs between these markets and the various purposes for
14 which it may have needed to do so by extension. It is irrelevant to the issues in this
15 case what, if any, understanding the OFT had that Wiseman allocated its costs
16 between those markets. As to (ii) the question is vague and/or at a level of extreme
17 generality and will not be answered."

18 Now, we go that sort of response in relation to a huge number of different questions. It is an
19 important issue. We were simply asking them how they allocated costs in relation to a series of
20 headings, and we were told "It is vague" and they just will not answer it.

21 When we sought disclosure, because some of these issues struck us as fairly
22 important, and we wanted to instruct Ernst & Young to address them, very, very late in the day
23 we had a concession from the OFT that they would not argue materiality, and that was a very
24 important concession. It certainly focused the way we examined the case from thereon in. It
25 has made life easier, we have not had to delve into a lot of the underlying mass and try and
26 persuade you of materiality. That concession could have been made a year or 18 months
27 earlier. The delay in this case is due to admissibility Appeals through Mr Lawrie's statement
28 being inadequate through unhelpful responses to particulars, through late concessions, and late
29 disclosure of documents. We do not want to be here two and a half years after the Decision.
30 We would liked to have been able to bring this Appeal shortly after the Decision was taken.
31 For Mr Turner to say it is a moribund Appeal is a bit rum frankly. I do not propose to say any
32 more about that.

33 So, the context to this case. As you know, Express's acquisition of the 51 per cent.
34 equity in Claymore was pre-announced in the Press. Within weeks of the acquisition, again as

1 you know, Claymore had lost 40 per cent. of its sales' volume to Wiseman, the details are set
2 out in the Notice of Appeal. The 40 per cent. first of all entailed the loss of the CWS contract,
3 it was approximately 30 per cent. You will see this in the Notice of Appeal, and Mr Larg's
4 statement 27 *et sec.* You will see the Competition Commission's Report, which said that on an
5 incremental basis sales were below AVC and on an all of Scotland basis below ATC. You
6 will see Mr Larg said it was a condition of CWS obtaining a very low price that Wiseman had
7 to have all of its Scottish business. So 30 per cent. went. In relation to all of Scotland, there is
8 a point I will make at this stage, which I will not make again later, about Mr Peretz's
9 submissions on the relationship between all of Scotland and exclusivity. The criticism lacked
10 any sense of reality, because you only have to ask yourself what Wiseman's reaction would
11 have been if a customer who had been offered all of Scotland had said: "Listen, I will take your
12 prices in the Highlands but not the Central Belt. They are very nice in the Highlands, but I will
13 not have them in the Central Belt", what would Wiseman's response have been? Would they
14 have said "Yes, of course you can have our very low prices in the Highlands. They are very
15 nice prices because they do not reflect the total costs of transport, but yes, well you can go and
16 compete and take them from someone else in the Central Belt." It just has a complete air of
17 unreality about it.

18 So that was Wiseman's first attack in the Highlands. The second was Alldays.
19 Mr Larg deals with this in para.35 to 44, that is about 5 per cent. of the business. They then
20 lost Morning Noon and Night, about 2.5 per cent., and then Aberness, approximately 2.5 per
21 cent. Of course, by the time they lost Aberness, it was a much higher percentage of their total
22 volume, because you had lost CWS, which was 30 per cent. so it is a higher percentage of the
23 total. But, by the time Aberness had gone 40 per cent. of the total business had gone. The
24 effects of this are set out, if I can give you the references, I will not ask you to turn them up,
25 supplementary vol.1, 703-706 of the Notice of Appeal, and there are footnote references to
26 documents there.

27 Express's investment in Claymore was on a stand alone basis viable; in the year end
28 30th September 1998 Claymore had an operating profit of £498,000. In the week ending 12th
29 December 1998 100 per cent. of Claymore's independent store business was in the Highlands.
30 By the week ending 19th February 2000, the 100 per cent. had gone to 34 per cent. (Notice of
31 Appeal 5.63). Within six months of the acquisition of the shares Claymore went from profit to
32 a loss of £32,600 per week (5.65). By April 2000 Claymore was losing £60,000 per week
33 (5.66) and by June 2001 Claymore had suffered annual losses of about £3 million. One of the
34 reasons the situation was mitigated thereafter was because as was explained in the Notice of

1 Appeal in December 2001 to reduce its losses Claymore sold its Central Belt business to
2 Grahams (5.67).

3 Then it is explained in 5.68 *et sec* how the decision to enter the Central Belt was taken
4 in order to find outlets for the milk it was bound under contract to purchase, because you enter
5 into long term purchasing contracts, you do not have an outlet in the Highlands, what are you
6 going to do with the milk you are contractually bound to acquire? You have to find an outlet
7 for it – see CC Chronology p.1146 where they explain that it was May 1999 that the Central
8 Belt was first viewed as a selling opportunity. It must have been fairly obvious to Wiseman
9 that if you targeted the Highland contracts of Claymore they would be saddled with milk which
10 they had nothing to do with unless they went into the Central Belt, and you will recollect the
11 evidence of Mr Wiseman to the Competition Commission that he was going to win a very high
12 percentage of the Central Belt, even if it meant losing money.

13 Those were the effects on Claymore, they were devastating. Claymore is on a life
14 support machine, supported by its parent company. The OFT says there is no breach. Taking
15 the conservative figures in the Competition Commission for market share, 65 per cent., albeit
16 that we have set out in the Notice of Appeal evidence from Wiseman itself saying it had 85 per
17 cent., but let us take 65 per cent. as conservative, the Competition Commission treats that as
18 ten times higher or thereabouts, to its nearest competitor, which was about 7 per cent. - so nine
19 or ten times bigger than its nearest rival.

20 The OFT's approach in this case is to conduct an investigation which, instead of
21 focusing on what actually happened meandered off into a series of blind alleys. The OFT did
22 not ask for or obtain copies of the letters, notes, etc. which make up the contracts between
23 Wiseman and its customers, and you will see from Mr Larg's statement that he says, and I do
24 not think this is disputed, that many contracts are informal, maybe letters rather than formal
25 contracts. The OFT did not ask for the totality of the inducements or other financial
26 advantages, paid or offered by Wiseman to Claymore's customers. It looked only at
27 exclusivity terms in contract (see the reply to request for particulars, para.27 and RBL 68 to
28 74). The OFT did not even ensure that Claymore's main customer were even included in the
29 runs it examined, and we heard yesterday the OFT confirmed that Aberness was not there, for
30 example. It did not analyse the profitability of those incremental customers. The OFT's broad
31 exercise ignored the fact that costs in the Highlands are not the same as costs for the whole of
32 Scotland. Irrelevant comparisons were made. I was criticised yesterday by Mr Turner in
33 particular, for our submission that by reference to the briefing note which formed virtually no
34 part of Mr Turner's submissions that the OFT had said that they had carried out a comparison

1 of price on the one hand and cost price on the other. You were then shown a table attached to
2 Mr Lawrie's statement which showed price against price. First of all, the briefing note says
3 what it does and I can go no further than that, but let us say that I am wrong on that. If price
4 alone is relevant then, given that the OFT's entire case is that costs differ, so that examining
5 price alone will not show anything, then how was it to be further beneficial to the OFT that you
6 simply prepared price against price? The OFT's case is that costs vary, so if you are going to
7 get a meaningful comparison price against price is not meaningful. The OFT cannot have it
8 both ways, either cost price is the test, in which case the benchmark must be cost price, or it is
9 price alone, but that is not the OFT's case.

10 Secondly, the OFT's comparative exercise was against English prices. In the
11 Competition Commission Report, and it is really for reference only at this stage (4.344 p.425)
12 the Competition Commission also made the point that comparisons with competition between
13 Wiseman and Express in England are: "...unlikely to be a reasonable comparator". There is
14 another, even more fundamental error, in the approach that the OFT adopted, basing its actual
15 decision on price comparisons with England. Really it is a point of principle as much as
16 anything else. In a market where there is a dominant incumbent, price differentials may very
17 well be consistent with the dominant undertaking having an ability to set prices in an
18 unconstrained manner, and abusively. In a market where there is no dominant undertaking and
19 a competitive structure, then price differences may be consistent with healthy competition.
20 You cannot simply look at England where there is no incumbent dominant undertaking and say
21 prices vary there with prices in Scotland and say ergo prices in Scotland must be normal,
22 because that begs the question still as to whether or not they are abusive. But the OFT
23 apparently thought otherwise.

24 Mr Turner made a point about costs and patterns. With respect, his point was
25 simplistic and it was wrong. If you do raise the cost bar on Mr Lawrie's table G – not mine,
26 Mr Lawrie's table G - the patter plainly varies. You only have to lift it a bit and you will see
27 the pattern for costs underneath the bar plainly varies, the entire shape changes. As you will
28 recollect from the table, you suddenly bring in all of these high volume customers, and you get
29 this spike which stretches out to the right and, again by definition, the pattern changes for
30 above cost. The only circumstance in which it does not change is if you simply forget there is
31 a cost bar, but since part of the analysis of predatory pricing is looking at the pattern of prices
32 below cost, it clearly changes if you alter the bar.

33 Another elementary error, the OFT's sampling of runs. The runs actually used by the
34 OFT in its sample did not match those used, in fact, by Wiseman. I dealt with this very briefly

1 in opening and Mr Turner riposted to it. I will just give you references and then make the short
2 point – RNA 3.81(c) and Haberman 4.64 for context. This was explained, and the artificiality
3 of the OFT’s exercised was explained by Wiseman to the OFT in its letter of 13th December 01
4 (core 337, bottom p.338, first para.p.339)

5 THE PRESIDENT: I just want to look at that. Yes.

6 MR GREEN: What was pointed out was that Wiseman had changed – the change was in England,
7 that is the point. I apologise if this is a series of somewhat random attacks on approach, but
8 time does not permit anything else. The OFT’s confusion was also evident in Mr Turner’s
9 analysis of AVC. He showed you table I, and if you would flick to this, please, p.379 of the
10 bundle, it will not take a second to see the point. You will see in that table that there are no
11 negative figures, and this was for reasons which were not explained, the way in which they
12 demonstrated graphically, or non-graphically, the high level of AVC. There are no negative
13 figures there. If you look at para.43 of RBL on p.232 you will see that the OFT actually found
14 a significant number of customers were sold at below AVC – something has gone wrong
15 because they are not reflected.

16 THE PRESIDENT: I am sorry ----

17 MR GREEN: Page 232 of the bundle you will see that there are a number of negative price cost
18 margins, which are not reflected. It is also important to note that ----

19 MR TURNER: Sir, that is instances, that is outlets, just to avoid confusion.

20 MR GREEN: Well these are apparently small customers with single outlets. In their sample we are
21 told from RBL that they picked only one in three of the smaller outlets.

22 THE PRESIDENT: Let us just see what we are talking about. Page 379 is average price, high
23 variable cost margin by main customer group. It includes MMN, for example, and a number of
24 CWS, and a number of main groups. Now, if we compare that with 232 ----

25 MR GREEN: There are some instances of sales below ATC.

26 THE PRESIDENT: And instances we infer are the outlets of small customers.

27 MR GREEN: They are the outlets of small customers. The OFT, as you know from the
28 methodology explained in RBL took one in three of the small customers, so it is going to be an
29 understatement. The only point is it was put to you that there were no sales below AVC, in
30 fact it is repeated in Lord Gabor’s overnight reply, but there plainly were. Now I do not
31 know what the reconciliation is but a scatter graph with a high degree of accuracy would have
32 demonstrated more clearly that there were some sales below AVC.

33 MR TURNER: Sir, may I just clarify this, it is quite simple. The table shows main customers as
34 well as groups, so for example you have CWS as an individual customer.

1 THE PRESIDENT: Yes, that is what I have just said, Mr Turner.

2 MR TURNER: Yes. At para.43 there is a reference to finding negative price cost margins in 33
3 instances, those are outlets of customers.

4 THE PRESIDENT: Yes, that is exactly what we have just said.

5 MR TURNER: Then in the following paragraph, which you need to look at as well, they looked to
6 see if there were any customers, whether single outlet or not, to whom supplies were made at
7 below average variable cost, and there were none.

8 MR GREEN: We asked for particulars of this and we got the typical unhelpful response. I will just
9 give you the references so you can see them later (request 16, p.516 and request 17, p.517).
10 My simple point is that there was an under inclusion of small customers in the sample. There
11 were instances of below AVC sales. We do not have a depiction of the extent of below AVC
12 sales, and table I masks what may be a much more complex position than is evident from that
13 table.

14 In relation to the high level of AVC we have quite candidly and frankly an
15 explanation in the Defence to the effect that there were quite a lot of costs omitted, and we can
16 argue about whether it is a significant percentage. You have seen them, and you will see, we
17 submit, that they were significant. The only point I want to make about that is the OFT's
18 riposte is "Well it does not really matter because we added in some costs which may appear to
19 be fixed". So the principle which the OFT worked on in relation to the high level of AVC is
20 one "Yes, we admittedly omitted quite a few costs, and the facts speak for themselves, but it
21 does not matter because one lax calculation deserves another, we added in a few fixed costs."
22 Whereas, Mr Haberman points out he does not accept that those are fixed costs and it is by no
23 means clear that one does counteract the other.

24 AVC and time, now this is an issue which is I think well canvassed between the
25 parties on paper. It is over what period of time do you assess costs? The only point I wish to
26 make at this juncture is to reiterate that the Competition Commission found below ATC pricing
27 for a period which I originally put at two and a half years. I was criticised for this and when I
28 went and checked in fact it is considerably longer, and I will just give you the references. The
29 Competition Commission found that with regard to CWS Wiseman sold at below ATC in the
30 year ending May 1999. In other words, for a 12 month period from May 1998 to 1999 – they
31 took a 12 month period, not a one month, 12 months. So May 1998 to whatever period one
32 wants to take, whether it is May 2001, which is the OFT's analysis point, or August 02, is three
33 to four years. So we therefore do say that on analysis the OFT had available to it evidence that
34 there was below ATC pricing for a considerable period of time.

1 The next point I wished to make I can do simply by handing something up. It is from
2 the OFT's own guidance, document 414, 1999. It is for later consideration but I will just
3 explain what there is in this document.

4 THE PRESIDENT: Yes, we have it in our handbook, Mr Green.

5 MR GREEN: Yes, it is para.4.10 and footnote 18 and it relates to bulk cream, and we simply submit
6 that the approach adopted by us and described in the skeleton is one which is consistent with
7 the OFT's approach, which is if you have two extremely closely related markets like First
8 Class and Economy seats on a flight, they should be accounted for separately, and if there is
9 revenue which is to be taken from to the other then it would need to be looked at by the OFT to
10 see whether or not there is some evidence of predation (footnote 18). I do not think I really
11 need to go any further than that.

12 I move from that to Stackelberg-warfare. This principle, we submit, is part of the
13 OFT's reasoning. It is linked inextricably to the OFT's view that the market was in some way
14 oligopolistic and you see it in paras.34 and 38 of the note. The point was never put to Express.
15 The warfare point was never put, the inefficiency or sub-optimality was never put to Express
16 for evidence or submission. It is not raised in RBL, yet it quite clearly was a key consideration.
17 We cannot for one moment accept that the three individuals whose name is attached to the
18 briefing note, and who were making a submission to their superiors under Chapter II, can
19 honestly believe that oligopoly means anything other than oligopoly. It is just simply too far
20 fetched. They plainly meant what they said.

21 THE PRESIDENT: What do you take it to mean, Mr Green?

22 MR GREEN: Oligopoly I take to mean more or less what is said in the first page of Mr Varian's
23 "Intermediate Micro-economics". It is a market where there are a small number of roughly
24 equal players, it is generally a market with three or four players, all of whom have roughly
25 equal market shares. I would submit that any rational lawyer, or economist or accountant at the
26 OFT would equally so understand it and would not, in any sense, ever confuse it with
27 dominance. I do not see how that could ever be the case. No lawyer trained in any form of
28 anti-trust on this side of the Atlantic (and I doubt on the other side) could sensibly believe that
29 oligopoly meant dominance. What appears to have been the case and is, indeed, supported by
30 Mr Turner's suggestion that the case officers preferred the minority to the majority view, was
31 that at some point in drafting the briefing note they forgot they were dealing with a case of
32 dominance. The logical construct of the briefing note is that there was a dominance, and they
33 have to decide whether there is abuse.

1 There are only two explanations, either they confused oligopoly with dominance, or
2 the alternative is that they thought that oligopoly theory was transmutable without change to
3 dominance. Either of those is plainly incorrect. I can clarify that the reference to Dodgson 1986
4 is a mistake. An economist who is a contact of ours spoke to Mr Dodgson and he knows
5 nothing of such an article. I suspect it is a typo and 1986 may actually mean “ibid” – it is
6 possible – or it means 1996, but we simply do not know. We are not aware that there is
7 a Dodgson article of 1986 and nor is the author.

8 Can I move from warfare to intent, and the meaning of elimination? What does “an
9 intent to eliminate” mean? An attempt to eliminate means an attempt to eliminate competition.
10 In this case Wiseman set out to eliminate competition from Claymore. Mr Wiseman said
11 “Wiseman will not share customers with Express.” The OFT’s theory, and Wiseman in their
12 theorising focus upon this word. One needs to stand back from it for a moment and ask what
13 the consequences are if intent to eliminate – assuming that that is even the test – actually means
14 an attempt to completely eliminate. It means that if you are somewhere else in this courtroom,
15 in the dock for GBH then that is not intent, because it is not an intent to eliminate, it is just an
16 intent to give someone a good beating. Equally, actual bodily harm or affray or assault is not an
17 attempt to eliminate, nor is manslaughter – only attempted murder or actual murder.

18 Article 82, as you know, an s.18 2(b) of the Competition Act defines as an abuse
19 “limiting production”, “limiting markets, limiting technical developments”. So it is an abuse to
20 have the intent to limit production, limit markets; and limit technical developments. This case
21 can be analysed in terms of conduct designed to limit production, or the development of
22 markets. “Limit” is a much more modest word than “eliminate”.

23 Most abuses, of course, are not conditional upon intent. Article 82 is objective and
24 effects based. Cases on rebates and discount schemes do not involve intent – *Hoffman La*
25 *Roche, Michelin* and so on. Mr Turner’s distinguishing factor in these cases is that they
26 involve schemes. With respect, that is a distinction without a difference. Why should the fact of
27 the existence of a scheme – if there is a scheme – alter the economic analysis? If one takes
28 *Aberness* as an example, they were paid a certain amount of money as a payment – Wiseman
29 had a scheme of making payments to win business. The payment could be viewed as
30 prospective loyalty, retrospective loyalty, what is the difference between that sort of scheme
31 and a more formal scheme operated by *Hoffman La Roche*. Mr Turner on *CMB*, where, as you
32 will recollect the famous Shipping Conference case, the entrants won 20-25 per cent. of the
33 market in the space of about three years. The Conference met the competition above cost.

1 Mr Turner said in relation to that that the Conference had the intent to eliminate but only
2 managed to curb. But if you invert the example you see how silly drawing a conclusion from
3 that is. On the OFT's theory there is no abuse, i.e. the dominant undertaking, through blissful
4 ignorance of its management manages to kill off a rival via its pricing but through ignorance
5 with no intent. So this is not an abuse, whereas if you have the intent to kill, which you only
6 harm, it is an abuse. With respect the OFT is walking on very thin ice on that proposition.

7 So far as the absence of a smoking gun is concerned, we submit the smoke is dense.
8 If you imagine a document with the following components you have what there is in this case.
9 It is a document which says as follows: paragraph 1: "Wiseman respond immediately, without
10 hesitation to the 51 per cent. acquisition of shares in Claymore. 2. Identify each and every one
11 of Claymore's customers, set up a system whereby the individual employees of Wiseman are
12 assigned to that customer, with a view to making contact. 3 Do whatever is necessary to win
13 the customer, even if it is not a customer we have supplied before. 4. If it is a customer we
14 have supplied to outside of the Highlands now offer to supply the Highlands. 5. Offer a price,
15 whatever it takes, which covers all of Scotland, but make it clear they cannot just take the
16 Highlands. 6. Demand exclusivity if possible, or obtain or principal or main status, or
17 a gentleman's agreement, but do what is necessary. 7. If necessary offer cash payments, these
18 can be as large as needs be. 8. Offer refrigerators as well – as many as needs be. 9. Make
19 contracts as long as you can, e.g. three years if you can get away with it. 10. If Claymore steps
20 out of the Highlands because they have to get rid of their excess milk we will fight them on the
21 Central Belt at whatever price is needed to win or retain the business. 11. The reasons for the
22 strategy is that they are a threat to our incumbent dominance. It is well resourced, so it can
23 back Claymore to expand. In any event we hate it, 'no one will welcome them into Scotland',
24 their entry is inefficient and sub-optimal, 'they are only trying to cause trouble'", and the last
25 one comes from the skeleton. If you found that document, that would be a smoking document.

26 Picking up briefly a few other points, and then I want to get down to my very last
27 point being the institutional balance and relief. Other points on intent, briefly: super
28 dominance, this was raised by Mr Turner, but it is not raised anywhere else. It is not in
29 Mr Lawrie's statement, 35 or 36, it is not in the briefing note. The OFT have not assumed
30 super dominance, it has not been part of our case.

31 The market sharing cartel, Mr Turner said it was part of the relevant context, but
32 again not in RBL, it is not in the briefing note, the OFT skeleton agrees that it is not relevant,
33 para.62(5) and footnote 26.

34 Can I hand up, and again I am not going to do anything more than just hand this up,

1 I know you have it, but it is a reference to Bellamy & Child which just deals with the cases
2 about continuing effects after a particular time period. I am sure you are familiar with them but
3 there are intellectual property cases, and there are various Article 81 cases. It makes the point
4 that if you have an agreement which continues after a certain period that is an abuse, even if it
5 has expired before, for example, accession, but its effects continue, that also is unlawful and
6 can I just note that the same point is made in EMI and CBS (1976 ECR 811). I do not think
7 I need to say anything more than that.

8 I now want to turn to what is, in effect, my final point, which is institutional balance.
9 Great care is needed with this point. The effect of the OFT's argument is to create a charmed
10 wall around Fleetbank House which the Tribunal is invited to keep well away from. Mr Turner
11 gave you as an example of what he considers to be an immune point, that if the Tribunal
12 concluded that the OFT had misconstrued evidence going to intent – the hit list was the
13 example he gave – then you should keep back, hands off, this is institutional balance. In other
14 words, if you identify an error of law, in other words an incorrect inference from an
15 uncontroversial fact, viz. the existence of the hit list, you should keep your hands away from it.
16 This is relative institutional balance. With respect, this is a dangerous point to advance.
17 Institutional balance is clearly important, very clearly important, and it is laid down in statute
18 and there are three principal aspects to it.

19 First, in the case of a breach or non-breach decision there is a merits' Appeal – that is
20 clearly just laid down in the Statute. It is to be contrasted with two other situations. First, there
21 is no provision for any appeal in the case of what we all know as an autonet(?) decision. That is
22 different to the position before the CFI, it is a major difference, and it is a major example of
23 institutional balance. The OFT has a jurisdiction to prioritise its work and not take a decision
24 provided it has not taken a decision – if that is not tortologous – and it cannot come to you.
25 That is a huge example of institutional balance which differs from the European scene. In the
26 case of commitments, mergers, appeals from the Competition Commission, we have judicial
27 review – again, an example of institutional balance. Parliament has thought about this quite
28 carefully after a great deal of consultation and debate and has laid down the balance. But when
29 the OFT is found to have taken a decision of infringement, or non-infringement, there is
30 a merits' appeal. I will not repeat what I said in opening, we accept there may be differences on
31 a merits' appeal as between a finding of infringement and a finding of non-infringement, but
32 they remain merits' appeals. I do not think we would materially disagree with the Tribunal's
33 formulation of the jurisdiction in this case at an earlier stage, but it is a fairly broad merits'

1 appeal nonetheless, even though you have articulated it in slightly different grounds to that
2 which you would be applying in a defendant's appeal against a penalty.

3 It was put to you by both Mr Turner and Lord Grabiner that in some ways subjective
4 factors affect the Appeal. Lord Grabiner's final comment was that the knowledge of the OFT
5 affects your jurisdiction – he put it as largely a matter going to relief. Subjective factors cannot
6 be relevant. They cannot be relevant to your jurisdiction and the role you have to play under
7 Parliament attribution in the Statute, that it was a good Decision, or a bad Decision, that it was
8 well taken, or inadequately taken, that the case handlers have an outstanding CV or are novices
9 – these things are irrelevant. They cannot govern your jurisdiction to ensure that competition
10 law is properly enforced. This case – and this is true of all three parties – this case is painful. It
11 is painful for the OFT who have to do other things. It is painful for Wiseman who are
12 investigated. It is extremely painful for Claymore. When it complained to the OFT it was in
13 desperate straits. It is acutely painful for Claymore when OFT rejected the complaint and
14 found non-breach, it became even more painful as Wiseman was permitted to keep the
15 contracts it won and then renew some of them. It remains painful in the extreme as you have
16 seen, no doubt to Wiseman's considerable gratification. It is painful for everybody – that is
17 a fact.

18 THE PRESIDENT: I think you are in your last five minutes now, Mr Green.

19 MR GREEN: I probably only need one or two more. Those factors are irrelevant. When it comes to
20 relief questions like that are again primarily irrelevant. Plainly under the Statute you do have
21 a discretion, unquestionably so. There are, we would submit, three considerations which we
22 would invite you to give consideration to. The first point is that although plainly you will wish
23 to think about it now, we would suggest that the question of relief is a matter to be returned to
24 once you have given your Judgment on the merits. If you are with us then we will need to see
25 your Judgment to see what follows from it. If you are not with us it is an irrelevant and
26 academic exercise anyway. If you are with us on certain points, then we would invite you
27 to produce the clearest possible statement of law about these practices as you can, because
28 otherwise if you simply produce a declaration in effect that the OFT has erred in its approach
29 we may have, after two and a half years, effectively a pyrrhic victory for Express, which is the
30 last thing that it wants.

31 If you decide to remit – I have made my submission already – that the remission
32 should be on the narrow issue of targeting, but we do not want to see some further all of
33 Scotland review. We do not believe there is any practical problem in remittal on this narrower
34 basis. For example, the s.26 requests sent on 3rd October 01 asked the right questions but in

1 relation to the wrong customers. The reply given by Mr Lawrie (10.2(b) p.505 core bundle)
2 when he was asked whether or not one could identify the incremental customers from its
3 samples, he said “Yes”, but they did not do it. So it is a limited and controlled exercise that we
4 would invite the Tribunal to consider if it were with us on these points.

5 Unless I can assist you further, those are my submissions.

6 THE PRESIDENT: Thank you, Mr Green.

7 LORD GRABINER: Sir, I know we want to rush, but there is just one small point in relation to
8 para.6.39 of the Arla Report that I was going to refer to. He says that we have said to the Arla
9 Commission that run costs are the same for all distances, so that the distance does not matter.
10 That is not right, in other words there is no conflict in what we said there and what we said
11 here. We said that the volumes hauled over the distance of a run influence the choice of
12 delivery vehicle used and hence the cost of the run. So in allocating the cost of a run volume is
13 a common cost and the appropriate basis for allocating common cost runs to the participants in
14 that run. I hope that is sufficiently clear, and I apologise.

15 THE PRESIDENT: Very well, I think that does bring us to the end of this hearing. Thank you all
16 very much indeed for your help over the last three days. We will reserve Judgment and give
17 Judgment as soon as possible.

18 Our particular thanks to the authorities who have allowed us to use this building, the
19 Sheriff principals, to our shorthand writer and to all our staff, and to everyone who has
20 contributed to this case, thank you very much indeed.

21 (The hearing concluded at 3.50 p.m.)