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IN THE COMPETITION APPEAL TRIBUNAL

Case No 1008/2/1/02

Victoria House
Bloomsbury Place
London WC1A 2EB

Monday 24 May 2004

Before:

The President
SIR CHRISTOPHER BELLAMY QC
(Chairman)

MR PETER CLAYTON
and
MR PETER GRANT-HUTCHISON

B E T W E E N:

CLAYMORE DAIRIES LIMITED
EXPRESS DAIRIES PLC

APPLICANT

- and -

THE DIRECTOR GENERAL OF FAIR TRADING **RESPONDENT**

- and -

ROBERT WISEMAN DAIRIES PLC
ROBERT WISEMAN AND SONS LIMITED

INTERVENER

MR BEN TIDSWELL and MR EUAN BURROWS appeared on behalf of the Appellant.

MR JON TURNER and MR GEORGE PERETZ appeared on behalf of the Respondent.

LORD GRABINER QC and MR JAMES GOLDSMITH appeared on behalf of the Intervener.

CASE MANAGEMENT CONFERENCE

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1 THE CHAIRMAN: Good morning.

2 MR TIDSWELL: Good morning, my Lord.

3 I appear with Mr Burrows for the Applicants in the
4 absence of Mr Green. I will be relying quite heavily on
5 Mr Green's submissions from 2 September, although I hope
6 I can avoid taking you to those in any detail in reading
7 bits of them out. There was also a short supplemental
8 skeleton which the Tribunal I hope received last week,
9 which deals with what I call prejudice points.

10 THE CHAIRMAN: Yes.

11 MR TIDSWELL: Again I was not planning to go to that
12 document, at least at this stage, unless the Tribunal
13 wishes me to, but rather to concentrate on the substance
14 of the issues before the Tribunal.

15 I am probably going to deal with four bundles
16 particularly, apart from the application bundle, which I
17 think is your bundle 23. I was wondering if I might
18 mention that I am likely to be going to Mr Lawrie's
19 statement at Bundle 13, and Mr Haberman's report and Mr
20 Bezant's report which are in your bundles 19 and 21. I
21 suspect that I might be going to those more than anything
22 else.

23 I would like to start with a short summary of the
24 basis for the application before jumping into the various
25 categories which are the subject of the application.

26 THE CHAIRMAN: Yes. Could I make one comment before you do
27 start, Mr Tidswell, which is one that we have actually
28 made before in this case. This is actually a Scottish
29 case and no one has referred us to any Scottish authority
30 whatever, so far as I can see, on what the scope of the
31 Sheriff's powers are and how we should exercise them in
32 these particular circumstances.

33 MR TIDSWELL: Sir, I do understand that. I was planning to
34 address the question of the approach in relation to
35 Scotland and Northern Ireland. I am sorry that we have
36 not managed to put an authority before the Tribunal on
37 that.

38 THE CHAIRMAN: I may have missed it, but that is my

1 impression. Please correct me if I am wrong.

2 MR TIDSWELL: Yes, I am sorry if I am guilty in that
3 respect.

4 Just to start the basis of the application. The
5 Tribunal will recall that this all starts on 27 March
6 2003 when the Tribunal ordered that there should be a
7 witness statement given by the respondent on the facts,
8 reasons and the legal considerations exhibiting
9 contemporary material.

10 THE CHAIRMAN: Yes, we remember that.

11 MR TIDSWELL: The basis for that was the standard principles
12 of disclosure applicable in JR affecting public
13 authorities. I wanted to summarise three propositions
14 from the cases without going to the cases, unless you
15 want me to.

16 The first comes from **Aquavitae**, where we say there is
17 a duty on the public authority to assist the court or
18 tribunal with a full and accurate explanation of all
19 relevant facts.

20 THE CHAIRMAN: That is the card face-up point.

21 MR TIDSWELL: Indeed. In fact, I then go to **Huddleston**
22 where it is said the cards face upward and points out
23 that the vast majority of cards will start in the
24 Authority's hands. So that is **Huddleston**, which is in
25 the Authority's bundles, which the Tribunal has.

26 The third authority, which is in Application bundle
27 23, is the IBA Health decision in which Lord Justice
28 Carnworth at paragraph 105 says this obligation to put
29 cards on the table places an obligation on the public
30 authority to put before the court the material necessary
31 to deal with the relevant issues.

32 Those are the three propositions about what the
33 purpose of this disclosure was.

34 Moving on to the procedural context, at least
35 touching very briefly on Scotland and Northern Ireland,
36 the submission that we make, and I think Mr Green has
37 dealt with this in paragraph 54 of his September
38 submissions (if I can call them the Green submissions),

1 is that it is desirable, we say, for the Tribunal to
2 approach disclosure when it is England and Wales, or
3 recovery when it is Scotland, or indeed discovery when it
4 is Northern Ireland, on a consistent basis.

5 We say that for present purposes what is important is
6 to ensure that whatever the Tribunal does in regulating
7 its procedure, indeed it has largely regulated its
8 procedure to some extent, but what it does should be at
9 least consistent with the approaches in those
10 jurisdictions. Certainly our inquiries indicate that
11 there is consistency if the requirements of relevance and
12 necessity are the requirements that are applied. In this
13 particular application we say that those are indeed the
14 key points and I think the other parties agree with that.

15 On that point, our understanding is that certainly there
16 are differences in Scotland and Northern Ireland.

17 I am sorry that I do not have authority for this
18 proposition, but our understanding from speaking to
19 Scottish lawyers is that there is no discovery as of
20 right in the way that we would know disclosure in this
21 country. However, there is jurisdiction to apply for it
22 and to be granted it and it must be shown to be relevant
23 material before that order would be made. There is I
24 think at least a broad concept of necessity even if that
25 is not the express test. Maybe Mr Grant Hutchison will
26 correct me if I have put that inelegantly but, as far as
27 I can discern from the provision in the rules and some of
28 the commentary I have seen, it suggests that necessity in
29 the broad sense will be considered by the Tribunal or the
30 court in that case and that makes perfect sense, of
31 course.

32 In Northern Ireland the position is again slightly
33 different, perhaps for interest and consistency, and that
34 is that it is pretty much (inaudible) and the position
35 there.

36 THE CHAIRMAN: But there is no automatic discovery in
37 Northern Ireland either, if I remember rightly, or it
38 always used not to be the case.

1 MR TIDSWELL: The impression that I have from the
2 information we have received is that there was a broad
3 discovery obligation. Whether it is done automatically
4 by order? There was some complaint. The material I have
5 been looking at is actually a Law Commission report into
6 that and there seems to be an issue that (inaudible) is
7 applied very broadly and is a great burden for litigants,
8 but of course relevance and necessity being components of
9 any decision-making process there as well. So we would
10 say that although indeed I take the Tribunal's point that
11 this is a question of Scottish recovery, we would say
12 that it should be done consistently if that is at all
13 possible, and in this case it is possible by looking at
14 relevance and necessity.

15 In this case what we have is a witness statement from
16 Mr Lawrie. That has three elements that I would like to
17 highlight. The first is that it annexes material as part
18 of the decision that has then been removed, so it is not
19 before the Tribunal. So the material that is part of the
20 decision that has been removed from the witness
21 statement. That is the 29 November letter and material
22 attachment to it which I will come to.

23 Secondly, it refers to material that on the face of
24 the statement did inform the decision-maker or, we say,
25 should have informed the decision-maker. That is the
26 Competition Commission report and the voluntary
27 assurances information.

28 Thirdly, it describes in some detail what appears to
29 be the primary tool which was used by the respondent to
30 reach its decision. That is a data base, the price cost
31 matrix, and that data base is not available to the
32 Tribunal either but it appears to have been the primary
33 tool, or at least a primary tool used to reach the
34 decision.

35 We say that in the light of all that and thinking
36 about those three categories of material, or three ways
37 of describing the material, and indeed the Tribunal's own
38 procedure, all of which are consistent, the issue is

1 reduced to two questions really. The first is, does the
2 material go to a relevant issue and, secondly, is it
3 necessary for the Tribunal to have it to deal with that
4 issue?

5 I wonder if I might take you to one case, which is in
6 the Respondent's bundle, which I have numbered as TP116.

7 It is the **Barts** case, the Hackney Borough Council case.

8 If I could ask you to read a short passage in that.

9 THE CHAIRMAN: It is annexed to TP116?

10 MR TIDSWELL: It is behind the OFT submission. I think it
11 is TP116.

12 THE CHAIRMAN: Yes.

13 MR TIDSWELL: The Tribunal may be familiar with this case.
14 It involved the closure of Barts. It is a question of
15 whether a proper decision had been made. I want to pick
16 it up at page 16 just above (B). What has happened here
17 is that the applicant applied to cross-examine. He has
18 also applied for discovery of documents. That was the
19 basis of the appeal. What the applicant says at 17(A) is
20 that the failures to obtain that disclosure and cross-
21 examination deprived him of his right to a fair hearing.

22 Then the question comes as to whether or not he should
23 have had that discovery, as it was in that case.

24 I would rather not read it unless you want me to. I
25 wonder if I could ask you to read from 17(C) where it
26 says "So far as principle is concerned ..." through to
27 (B) on page 20, where he actually describes fishing?

28 THE CHAIRMAN: "There is a solid bedrock of common ground
29 ...".

30 MR TIDSWELL: Indeed.

31 THE CHAIRMAN: Which is always an encouraging place to start
32 from. Forgive me, this is the judgment of Lord Justice
33 ...?

34 MR TIDSWELL: This is the Master of the Rolls of the time,
35 Sir Thomas Bingham.

36 THE CHAIRMAN: The test at page 20 is "have they raised a
37 factual issue of sufficient substance or adduced evidence
38 which grounds a reasonable suspicion of unlawfulness such

1 that the application cannot be fairly resolved without
2 discovery?" Is that the test?

3 MR TIDSWELL: Indeed, although I think the principles that I
4 would draw out of it are, firstly, that discovery can and
5 should be made in JR type proceedings. That would be my
6 first submission, which is clear from that case.

7 Secondly, that the test is, as indeed the Tribunal has
8 itself established, that of relevance and necessity,
9 necessity being fairly disposing of the proceedings.

10 THE CHAIRMAN: Where necessary for fairly disposing of the
11 application.

12 MR TIDSWELL: Indeed. I would make the point that "fairly
13 disposing of the proceedings" often has tacked on the end
14 of it, and it perhaps does not need to have in this case,
15 a question of saving costs.

16 Also, picking up the point on page 18(E) where the
17 challenge is not so much the decision itself as the means
18 by which it would reach, and that is making the point
19 that it would be unfair if the party raises a factual
20 issue, especially in a challenge to the means by which a
21 decision is reached, which is what we say we have here,
22 which the court concludes may not be able to be resolved
23 without documents.

24 THE CHAIRMAN: That is at 18(E)?

25 MR TIDSWELL: That is at 18(E).

26 Finally on that extract, I do not know whether my
27 learned friend would like me to go through the bit on
28 fishing - I suspect he will go to it himself - but at the
29 bottom of page 19 fishing is defined as being the hope
30 that there may exist documents that will give colour to
31 the assertions of the applicant, which is described as
32 the "unhappy event of fishing".

33 THE CHAIRMAN: "... no rational reason to suspect ...".

34 MR TIDSWELL: Precisely, Sir, and we would say that that is
35 quite helpful here in deciding whether or not there is
36 any fishing going on.

37 Just to finish the question of background, we make
38 the submission that there is no extra JR threshold that

1 applies in this case beyond relevance and necessity and I
2 understand at least the OFT to be saying the same thing.

3 Indeed if I could give you a reference. I do not want
4 to take you to it unless you would like me to, but the
5 reference, firstly in Mr Green's skeleton, is paragraph
6 38 where he summarises the Freeserve grounds of review.
7 He actually summarises it a little bit abruptly, because
8 he misses out some words. He says "the documents are
9 relevant to whether the decision is incorrect from the
10 point of view", and he goes on to list the reasons given
11 and the facts, the law applied, the investigation
12 undertaken, which is the point here. The words he misses
13 out are "incorrect or at least insufficient", and I
14 wonder if I might ask you to note that.

15 THE CHAIRMAN: "Incorrect or at least insufficient".. He did
16 say that.

17 MR TIDSWELL: Indeed. That is Freeserve at paragraph 114,
18 which is tab 2 of Bundle 2 of our authorities. I will
19 not take you to that unless you want me to.

20 THE CHAIRMAN: No, thank you.

21 MR TIDSWELL: If I could go on to look at relevance and
22 necessity in relation to the five categories. I wonder
23 if I might ask you to take Bundle 23 at tab 4. That has
24 a list of the five categories for disclosure. What I
25 would like to do, if I may, is to take those slightly out
26 of order. It might turn out to be more helpful to do it
27 that way.

28 I would like to start, if I may, with Category 2,
29 which is the 29 November letter. I think the starting
30 point for that is to see what Mr Lawrie said about it.
31 If I can take you to Mr Lawrie's statement at your Bundle
32 13, page 8. It is paragraph 25 where Mr Lawrie explains
33 that the Section 26 Notice was issued on 25 October and
34 the information sought. There are two bullet points
35 there: prices charged and then, under the second one,
36 the costs of supplying. Under the costs he details the
37 various points. If one were to run one's eye down that
38 subsidiary list of bullet points there is (1) costs,

1 depot costs, over the page, then trunking costs and dairy
2 costs, trunking costs of course being the costs of
3 getting the milk from the dairy to the depot. So there
4 are four categories there which one assumes he considers
5 to be the important information that that 25 October
6 request sought.

7 If I could take you to page 64 of the exhibit. If we
8 could have a quick look at that Notice. It is 64 of
9 RBL1.

10 THE CHAIRMAN: That is the Section 26 Notice.

11 MR TIDSWELL: Yes, this is the Section 26 Notice. If you
12 look over the page at 64 you will see a slightly longer
13 list, but the items that are identified by Mr Lawrie in
14 the statement are the first five - I to V on page 64. Of
15 those we have already items I and II. They have been
16 given to us and we will see shortly just how that comes
17 back to the OFT, but we have not had items III, IV and V,
18 and that is what we are after.

19 If I could ask you to jump over to 82 very quickly,
20 the Tribunal will see that that is the 29 November
21 letter. What is said there is in relation to items I and
22 II, which are in fact the ones we have got. "We will
23 give you those later", and indeed they do on 13 December.

24 Then over the page "information relating to trunking
25 costs is attached" and there is a short explanation about
26 that. "Dairy costs are attached and the price
27 information is attached", and there is quite a lot said
28 about the price information.

29 The first point that I would make about that is that
30 it was important enough. This material that came back,
31 items III, IV and V, or the trunking, dairy and price
32 information, was important enough to be annexed in the
33 voluntary disclosure letter requesting it, the letter
34 responding to it and half of the data that is requested.

35 So the run and depot costs have been annexed but not the
36 rest of it. I do not think it is a particularly
37 controversial proposition to say that in relation to both
38 predation and discriminatory pricing there is an issue in

1 this case about how the OFT has built up its costs
2 picture, dealing in particular with costs first, and what
3 it used that for. Mr Lawrie does explain what it did and
4 how it used the costs information in the paragraphs that
5 we have just looked at and it is very clear that the data
6 formed a very significant element in the decision that
7 the OFT made.

8 THE CHAIRMAN: I think in general terms, Mr Tidswell, the
9 issue for us at the moment is this. Express has now re-
10 pleaded its case and supported it with an expert's
11 report. The OFT has put in its defence. Wiseman, the
12 Intervener, has put in its statement of intervention,
13 equally supported with an expert's report, which joins
14 issue with your expert's report.

15 Are we now in a position to deal with the issues as
16 they now present themselves in those pleadings within the
17 context of an appeal of this kind - and there may well be
18 issues as to what kind of appeal this is - or do we
19 actually at this stage need yet further information in
20 order fairly to dispose of the appeal? That is more or
21 less how we are framing the question to ourselves, if
22 that helps you at all.

23 MR TIDSWELL: It does indeed. Really the thrust of where I
24 go today is that it would be possible to go ahead and
25 have a hearing, but what is clear from Mr Haberman and Mr
26 Bezant's reports is that there is going to be a fair
27 amount of satellite argument about what the right set of
28 numbers is to demonstrate any proposition.

29 THE CHAIRMAN: I think you need to try to make that good at
30 some point. What we need to know is how far we need more
31 than we have got. We have got quite a lot now - much
32 more than we had when we started, as it were. How far we
33 actually need in the sense of necessity more than we have
34 got in order fairly to deal with this case.

35 MR TIDSWELL: Yes, Sir. I certainly will try and make that
36 clear. I think it is in fact an illusion to suggest that
37 having three-quarters of the information gives us the
38 opportunity to deal with it properly. What it does is it

1 gives the experts an opportunity to argue about it and
2 because we have got a lot of information it does not
3 necessarily mean that we are in a better position than
4 not having much.

5 THE CHAIRMAN: Well certainly, speaking for myself, I cannot
6 pretend at this stage to be anywhere near on top of what
7 the issues on the merits are or are likely to be, but the
8 general impression that one has is that there are issues
9 as to the methodology that the OFT used. One question is
10 how far we need to get into detailed figures in order to
11 decide the arguments about methodology, putting it quite
12 neutrally at the moment, as to whether the test is a
13 reasonableness test or some other test or whatever the
14 test is. Have we got enough now in order to approach the
15 question of the OFT's treatment of the methodology
16 without having to go, as it were, more underneath the
17 methodology into the detail? That is the question - or a
18 question.

19 MR TIDSWELL: I understand Sir. That is very helpful. One
20 could approach this by saying, as indeed perhaps the OFT
21 will, it is enough to know that there is a methodology
22 issue and to argue about it in the abstract without any
23 numbers, but I think that is going to be very very
24 difficult.

25 THE CHAIRMAN: If you can develop that submission, that would
26 be helpful.

27 MR TIDSWELL: Thank you Sir. I shall try to do that.

28 In relation to where we are with the amount of
29 information that we have actually got, the peculiarity of
30 our situation is that we have part of the jigsaw but we
31 cannot really see what the picture is because we have
32 only got part of it.

33 THE CHAIRMAN: Well Mr Haberman has been able to do a report
34 and on the basis of that report he has been able to
35 arrive at certain views.

36 MR TIDSWELL: Indeed.

37 THE CHAIRMAN: He says he wants to check it, but let us
38 assume, for argument's sake, that his approach is a

1 tenable approach.

2 MR TIDSWELL: The difficulty is that then Mr Bezant comes
3 along and says "No, you have misunderstood the numbers;
4 you are using the wrong numbers and they are taken from
5 the wrong sources; you have not asked the right
6 questions."

7 THE CHAIRMAN: If you can take us to where there is an issue.
8 What we want to find out is where we have got issues
9 which depend on the actual numbers as distinct from
10 issues that depend on competing theological schools of
11 thought as to how one should look at the numbers.

12 MR TIDSWELL: Indeed, Sir. I will do that.

13 THE CHAIRMAN: Forgive me. I keep taking you out of your
14 stride.

15 MR TIDSWELL: No, that is very helpful, Sir. Just before I
16 do that, if I may show you one other bit of information
17 while we have got Mr Lawrie in front of us. If I could
18 ask you to look at pages 146 and 147 of his exhibits.
19 What we have here are two pages of some sort of
20 management accounts produced on a depot basis.

21 THE CHAIRMAN: These are the pages that we have got in blank,
22 are they?

23 MR TIDSWELL: They should not be in blank.

24 THE CHAIRMAN: In the version that I am looking at - they may
25 have changed since volume 13 was put together - but in
26 our volume 13 these pages are still blank. We ought to
27 go back to volume 12 for a fuller version.

28 MR TIDSWELL: The Tribunal will see in the top left-hand
29 corner the depot to which this information relates, in
30 the first case Manchester and the second is Edinburgh.
31 These were supplied by Wiseman to the OFT quite late in
32 the process. There is a covering letter just before it
33 which explains that. But the point that I wish to draw
34 from these is that if one looks down the left-hand
35 column, which lists what sort of information is in here,
36 one can see that there is in fact information about
37 trunking in here and there is information which deals
38 with dairy costs, which are attributable to, as I see it,

1 the costs of sales which are applicable to this
2 particular dairy. The point here is that the bit of
3 information we have not been given is the general
4 information about trunking and dairy costs in relation to
5 costs. I will come to price, if I may. But in fact we
6 are now getting in another way a little slice of
7 information about those subjects, but not in relation to
8 the Keith Depot, which is probably the most interesting
9 depot. What does not seem to have happened is that this
10 bit of paper was produced for the Keith Depot. If it
11 has, we have not seen it. We suspect that the OFT did
12 not ask for it and has not got it. But if it is being
13 said that you should not have dairy information in
14 relation to cost of sales for trunking information where
15 it has been recharged here, that does seem at odds with
16 at least a little slice of information for other depots
17 being provided. It all goes to the point that I have
18 probably inelegantly made before, which is that we have
19 been given little bits of information around the place
20 about various different parts of the costs operation, but
21 no way of looking at that and seeing if it makes sense,
22 because it is incomplete.

23 THE CHAIRMAN: So according to you we all have to be very
24 careful about actually mentioning any figures in this
25 case obviously?

26 MR TIDSWELL: If I could ask the Tribunal. I am certainly
27 not going to mention any.

28 THE CHAIRMAN: I am only saying that to remind myself.
29 According to you the line on these documents, which
30 relate to Manchester and Edinburgh, the total cost of
31 sales is likely to include raw milk costs and other
32 elements of that sort.

33 MR TIDSWELL: That is certainly what I would understand,
34 because it then produces a gross margin figure and that
35 seems to me to be what they must be doing.

36 THE CHAIRMAN: Yes. As far as trunking costs are concerned,
37 they are wrapped up in operation costs.

38 MR TIDSWELL: They appear to be down the bottom there as a

1 recharge.

2 THE CHAIRMAN: I see there is a trunking recharge, yes. We
3 are not quite sure what the trunking recharge is, but
4 there is something which says "trunking recharge".

5 MR TIDSWELL: I am not quite sure what it is either, but I
6 suppose - and perhaps that is not a very sound basis to
7 proceed on - that what it is is the depot being charged
8 its share of the trunking costs of getting the milk
9 there, so the depot's operations can be looked at.

10 THE CHAIRMAN: And similar information is not available for
11 Keith, as far as we know?

12 MR TIDSWELL: It does not appear. One assumes it must have
13 existed. The OFT basically say in their response that it
14 is irrelevant to management accounts and how costs are
15 accounted for by Wiseman. They do not seem to have asked
16 for the Keith information like that, which we say would
17 have been quite helpful. But the point, for particular
18 purposes, is that again we have got all sorts of bits of
19 information, including some trunking and dairy costs, but
20 for some reason the 29 November letter, which completes
21 the picture and makes it essential, is missing.

22 Can I take your invitation to try and make good some
23 of the points about Mr Haberman and Mr Bezant? I wonder
24 if I could start with Mr Bezant. If we could turn to
25 Bundle 21 and page 11, paragraph 3.22.

26 Mr Bezant starts talking about the analysis of
27 Wiseman's operating costs. He says he sets out an
28 analysis below and over the page and then over the page
29 there is figure 1. I think this has been removed from
30 the non-confidential versions so you should treat this as
31 confidential. You will see there is a breakdown. It
32 gives percentages to the various aspect of activity
33 carried out.

34 What he says in 3.23 is that the information comes
35 from a CC report, indeed the Edinburgh Depot management
36 accounts, which we have just been looking at. Then there
37 is some other information about run cost and depot costs.

38 Mr Bezant then goes on in his report at page 27,

1 which I do not think I need to take you to unless you
2 would like me to, to engage with Mr Haberman about the
3 treatment of costs and particularly the two big issues,
4 which are variability of costs - what is fixed and what
5 is variable - and the allocation of costs as between
6 markets and customers. There is in fact a disagreement
7 at 7.17 on the way trunking costs should be dealt with. I
8 do not think I need take you to that, unless you would
9 like to see it.

10 The problem with all this is that neither Mr Haberman
11 nor Mr Bezant actually know what the costs are. If one
12 were doing this for the Keith Depot, which is probably
13 the most interesting depot for the purposes of this case
14 because it serves the Highland runs which are obviously
15 the centre of a lot of the argument, nobody knows what
16 they are. Nobody knows what that information is - or at
17 least nobody who is capable of commenting on it in an
18 expert's report.

19 THE CHAIRMAN: So it is the relevant costs in relation to
20 Keith that you are particularly focusing on?

21 MR TIDSWELL: Precisely. It is pretty clear that there is
22 going to be an argument between Mr Bezant and Mr Haberman
23 about whether it is useful to use Edinburgh figures in
24 here or whether he should be using Keith figures and how
25 they might differ. For example, one might well argue
26 that there will be higher trunking costs in Keith because
27 it is further away from a dairy, or that the run costs
28 are likely to be bigger because there is much greater
29 distance to be covered from that depot to make the runs.

30 I wonder if I could just make that good? If you
31 would look back at Mr Lawrie at page 21 of the exhibits.

32 What we have here is Table B. Sir, this is the answer
33 from Wiseman to some of the depot costs' information.
34 Again if I could ask you to look at the top couple of
35 lines. I will not mention numbers again, if I may, but if
36 I could ask you to look at the first column, which is the
37 Keith Depot. Then cast across the second to last column
38 which is Edinburgh. The first two lines show "total

1 depot cost" and then under that "costs accounted for by
2 runs from depot". The relationship between the first and
3 second lines appears to be how much of the depot cost is
4 actually run cost.

5 THE CHAIRMAN: One as a percentage of the other is rather
6 different for Keith than it is for Edinburgh.

7 MR TIDSWELL: Precisely, and it supports the suggestion
8 that run costs in Keith may well be quite a burden, on
9 matters of profit, compared with Edinburgh. One can see
10 that Mr Haberman might fairly say to Mr Bezant "you have
11 got the wrong numbers and we need to try to rework
12 those", but, of course, we have not got the right
13 numbers. It is, in our submission, not a sensible or
14 efficient way to dispose of these proceedings by having
15 those experts arguing about what I would call satellite
16 points. What they should be doing is agreeing that table
17 in relation to Keith Depot so that the Tribunal has the
18 benefit of an agreed position on costs. When they come
19 to talk about allocation and say, for example, if one
20 were to use a different table of allocation, it might
21 change the variable run cost percentage from X to Y and
22 how much difference that would make.

23 THE CHAIRMAN: Forgive me for not being totally on top of the
24 detail here, Mr Tidswell. What is it that you need that
25 is not given to you by 115? You can look at 115. You
26 have got an item which says "costs accounted for by runs
27 from depot".

28 MR TIDSWELL: I think the point is that it is the whole
29 basis of this figure 1. It is, on the basis of the
30 information we have got, impossible to create a figure 1
31 diagram so that the Tribunal can see just how important
32 each element of cost is and how significant a change
33 would be. It is impossible to do that for Keith unless
34 one has the information. That is bound to be a point
35 which is going to come up. We are going to say had they
36 included some costs, which the OFT say were fixed as
37 variable costs, then that picture changes. Similarly we
38 are going to say that if they are allocated by some

1 method other than volume when they were looking at the
2 run costs - instead of allocating costs to the big
3 supermarkets they looked at the actual cost of driving
4 out to the far middle ground customer - how is that going
5 to affect their picture? We would say that that is
6 helpful to the Tribunal. The Tribunal ought to know what
7 the various components of cost are for Keith, including
8 the run costs and how that compares with other fixed or
9 variable cost and what is unhelpful for the Tribunal, we
10 would say, is to have the experts arguing about what the
11 model is, let alone what the implications are.

12 THE CHAIRMAN: Thank you.

13 MR TIDSWELL: We say it would be much more sensible, would
14 save costs and time and would clarify the issues to give
15 the 29 November information to both experts as soon as
16 possible and to let them absorb that, meet, because we
17 suggest that there may well be some advantage in having
18 the experts meet and working out where they really
19 disagree, which they ought to be able to do if they are
20 working off the same information as the information the
21 OFT used, produce a note for the Tribunal on where they
22 agree and disagree and, where they disagree, what the
23 significance is.

24 THE CHAIRMAN: But when you say the information in the 29
25 November letter, are you talking about Keith?

26 MR TIDSWELL: I am talking about all of the cost information
27 and also the price information.

28 THE CHAIRMAN: So far we have been on costs. We have not got
29 to price.

30 MR TIDSWELL: Indeed. But what I am submitting is that it
31 is desirable to have complete information in the hands of
32 experts so they cannot argue about what is missing and
33 what is or is not relevant in the missing data, to have a
34 set of data which is the same as the set of data which
35 the OFT had and not to be able to argue whether something
36 is missing or whether it matters. We are certainly happy
37 to proceed with an experts' meeting and indeed suggest to
38 the Tribunal that it would be advantageous. Having seen

1 Mr Bezant's report, it would clearly help the Tribunal if
2 there were able to be a list of points on which agree or
3 disagree on in relation to that. They are both well
4 experienced experts and ought to be able to deal with
5 that. That is costs.

6 If I can move on to pricing, unless you would like to
7 pick anything else up?

8 THE CHAIRMAN: No.

9 MR TIDSWELL: There are two points really. The first is
10 that if we are right and costs are and can be
11 demonstrated to be understated, then it is obvious that
12 the relationship between the prices, and particularly
13 prices for particular customers and particular areas, and
14 costs become very relevant. Indeed, you may have seen at
15 some stage (I will not take you to it unless you want me
16 to) that the Competition Commission did in fact carry out
17 a sensibility analysis on their costs with prices in
18 several places to look and see how that relationship
19 worked.

20 The OFT do that as well, but they do so, we would
21 say, rather crudely by what they call a high and a low
22 proxy. That is Mr Lawrie's statement at paragraph 42.
23 He talks about his high and low proxy and feeding those
24 proxies into his analysis.

25 We suggest that it would be helpful for the Tribunal
26 to know at the end of the process what the relationships
27 between costs and price were if we can show costs were
28 'X' per cent higher than the OFT reached a year on.

29 THE CHAIRMAN: If you, for argument's sake, were to undermine
30 the OFT's approach to costs, would you need to know the
31 pricing information? Would that perhaps not get you over
32 the hurdle that you need to get over to secure the
33 remittal back?

34 MR TIDSWELL: Well it might do, but we also think that the
35 Tribunal might be helped by knowing how much it mattered.

36 If, for example, it was an increase in price by a small
37 number of percentage points, which is possible, that we
38 were able to demonstrate was a likely better view of

1 costs, the question then becomes, "in this industry does
2 that really matter?" You have probably picked up that we
3 say it is a very low margin industry and these things do
4 matter. But the pricing information, we say, will help
5 the Tribunal decide whether there is any point in sending
6 it back.

7 There is a further point, which is a smaller point.
8 One could do that at a general level with some of the
9 information we have got, but there are some points in
10 relation to smaller customers aggregated together. In Mr
11 Lawrie's statement particularly you will recall there are
12 a set of graphs and maps and in that information there is
13 a line of customers who are called the "A" customers and
14 the "B" customers. It is difficult to work out how many
15 there are in there. There are maybe several hundred
16 customers and they are aggregated together. If one were
17 actually looking to see whether there was any evidence of
18 price discrimination, for example, in relation to those
19 customers, it is impossible to do that as it is
20 aggregated in the material in front of the Tribunal. In
21 other words, while the Tribunal might take a view from
22 some of the maps and graphs about the general line of
23 prices in relation to some of the smaller customers where
24 there are certainly instances evidenced in the
25 applicant's case about challenging some of the prices, it
26 is impossible to do that because of the way they are
27 aggregated.

28 I wonder if I could take you to Mr Haberman on the
29 point of revenue. He is in your Bundle 19. I would like
30 to do a similar exercise in relation to costs. It is
31 paragraph 5.106.

32 What he does there is he goes through and does his
33 best in relation to looking at the revenue side, his
34 pricing, to see whether he can find some evidence of
35 anomalies or peculiarities which suggest price
36 discrimination and he says in 5.106 that he has found
37 that quite difficult because he has not got the pricing
38 information but he does his best. He picks out things

1 which suggest patterns of pricing anomalies which might
2 suggest discrimination and, for example (in 5.108) if you
3 have got places which are much closer to depots.

4 THE CHAIRMAN: Yes. You have to be careful here about
5 figures, don't you?

6 MR TIDSWELL: Precisely. But higher prices, and that seemed
7 pretty peculiar. He also goes on to say that the pricing
8 analysis, at least as far as he sees, seems to have been
9 fairly simple.

10 The point in particular here was that where he gets
11 to his summary in 5.113 and having tried to show in a
12 couple of graphs there that there are some price changes
13 which are quite odd, he says, "As far as I am able to
14 tell from limited data whenever it was provided I
15 actually failed to analyse the prices charged by Wiseman
16 (reading from document) evidence of discriminatory
17 pricing to identify evidence of exclusionary pricing in
18 contracts with specific customers". Of course, the
19 pricing point goes to the all Scotland arguments as well.

20 That is his best attempt on the price information he
21 has got to look at peculiar pricing patterns.

22 Mr Bezant comes back on that. It is at paragraph 9.9
23 of his report. I can take you to it if you would like me
24 to, but in general what he says is that there could be
25 other reasons.

26 THE CHAIRMAN: I think we would like to look at it.

27 MR TIDSWELL: It is on page 39 of Bundle 21. He is talking
28 here, just under the heading "My comments and Mr
29 Haberman's position", about the anomalies. He talks
30 about some of the geographic anomalies. He says, for
31 example, in 9.12: "In this light the anomalies that Mr
32 Haberman cites may have a simple explanation as it
33 appears that price patterns are to be expected in the
34 dairy industry." In fact, he looks in 9.13 at the
35 example that I have just referred to and he says, "This
36 could be explained by, for example, the presence of
37 national change, taking larger volumes at lower prices
38 and one post code and not the other." The trouble is

1 that he does not know the answer to that and neither does
2 Mr Haberman, but if they had the pricing data they would
3 know what sort of pricing occurred in that area. There
4 is once again an opportunity for Mr Haberman and Mr
5 Bezant to disagree on the significance of pricing
6 patterns, when they do not actually know what they are,
7 expect in very general terms and they certainly do not
8 know what sort of customers they relate to or what the
9 significance of those customers being priced like that
10 is. I should note at this stage that in our request for
11 further particulars we did ask for information which
12 would help us to understand how these anomalies arose and
13 the respondent declined to provide that.

14 What we had, we say, is the same problem, which is
15 that we are going to have Mr. Haberman and Mr Bezant
16 arguing about what may be, based on secondary sources of
17 information and that is something that we can avoid. I
18 should remind the Tribunal that the OFT did find that
19 there was price discrimination. (That is Mr Lawrie at
20 64). They also found that there is an excessive mark-up
21 for smaller customers in 66. They found negative price
22 cost relationships in seven sectors. (RBL 49). They say
23 that in each of these cases they looked at the data and
24 they did not find a pattern.

25 I did not have anything further to say about pricing,
26 unless you would like me to explore it further?

27 THE CHAIRMAN: Thank you.

28 MR TIDSWELL: I was going to move on to the price cost
29 matrix, if I may, which is in our letter the third item.

30 In relation to the price cost matrix I do not want to
31 say an awful lot because a lot of the points that I have
32 made are the same as the 29 November material. We are
33 talking about key information for the decision. Perhaps
34 I might briefly show you what Mr Lawrie says in paragraph
35 21 of his witness statement. In paragraph 21 he talks
36 about a data set, which is the information he received,
37 and then in 22 he says, "We need it to devise a way of
38 obtaining cost and price information (reading from

1 document) to produce robust conclusions." Then in
2 paragraph 30 he talks about the price cost matrix
3 directly. He says, "From the information provided by
4 Wiseman the price cost matrix compiling information was
5 created." That is the document we talked about. I
6 understand that it is a document on a database. It talks
7 about what was in it and he says, "Substantial
8 spreadsheet computations were carried out ...". We say
9 it is substantially the means by which the decision was
10 reached. We say that this is a case about the
11 relationship of cost and price and the way that the OFT
12 approached their assessment and analysis. That is
13 Freeserve looking at the investigation. Clearly the OFT
14 relies on the output of this and all the maps and graphs
15 that we have got at page 116 of RBL to justify their
16 decision. We say the relevance is very clear. I do not
17 think that that is challenged by the OFT or Wiseman. It
18 is really a question of necessity. I do not want to
19 repeat what I have said.

20 THE CHAIRMAN: If one was looking at the price cost matrix
21 from the perspective of proportionality, this is a lot of
22 very detailed and pretty extensive information.
23 Certainly the question in our minds is whether this
24 information really is necessary, albeit perhaps relevant.

25 MR TIDSWELL: I think if Mr Haberman were here he would say
26 --

27 THE CHAIRMAN: I know all experts always want to have as much
28 as they can. (laughter)

29 MR TIDSWELL: He might have advanced that argument, but I
30 was not going to articulate it. If he was here I think
31 he would say 'if you give me a whole lot of data, the
32 easiest way to give it to me is in a database, because
33 otherwise I have to put it into a database myself or try
34 and make do without it'. Really all we are talking about
35 here, at least at one level, and we do not know what is
36 in this price cost matrix, but why we want it is that it
37 is a nice convenient way of summarising the information
38 the OFT received. What I am not suggesting is that the

1 experts should rush off and start doing masses of
2 analysis and produce all sorts of things.

3 THE CHAIRMAN: But is not the danger that that is going to be
4 the next step, as it were? The more stones one lifts up,
5 one finds something under the stone and then there is
6 another stone under that and then one wants to lift up
7 that, and on we go.

8 MR TIDSWELL: That is something that is obviously a
9 possibility but it is not what the applicants say they
10 want it for.

11 THE CHAIRMAN: No. So they say they want this for what
12 exactly?

13 MR TIDSWELL: We would say we want it because it is a
14 convenient summary of the cost and price information that
15 was received and which we say we should have in relation
16 to the 29 November letter. That is why we want it.

17 Where, for example, the OFT says 'there is no need to
18 re-run the investigation', well we do not want to re-run
19 the investigation, but we have been told by the OFT that
20 we must show a serious error in methodology. That is in
21 the defence at 36 and 37. We also say that it is pretty
22 unattractive for the Tribunal to have no idea what the
23 effects of the error might be. We agreed that it was
24 helpful for the Tribunal to know what the effects of all
25 this is. We say that it is not possible to do this
26 without some figures and there is no point doing it on
27 figures that are not the right figures.

28 I think it is important that we are not trying to
29 create a new set of figures that would demonstrate an
30 infringement. That is not the Applicant's case. We
31 realise that the position which the OFT got itself to is
32 not one where it is possible for us to say 'here is the
33 material and here is an infringement; you should find
34 it'. We are clearly not saying that. What we are trying
35 to do is to show that when they got the material they
36 used it in a way that was peculiar and that was
37 unreliable. It is quite difficult to do that without the
38 numbers.

1 If I can move on to the next category, which is the
2 Competition Commission material. The easiest way to do
3 this, if it is convenient, is to have a look at our
4 letter of 16 April, which is at tab 4 of Bundle 23. It
5 is appendix 1, which is on page 9. What that does is set
6 out what the missing information deals with. If one is
7 looking at the paragraph numbers you can tell what part
8 of the document it relates to. The paragraph 2 series is
9 from the conclusion, so that is summary information and
10 in fact it repeats some of the later information. 3 is
11 focusing mainly on costs and 4 deals with pricing and
12 discrimination to a large extent, not exclusively but
13 that is the general trend of the material. I am not sure
14 if the Tribunal has had an opportunity to look through
15 this, but I would invite you to run your eye down, for
16 example, page 10 to see what sort of information it is
17 that is set out in the report. I could take you to the
18 report but I am not sure that it adds much beyond the
19 summary here. We are dealing with things like
20 distribution costs. That should be in the third line of
21 3.81. I think that should be "distribution costs by
22 depot" in the second to last line. "An analysis of
23 processing and distribution costs, including processing
24 costs by dairy, distribution costs by depot", I think
25 that should be. It obviously goes right to the heart of
26 the question of whether or not the OFT got their analysis
27 right on costs and on predation. Indeed if one looks
28 over the page at the material there, which deals with the
29 trend of prices, it goes to the heart of the question of
30 price discrimination. As the Tribunal knows, we say (Mr
31 Haberman in particular) the OFT did not get it right,
32 because we say they relied on an allocation of costs by
33 volume that skewed costs within runs and between markets,
34 between the middle ground and supermarkets.

35 THE CHAIRMAN: On that particular point, that the allocation
36 of costs by volume has skewed the result, to what extent
37 is that an issue that we can tackle without needing to
38 know the detail of the underlying information?

1 MR TIDSWELL: I think as a matter of principle you can
2 tackle it without any numbers at all, because the point
3 we make is that when you think about it as a matter of
4 principle it is a pretty odd thing to do. If you have
5 got a supermarket first on the drop and you have got six
6 other drops middle ground, the bulk of the volume goes
7 into the supermarket but the costs are being allocated in
8 there as well, when if you drop the supermarket out you
9 still have the costs of the run, so that is a point of
10 principle in a way.

11 THE CHAIRMAN: Yes. If you were right on that point, we
12 would not need the underlying detail and if you were
13 wrong on that point similarly the underlying detail would
14 not help us either.

15 MR TIDSWELL: Well only to the extent that if we go back to
16 Mr Bezant's bar graph, or however everyone describes
17 that, his figure 1, it is helpful to see what the effect
18 would be on the overall cost structure. If the Tribunal
19 wants to know at the end of that exercise whether it
20 makes any difference, which is what the OFT say the
21 Tribunal has got to consider, then it is going to be
22 important to know what the numbers are.

23 THE CHAIRMAN: So that comes back again to figure 1 of Mr
24 Bezant in relation to Keith, as distinct from Edinburgh.

25 MR TIDSWELL: That would apply to that as well but it would
26 apply more generally. For example, one of the things we
27 say is that it would have been a much easier exercise to
28 look at the Highlands, in our estimation, rather than
29 doing masses and masses of analysis over all of Scotland
30 and dealing with it.

31 THE CHAIRMAN: It would appear that the OFT did a very
32 extensive look at everything.

33 MR TIDSWELL: Really that leads one back to a woods for the
34 trees argument, about whether that is actually a sensible
35 way when you have got a situation where there is an awful
36 lot of estimation that necessarily needs to take place to
37 get the information in the first place. Then you start
38 adding into that methods of allocation, which have an

1 inevitable distorting effect, we say, and you are left
2 with a set of information which is really not very
3 useful. That is the point. I think the question is how
4 far away from being useful is it? That is the point of
5 the numbers. One can establish in principle but one is
6 still left with the difficulty that you do not really
7 know whether it is significant or not. The same point in
8 relation to missing out costs and the allocation between
9 fixed and variable costs.

10 What we do know is that Mr Lawrie says that the OFT
11 used cost in the CC report to check the reliability of
12 his proxies and he had his high and his low proxy in
13 relation to fixed and variable cost. That is worth
14 having a look at. It is on page 15 of Mr Lawrie's
15 statement. It is footnote 8. He says there that 'in
16 order to check whether we have a measure of costs giving
17 a reliably close approximate of costs we compare the
18 measure of costs in the CC report with the equivalent
19 measure as calculated from the information that came from
20 Wiseman'. He says that he looked at data in para 4.342
21 in relation to a particular client. The interesting
22 thing about that, and indeed it is perhaps a point that
23 we need to go back, is that we have in fact had this
24 information. I am sorry if we have not made that clear.

25 But in a departure from principle, in fact the OFT has
26 given us the material that Mr Lawrie is talking about
27 here. That is right at the very back and I suspect it
28 may have come a little bit later, like the material we
29 looked at before. It may be in the earlier rather than
30 the later Lawrie version. It is page 150 and 151 of Mr
31 Lawrie's exhibits. What we have here is an unredacted
32 version of the CC report and it is very helpful. We have
33 got two pages of material which do allow us to look at
34 what Mr Lawrie says he did and for Mr Haberman and Mr
35 Bezant to have an informed discussion about it. That is
36 an area where we hope issues are crystallised and they
37 are able to reach at least an agreement about what they
38 disagree on. We think that is helpful. What we do not

1 understand is why we are restricted in having access to
2 that sort of material where it would be helpful
3 elsewhere. It is the case that Mr Lawrie uses the CC
4 findings elsewhere. If you look at paragraphs 55 and 56
5 he says, "When you look at our starting point, the CC
6 report [this is on targeted discriminatory pricing] the
7 CC concluded Wiseman goes to price discrimination". Then
8 he talks about what the CC did and found. He goes on in
9 56: "It is clear from the CC findings that extensive
10 price differentials are observed. It does not provide
11 clear and compelling evidence." Then two pages over at
12 page at 64 he talks about their finding at 64, "In
13 conclusion we found evidence of price discrimination" and
14 then he says, "In our view these findings were more
15 robust than the CC's conclusion." That is effectively
16 using this part of the decision.

17 I wonder if I might take you to the CC report,
18 because if one looks at it one can see the sort of
19 information, the sort of usefulness that comes out of it.

20 I think it is your Bundle 2. There are two particular
21 passages. The first one is at Chapter 4, 4.324.

22 THE CHAIRMAN: It is tab 12, I think.

23 MR TIDSWELL: It is paragraph 4.324 at page 139. What the
24 CC is doing here is looking at the differential in
25 pricing between middle ground and supermarket customers
26 and also the differential as between depots. If one
27 turns over the page at 4.324 what you get here is a
28 description of how that differential changes. I am
29 particularly looking at the Keith Depot in 4.324 and
30 4.325 and following paragraphs. What they are saying is,
31 if you look at the Keith Depot how does its pricing
32 compare at the time with the pricing in supermarkets and
33 other depots and they find that it at fault, or at least
34 it appears to be. If you look at the last sentence of
35 4.324, "The differential fell by ..." and we are not
36 allowed to know how much. Then it is looking at
37 "Customer Groups" in 4.325. We think that is pretty
38 helpful information and it is not an exercise that the

1 OFT appears to have carried out at all. It would be
2 interesting, we think, for the Tribunal to see, if one
3 was standing back and looking at the woods rather than
4 trees, that there were some indications of things the
5 Tribunal might think the OFT should have been thinking
6 about.

7 THE CHAIRMAN: So 4.324 through to ---

8 MR TIDSWELL: There is a table, 4.16, which is a summary of
9 the differentials between supermarkets and middle ground.
10 It is really through to 4.329.

11 THE CHAIRMAN: What about the rest of the stuff in the CC
12 Report? Again I am getting the impression that you are
13 focusing particularly on the Keith Depot, which is 4.324
14 down to 4.329 but there is a lot of other stuff you are
15 asking for in relation to CC.

16 MR TIDSWELL: Well there is. It is all set out in the table
17 at appendix 1 and we say it does all go to a ground in a
18 revised notice.

19 THE CHAIRMAN: We can work through it.

20 MR TIDSWELL: I think I can perhaps summarise it by saying
21 the material in section 3, which is on page 10 of the
22 table, is all about the allocation of costs and
23 particularly about how fixed and variable costs should be
24 treated. It is helpful as an overview. There are things
25 in there which are quite helpful like, for example - it
26 is the trunking costs' point again - there is an
27 observation about trunking costs if you look at that
28 table. Perhaps I should take you briefly to that section
29 and have a look at it while we have got it out. If we
30 can go to 3.74 in the CC Report. It is at page 60.
31 Perhaps just turning the pages there is an analysis of
32 the Scottish operations.

33 THE CHAIRMAN: These are the Scottish operations as a whole?

34 MR TIDSWELL: Precisely. It starts here looking at them as
35 a whole. That is not information we have got. Indeed Mr
36 Haberman estimates some of that when he deals with
37 working out roughly what the cost of their operations
38 might be. Then it goes on to product type over the page

1 and the volumes for fresh processed milk sales. Then it
2 gets into an analysis of the actual costs, and so on. At
3 page 62 it is talking about processing and distribution
4 costs by dairy. Again we have got that information.

5 Abeness I think is Keith. I think that is right. They
6 do not necessarily call them the names that we call them.

7 It is talking about packaging costs in 3.83 and whether
8 they are variable or not. Over the page at table 3.14
9 distribution costs by depot. Actually there is a Keith
10 there. Perhaps I am wrong about packaging costs. I am
11 sorry. We are talking about dairies in table 3.15. That
12 is my fault. I have got confused.

13 THE CHAIRMAN: Do you need 3.13?

14 MR TIDSWELL: Well we would not need it. I think it is fair
15 to say that it would not be nearly as helpful to us if we
16 had the 29 November material. Clearly if you are going
17 to give us the 29 November material, then some of the
18 material we see in this costs section is a fallback. It
19 provides something of a benchmark to give you some idea
20 of what the costs might be if we are right, what sort of
21 range of costs we are talking about. But there are also
22 things in here which provide cross check opportunities
23 which Mr Haberman says should have been carried out which
24 we would like to show you if we had the numbers to
25 compare different elements of what the OFT did with what
26 the CC did and to say 'well, there is obviously a
27 difference and we think we can account for it'.

28 The point about trunking is on page 67. On 65 one
29 sees there is a sensitivity analysis in relation to
30 variable cost proportions.

31 THE CHAIRMAN: I do not know if you can answer a question of
32 detail of this sort, but if you look at page 63,
33 distribution costs by depot, is it the case that we
34 happen to have Edinburgh? We have also got Manchester,
35 but they are not in the table because they are not in
36 Scotland, but we happen to have Edinburgh.

37 MR TIDSWELL: That is the position. We do not know why we
38 have not got Keith but it would be jolly helpful if we

1 did. It is too late to do that now because obviously the
2 OFT did not ask for it and we cannot ask for it now.

3 MR CLAYTON: But I think the costs on this table are
4 actually for four years, are they not, whereas the
5 management accounting costs are just for one month. The
6 information is not the same.

7 MR TIDSWELL: That is absolutely right.

8 I do not want to take you through all of it, but the
9 point I mentioned about trunking is on page 67 (this is
10 3.101) and there is a big difference in the way the OFT
11 approaches trunking costs, treating it entirely fixed,
12 and the way that the CC treated it. Here we have the
13 information which tells us how much that matters. We can
14 find out what the likely cost is for trunking. Similarly
15 over the page at 68, 3.106, "Cost of Capital". I think
16 we have actually got all we need on that, to be fair.
17 That is probably not a good point. But there are lots of
18 little bits of information here where the CC has gone
19 through an exercise of looking at the costs more in a way
20 that Mr Haberman says should have been the starting point
21 for the OFT and reached some rough benchmarks. We say
22 they are useful for the Tribunal and for us to
23 demonstrate what those benchmarks might relate to where
24 the OFT got to.

25 THE CHAIRMAN: What I am trying to get at, Mr Tidswell, is
26 not so much whether this, that and the other would be
27 useful, but what, in your submission, is the irreducible
28 minimum which is necessary in order to do justice in this
29 case? What are the must-haves that you say are among all
30 this information? I know you do not want to cut down
31 your request, but there must be within the request - and
32 from time to time you have indicated certain figures that
33 are more important than other figures, or more central to
34 the argument than other figures - and I want to get some
35 feel for what is really necessary, if I can put it like
36 that, in your submission.

37 MR TIDSWELL: I understand that, Sir. The difficulty with
38 that approach is that it leads one back to the question

1 of what is fair for the Applicants. What I think I am
2 saying is that the Applicants would like to be able to
3 make a point about what is fair.

4 THE CHAIRMAN: You do not know the information yet so you say
5 it is a bit difficult for you to rank it in order of
6 fairness?

7 MR TIDSWELL: Precisely. Indeed if we had the information I
8 would hope that we would responsibly identify what was
9 useful, make use of that in a sensible way and discount
10 the rest.

11 THE CHAIRMAN: I see.

12 MR TIDSWELL: There is one further point. If I may take you
13 to one further place in this report, which I think is
14 interesting on that theme. If you would not mind going
15 to 4.350. It is the last reference in here.

16 This is a section talking about particular customers
17 and there has been an analysis by the CC of the net
18 prices charged to the three customers. We have looked at
19 already pages 146 and half of 147, which is the
20 particular customer cross-check which was carried out for
21 Mr Lawrie's statement. What is striking about this is
22 that if one then goes on you can see, starting halfway
23 down page 147 at 4.350, another customer there and then
24 two more customers on 148. There is a big chunk missing
25 in relation to Abeness at 4.354, but if one looks at
26 4.355 the Commission says, "Based on its own figures last
27 year (reading from document) and particularly the
28 Abeness accounts". That is the stuff we have not got.
29 We do not know what that says. Then further down,
30 "Wiseman said that CWS (reading from document) only the
31 Abeness account did not generate a small contribution
32 after applying for its costs."

33 You asked me how important is it for us to have that.
34 Well, it seems to us to be quite important. It may turn
35 out not to be, but it is a pretty striking conclusion and
36 it would be very interesting to see that information.
37 Abeness is barely mentioned by Mr Lawrie (I think it is
38 mentioned once) in relation to development and

1 exclusionary contracting but, as far as we can see, there
2 is no evidence whatsoever that this point about Abeness
3 is picked up and studied by the OFT.

4 Again it comes back to the question of whether the
5 way they did it, by getting into a very detailed
6 examination of the whole of the figures, is a sensible
7 way to deal with it when one is able to go back to the CC
8 report and see that there are a number of bigger picture
9 indicators that show problems. That is the value of the
10 CC report. That is all I was going to say about the CC
11 report.

12 If I can move on very quickly to voluntary
13 assurances. I do not want to add much to what is said in
14 the 16 April letter. The critical point here is that in
15 paragraph 12 of the response the OFT said that the
16 voluntary assurances data could be used for cross
17 checking and they said that it "appeared consistent". It
18 is not really clear what that means, but it seems to us
19 to be at least a suggestion that some exercise was
20 carried out at the time and therefore some reliance is
21 placed on the voluntary assurances information.

22 As I read the OFT's submissions on this, they say at
23 paragraph 40 of their submissions that in relation to the
24 CC they won't rely on information not given to us, which
25 is not a very helpful concession by them. But I do not
26 think at least, and I will be corrected if I am wrong
27 about this, that they have said the same thing about the
28 voluntary assurance. I think they are saying at
29 paragraph 12 of the response that it was used as a check,
30 if only at a very general level. Of course, Mr Haberman
31 criticised the failure to cross check. It is clearly
32 relevant material.

33 There is a much smaller point, but perhaps again a
34 significant point, which is that we do say that when the
35 voluntary assurances were negotiated, to comply with them
36 Wiseman had to raise their prices. Mr Sweeney confirms
37 that that is true, although he says for a limited number
38 of customers. The reference for that is Mr Sweeney's

1 statement at 8.6.1. That is all I was going to say about
2 voluntary assurances.

3 The last point is the Meeting Notes. Really this is
4 just a procedural point. The Tribunal will recall that
5 there was a crucial meeting on 14 March and it is not
6 clear how Mr Lawrie is able to recall the description he
7 gives in his paragraph 76. The Tribunal was told that
8 there were no notes, but there was in fact a note. Of
9 course, these things happen, but it is not entirely easy
10 to reconcile the note we have been given of Mr Lawrie's
11 paragraph 76 and it is clearly very useful to have the
12 note.

13 THE CHAIRMAN: Sorry - what note are we talking about?

14 MR TIDSWELL: The Tribunal may recall that it turned out
15 that he had in fact taken a note of the 14 March meeting
16 and Mr Lawrie had not had it when he did his statement.
17 It turned up. In fact, I do not think the OFT knew about
18 it until after the Case Management Conference on 2
19 September when the Tribunal was told there was not a note
20 and I believe the Officer came back from holiday and
21 said, "Hang on, I might have one". That was produced
22 under cover of a letter dated 18 September 2003. That
23 sets out in short form what happened at the 14 March
24 meeting, of which Mr Lawrie had given an explanation of
25 his recollection.

26 We say that that is pretty helpful. It is certainly
27 helpful to us. What we want to know is what other notes
28 there are. The position we have got to is in the 18
29 September letter the OFT have said 'there are some other
30 notes but there is no basis on which you can sensibly ask
31 for them because they are internal documents or they do
32 not go to the particular points in this case'. All we
33 are saying is that it is right that we should know what
34 sort of documents we are talking about here in slightly
35 more detail. We would like a list of them.

36 THE CHAIRMAN: Of those notes?

37 MR TIDSWELL: A list of those notes. In other words, the
38 Tribunal --

1 THE CHAIRMAN: Of the meeting on that date?
2 MR TIDSWELL: No. Of any notes they now have discovered
3 that they say are not relevant.
4 THE CHAIRMAN: This is not just in relation to the meeting?
5 MR TIDSWELL: No, I am sorry.
6 THE CHAIRMAN: No, it is my fault for not following it.
7 MR TIDSWELL: As far as we know there is not another note in
8 relation to that meeting, but there were other meetings.
9 Mr Lawrie has given his recollection and it would be
10 useful to know whether there are other notes. We are not
11 asking for anything more at the moment than a list of
12 those. We say that that is no great burden and it ought
13 to be provided. That deals with that last point.
14 The only point I have not dealt with is
15 confidentiality. I have left it until the end because it
16 seems to us that it applies generally to everything.
17 Firstly confidentiality applies generally to everything
18 and, secondly, it seems to us that the right way to go
19 through this process is to work out whether disclosure
20 ought to be given were there no confidentiality point and
21 then to see how to deal with it once the confidentiality
22 point emerges. We say we have got to the stage where we
23 would simply submit that the case for recovery is clear
24 and compelling for all of these points and the question
25 is the perfectly understandable concerns that Wiseman has
26 about confidentiality. We say we have already done that.
27 We have got a confidentiality ring in place. There is
28 no question of this information being disclosed to my
29 clients. There is no suggestion that it has not worked
30 so far. We have had very similar information. I have
31 shown you some of that this morning and there is really
32 no reasonable basis upon which we say Wiseman can say it
33 would harm them for the confidentiality ring members to
34 see it. We do note that at one stage Wiseman insisted
35 that Mr Elliott, whom the Tribunal might remember was an
36 auditor for Ernst & Young who was quite closely involved
37 with Express's business, was asked to be taken off the
38 confidentiality ring because Wiseman, as we understand

1 it, were concerned that he was too close to them. Mr
2 Haberman does not have that sort of connection. I think
3 it is pretty clear that he has not been discussing
4 matters with Express because he is criticised for not
5 knowing enough about the dairy industry. We say that
6 there is no reasonable basis on which a concern can be
7 expressed about the confidentiality and human error. It
8 is not really realistic that in future years people are
9 going to remember detailed cost information. Perhaps
10 most importantly none of the stuff is contemporary. It
11 is all November 2001 or earlier. I think that is right.
12 But certainly it is at least two years old, approaching
13 three years old.

14 Mr Sweeney makes some points about price patterning
15 and the ability to guess what is going on, but that does
16 rather suggest a considered effort to breach the
17 confidentiality ring and to apply analysis to it and that
18 is just not going to happen.

19 We say that there must come a time, regardless of
20 what Mr Sweeney says, where this information is past its
21 sell-by date. Certainly as far as the ring goes, it is a
22 perfectly sensible ring. It has worked well in the past.
23 We say there is no issue here.

24 There are some further points made by the OFT about
25 deterring undertakings and I do not really want to say
26 anything more than what Mr Green said in his skeleton at
27 paragraphs 102 to 110, if I could ask you to go back to
28 that.

29 But at the end of it we say that this is a perfectly
30 sensible way of dealing with a perfectly sensible
31 confidentiality concern. It has worked for very similar
32 information and there is no reason why it should not
33 apply now.

34 That is all I have to say, Sir.

35 THE CHAIRMAN: Thank you very much indeed, Mr Tidswell.

36 Yes, Mr Turner?

37 MR TURNER: May it please you, Sir.

38 We say that the application for disclosure should be

1 dismissed and that the Tribunal should take this
2 opportunity to fix a date for the final hearing.

3 If it please the Tribunal I will structure my
4 submissions in response in this way. First, to address
5 some of the principles that should apply to disclosure in
6 a case of this kind. Secondly, to turn to the
7 application of the principles in this case, which itself
8 falls into two parts. What is the stage that has been
9 reached in this case in terms of defining the lines of
10 battle and the issues between the parties. Secondly,
11 against that crucial battle, to inspect the reasons which
12 are now given by Claymore and in their letter of 16 April
13 for requesting what is a very large amount of additional
14 cost and price data at this stage. If I may also say
15 that Mr Peretz is going to follow me on matters of detail
16 that he is better equipped to handle, given his in-depth
17 knowledge of the case, and I believe he also wishes to
18 tackle the meeting notes point.

19 THE CHAIRMAN: Yes.

20 MR TURNER: Starting then with the principles which should
21 apply in a case of this kind, we refer to six essential
22 propositions, some of which have been trailed in the
23 skeleton arguments.

24 First, that the decision by the Office in this case,
25 whatever the documents which comprise it, has to contain
26 the reasons which allow the appellant and the Tribunal to
27 understand what it was the OFT did. The essential
28 elements of the reasoning, and now, although I do not
29 have this in front of me I am referring to Freeserve,
30 paragraph 118, "essential elements" include what the OFT
31 took into account and what principles it applied at the
32 time that its decision was taken. When you have that,
33 the spotlight in the appeal then switches to what has in
34 fact been done and typically whether you see some error
35 of law, whether some facts have been got wrong or have
36 been left out of account, or whether some inherently
37 unreliable method of appraisal may have been used. All
38 of those are, to some extent, in play in this appeal.

1 The second proposition is what a complainant may not
2 do. What it may not do is to call for all of the
3 underlying materials and details on the OFT's file so
4 that it can rove through them in search of additional
5 points.

6 Thirdly, nor is a complainant entitled to all of the
7 underlying material which is now being sought, merely by
8 saying something along the following lines. 'My case is
9 that you, the Office, should have done X, Y and Z in your
10 investigation. You have failed to do so. If you give me
11 that material I will do X, Y and Z and I will show you
12 what would have been the outcome of what is *ex hypothesi*
13 a different kind of investigation'. That, in our
14 submission, is essentially what Express is trying to do
15 in the present case. It is not a question of saying,
16 which might be different: 'If I had all of the
17 individual cost data I could then form a view on what is
18 the right approach to cost allocation, for example.
19 Without that material I am afraid I just do not know what
20 is the right approach and I cannot take the matter
21 further'. But that is not what is being said in this
22 case. I will take you to Mr Haberman's report and the
23 grounds to show that.

24 On the contrary Mr Haberman and Express are both
25 clear and definite about what approach should have been
26 followed on every issue. There is no uncertainty in
27 their minds to resolve.

28 The fourth proposition is that it is not in question
29 here, certainly not by us, that the Tribunal must have
30 all the necessary information to resolve the issues in
31 this appeal. But that does beg the question as to what
32 this phrase "resulting issues" means when applied in this
33 context, because in this case our submission is that you
34 already have all of the underlying material which you
35 need to understand what the OFT did and its reasoning.
36 What you do not have is a mass of finely grained,
37 commercially sensitive data at the level of individual
38 customers and individual depots which would allow Express

1 to run its own analysis on a different basis from that
2 conducted by the Office, and we say that that is not the
3 proper territory of an appeal.

4 Fifth, Express say that they are entitled generally
5 to documents that are referred to in the pleadings and
6 the witness statements, here Mr Lawrie's statement, which
7 appear to be a central part of the reasoning by which the
8 OFT came to its decision. We have no doubt that that is
9 right, but none of the materials which they are asking
10 for fall into that category because they are not central
11 or, in our submission, even material to the reasoning of
12 the OFT's decision and nothing in Express's written
13 arguments, in the pleadings or in Mr Haberman's report
14 impacts on that.

15 Sixth, Express mis-characterises our position in
16 relation to the appeal. They say that the Office's
17 position is that they have to show that any errors in the
18 analysis matter in order to succeed. But that is not our
19 position insofar as we do not say that Express must now
20 take out a calculator, re-calculate the numbers and
21 engage in some form of quantification exercise. We have
22 expressly sought to underline this point (and it is in
23 paragraph 50(a) of our skeleton). What we say is that
24 Express cannot rely on some trivial anomaly or failure in
25 order to say that our decision should be set aside. If I
26 may give an example, for example, one small postcode area
27 on a large map in which one finds a surprisingly low
28 average price of milk per litre, or something of that
29 kind. What they have to do is to say that there is some
30 error which undermines the reasoning of the Office in the
31 decision.

32 THE CHAIRMAN: But there would have to be a material error.

33 MR TURNER: It has to be a material error.

34 THE CHAIRMAN: They say that they are a bit worried that at
35 some point someone will come back and say, 'Ok, maybe
36 there is another way of doing it on that particular point
37 but it is not material'.

38 MR TURNER: If one were to take one of their central points,

1 which is the allocation of the run cost, they take issue
2 with our weighting map by reference to volume and, to
3 pick up something, Sir, that you were canvassing in
4 argument with Mr Tidswell, if you accept that that was a
5 flawed approach, then in our submission, and we would
6 respectfully agree, that is the end of the matter because
7 that is important.

8 THE CHAIRMAN: That is a material error.

9 MR TURNER: That would count. You do not need the
10 underlying figures, the finely grained data, in order to
11 produce calculations. The point of principle is
12 sufficient.

13 My seventh point related to disclosure. We say that
14 there should be a common approach to the exercise of your
15 powers to order disclosure - what is now Rule 19.2(k). I
16 am not sure that that set of rules governs this appeal.

17 THE CHAIRMAN: We are still on the old rules. It is the last
18 appeal under the old rule.

19 MR TURNER: What we do say is that we agree with Express
20 that there should be a common approach first and also
21 that in relation to Scotland, so far as we have been able
22 to discern, there is no automatic disclosure and that
23 necessity is again a broad touchstone. I am afraid we
24 also have not been able to get to the bottom of that
25 point for the purposes of this application.

26 So far as judicial review and analogous situations
27 such as the present are concerned, the expression "cards
28 up on the table" has been bandied about, and that is
29 right, but that needs to be understood in its correct
30 context. What that means in a case of this kind is that
31 the public authority, here the Office, cannot sit on
32 material which is adverse to its case and must give a
33 full and frank explanation of what it did. We say that
34 we have done that. Disclosure, as a supplementary
35 exercise, will follow from that only if you need to go
36 behind the material which has been proffered for some
37 reason, normally because there is some real doubt as to
38 its accuracy or as to its completeness and in order to

1 engage in the exercise what you need to do is to have a
2 look at what are the issues which are alleged and to
3 judge from that whether what you have is sufficient to
4 meet the point.

5 I then turn to application of these principles in
6 this case. First, there is a threshold matter. What is
7 the stage that has been reached in terms of defining the
8 lines of battle. This is an important point which I
9 would dwell on for a moment, because the Office has
10 provided a 30 page witness statement explaining what led
11 it to close the file. There are 151 pages of
12 contemporaneous exhibited documents and there is also the
13 reply which the Office put in.

14 What happened in February is that Express responded
15 with a very dense revised notice of appeal and an
16 accompanying expert report which you will have had the
17 opportunity to look at and together, as Wiseman pointed
18 out, they add up to some 250 or so densely reasoned
19 pages. More particularly, leaving aside the length, what
20 they do is they set out 18 overlapping grounds of appeal
21 and those leave no doubt that Express has been able to
22 plead out full and solid tack. There is no place in
23 either the grounds of appeal or in Haberman where we say
24 when you look at it there is anywhere a case that is put
25 tentatively, let alone provisionally. Also the
26 supplementary statement of facts in the revised notice of
27 appeal sets out a microscopically detailed account of the
28 entire investigative process. I shall not take you to
29 that now, for reasons of economy of time, but would ask
30 you to look at that.

31 Against that background where are we? We say it is
32 incumbent on Claymore now to show you some point or
33 points of doubt about what the OFT did or about the
34 principles that the OFT applied and then, having done
35 that, to show you the documents which they are asking for
36 and explain to you why those documents can be expected to
37 cast light on the questions. But in their written letter
38 of 16 April and even today in argument that has not been

1 done.

2 For example, in relation to the Competition
3 Commission report they ask for confidential information
4 from what amounts to more than 50 paragraphs and tables,
5 but what they have not done is to take one particular
6 item and say why it will assist to clarify some issue
7 that they have raised.

8 THE CHAIRMAN: We have had a certain amount this morning
9 about the Keith Depot, among other things, Mr Turner.

10 MR TURNER: We have had reference to the Keith Depot, but
11 what you have not had is anything going beyond that to
12 the arguments which have been raised by either Mr
13 Haberman or in the grounds of appeal precisely. What you
14 have had is a statement that the Keith Depot is in
15 general terms relevant because of its geographical
16 location, to issues that arise in this appeal. But what
17 we say is that you do need to go to the grounds
18 themselves and ask yourself what are they alleging and
19 why is it that information about the Keith Depot, or any
20 other piece of information, is going to be helpful to
21 them in clarifying something. If they can show you that,
22 then we will lock horns and then we will engage, but they
23 have not done that.

24 On that, perhaps it is convenient to turn to what
25 they say specifically now and start with the Competition
26 Commission report. May I invite the Tribunal to pick up
27 the letter of 16 April, which constitutes their written
28 argument.

29 THE CHAIRMAN: I suppose it is fair, Mr Turner, to say that
30 at this stage quite a lot has happened in this case since
31 we last looked at it in any detail. We have had the new
32 notice of application of 16 February. We have had your
33 defence of 29 March. We have now had the statement of
34 intervention of 7 May plus Mr Haberman's report and Mr
35 Bezant's report.

36 Because this is by its nature still at the
37 interlocutory stage we, as the Tribunal, have not done,
38 and would not normally do at this stage, the exercise of

1 going through all those detailed pleadings and creating
2 for ourselves some internal document as to what all the
3 issues in the case are. That is the situation that we
4 are in.

5 MR TURNER: I do understand that, and may I say I sympathise
6 with the situation.

7 THE CHAIRMAN: We have a general idea obviously, but we have
8 not gone into it in detail.

9 MR TURNER: Nevertheless what we find ourselves in today is
10 a choice between two positions. They seek to take
11 advantage of that generalised lack of coherence and
12 everybody's thinking about the issues in the case at this
13 stage and say 'well here are important relevant materials
14 because they relate to costs'. You see that. You see
15 reference to the Keith Depot and its location is
16 important in this case, and there are issues relating to
17 cost in the case. If you leave matters at that level,
18 then frankly there will be no possibility of letting the
19 entire camel into the tent because almost all information
20 in this case is going to be said to be relevant on that
21 basis and there is no stopping point.

22 The sensible approach is to say 'it is for you, the
23 applicant, to tell us why a particular piece of
24 information is needed in relation to an argument that you
25 are raising; you are the applicant or the claimant; you
26 take us to the place in your case where there is an issue
27 and then, having done that, explain to us why this
28 additional material is needed'. We say that that is
29 particularly important, and I speak in the role as a
30 spokesman for a public authority here where there is
31 extremely sensitive commercial information which is at
32 stake. There is great nervousness both on Wiseman's
33 part, which they will no doubt speak to, but also on the
34 Office's part if sensitive commercial information
35 belonging to one competitor can pass through on the basis
36 of a level of argument of that generality in these
37 proceedings.

38 Sir, turning back to the letter, I would prefer to

1 apply that rubric to the way in which Claymore, Express,
2 have approached this application for disclosure. If you
3 turn to page 2 you see here conveniently set out, first,
4 reasons why the material in the Commission's Report is
5 said to be relevant to the applicant's case in three
6 numbered paragraphs and then below that their arguments
7 as to why disclosure of that material is necessary. In
8 each case the three numbered paragraphs reflect three
9 topics, the first of which is material which shows the
10 basis on which the Commission identified AVC and ATC, and
11 so on. The second relates to material which evidences
12 exclusionary contracting and its impact. The third
13 relates to material showing pricing and/or margin
14 anomalies, which suggests targeted and discriminatory
15 pricing. At the side of each of those you have the
16 grounds in the revised notice of appeal which are said to
17 be relevant.

18 Let me take as an example, because I shall not go
19 through all of this - I simply cannot for reasons of time
20 - and look at the first paragraph: "Why disclosure is
21 necessary in relation to material going to predation".
22 That is paragraph 1. That is grounds 2 and 3 of the
23 revised notice of appeal and you may recall that ground 2
24 is the attack on the estimation of average variable
25 costs. Ground 3 is the attack on the estimation of
26 average total costs.

27 What I say is that here, as with all of these
28 allegations, if you pick up the revised notice of appeal
29 which I would now invite you to do, and have a look at
30 the allegations that are made, you will see that in each
31 case the elements of the attack are perfectly clear. May
32 we take by way of example (I could have chosen ground 2
33 but I am going to take ground 3) which begins at
34 paragraph 4.20 on my pagination at page 47.

35 THE CHAIRMAN: ATC.

36 MR TURNER: Yes. This is the average total cost ground and
37 it goes over to paragraph 4.36 on page 50. When you read
38 this, and I shall summarise, there are essentially four

1 points. The first which you see in paragraph 4.22 all
2 the way to 4.28 is a criticism that the Office adopted
3 what they call a bottom-up approach, building up the
4 total costs. At 4.26, a theme repeated throughout the
5 document, they also complain that no reconciliation was
6 carried out with Wiseman's actual costs as recorded in
7 its accounts. Pausing there, it is interesting that if
8 they were really going to follow this argument to its
9 logical conclusion, given the prominence of that
10 particular claim in their revised notice of application,
11 one would expect them to ask for Wiseman's management
12 accounts, because the information that they are actually
13 asking for features far less prominently, if at all in
14 some cases, in their pleadings and the expert report.

15 The second argument then is that the Office was
16 dependent on Wiseman to identify the relevant costs and
17 to allocate them to the middle ground customers. You see
18 that in 4.29 beginning "Secondly".

19 The third argument is that the Office estimated
20 central costs by applying a mark up of 3 per cent. That
21 is in paragraph 4.30. In paragraph 4.32 et seq the
22 estimate of average total costs was a working proxy and
23 because it was a proxy had been more than say 5 per cent
24 out from the true measure of total costs when properly
25 allocated.

26 The argument, and this is in no way atypical, is
27 developed clearly in definite terms and without any
28 reference to anything that is missing in order to make it
29 good. I can go through each of the grounds in this
30 revised notice of application and it is the same story.

31 Then one turns, having seen that, to the arguments
32 which are deployed in the 16 April letter for saying that
33 at this stage there should be further disclosure. One
34 looks on page 2 under material going to predation under
35 the heading "Why disclosure is necessary" to see what
36 they say. In short they say that the report is a
37 valuable source of information to cross check the
38 respondent's findings and the reliability of the data

1 obtained from Wiseman. They then say that Mr Haberman
2 believes that the OFT understated the relevant costs and
3 he and the applicants ought to have access to relevant
4 information that might verify that belief.

5 Pausing there, you will see that that is put in pure
6 generalised terms and that no particular part of the
7 material in the Competition Commission report is referred
8 to and you are not told what it is needed for.

9 Thirdly, and lastly, because Mr Haberman criticises
10 the Office's classification of fixed and variable costs,
11 which he does do, although for specific reasons, you get
12 the general submission that he and the applicants ought
13 to be entitled to see if, as he suspects, the Commission
14 used a different classification and the consequences of
15 that classification.

16 There we are. Even before turning to the detail of
17 what Express wants in the appendix to this, you have not
18 seen identified there any particular matter of confusion
19 about what the Office did which requires to be clarified.

20 Express wishes to establish its own analysis of its
21 competitors' costs and to say that that should be
22 preferred to the Office's approach. When you turn to the
23 material which is asked for from the report we say that
24 it does not cast any light on the Office's approach at
25 all so far as relevant to the arguments. I would like to
26 pick up the Commission's report to look at its approach
27 to fixed and variable costs, because that is said to be a
28 point of criticism. The existing text fully explains
29 what the Commission did and how it differs from the
30 Office of Fair Trading. There is absolutely no need, and
31 none has been shown to you, why the specific numbers are
32 needed. May I just show you that. If you would pick up
33 the report.

34 THE CHAIRMAN: It is annexed to the original notice of
35 application I think at tab 12.

36 MR TURNER: If you then turn to paragraph 3.88, which is on
37 page 63 of the internal numbering, or rather just above
38 paragraph 3.87, this is the section of the report in

1 which the Commission deals with fixed and variable costs
2 and how it allocates them. What you see first is that it
3 takes the heading "Processing" just above 3.88 and
4 records first that Wiseman has told them what percentage
5 of its processing costs were variable and which were
6 fixed in those years. It gives the figures 53 per cent
7 and 47 per cent. If you turn over the page, you see at
8 3.90, leaving aside the absolute figures, in the third
9 row down for fixed and variable the percentages are
10 certain percentages. The working assumptions are given
11 there. Then if you turn over the page again, and this
12 was mentioned by Mr Tidswell, at 3.93 you see that the
13 Commission took the percentages and tested their
14 sensitivity by saying 'What if variable costs were not 53
15 per cent but were 65, or 60 or 55?' Then at 3.94 they
16 reach a conclusion about how that would affect matters.

17 The same sort of analysis, taking a figure for the
18 attribution of fixed and variable costs for distribution,
19 then follows in 3.95 and following and again the
20 Commission, after asking Wiseman what it considered to be
21 fixed costs, takes those numbers and then, at 3.99, says
22 'We tested this to see the effect on variable costs on
23 different assumptions'. They do exactly the same thing,
24 if you move on to page 67, for trunking.

25 THE CHAIRMAN: But it is a bit difficult to work out what
26 effect these sensitivity analyses are having because in
27 3.94 we are not quite told what the result is if you
28 increase it by various different percentages. You may
29 say that it is not necessary for us to know that.

30 MR TURNER: What you certainly cannot do is yourself take
31 the CC figures and look at these different matters as a
32 matter of fine detail. But that, importantly, is not
33 what the issue in this case is about. What they complain
34 about is the way that the Office of Fair Trading
35 approached matters, which was different from this. They
36 took a low measure of variable costs, which included
37 certain elements as completely variable and others as
38 completely fixed and a high measure of variable costs in

1 which they brought more cost elements into the variable
2 category, notably packaging and processing. It is that
3 point of principle which is attacked. It is said that
4 the Office should not have done that and it is said that
5 the Office should have looked at the relevant time period
6 over which costs could be said to be variable. These are
7 the points of principle. These are the arguments which
8 are raised in the appeal. You are not being asked, at
9 least at the moment, until today to take the actual
10 figures and run numbers and see what the outcomes are and
11 then compare them against each other. That does not
12 feature in the case.

13 If you would turn to paragraph 5.63 of Mr Haberman's
14 report, he is said to be the person who wants this
15 material.

16 THE CHAIRMAN: "Conclusion on classification".

17 MR TURNER: Yes. What he is doing there is criticising how
18 the OFT have done it by taking their approach to
19 calculating average variable costs not dependent on the
20 particular numbers but dependent upon the approach that
21 they adopted. Interestingly this is the only place in
22 which he mentions in this context the Competition
23 Commission's approach. What you see in 5.63(a) is that
24 he knows that Wiseman had told the Commission that some
25 of these costs were variable and he criticises the OFT
26 for leaving them out on that basis. At (b) "We assumed
27 [that is the Office] that trunking costs were fixed", and
28 he says, "Well the Commission decided [and you have seen
29 how they approach that] that 50 percent of the trunking
30 costs should be considered variable", and so on. But
31 that is it. So far as he is concerned he is merely
32 pointing out that there was a difference of approach
33 which, in his view and in the appellant's submission is
34 fundamental, but you do not need to take these fine
35 numbers to play with them to produce a different result
36 because it is not relevant to the issues which are live
37 in this appeal.

38 THE CHAIRMAN: Well it might, as it were, bring it to life a

1 bit if that by agreement somebody could work out or show
2 us what result the two different approaches actually
3 arrive at. It may be that it is not a very important
4 result. On the other hand it may be that it is a
5 completely fundamental result. But it is a little bit
6 unsatisfactory if one does not quite know what the result
7 is going to be. It does not necessarily involve a huge
8 amount of data but some kind of illustrative and agreed
9 example might be helpful.

10 MR TURNER: Sir, that is a different proposition, because
11 there may be a way. That is something which we would
12 need to think about.

13 THE CHAIRMAN: I am not making a particular suggestion. I am
14 just trying to think aloud as we go along.

15 MR TURNER: Sir, if I may say so, that is a proposal that we
16 might want to think about, but that is very different
17 from what is currently being proposed. What is currently
18 being proposed will lead inevitably - and it will become
19 apparent in a moment - to delay because there is a vast
20 amount of information that will come and if Mr Tidswell
21 does with the information even what he says he wants to
22 do, which is to perform all of these cross checks and
23 calculations, it must be inevitable that this case will
24 go off again and it will go off past the long vacation at
25 least until the autumn term. We say that that is
26 unsatisfactory and it is disproportionate at this stage.

27 THE CHAIRMAN: I have to say on that, Mr Turner, that it is
28 not completely certain that we are going to be able to
29 fit it in before the long vacation anyway. The
30 Tribunal's case load is pretty heavy at the moment.

31 MR TURNER: Sir, I do understand that. We have investigated
32 diaries. We were minded to propose the last week in
33 July.

34 THE CHAIRMAN: Well we will see. It depends on how we get on
35 with other pending cases.

36 MR TURNER: Sir, moving on. I am conscious of the time and
37 I do not want to take all day over this, but it is
38 necessary to make these points good.

1 The second element in the Competition Commission
2 Report material which is sought is material which
3 evidences exclusionary contracting and its impact. That
4 is said to relate to grounds 12 to 14 of the allegations.

5 Here I would ask you to return to the 16 April letter
6 briefly to inspect point 2 where there is a paragraph
7 addressing that point. What Express say they want is
8 material which shows the extent to which Wiseman was
9 prepared to pay money to Abeness to obtain an
10 exclusionary contract, what they say is the pricing
11 effect of the exclusionary contracts, which we understand
12 to mean what were the prices charged by Wiseman to
13 particular customers, something which I thought was
14 confirmed by Mr Tidswell this morning.

15 Taking the first of those, as to the extent to which
16 Wiseman was prepared to pay money to Abeness, that sort
17 of thing, which was not specifically referred to by Mr
18 Tidswell today, is not relevant on any view. It is dealt
19 with in the Competition Commission Report, the fact that
20 Wiseman did pay a certain amount of money to Abeness to
21 obtain an exclusionary contract, but neither the revised
22 notice of appeal, nor Mr Haberman, rely on the amount of
23 that payment at all. There is only a glancing reference
24 in the revised notice of appeal to the fact of that
25 payment having been made. Indeed the Office's point on
26 this is that there was not in fact an exclusive agreement
27 struck, or at least adhered to. That is plainly set out
28 in Mr Lawrie's statement and he refers to the relevant
29 paragraphs of the Competition Commission Report where it
30 is plain that the Competition Commission said the same
31 thing. Sir, I do not know if you are interested - it was
32 not specifically canvassed in argument - but if you would
33 like the relevant paragraphs from the Competition
34 Commission Report those are paragraphs 2.107 and 4.267.
35 At 4.267 in particular, at the top of the page, the
36 Commission itself noted that some of the stores for which
37 Abeness negotiated was supplied with milk from Mitchells
38 based near Aberdeen as well as Express Claymore and there

1 was not apparently in fact an exclusive agreement which
2 had any bite. Where we are going in asking for the size
3 of the payment which procured an exclusive agreement is
4 unclear.

5 As to the other point, the pricing effects of the
6 exclusionary contract, as it has been called, what they
7 seem to be asking for - and we have looked at the
8 material in the table attached to the 16 April letter -
9 is what is the price that was charged by Wiseman to CWS
10 under its all of Scotland contract. Again that was
11 touched on, albeit briefly, this morning. But we say
12 that that information which is requested has not got
13 anything to do with the Office's reasoning and it is not
14 alleged to have anything to do with the case, because we
15 have looked in grounds 12, 13 and 14, which are the ones
16 that are referred to and relied on and we have not seen
17 anything that would justify the production of this
18 information. For the reasons I have given, it is
19 incumbent upon my friend to do that exercise.

20 Turning to material evidence in targeting and price
21 discrimination, grounds 10 and 11 of the revised Notice
22 of Appeal, the position here is that according to Express
23 Mr Haberman has identified what they say is a number of
24 differential patterns and anomalies in the data that was
25 used by the Office of Fair Trading. He does that in
26 paragraphs 5.101 to 5.114 of his Report. I would invite
27 you to turn that up, because here we have a reference to
28 something specific in Mr Haberman and therefore it is
29 worth seeing whether he is saying 'I need this
30 information in order to do my work'. So that is 5.101 to
31 5.114 which are referred to, beginning on page 72. If
32 you look specifically at 5.108 you can zero in on what he
33 says about the patterns and anomalies which he has found
34 in material annexed to Mr Lawrie's witness statement.
35 Just casting your eye down letters A to F you see the
36 sort of things that he is talking about.

37 THE CHAIRMAN: So they should have investigated it further?

38 MR TURNER: Yes. Sir, you have the point. He is saying

1 'here is something that appears to be an anomaly. The
2 OFT should have investigated the reasons for this' is the
3 essential message. That, in our submission, is classic
4 'what if' territory, because he is attempting, by trying
5 to obtain the information, to strike out in a different
6 direction.

7 THE CHAIRMAN: What about the last sentence of 5.109: "The
8 lack of disclosure means I cannot tell whether such
9 techniques were used by the OFT nor what their impact
10 might be"?

11 MR TURNER: Sir, that is a discrete point relating to the
12 use of a multiple regression technique and we can answer
13 that directly by way of a letter. We are very happy to
14 do that. That particular point might have been
15 overlooked, but we can deal with that discretely.

16 Mr Tidswell, in fairness, has just asked me to draw
17 your attention to 5.106 as well, which I will do. What
18 he says there is that "Due to the non-disclosure of
19 Wiseman's pricing information obtained by the Office I am
20 limited to the extent of the comments I can make about
21 the Office's approach to revenue issues. However, I am
22 able to make the following observations."

23 What we say about that is that that again is a
24 general comment. He elsewhere says "I am hampered by not
25 having access to absolutely everything". But the
26 important point is what argument does it go to and how
27 will the information that he wants be relevant?
28 Otherwise what we are into is an exercise whereby they
29 are saying give us now a large amount of price and cost
30 data so that we can see whether we can detect further
31 errors and bring them out. In other words we are very
32 much further behind in this appeal process than we had
33 hoped that we were.

34 Sir, subject to anything that the Tribunal may ask,
35 that is what I propose to say about the Competition
36 Commission Report.

37 Mr Tidswell began his address by referring to the
38 attachments to Wiseman's 29 November letter.

1 THE CHAIRMAN: He did take us to one or two passages in the
2 report relating to the Keith Depot and to the pricing to
3 Abeness I think it was.

4 MR TURNER: Sir, let me take one of those and make a general
5 point about the other. If you would turn to paragraph
6 4.355 of the report, which I believe is the place where
7 Mr Tidswell took you, to the reference to Wiseman having
8 lost money on the Abeness account. It is page 148. We
9 have here a statement that Wiseman appears to have lost
10 money after accounting for fixed costs on the Abeness
11 Mare account in particular. That is a good example. It
12 is a stray piece of information which is not factored
13 into any particular allegation or argument about what the
14 Office is said to have done wrong in the case. If
15 anything it appears to be a loose end which they wish to
16 pick up and make a new argument in relation to. It does
17 not feature in the existing case. Maybe when I sit down,
18 in reply Mr Tidswell will take you to the part of the
19 revised Notice of Appeal or Mr Haberman where this is in
20 issue.

21 The same point, in my submission, goes to the
22 material in relation to the Keith Depot.

23 THE CHAIRMAN: That was 4.324 down to 4.329 at page 140?

24 MR TURNER: Yes. Again we say that here we have a group of
25 requests for particular information represented by the
26 scissors mark. What he does is to say 'this is all in a
27 general sense relevant because it relates to the Keith
28 Depot', but what he does not do is go the extra step in
29 the chain, which we say is relevant, and that is to say
30 'what are you going to do with it and how does it bear on
31 some proposition which you find in the case'. Sir, Mr
32 Peretz may follow me as a point of observation on that.

33 THE CHAIRMAN: So you are saying essentially that we need to
34 be taken to the revised notice of application to specific
35 paragraphs and by reference to that have explained to us
36 what the bearing of this now requested further disclosure
37 is in relation to those specific points that are there
38 pleaded?

1 MR TURNER: Or at least, even if that is not done, it should
2 be tied down to a particular argument, at least in
3 general terms.

4 THE CHAIRMAN: Or something in Mr Haberman's report?

5 MR TURNER: Or even to say 'here is the problem that we are
6 worried about with what the OFT did'. But what one
7 cannot do is to say: 'here is the area of variable costs
8 and here is the geographical location of the Keith Depot.
9 They must be relevant to the investigation that was
10 carried out and therefore we want to obtain additional
11 information in order that we can see whether there is
12 further work that should have been done on our account'.

13 At this stage in the game, when there was such extensive
14 pleading and such extensive work has been done, this
15 should not happen.

16 The attachments to Mr Wiseman's letter of 29
17 November, address dairy and trunking costs and certain
18 pricing information. Sir, you will recall that this
19 information was provided by Wiseman in response to a
20 formal notice from the Office of Fair Trading. Mr
21 Tidswell took you to the letter at page 64 of RBL1.

22 Why is this information required? Again one needs to
23 inspect what is said about the relevance of this
24 material, in addition to the oral argument of Mr
25 Tidswell. What Express do in the 16 April letter is to
26 refer (at the top of page 4) to a group of grounds in
27 numbered points 1 to 6, grounds 1, 2, 3, 5, 6, 10 and 15.

28 Having referred to the grounds Express, does not explain
29 the propositions in its argument for which it needs this
30 sensitive data in order to make out its case. If I pluck
31 at random one of these grounds, ground 5, failure to
32 consider incremental customers properly, what one would
33 have expected to see for a hearing of this nature and
34 application today is a statement for you from Mr Haberman
35 supporting the application, in which he says 'I need to
36 have that sort of information because with it I will be
37 able to show X, Y and Z'. Without that all of us are
38 floating freely and it is very difficult to say where the

1 requests for information should stop.

2 THE CHAIRMAN: Does that last point bear more generally
3 perhaps on the application that for an application like
4 this we need some kind of supporting witness statement by
5 somebody saying 'I have tried to come to grips with this
6 issue; it all looks to me extremely unsatisfactory but I
7 just cannot get any further with what I have got unless I
8 have A, B and C'?

9 MR TURNER: Yes. We very strongly urge that on the
10 Tribunal. That would be normal in civil litigation.
11 Without it we, for our part, have agonized over how we
12 are to say that any of this is relevant and for your
13 part, Sir, the Tribunal is in a similar position, that
14 other than applying an instinctive, or almost intuitive
15 gut feel to the sort of information which is there, it is
16 difficult to draw a line. It is incumbent upon the
17 Applicant to perform that exercise.

18 THE CHAIRMAN: There normally would be such a statement in an
19 application for supplementary disclosure in civil
20 litigation.

21 MR TURNER: Yes, there would, and also in judicial review
22 proceedings if disclosure was required, to explain the
23 need for it.

24 So far as dairy and trunking costs are concerned, I
25 would make the following points in response to Mr
26 Tidswell this morning.

27 Obviously it is correct, as Mr Tidswell points out,
28 that dairy and trunking costs are referred to in the
29 narrative of the witness statement and it is explained
30 that the Office obtained such information relating to
31 dairy and trunking costs. But again a different
32 question, and the important one, is whether there is a
33 concern, which should be expressed through Mr Haberman,
34 that without that data some particular issue cannot be
35 properly and fairly resolved. That is not touched on in
36 the revised notice of appeal so far as we can see
37 anywhere. That is not touched on in Mr Haberman's expert
38 report so far as we can see anywhere and there is no

1 statement from Mr Haberman today.

2 THE CHAIRMAN: Well the points that are made, as I understood
3 it, among others, were that we have got the run costs and
4 the depot costs, or at least some depot costs, and it is
5 odd that we do not have dairy and trunking costs. We
6 have got a chart in Mr Haberman's statement that is
7 apparently based upon Edinburgh but there does appear to
8 be a material difference between Edinburgh and Keith.

9 MR TURNER: Sir, I believe that is Mr Bezant's statement, as
10 far as I am aware.

11 THE CHAIRMAN: Sorry, yes.

12 MR TURNER: Sir, that does raise an additional point.

13 THE CHAIRMAN: We have a further level of complication now.

14 MR TURNER: Well, for the purpose of presentation Mr
15 Tidswell presented the argument as one being an issue
16 that experts will have to lock horns on, Mr Haberman on
17 one side and Mr Bezant on the other. Mr Bezant is the
18 Intervener's expert in this case. He is not a
19 representative of the Office, which is the Respondent.
20 The Respondent's position in relation to trunking costs
21 and dairy costs I should perhaps briefly outline to the
22 Tribunal again so that you can see for yourself how the
23 issue before you at the final hearing is likely to be
24 formed.

25 If you would turn to the defence at paragraph 69.
26 Sir, it should be page 23 of your numbering. What you
27 see here is that trunking costs were not included in the
28 high measure for variable costs which the Office used and
29 it is explained why, namely that they formed a very small
30 part of total costs, between 0.7 to 3 per cent and that
31 is, I believe across the range of customers. What you
32 have therefore is the Office putting the matter into
33 context and explaining - and it complements what Mr
34 Bezant has now said - that you are talking here about a
35 very very small area of cost. One could say the
36 Applicants must be entitled to check that figure, the 0.7
37 to 3 per cent. If one goes down that road that does mean
38 handing the entire file over and essentially saying that

1 they are entitled to audit all of the information and
2 estimation which the OFT has performed in this case. But
3 there is no reason to doubt that this figure is correct
4 and this is the issue which the OFT intends to deploy at
5 the final hearing in relation to trunking costs. It is
6 an issue of scale. Unless there is some reason for
7 doubting this and wanting to go behind this figure,
8 applying the process that one would use in a judicial
9 review, we say that there is no reason for simply opening
10 the tea chest and handing over all of the information.
11 This was the thinking process of the Office of Fair
12 Trading, which is what you are concerned with. Why did
13 it leave this element of cost out of account? Would it
14 have made a difference? This is the Office's position on
15 this point.

16 THE CHAIRMAN: So according to you we ought to have some
17 statement either from Express itself or from Mr Haberman
18 which says 'based on our experience, which is that
19 trunking costs are an average (of whatever it is), this
20 figure looks completely out of line and our evidence is
21 that trunking costs are quite different from this;
22 therefore there would be an issue as to that and we need
23 therefore to understand how the OFT arrived at the figure
24 that it has used', in which case we have to devise some
25 mechanism for verifying what the figure is, which might
26 be disclosure or it might be some other mechanism.

27 MR TURNER: Yes. May I also make that good with one
28 additional fact, which perhaps I ought to have brought
29 out. Let us not all ignore the point that Claymore is a
30 major participant in this industry. They would be able,
31 as a result of that position, and different from some
32 judicial review situations in particular --

33 THE CHAIRMAN: They have got a reasonable idea of what the
34 costs are likely to be?

35 MR TURNER: Yes. If they have a reason for thinking that
36 there is some problem here, some reason to suspect a
37 problem, they have the tools to bring any of this to your
38 attention, but in none of this application today do they

1 do that. That is an important point.

2 So far as dairy costs are concerned, if you would
3 turn to Mr Haberman's report again and just have a look
4 at paragraph 3.20, you will see here a table headed "Key
5 principles underlying the investigation" where various
6 cost categories are set out. Under dairy costs they are
7 split into processing costs and packaging costs.

8 The Office's position on this again is that on its
9 high measure of average variable costs packaging and
10 processing costs were treated as completely within the
11 variable cost category. We say that that is a complete
12 answer to this particular level of debate, because if
13 they had all been treated as within the variable cost
14 category, then arguing about the precise allocation
15 within the category is not important and will not
16 influence the issues that will need to be resolved in
17 this appeal, because the OFT has already assumed against
18 itself that all such costs fall into the variable camp.

19 Sir, perhaps that is a convenient moment. I was
20 then going to move on to the remaining issues.

21 THE CHAIRMAN: Yes. Thank you. 2 o'clock.

22 (The short adjournment)

23 MR TURNER: Sir, would it be convenient if I turn briefly to
24 the issue of Keith Depot? Some points were made prior to
25 the adjournment to which I would like to draw to the
26 Tribunal's attention.

27 THE CHAIRMAN: Yes.

28 MR TURNER: Would you again pick up the Competition
29 Commission Report and turn to the section that was
30 canvassed in argument at page 140, paragraphs 4.324 and
31 following. What we have not done, other than to note
32 that this is referring to details relating to the Keith
33 Depot, is to focus upon what that information actually
34 concerns. The point which has been urged upon me by the
35 Office is that the sort of information which has been
36 mentioned by Claymore, which they want in relation to
37 Keith Depot, actually goes nowhere and bears no relation,
38 yet again, to the arguments in the case. You can see

1 this if you glance down at what this section is actually
2 looking at. What it is concerned with is the level of
3 prices from the Keith Depot to middle ground customers
4 compared with supermarkets in the relevant area in the
5 Highlands which it serves.

6 THE CHAIRMAN: This is prices, isn't it?

7 MR TURNER: This is prices. One asks oneself what one gets
8 with this sort of information. If the level of pricing
9 is going down it may suggest that there is some targeting
10 perhaps of the customers in the Highlands area, which is
11 an important area, and that that may in turn suggest that
12 there might be some abusive pricing policy being
13 conducted. Of course, this case concerns the question
14 whether Wiseman did or did not engage in an abusive
15 pricing policy, and that was precisely what the Office
16 looked at. It looked at the question of targeting of
17 customers in the Highlands area. It looked at the costs
18 of serving customers in that area versus the prices to
19 them and made comparisons with what was going on in other
20 areas. It looked at prices to see if they were below
21 their measures of average variable costs or average total
22 costs. It looked at all of these things. This sort of
23 information does not get one very far at all. The
24 purpose of looking at the pricing from the Keith Depot
25 may ring alarm bells and lead you to do further
26 investigation, but beyond that you are into the sort of
27 analysis and the detailed examination that the OFT
28 conducted and we, for our part, cannot understand how
29 this sort of information is useful at this stage, how it
30 is relevant to the issues that are pleaded in the appeal
31 and nor has that been explained.

32 So far as the management accounts for the Edinburgh
33 Depot are concerned, it was suggested that there are some
34 accounts for the Edinburgh Depot and that therefore there
35 should be produced similar information for the Keith
36 Depot, if indeed we had it. But the reason why the
37 accounts for the Edinburgh Depot were obtained by the
38 Office is explained by Mr Lawrie at paragraphs 52-53 of

1 his statement, and it was for a very limited purpose
2 indeed. I will not trouble the Tribunal to go there, but
3 we can if it is felt necessary. It was simply to see if,
4 comparing the Edinburgh Depot with Manchester, one saw a
5 different level of profitability when one compared the
6 Scottish depot with a depot in an altogether different
7 area which was subject to intense competition. That was,
8 as it were, a discrete issue. It had nothing to do with
9 any detailed analysis of the cost structure of the depot
10 and it formed no part of the investigation beyond that.
11 That is the sum total of it. In order to say now that
12 they need this sort of detailed information, if indeed we
13 had it, about the Keith Depot, they would be striking off
14 again in another direction to try to perform an exercise
15 which the Office itself has not conducted and that is an
16 illegitimate exercise.

17 So far as obtaining trunking costs for the Keith
18 Depot are concerned, again it has not been explained to
19 you, and we do not understand what they are going to do
20 with that sort of information which bears on the issues
21 in this appeal.

22 I will leave it there, because we simply cannot see
23 how they can combine that with other information in a way
24 which undermines some element of the OFT's approach. In
25 short we say about all of this information that this is
26 an example yet again of drawing attention to an area
27 which they say is relevant because it is the Keith Depot
28 which serves a relevant area of Scotland and saying that
29 in general terms costs and price information are
30 necessary. But they are not necessary and this does not
31 discharge the burden that they need to overcome in this
32 kind of application.

33 With that I turn to the price cost matrix. May I
34 begin by saying that it was described as a convenient
35 summary of price and cost information. May I say it is
36 very far from that. It is a huge database which contains
37 information about individual customers, prices and
38 estimated costs to serve those customers and it contains

1 a significant degree of estimation because it has been
2 built up from underlying spreadsheets obtained from
3 Wiseman. As a picture of how large this document is -
4 and may I say that before coming here this morning I
5 asked for it to be sent to me on the e-mail - I have a
6 new computer and yet when I tried to open the attachment
7 it would not open it because the document is so
8 extensive. We are not talking about a convenient summary
9 of price and cost information at all. We are talking
10 about extremely large and very commercially sensitive
11 information and one would expect therefore to see a
12 cogent argument now produced by Express to justify it
13 being required in these appeal proceedings. But the
14 argument which is deployed, which one sees in the 16
15 April letter is, in short, the same as before. Because
16 one of their arguments, in general terms, is that the
17 Office analysed the data wrongly, they say that they
18 should be allowed to analyse it correctly in the appeal.

19 If it is convenient the Tribunal might want to turn up
20 the letter at page 5. At the bottom of page 5 we have
21 "Why disclosure is necessary". They take, first, a false
22 point that we are seeking to prevent them from
23 quantifying the extent of what they say are mistakes. We
24 are simply saying that that is no part of the exercise.

25 They then say "Mr Haberman has made a clear case that
26 there were mistakes based on the limited material to
27 date", so he has at least reached clear and definite
28 conclusions, but the argument that they deploy for
29 obtaining more is then, "It is only right and proper that
30 Mr Haberman should have the opportunity to verify his
31 conclusions by access to the very material which the OFT
32 used in order to conduct its investigation." There you
33 see the pith and core of the argument which is now
34 presented to you. But they say they must have the
35 information in order to be able to audit what the OFT has
36 done and see whether in performing that exercise they
37 come out with different figures. We say that that is
38 illegitimate.

1 Express refers to Mr Haberman again on page 5 under
2 the heading "Relevance to Applicant's case" just above
3 the passage "Why disclosure is necessary". If I may ask
4 the Tribunal to turn to Mr Haberman on this, you will see
5 that again the characterisation that I have given about
6 the scope of Mr Haberman's evidence is correct.

7 If you would turn please to paragraphs 5.69 to 5.100,
8 which deal with cost allocation, I will show you two of
9 the paragraphs which are relevant for present purposes.
10 The first is paragraph 5.85, under the heading
11 "Allocation of run costs". What you see here is an
12 attack on the OFT's allocation of run costs and a reason
13 given for thinking that the OFT's allocation is
14 incorrect. He draws a clear and strong conclusion in
15 5.85 that it is clear from the graph that run cost is not
16 primarily driven by volume, which means that all the
17 OFT's calculations of distribution costs by outlets and
18 customers are based on an erroneous assumption and are
19 therefore themselves wrong. He has no difficulty at all
20 in reaching that conclusion on the material which he has
21 available. Nor does he say 'I need price cost matrix in
22 order to reach conclusions which are clear and definite
23 and which I could not otherwise reach', other than a
24 general statement that he wants more information and
25 would like to have it. You do not find that degree of
26 definiteness in the argument.

27 Than at 5.90 you have an important paragraph, because
28 here is Mr Haberman giving his view on how run cost
29 should be allocated. You will see there that he has no
30 difficulty in reaching a clear conclusion: "In my view
31 the most accurate approach would be to attribute delivery
32 costs to each outlet specifically according to time spent
33 at each outlet and then share travelling costs, wages and
34 vehicle costs equally between outlets or, for simplicity,
35 to share all run costs equally between outlets." This
36 bears on the point that I was mentioning at the outset
37 under my propositions. He has a clear view on how costs
38 should be allocated. He expresses that view. What he

1 does not do is say that 'without access to further
2 information I am not in a position to express a view on
3 this point', and that is therefore no basis for seeking
4 to obtain information of the magnitude and depth that
5 they currently seek.

6 THE CHAIRMAN: Mr Turner, forgive me for not having it in the
7 forefront of my mind. As regards your defence, on a
8 point like the one that we are on at the moment,
9 presumably it would be open to the OFT to say 'Well, even
10 if you did do it the way that Mr Haberman says you could
11 do it, it would not make any difference'?

12 MR TURNER: Yes, I understand that.

13 THE CHAIRMAN: Perhaps it might be a bit difficult for you to
14 advance that case, not having disclosed the figures that
15 one is working on.

16 MR TURNER: I understand that, Sir. We do not advance that
17 case.

18 THE CHAIRMAN: You join issue on the principle?

19 MR TURNER: Yes. If they are right about that and if they
20 persuade you that Mr Haberman's approach is the right
21 approach, then there was a flaw.

22 THE CHAIRMAN: If Mr Haberman was right on a point like this,
23 we would probably have to assume that it was potentially
24 a material error or it could be a material error unless
25 there were some countervailing evidence the other way?

26 MR TURNER: Yes. I am not aware that we are advancing that
27 sort of case. If we do, then it would be only fair for
28 us to give them the basis to test our riposte, but we do
29 not do that. Let me make that very clear. We are
30 dealing with this case on a point of principle, which is
31 the reaction to the way in which they advance it.

32 The information to monitor voluntary assurances is
33 the next topic, which is addressed on page 6 of the 16
34 April letter. I can be very brief about this. This was
35 information obtained about costs and prices to the
36 Highland customers. It was not information that was
37 relied on by the OFT in the decision or which formed any
38 central or material part of the analysis whatsoever,

1 other than as an incidental cross check. As it has been
2 explained to me, Wiseman was subject to these assurances
3 and for that purpose they had to produce to the Office
4 some contemporaneous material which the OFT monitored by
5 reading it and making sure that indeed costs were being
6 covered, which was the purpose of the assurance. In
7 doing so they might incidentally have been thinking to
8 themselves, 'by the way, is there anything in this that
9 casts doubt on what I am also looking at in the
10 substantive investigation'. It was conducted at that
11 level of generality and no further and for that reason
12 this information has no part in the analysis. It is
13 information that is being sought in order to conduct a
14 further analysis and does not form a legitimate part of
15 the appeal.

16 Express's justification for it, which appears on page
17 7 of the 16 April letter, again under the heading "Why
18 disclosure is necessary", is particularly revealing.
19 They say, "The Applicants must surely be entitled to see
20 information which the OFT had and could have used as a
21 means to cross-check information gathered during the
22 investigation but did not use for that purpose". That is
23 the height of their application in relation to that
24 information.

25 Sir, I said that Mr Peretz will deal with the issue
26 of the meeting notes, which is the last topic, but may I
27 conclude by inviting the Tribunal robustly to reject this
28 application. In short it is unfounded. It is not
29 properly constituted by any supporting reasoned document
30 explaining to you why particular items of information are
31 needed and there is nothing beyond that actually in the
32 pleading or in Mr Haberman's report that should give you
33 cause to think that this information is required. If the
34 information is called for it will cause great concern in
35 terms of commercial confidentiality but more particularly
36 it will also inevitably lead to further work and very
37 great delay. I have made the point. We say it is
38 dangerous because of the sway of confidential information

1 that would be transferred from one competitor to another
2 and it is simply not satisfactory when argument is
3 presented at such a high level of abstraction for
4 material to be required in that fashion.

5 Sir, we are ready to fix a date for a final hearing.

6 We say the state of the pleadings is such that this case
7 is ready for that. Unless I can help otherwise, I will
8 hand over to Mr Peretz?

9 THE CHAIRMAN: Can I just be clear, Mr Turner. Just looking
10 again at the letter of 16 April - I am on page 4 but the
11 point is made in various places - at the end of the
12 paragraph just before the heading "Why disclosure is
13 necessary" there is a sentence that begins, "There could
14 hardly be a clearer case of circulatory reasoning. The
15 Respondent maintains that the Applicants' case cannot
16 succeed unless the Applicants can show the investigation
17 was carried out wrongly and that the mistakes had a
18 consequence, but the Respondent refuses to provide the
19 Applicants with material that would assist further in
20 this process", and similarly elsewhere.

21 MR TURNER: Yes.

22 THE CHAIRMAN: But I think you are saying that you are not
23 actually taking a 'you cannot prove that it matters' sort
24 of line. You are saying 'we will debate with you on the
25 issue of principle and we won't say that the issue we are
26 on does not make a difference. We will argue the matter
27 on the question of principle'. I think your case is that
28 on the principle it was a reasonable approach within the
29 margin properly attributable to the public authority to
30 do it the way that it did?

31 MR TURNER: Yes. The volume weighting of the run costs,
32 which is a big issue in the case, is a good example of
33 that. If Express persuades you that we had the wrong
34 approach and you should have had Mr Haberman's approach,
35 then --

36 THE CHAIRMAN: It would need a second look?

37 MR TURNER: Yes.

38 THE CHAIRMAN: Thank you.

1 Yes, Mr Peretz?

2 MR PERETZ: Sir, I was going to make a couple of points of
3 detail. I hope you have had handed to you a document.
4 This is the table based on the table at the end of the 16
5 April letter which, as you will remember, sets out the
6 various bits and pieces from the CC Report that are
7 sought. The left hand three columns reflect that table.

8 I have made a couple of corrections and comments where
9 it is plain that they mean figure rather than paragraph.

10 There is the odd correction in the left hand column to
11 broadly what is in the table. The middle column headed
12 "Text" sets out the text to which they are referring,
13 because that is sometimes helpful and then there are
14 comments on the right hand side. Sir, you will be
15 grateful to hear that I do not want to take the Tribunal
16 through each of these comments but just to highlight a
17 couple.

18 The first is on page 2 of the table, dealing with
19 paragraph 2.122 of the CC report, which is at the bottom
20 of page 33 in the internal numbering of that report. One
21 can see, I have set out the sentence in the table, that
22 the missing element here is the extent to which Wiseman
23 is said to have failed to cover its average total costs
24 on each litre of processed milk that it sold to Abeness
25 Mace in July 2000.

26 The short point that I want to make is a point of
27 detail, but the overall headline point I am trying to
28 make is that one needs to go through each of these things
29 that are sought, because there are points of detail in
30 relation to each of them.

31 This is a point of detail. If one goes to paragraph
32 3.111 of the CC Report, which is at pages 70-71, one
33 finds that there are two tables which set out the extent
34 to which the prices (and the right hand table relates to
35 Abeness Mace) failed to cover AVC and ATC and you will
36 see that there are figures there which explain in the
37 relevant year 1999-2000 the extent to which Wiseman was
38 found to have failed to cover in its pricing AVC and ATC

1 in relation to Abeness Mace.

2 The simple point here is why, given that that
3 information was provided, do they need the information
4 which has been redacted from 2.122? There is simply no
5 explanation of that.

6 The next series of points that I want to make relate
7 to pages 4 and 5 of the table. This is a series of
8 requests that they make for the data set out in Chapter 3
9 of the CC Report. Chapter 3 of the CC Report deals with
10 a large amount of information provided by Wiseman and to
11 some extent other Scottish milk processors but mainly
12 Wiseman.

13 In relation to the cost and price data sought, there
14 are two arguments made as to why those should be
15 disclosed. The first, which Mr Turner has already dealt
16 with and I do not need to go over again, is the point
17 they make that one needs to have the data in order to
18 understand how it is that the OFT allocated costs or how
19 it is that the CC allocated costs, one or the other or
20 both. The short answer to that is that it is entirely
21 unexplained how being given details of the precise
22 figures helps them when the methodology of the CC is set
23 out in extenso in the CC Report and the methodology the
24 OFT has set out in the Lawrie statement.

25 The other point made by Mr Tidswell in asking for
26 this information was that he submitted that the data in
27 Chapter 3 of the CC Report would be useful and
28 interesting as a comparison to the OFT's conclusions.
29 What I would invite the Tribunal to do in relation to
30 that submission is to ask itself the following questions,
31 which are simply not answered. Why is it that the data
32 in the CC Report is likely to be any form of relevant
33 comparison when for a start the data in question are all
34 annual figures relating to the period from 1995, 1996,
35 1997, 1998 going on and ending in May 2000, when the
36 OFT's figures relate to 2000 and 2001. There may be
37 answers to that, but they have not been provided by the
38 Appellants. There is simply no explanation.

1 Why is it that the annual figures, which is what is
2 provided, are a relevant comparison to the monthly
3 figures which the OFT was using? Why is the CC data said
4 to be a relevant comparison, an interesting comparison,
5 when for example the CC's approach to depot costs failed
6 to do what the OFT did, which is to break depot costs
7 down into run costs and remaining depot costs?

8 It is frankly not for us to try and invent answers to
9 those questions. It is for the Appellants to satisfy you
10 that there are answers.

11 If we can go on to page 9 of the table. I can make a
12 very short point about that. What is asked for is
13 information which is supposed to show a general trend of
14 Wiseman prices. We are again talking about the period
15 1995 to 2000. If one turns to what is already in the
16 public version of the CC Report, I can demonstrate this
17 quite clearly. What one has at paragraphs 3.12 to 3.13
18 is illustrated by two tables at pages 136 - 137 of the CC
19 Report. I have got the original version and these tables
20 are in colour. These tables show a general trend of
21 Wiseman pricing. It is not explained why those tables
22 are not enough, even if one assumes that the tables are
23 of any relevance to the inquiry conducted by this
24 Tribunal at all.

25 I do not think I need to go to any other points of
26 detail in the table.

27 The final point I wanted to deal with that Mr Turner
28 flagged up is the issue of whether the OFT should now be
29 required to list various meeting notes kept by officials.

30 It is important to take the Tribunal to the letter of 18
31 September 2003. I do not know whether the Tribunal has
32 that? It is at page 89.

33 THE CHAIRMAN: Yes, we have that.

34 MR PERETZ: The Tribunal will remember that on 2 September
35 the Tribunal and I had a discussion about the OFT's
36 notekeeping in the case and among other things I said
37 that we had disclosed such notes as there were. We had a
38 discussion of whether officials might have kept a

1 personal note. As a result of that discussion Mrs Pope
2 had a look through her personal notes and discovered that
3 in fact she did have a note of the meeting of 14 March.

4 THE CHAIRMAN: Mr Peretz, is there any such thing as a
5 "personal note" in this area? Any note kept by an
6 official of a meeting is not exactly a personal note, is
7 it?

8 MR PERETZ: By "personal note" I simply mean that it was a
9 note that Mrs Pope took, obviously in her official
10 capacity since she was doing everything relevant to this
11 case in her official capacity.

12 THE CHAIRMAN: Yes. It is not a list of shopping, or
13 anything of that sort.

14 MR PERETZ: No, indeed not. But she took it back to her
15 desk and she kept it essentially for an aide memoire for
16 herself. It was not placed on the OFT's file. She kept
17 it for her own official purposes. Mrs Pope went back and
18 looked through her notes and she discovered this note of
19 14 March. The OFT then, this note having been
20 discovered, conducted a review asking other officials
21 involved whether they might have kept some notes of their
22 own which had not found their way on to the file. The
23 notes were all gathered together and reviewed and for
24 reasons set out in the letter the only note which it was
25 felt appropriate to disclose was Mrs Pope's note. The
26 remaining meeting notes that there were fell into one or
27 other of the categories set out down at the bottom of the
28 first page and over into the second page. That is to
29 say, notes which simply added nothing whatsoever to a
30 meeting note which was already in the papers, a brief
31 personal note relating to irrelevant matters and a note
32 relating to an official's own thinking in internal
33 discussions with colleagues. That is what that is.

34 What you were originally invited to do on the basis
35 of this letter, and up until this morning you were being
36 invited to do, was to order the OFT to take the very
37 unusual step in proceedings of this type or in judicial
38 review proceedings of preparing a list of documents for

1 inspection. That extravagant request has now been scaled
2 back to a simple request that the meeting notes should be
3 listed. However, the fact that the original request was
4 extravagantly unreasonable does not make the modified
5 request any less unreasonable and unjustified. The only
6 basis upon which the Applicants would be entitled to a
7 list of the sort that they now ask for is if they could
8 pro-doubt on what they are being told in this letter of
9 18 September. They have given the Tribunal no reason at
10 all to explain why they doubt what is being said to them
11 here. All they have said is that they do not accept what
12 is said to them here and that is simply not good enough.

13 THE CHAIRMAN: It might - I do not know, Mr Peretz - but if
14 we were to come to the view that matters relating to the
15 negotiating and monitoring of Wiseman's voluntary
16 assurances were not sufficiently proximate to the issues
17 we have to decide and if we were to come to the view that
18 an official's own internal notes of his own thinking and
19 colleagues' thinking was properly to be regarded as an
20 internal document, that would leave us with A out of this
21 list of A, B and C.

22 MR PERETZ: Yes.

23 THE CHAIRMAN: One of the problems with this case is that the
24 notetaking, the document trace and general state of the
25 files gives rise to a certain amount of concern on the
26 part of the Applicants and does not seem to have been
27 entirely satisfactory, but it may be that A is the one
28 you need to think about.

29 MR PERETZ: The issue in A only arises --

30 THE CHAIRMAN: What is the difference between the note that
31 Mrs Pope took, which you very properly made available,
32 and the other notes that are referred to in A?

33 MR PERETZ: The essential difference is that 14 March was a
34 meeting with Wiseman, so there is obviously no express
35 note of it - they were not there - and up until Mrs Pope
36 discovered her own personal note of that meeting the OFT
37 believed that there was not a note on its files. A
38 certain amount has been made of the 14 March meeting and,

1 given that, it was felt right to disclose Mrs Pope's
2 note. That is to be distinguished between, for example,
3 meetings with Express, where there is a long Express note
4 on which they are relying.

5 THE CHAIRMAN: When in A it talks about brief personal notes
6 made during meetings, do we know what meetings we are
7 talking about? Are we talking about the 14 March
8 meeting, for example?

9 MR PERETZ: No, because A is full notes which are already to
10 be found in the application or in material already
11 disclosed, so we are not talking about 14 March. At the
12 stage that that letter was written, that was until the
13 disclosure of Mrs Pope's note, it was a meeting in
14 respect of which there was no note on the Tribunal's
15 papers. It had not been disclosed previously and there
16 was obviously nothing about it in the application.

17 THE CHAIRMAN: Do you happen to know how many notes we are
18 talking about? Are we talking about five dozen notes or
19 three notes?

20 MR PERETZ: I think we are talking about a fairly limited
21 quantity of notes but, with respect, that is not the
22 point. There is a question of principle as to whether
23 this is an appropriate remedy or appropriate measure to
24 require the OFT to do and the mere fact that it might not
25 take the OFT very long simply does not matter. There was
26 a question of principle there.

27 THE CHAIRMAN: We would need to go through the normal stages
28 of working out to what issue does it relate and what is
29 the balance of convenience, or whatever the right phrase
30 is.

31 MR PERETZ: Yes. The OFT has examined these notes against
32 the background of the cards-on-the-table approach, which
33 we have already extensively discussed today, and on that
34 basis has taken the view that these notes do not require
35 to be disclosed for the reasons set out in A, B and C
36 because they fall into those categories.

37 THE CHAIRMAN: Yes, I see.

38 MR PERETZ: The Tribunal should only, in our submission,

1 take the unusual step of requiring a list of those notes
2 to be provided if there was some doubt, backed by
3 evidence or a witness statement or some reasoned
4 application as to why it was suggested that the 18
5 September 2003 letter is not correct. There is not. All
6 we have is statements from the Applicants that they do
7 not accept it.

8 There was obviously - Mr Tidswell called it a 'slip',
9 we are prepared to accept that - in that Mrs Pope's note
10 was not disclosed earlier. It was all they can point to
11 and, as Mr Tidswell very fairly said, this sort of thing
12 happens in litigation.

13 That is all I am going to say.

14 THE CHAIRMAN: Thank you very much.

15 Yes, Lord Grabiner. Good afternoon.

16 LORD GRABINER: May it please you Sir. I gratefully, if I
17 may, adopt Mr Turner's submissions and I am not going to
18 repeat what he has said. Could I bring us back to what,
19 in our submission, is the key issue here, namely the
20 question to be addressed in this hearing.

21 The key question, we suggest, is whether recovery and
22 inspection is necessary at this stage for fairly and
23 justly disposing of the appeal. That is essentially the
24 point. We respectfully agree with the way that you put
25 it to Mr Tidswell, looking at things like what I think
26 you called the "irreducible minimum", the must-haves.
27 This is essentially the exercise and it has got to be by
28 reference to that test.

29 That is the test that comes out of Rule 17, which is
30 the governing rule, which is why I suspect that although
31 there may be differences between the Scottish
32 jurisdiction and the English jurisdiction, such
33 differences as there may be are not relevant ones for the
34 purposes of this hearing.

35 THE CHAIRMAN: Well the rules I think are designed to reflect
36 the practice in the three jurisdictions.

37 LORD GRABINER: It happens by good fortune that the position
38 in Scotland and in England is the same in this respect,

1 that there is no automatic disclosure. But otherwise the
2 approach is the approach summarised in Rule 17, "to give
3 such directions as it thinks fit to secure the just,
4 expeditious and economical conduct of the proceedings",
5 and the way we put it for the fair and just disposition
6 of the appeal is in effect an appropriate gloss or
7 similar formula but derived from the authorities, in
8 particular the *Aquavitae* case and the *Barts Hospital*
9 case, to which reference has already been made.

10 Could I also by way of a preliminary observation say
11 this. One might be forgiven for thinking that some of
12 the minutiae of the debate which emerges from the way Mr
13 Tidswell makes his argument rather departs from the
14 judicial review nature of the disclosure process that we
15 are involved in and, in our submission, that must not be
16 forgotten. It is common ground, I think, that we are
17 approaching the disclosure exercise, or the recovery and
18 inspection exercise, on the basis of the comparison with
19 a judicial review application.

20 I wonder if I might, and without wishing to weary you
21 with any unnecessary legal authority, just draw your
22 attention to a couple of brief passages in the *Harrison*
23 case in the Court of Appeal, which is in tab 3 of the
24 bundle that we have produced to the Tribunal, which
25 includes our skeleton argument? The Court of Appeal
26 consisted of Lord Justice Glidewell and Sir Dennis
27 Buckley. There are two passages that I would like to
28 show you. One is on page 7 in the substantive
29 penultimate paragraph of the page, where Lord Justice
30 Glidewell says:

31 "In my judgment the role of the Court in judicial
32 review is different from its role in an ordinary
33 action. That is correct. It is impeccable.

34 Judicial review is a different sort of a process from
35 the fact finding process which is a necessary part of
36 any action begun by writ and the process of applying
37 the law to those facts."

38 Then he says this:

1 "Judicial review notoriously is based upon the way in
2 which a decision has been made, not whether the
3 decision itself was correct."

4 That is a critical sentence, in my respectful submission,
5 because, as we will explain in a moment and which is I
6 think already obvious from the argument that you have had
7 presented to you, you are not going to be on an exercise
8 to determine what is the correct answer here. The
9 exercise that you are engaged upon is the way in which
10 the decision has been made and whether or not it is
11 appropriate to come to a view that that mechanism or
12 methodology was wrong or not. We could no doubt have a
13 debate until the crack of doom about the so to speak
14 right answer to all of this, but that is not the exercise
15 that you are engaged upon and I would urge you strongly
16 not to be succoured down that line, because it would be
17 an entirely inappropriate one. I will come back to that
18 point, if I may, in the context of one or two issues in
19 this appeal.

20 Then over the page, again in the penultimate
21 paragraph, the learned Lord Justice says:

22 "What clearly is important is that the criteria are
23 those set out in Rule 8. I find it unnecessary to
24 decide whether the approach to discovery in judicial
25 review is in principle more circumscribed than in
26 relation to an action begun by writ. What is clear,
27 in my view, is that inevitably because of the nature
28 of the jurisdiction, discovery in judicial review
29 will be appropriate in far fewer cases and will
30 frequently, even when it is ordered, be more
31 circumscribed in its extent than it commonly is in
32 relation to an action begun by writ. But that, so to
33 speak, is not so much a matter of principle as the
34 nature of the creature."

35 I emphasize that point as well, because it is consistent
36 with the bit on the previous page which I just showed to
37 you.

38 "I remind myself of the test ..."

1 Then you see a very similar test:

2 "if and insofar as the Court is of the opinion that
3 discovery is not necessary either for disposing
4 fairly of the cause or matter or for saving costs."
5 It is the same sort of approach which drives the test.

6 Could I try to identify what in our submission are
7 the considerations which the Tribunal should have in mind
8 in the context of this particular case when coming to a
9 judgment about the matters before you.

10 First of all the reasons why recovery and inspection
11 are said to be necessary at this stage. You have got to
12 be satisfied that recovery and inspection is necessary.

13 Next, the issues to which recovery and inspection is
14 said to be relevant.

15 Next, the incidence of disclosure which has been made
16 to date. So bear that in mind, because this is a case
17 where there has already been a significant amount of
18 disclosure.

19 Next, the fullness of the pleaded case from Express,
20 and I would venture to suggest that it could not possibly
21 be any fuller. Incidentally, bearing in mind what one is
22 supposed to be doing in these proceedings in terms of how
23 much documentation you could use for these purposes, they
24 have gone well over the top on that, not because of
25 verbosity necessarily, though I would not suggest that
26 there was not any, but it does suggest that they had
27 plenty of material to play with.

28 Next, whether recovery and inspection is
29 proportionate.

30 Next, the delay in costs which would be occasioned by
31 further disclosure. The fact is that if we do not come
32 on at the end of July, for example because the Tribunal
33 has other business, fair enough. But that is not a
34 justification for some parkinsonian exercise which would
35 involve the production of further documents just because
36 we won't come on anyway, if that is the case.

37 Next, the commercially sensitive nature of the
38 information sought.

1 The background to those questions, if I can identify
2 the background points, and again they will be known to
3 you - I am just going to synthesize them and only one or
4 two do I want to develop, because you are familiar with
5 them - is, first of all, this question is now being
6 considered for the fourth time in the six CMC's that we
7 have so far had. If I might just remind you in that
8 context that the complaint in this case was made in March
9 1999. The case began in November 2002. The OFT's reply
10 was in November 2003 and then we waited from then until
11 19 March for the other side to ask for more disclosure.
12 This is very leisurely litigation. It is very difficult
13 to understand why there has been such huge delay in that
14 regard. We do respectfully suggest that enough is enough
15 and that you really ought to be stamping upon it. I know
16 that is something that you do not like to do, but it has
17 to be done.

18 THE CHAIRMAN: What - stamp on things!

19 LORD GRABINER: Well it depends on what is underneath your
20 foot. I want you to understand that. But enough is
21 enough, we say, and in this case the factors all drive in
22 that direction.

23 Next, as I have already suggested, they have been
24 able to plead a very lengthy case in the light of the
25 greater incidence of disclosure than would normally have
26 been available to any complainant. One of the reasons
27 for saying I want disclosure is because 'I am
28 embarrassed; I cannot plead my case'. That is not this
29 case. That was originally one of the arguments that was
30 put forward in support of an earlier application for
31 further disclosure, but it is no longer put on that
32 basis. Obviously it cannot be in the light of the fact
33 that they have been able to plead it as extensively as
34 they have.

35 Next, they admit quite frankly that they understand
36 the methodology and the reasoning behind the OFT's
37 decision of non-infringement, but what they say is that
38 they want, and I quote, "to be certain" of their

1 criticisms.

2 My submission is that that is a fundamentally
3 misconceived approach to this problem. It is not
4 consistent with what we saw Lord Justice Glidewell saying
5 a moment ago and it is entirely inconsistent with the
6 role of this court on an application like this.

7 Since Mr Green's skeleton to you on 2 September I
8 think it was, there have been a number of developments in
9 this case. One of them I have already mentioned, the
10 pleading, but it is also the case that they no longer
11 seek a finding of positive infringement. Indeed it is
12 part of their case, and at first blush it becomes quite
13 an attractive proposition for them to be making, they do
14 not ask the Tribunal to make any findings of fact. It is
15 not as if they are inviting this further recovery and
16 inspection so as to help you to come to a finding of
17 fact. On the contrary. It is to enable them or their
18 expert to be certain of the argument that they want to
19 present to you and, in my submission, that in principle
20 sounds simply all wrong.

21 Next, there is material which is available to them
22 from the public domain which perhaps they have not taken
23 as much advantage of as they could have done. We see
24 that from what Mr Bezant has to say on the subject
25 because quite a lot of his thinking is driven by material
26 that is publicly available and which he expressly relies
27 upon in the report he has produced.

28 Next we suggest that there will be inevitably further
29 delay and increased costs, as I think is accepted by the
30 other side in any event in the context of a five year
31 dispute which has represented and does represent a
32 continuing burden upon my clients.

33 On confidentiality we say that the effect would be
34 that the other side would get a great deal more
35 information on a key competitor. They would get a
36 complete picture of our business as of 2000 and 2001 and,
37 for reasons which I think I developed last time round and
38 which I think are the subject of some more evidence this

1 time, they would simply be able to deduce from that
2 information our current commercial and pricing strategy.

3 Finally on that point there is ample material before
4 the Tribunal to enable the issue on the appeal to be
5 reached, and the issue on the appeal is as to the
6 robustness of the OFT's decision. You do not need this
7 material in order to come to a judgment about the
8 robustness of the OFT decision.

9 In our submission we do go so far as to say that it
10 cannot seriously be suggested that disclosure is
11 necessary at this stage for the fair and just disposition
12 of the issues on the appeal.

13 I want to look at a few examples of the deficient
14 thinking, as we would suggest, in the other side's
15 approach and there are some very fundamental
16 misconceptions. First of all, what we call shadow
17 investigation.

18 The purpose of the exercise appears to be to conduct
19 a shadow investigation to see if some different result
20 can be arrived at on what I think you have called a "what
21 if" basis. You have deprecated that approach in earlier
22 judgments that you have given in this case. There is a
23 passage in your 9 June judgment at page 7. I do not know
24 if you have the point in mind, but can I very quickly
25 read it to you. You said:

26 "This is not an occasion for the Applicants to seek
27 to re-work all the workings that the Director has
28 made on the basis of the original raw material
29 supplied to him. The primary purpose of the case is
30 to identify whether the Director has made any
31 material error of law, whether he has carried out a
32 proper investigation, whether his reasons are
33 adequate and whether there are material errors in his
34 appreciation. It should not, at least ordinarily, be
35 necessary to go in great depth into the underlying
36 documents in order to establish whether any of those
37 points arise."

38 We respectfully agree with every word of that.

1 Then at the CMC on 1 April I think you said this:
2 "There are perhaps risks in being drawn into a much
3 more detailed analysis on a 'what if' basis when it
4 is not clear that the 'what if' ever was the 'what
5 if' that was being conducted at the time."

6 That is quite an important point as well, because you end
7 up with a completely different factual matrix or scenario
8 upon which to come to a judgment, which is not the 'what
9 if' at the relevant time, or may not be. It certainly
10 was not the subject matter of what was being investigated
11 at the time by the OFT.

12 Can I take a couple of specific examples from the
13 case. In support of its application for disclosure of a
14 price cost matrix and the attachments to the Wiseman
15 letter of 29 November 2001, the other side say that the
16 information is necessary to demonstrate the actual
17 consequences of the mistakes allegedly made by the OFT.
18 For example, it is said that the OFT erred in its
19 approach to predation by failing to identify the time
20 period over which the alleged abuse took place.

21 The OFT, as we understand it, has actually accepted
22 that it did not have any particular time period in mind,
23 so why do you need to do the exercise? If they were
24 wrong to have adopted that approach then you can make
25 that conclusion.

26 THE CHAIRMAN: Well I have understood Mr Turner to accept
27 today that he is not taking the point that if their
28 approach was wrong it made no difference.

29 LORD GRABINER: Absolutely.

30 THE CHAIRMAN: In relation to at least the key arguments, the
31 main arguments, he is accepting that if it was an error
32 it is a sufficiently material error to merit a second
33 look. Those are words I use and not the words he used,
34 but that is the position.

35 LORD GRABINER: On that particular example, the only point I
36 want to get at is this, that it is not an exercise that
37 involves the need to go down the road of following
38 through the correct time period and working it all out to

1 the nth degree. They did not look at it in terms of the
2 time period. Are they right or are they wrong as a
3 matter of principle? That is the issue, as we understand
4 it.

5 THE CHAIRMAN: Yes.

6 LORD GRABINER: And you do not need any further recovery in
7 order to make a judgment about that. It is quite
8 unnecessary.

9 Similarly in relation to the allocation of costs
10 between outlets on a run by volume, which is a separate
11 example. The OFT on this example have accepted that costs
12 were allocated by volume, and they have explained why
13 that was done.

14 Mr Haberman, in his report, says:

15 "Since the OFT used volume as its sole basis for any
16 costs allocations to be carried out, all erroneous
17 allocations have the effect of allocating excessive
18 cost to high volume outlets and customers and
19 insufficient costs to low volume outlets and
20 customers. The limitations of the information
21 available to me prevent me from identifying all the
22 effects of this error but I have been able to arrive
23 at some illustrations and estimates."

24 He then gives a number of detailed examples of the
25 effects of the alleged error in his paragraphs 5.95 to
26 5.100.

27 Again the point is clear. It is on the table. We
28 know what the dispute is. Mr Haberman's criticism has
29 force or it does not. Why do you need any further
30 recovery? Answer: You don't.

31 Then in relation to information sought to monitor the
32 voluntary assurances so as to demonstrate that the OFT
33 failed to accumulate proper costs' data to allow a cross
34 check of the information provided in response to the
35 investigation. But as Express recognised in their letter
36 of 16 April, the OFT has made clear in its reply that
37 there was no systematic cross checking of the data
38 provided in relation to the voluntary assurances against

1 the information provided by Wiseman in response to the
2 section 26 notice. So Express is able to make the point
3 that the OFT failed in its approach without needing to
4 conduct a shadow investigation or, as it is put by the
5 Applicants, to see information which the OFT had and
6 could have used as a means to cross check information
7 gathered during the investigation but did not use for
8 that purpose. At least one thing that can be said for
9 them is that they are consistent, but they are
10 consistently wrong, in my submission, for the reason that
11 I have endeavoured to suggest.

12 Could I say next something about what we call
13 fishing. In our submission this is a fishing exercise.
14 Either it is fundamentally misconceived, but for good
15 reason, namely a failure to understand, or an error.
16 Knowing the quality of Mr Tidswell and his firm from
17 years past we know it cannot be an error. This is a
18 fishing exercise. His clients are very anxious indeed to
19 get their hands on as much information as they can from
20 my clients. I do not invite you to reach a conclusion on
21 that question, but please bear it in mind as perhaps a
22 realistic assessment of what is actually being played out
23 before you. It is possibly attractive, but certainly
24 inappropriate, to make bare unsubstantiated allegations
25 and then to call for discovery in an attempt to prove
26 your suspicions. The Barts Hospital case says that that
27 is not the right way to do it. It is also inappropriate
28 to seek to go behind the OFT's written evidence to
29 ascertain whether it is correct or not, without any
30 extraneous evidence to substantiate its claim, and that
31 is what the *Harrison* case decides.

32 A very good example of fishing is the allegation that
33 Wiseman deliberately manipulated data provided to the
34 OFT. That is a charge that is made. This is put forward
35 as a reason for seeking disclosure of the unredacted
36 sections of the Competition Commission Report said to be
37 relevant to predation and the information used to monitor
38 the voluntary assurances. We give a number of other

1 examples in paragraph 23 of our skeleton, which I will
2 not trouble to turn up, but they are there.

3 Can I go to a separate point, which is the point
4 about disclosure in stages. The point about this is that
5 you have already ruled that disclosure should be
6 approached on a stage by stage basis and at every stage
7 the burden is on the applicants to show why the material
8 sought is necessary for the fair and just disposition of
9 the appeal. It is not enough simply to point to the
10 great deal of disclosure given to date, which at times Mr
11 Tidswell came very close to doing - in fact I think he
12 did cross the line on one or two occasions. He was in
13 effect saying 'we have seen so much; why can't we see
14 the rest of it'. He said that with a straight face, but
15 deep down he must have been quite amazed at the words
16 that were coming out of his mouth. But that is the
17 effect of the argument and it is not an appropriate way
18 of proceeding, in our respectful submission.

19 THE CHAIRMAN: He says it is illogical to stop when you have
20 only got half the picture on certain points.

21 LORD GRABINER: I can understand that, but we are not on an
22 exercise of logic. We are actually on an exercise of
23 common sense here.

24 THE CHAIRMAN: But we should not entirely abandon logic.

25 LORD GRABINER: We must not ever abandon logic. That is
26 absolutely right. I hope that I have never been accused
27 of that, but if you are really concerned about ensuring
28 that you get a just result you have got to be practical
29 about what the disclosure should be in the particular
30 context of the case.

31 THE CHAIRMAN: Yes. We have to be practical and
32 proportionate and all of those things.

33 LORD GRABINER: You have got to be realistic and a realism is
34 something maybe that is not always susceptible to a
35 logical analysis, but I think we know what it is when we
36 see it.

37 Then there are things that I do not need to address
38 because they have already been addressed.

1 I do emphasize the point in passing. Mr Green is not
2 here today but he won't mind me quoting him in his
3 absence accurately. I will just remind you of three
4 observations of his own on the last occasion.

5 "We think we know what happened and we think we know
6 why they went wrong. We think we do know what they
7 did and we have a pretty good idea of the precise
8 exercise which was carried out. We do know more or
9 less what they did."

10 It is very difficult to understand, in the face of those
11 observations by experienced counsel, that further
12 recovery is actually necessary.

13 I have already made the point in a slightly different
14 context, but it is this expression about the need for
15 certainty. One of the points that is made, I think by Mr
16 Green, on a previous occasion in the transcript at page
17 29 and then at pages 32 - 33 is this: "Mr Haberman is
18 entitled to be certain that he is not making a mistake."

19 Well he is not actually entitled to that as part of
20 this exercise. He might be interested in being certain,
21 but actually it does not figure in the debate that we are
22 concerned with here. For example, recovery and
23 inspection is sought of the unredacted version of the
24 Scottish Milk Report allegedly so as to be able to
25 criticise further the methodologies which were in fact
26 adopted by the OFT. But as set out in the OFT's
27 skeleton, the Competition Commission's methodology is
28 adequately set out in the publicly available version of
29 the report or in previously redacted versions which have
30 now been disclosed to Express. This is an important
31 point, because it shows that the methodology is revealed,
32 as Mr Green confirms and as is well understood. In the
33 circumstances it is not necessarily, in effect, to go
34 further. That is why we respectfully suggest that this
35 is a fishing exercise, a disproportionate exercise and
36 one that is not justified.

37 I do not think that I need to trouble you with the
38 points that I am now passing over. I have virtually

1 completed now.

2 Can I go to the question of confidentiality. I do
3 not think I need to add very much. There is a second
4 witness statement of Mr Gerald Sweeney which we have
5 provided, which explains why, in confirmation I think of
6 matters that I have previously addressed you about, we
7 would object on the grounds of confidentiality. We say
8 that access to Wiseman's pricing strategy for 2000 and
9 2001, which has not been subject to any significant
10 change, would enable a sophisticated competitor, such as
11 Express, to calculate the current spread of prices
12 without difficulty and would thereby gain a real insight
13 into the way Wiseman prices to different types of
14 customers. We also say that provision of the remaining
15 cost information would give Express a complete picture of
16 Wiseman's cost base for 2000 and 2001 and would enable it
17 to calculate the various elements of Wiseman's current
18 cost base. We do suggest that it is not appropriate for
19 this disclosure to be given. Of course, I recognise that
20 in an appropriate case the confidentiality argument might
21 not bear very strongly, but in a case like this it ought
22 to bear more heavily because you cannot be satisfied on
23 the material in front of you and the arguments that have
24 been addressed to you that this is a suitable case for
25 this weighting the scale --

26 THE CHAIRMAN: It is probably part of proportionality more
27 generally, I should think.

28 LORD GRABINER: Precisely.

29 The last point I want to make is this. I must confess
30 that I really had not anticipated that it would be
31 necessary for me to address this issue today in the light
32 of the remarks that you made last time round and I
33 remember that when I had the audacity to make a further
34 reference to it at the close of my submissions last time
35 round you seemed rather surprised that I was banging on
36 about it, which I entirely understand and perhaps I
37 should not have done, but now I suspect I should have
38 done. You may be surprised to know that, despite what

1 passed on the last occasion, the other side have still
2 refused to withdraw or vary paragraph 1.2(c).

3 THE CHAIRMAN: This is Chapter I again, is it?

4 LORD GRABINER: Absolutely. It is still sitting there and
5 they are still hoping that you are going to swallow that.
6 You really must not swallow it, for all the reasons that
7 I addressed to you last time. We have never had sight of
8 the documents relating to the Chapter I case and in
9 particular to the witness statements at tab 16 of volume
10 1 of the annex to the original notice of application. We
11 cannot deal with it ourselves and the idea that it should
12 be a live issue here when it is a live issue elsewhere is
13 entirely inappropriate and in our submission, in view of
14 the fact that the other side are very keen apparently to
15 retain it, I do earnestly suggest that you should simply
16 strike it out. 1.2(c) incorporates the entire case.
17 That is the point.

18 There are a couple of points that arose in
19 submissions this morning by reference to Mr Bezant's
20 report that I want to make very brief points about, if I
21 may.

22 Can I draw your attention to his report at paragraph
23 3.22 but at figure 1 which is on page 12.

24 THE CHAIRMAN: This is the discussion of Edinburgh, Keith and
25 so forth.

26 LORD GRABINER: Yes. Figure 1 is demonstrating in principle
27 types of costs and cost drivers. That is all it is
28 designed to do, so that you can understand, first of all,
29 what is a clear cost driver. The example is volume. It
30 is shown as a clear cost driver. You will see the top of
31 a gasometer, so to speak.

32 THE CHAIRMAN: Yes.

33 LORD GRABINER: Then Significant Costs. That is another
34 concept of cost or a cost driver that you should be aware
35 of. Raw milk. Then, thirdly natural limitations of
36 exercise in trying to allocate certain costs, and you can
37 see those identified. It is not a reworking of the Keith
38 data nor a suggestion that it should be reworked. Let us

1 be absolutely clear about what the purpose of this is and
2 why it is before you.

3 Whilst we are in that volume could I invite your
4 attention to paragraphs 8.20 to 8.21, and particularly to
5 8.21(a) on page 35. Reference was made to this before
6 the adjournment as well.

7 The principal issue is costs incurred pre-depot.
8 That is dairy processing, packaging and trunking, as Mr
9 Haberman has detailed in the depot and run costs. But as
10 figure 1 shows, and as appears was agreed between the
11 experts, pre-depot costs are in the large part costs
12 which vary with volume. This is a pure methodology
13 matter. You do not need to audit the pre-depot costs,
14 which appears to be the suggestion, because you can audit
15 until the cows come home. That will not affect the
16 methodology and it is the methodology which is the
17 subject of the debate. That is why the information is
18 there and that is why the issue is before this Tribunal.

19 The only other point I think arises out of Mr
20 Haberman's report, and again I apologise for taking you
21 to another volume but this is the last point I want to
22 make. If you would go to Mr Haberman's expert report at
23 paragraph 5.106, page 73. It is really that whole
24 section, 5.106 to 5.112.

25 Mr Bezant's point is that these are described as
26 anomalies. Mr Haberman has concluded from this that the
27 OFT's approach and its subsequent conclusions must
28 therefore be flawed. Latching on to the word "anomalies"
29 he then leads to the conclusion flawed.

30 Mr Bezant observes that they may represent industry
31 features, not anomalies or evidence of discrimination,
32 and so on. That is the extent of what he is saying. He
33 takes issue with Mr Haberman's reasoning. It is not a
34 debate about the need to examine the underlying data.
35 That is really the point that I want to get across to you
36 there.

37 In my submission, what it all boils down to is that
38 there is a great danger in this case of losing sight of

1 the wood for the trees. There is enough material
2 available to this Tribunal to come to the judgment that
3 it has to come to, especially as, as I say, you are not
4 being invited to find any facts, you are being asked to
5 decide whether this should be thrown out or whether this
6 should be sent back to the OFT. That is the issue you
7 have to decide. In our submission you can do that on the
8 back of the material that is already available to you and
9 it cannot be in anybody's interests, save possibly for
10 the ulterior purpose of Express, to get their hands on
11 yet more material. That, as I say, in my submission is
12 not a justification for ordering any further recovery or
13 inspection in this case.

14 Those are our submissions.

15 THE CHAIRMAN: Thank you Lord Grabiner.

16 MR TIDSWELL: Sir, I have a small number of points. I am
17 hoping they will not take very long.

18 The first one is in relation to the question of cards
19 on the table. I do wish it to be clear that we are
20 saying that there was a question of incompleteness, only
21 of partial cards on the table. The example for that is
22 the 29 November letter. Mr Turner suggested that in
23 these situations it was difficult to go behind unless it
24 was shown that something was wrong or incomplete. We do
25 say incomplete.

26 The second point is about management accounts. I
27 wonder if I might deal with this just to be clear where
28 we are. I think there is perhaps some confusion about
29 what we are asking for and what we are entitled to. We
30 certainly do not ask for the Keith management account of
31 the depot because we know the OFT does not have it.

32 If I may ask you to look quickly at the OFT's
33 response to the request for further particulars. It is
34 in your bundle 15. If I could ask you to look at two
35 points in there.

36 Firstly, page 11. It is item 7.3: "Please state
37 whether in arriving at conclusions as to the
38 categorisation of costs as fixed or variable, the OFT

1 referred or otherwise cross checked its conclusions
2 against Wiseman's management accounts", and the answer to
3 that is that it did not.

4 Then on page 34 it says here: "... in the 13
5 December letter Wiseman said that it did not itself use
6 this methodology". That is the costing methodology used
7 to answer the Section 26 Notice. "Please explain how the
8 OFT understood this methodology to work." The OFT say,
9 "It is irrelevant to any issue in the present case what
10 methodology Wiseman itself uses in accounting for or
11 analysing its costs."

12 It is worth perhaps pointing that out because that
13 seemed to us to be rather unhelpful at the time and it
14 seems to us to be rather unhelpful now in terms of
15 identifying how the methodology was dealt with by Wiseman
16 and how the OFT understood it. But nonetheless the point
17 on management accounts, just to be very clear about that,
18 we do not understand the OFT to have asked for any of
19 them, except the two depot pages we have seen, Edinburgh
20 and Manchester.

21 If I may change to a different subject, the question
22 of Abeness. The Tribunal will recall the figure that has
23 been deleted that shows what inducement was paid. First
24 of all I think it was described as being dealt with in a
25 glancing fashion. We do not accept that at all. I
26 wonder if I can give you three references. I will not
27 take you to them but in the revised notice of application
28 it is 4.106, 4.112 and 4.123(a). The last one
29 particularly makes it very plain that the whole question
30 of that inducement is in issue.

31 What we say about that is that it is a question of
32 effect. What we need to know is how big the figure is to
33 understand the materiality of the effect and we are
34 talking here about the effect of an exclusionary
35 practice. There is a world of difference between paying
36 an inducement of £100 and paying an inducement of
37 £10,000.

38 THE CHAIRMAN: Can you remind me when that was paid, Mr

1 Tidswell. I have a memory that it was before the Act
2 came into force, but I may be wrong about that.

3 MR TIDSWELL: I believe that is right.

4 THE CHAIRMAN: Never mind, we can check it.

5 MR TIDSWELL: I think we will probably have to get back on
6 that. I think the cross reference was the last paragraph
7 in that section. (7 July 1999, 4.267). The point about
8 that is that it was a continuing contract. There may be
9 factual issues.

10 THE CHAIRMAN: It was a three year contract, as I remember.

11 MR TIDSWELL: It was a three year contract. I think my
12 learned friend made reference to it about not being
13 exclusive and went back to the witness statement of Mr
14 Lawrie. I think there is an issue about what the nature
15 of it really was and about whether it was exclusive in
16 relation to the things it related to as opposed to in
17 relation to all the shops, if one can see the
18 distinction. But we would say that it falls within the
19 Act. We would say it is plainly at issue and it is
20 important. That is an important point.

21 The next point is a different point altogether. This
22 is the question of materiality. I think this is much
23 more difficult than has been portrayed to the Tribunal,
24 but I do not take anything from what Mr Turner says. I
25 fully accept what he says at face value, but it is quite
26 difficult to see how that is going to work in practice.
27 The defence is littered with references to the question
28 of materiality. If I may I would like to give you some
29 references, not all of them but I have quite a number
30 here, starting with paragraph 52.

31 THE CHAIRMAN: If I may, I think certainly in the Tribunal's
32 mind, Mr Tidswell, whatever the outcome of this
33 application the OFT is not in a position to have it both
34 ways. It is not in a position to say 'you have not
35 proved your case but then we have not given you the
36 material that you would need if you were trying to prove
37 your case'.

38 MR TIDSWELL: I understand Mr Turner to be accepting that

1 proposition. I am grateful for that. It is very
2 helpful. But I just wonder how difficult that is going
3 to become. The way the OFT's case is put, for example,
4 starting with paragraph 32, there is the reference in
5 there to the broad extent of the margin of discretion.
6 Then over the page at 36 they say "The Tribunal may
7 consider whether [reading from document] under
8 challenge". Then similarly in relation to areas and
9 inferences and conclusions in 37. They are so
10 significant as to undermine the decision. That is
11 repeated in paragraphs 38 and 39. Then in various places
12 throughout the document there are references to the level
13 of distortion that needs to be proved.

14 Just to give you two examples, probably the most
15 useful one is para 149. They say at the end of that
16 paragraph, "The Applicants have not discharged their
17 burden [reading from document] was so significant as to
18 undermine the decision. ... do not believe how taking
19 such steps would change the outcome of the decision."

20 I am not trying to second guess Mr Turner and I quite
21 understand what he is saying, but I do wonder where, for
22 example, we are going to find the line is between a key
23 argument and not a key argument. I also wonder, because
24 Lord Grabiner did not address the point directly I do not
25 think, unless I have misunderstood him, where Wiseman
26 would be on all of this. That takes us back to figure 1
27 and you will recall that Lord Grabiner referred to that.

28 There we are with a question of that top slice and how
29 material it might be. The point of that picture, as I
30 understand it, is to show the extent of the materiality
31 of that slice.

32 I think the clearest place where one can see the sort
33 of difficulty that might arise with assessing the
34 materiality of some of these points is the point that Mr
35 Turner took you to, but if you would not mind going to
36 the defence at paragraph 68.

37 THE CHAIRMAN: 68 and 69 I think.

38 MR TIDSWELL: Indeed and over the page to 70-71. This will

1 go to the question of whether trunking costs are
2 important, and so on. I am not going to do this because
3 I think these numbers are probably confidential, but if
4 one were to look at the number in 68 and see in relation
5 to depot cost the percentage which has been excluded
6 because it was only a small part of the costs --

7 THE CHAIRMAN: If you take the figures in 68 which are said
8 to be a small part of the cost, 69 which is said to be a
9 small part of the cost, 70 which is still a small part of
10 the cost and 71 which is still a very small part of the
11 costs, collectively they all add up, so you submit, to
12 quite a significant part of the cost.

13 MR TIDSWELL: And indeed one could then add to that another
14 9.7 per cent which is what the Commission found as the
15 cost of capital. We know that and that is an open
16 figure. So one is approaching a pretty significant
17 figure in an industry where it might be said that 2 or 3
18 per cent was a humble margin.

19 It moves on to the point about the irreducible
20 minimum, because inherent in that test of necessity is
21 the question of fairness from the point of view of the
22 applicant. I think, for example, in relation to the
23 Keith material which we looked at and the differential
24 pricing, and it was said by Mr Peretz that all it does is
25 to ring alarm bells, I think the Applicants would say why
26 aren't they entitled to ring the alarm bells and at what
27 stage is it being said that they are not being able to
28 prove their case as opposed to plead it. They are quite
29 different things. In a sense there is not much point in
30 being able to put the argument unless one can prove it.
31 Mr Haberman said many times that he is hampered by the
32 lack of information and he has already been criticised
33 quite heavily for not having grasped every point in the
34 final detail. I think the Applicants must wonder whether
35 that is going to happen at the hearing, to some extent,
36 as well. At what stage is it that one does get a key
37 question and we are able to say to Mr Turner, you cannot
38 make that point, it is no longer possible to say it is

1 material or not and it has got to go back. I think that
2 is quite unsatisfactory and that leads us to be concerned
3 about the position where we do not have this material and
4 the experts particularly do not have the opportunity to
5 deal with it properly.

6 Moving to a further point, if I may. We are very
7 happy to commit to a process which does not allow us the
8 opportunity to create new documents, new pleadings or new
9 expert reports. What we suggest as a way of avoiding
10 that problem is to make sure the experts have it and they
11 can sit down together and can sort out where they are and
12 where they are not.

13 THE CHAIRMAN: How does that work, in your vision of things,
14 Mr Tidswell? If they sit down and work out where they
15 are and find that they are not where they thought they
16 were, where do we go from there? Or if they do not agree
17 where they are.

18 MR TIDSWELL: Indeed. Where they ought to get to, and I am
19 assuming that they have access to a reasonable body of
20 information, whether it is the 29 November material or
21 whatever it happens to be, that they have enough material
22 so that when they sit down with a list of things they
23 disagree about, which is certainly what our expert is
24 doing at the moment and I assume Mr Bezant is doing as
25 well, they are able to discuss those points. They are
26 able to decide, on the basis of actual figures, which one
27 of them is right if they can and if they cannot they will
28 need to produce a document for the Tribunal, in the
29 ordinary way, which illustrates where the differences
30 are. That, in my recommendation, is what the Tribunal
31 should expect.

32 THE CHAIRMAN: You are not saying that you want to make any
33 new points beyond the points that we have got already.
34 You are not going to seek leave to amend, whatever.

35 MR TIDSWELL: At the moment we certainly would not expect to
36 do that and I would be very happy to put myself and Mr
37 Green in the hands of the Tribunal to make it clear that
38 we should not be doing that. What I would not do is to

1 accept Mr Green cannot use a number he has got in a CC
2 Report and his submissions to bolster his point, but we
3 are certainly not interested in going off on a new set of
4 points. We think Mr Haberman has basically located the
5 points. We now want to verify that really it is a matter
6 of proof that he has and that they matter. We would be
7 happy to be restrained. My suggestion about the experts
8 meeting was a mechanism precisely to provide that
9 restraint. I would submit that I think the Tribunal has
10 every right to expect the experts to do that anyway, to
11 sit down and work out what they agree and disagree. It
12 should be happening, but it is a way by which restraint
13 of the use of the information could be accepted.

14 In relation to the question of judicial review, I am
15 sorry to say that I do not think we are on common ground
16 with Lord Grabiner in relation to that. I thought we
17 were on common ground with the OFT but we do not see it
18 as a basis of comparison to JR principles. We think the
19 significant difference in this case, indeed in this
20 Tribunal, is because of the Freeserve indication that
21 investigations can be reviewed and that must be broader
22 than the *Wednesbury* type unreasonableness that the
23 *Harrison* case is referring to. In *Harrison* the question
24 is all about whether the decision was outside *Wednesbury*
25 bounds. We are not doing that here. That is quite
26 different.

27 On the question of a finding of fact, I am not
28 entirely sure whether we are supposed to have said we do
29 not expect any finding of fact to be made. If that means
30 a finding of fact in relation to infringement, well
31 absolutely fine. But if it means a finding of fact in
32 relation to the investigation, well we will be asking the
33 Tribunal to make those findings.

34 THE CHAIRMAN: To what actually was done or not done in the
35 investigation.

36 MR TIDSWELL: Indeed, and I cannot see how the Tribunal can
37 avoid that if it is going to make a decision on it.

38 In relation to the meeting notes I do not have much

1 to say at all, except that if it is a question of
2 principle it seems to have gone out of the window on 14
3 March meeting, because we have been given the note. I
4 simply do not understand why some principle applies to
5 some notes and another to other notes. I submit that to
6 deal with it as a matter of principle is not very
7 attractive. It is a strange set of circumstances. It
8 has come up in a very peculiar way. There is no doubt
9 that there are some differences between the note and the
10 way that Mr Lawrie recalls the meeting. That may or may
11 not be significant. But in the circumstances, and they
12 are quite special circumstances, we say that it would be
13 appropriate to know just what is there. That is all we
14 are asking for.

15 The final point raised by Lord Grabiner was Chapter
16 I. I do not know whether you want me to deal with that
17 now.

18 THE CHAIRMAN: What is your position on Chapter I, Mr
19 Tidswell, because although we have not ruled on it and I
20 am not sure we are seized today of a formal application
21 to strike it out, it is quite difficult to take it very
22 far, if anywhere, if the other case is stayed and there
23 is apparently some ongoing investigation?

24 MR TIDSWELL: I understand that, Sir. I would certainly ask
25 you not to deal with it today and strike it out if you
26 were so minded. We say it is a matter which, if it is to
27 be struck out or not - and there may be an application
28 made - it should be made in the proper way and it should
29 be dealt with at the hearing.

30 THE CHAIRMAN: What is your present position as to what, if
31 any, regard we should have to Chapter I?

32 MR TIDSWELL: I wonder if I might take you to another letter
33 of 16 April. It is not the one we have been looking at a
34 lot today. I am not sure if you have got a bundle of
35 correspondence? (The Treasury Solicitor has very kindly
36 produced a bundle, if it is easier to hand that up and
37 ask you to find it in there).

38 THE CHAIRMAN: I think we have got it.

1 MR TIDSWELL: It has got a heading about four lines down
2 saying, "Criticisms of revised notice", which we respond
3 to. It is on page 3.

4 THE CHAIRMAN: Yes, "Other Matters". It is the second
5 paragraph.

6 MR TIDSWELL: Precisely. What we are saying here is that
7 although we of course understand the position that the
8 Tribunal articulated that while the investigation into
9 Chapter I is progressing no findings about it can be
10 made, we say that if there was an investigation, the
11 respondent misunderstood the relevance of that. We say
12 that the way in which they failed to take into account
13 the existence of a Chapter I inquiry is itself a ground
14 of appeal. That is how we have pleaded it. We have made
15 that very clear. That is the position we assert and will
16 assert and if we are not struck out we will argue it. We
17 do not intend to give that up, but we say that that does
18 not involve the Tribunal getting into any of the
19 questions as to the likely outcome of the current
20 investigation or what was happening in the past
21 investigation. The only relevance is that there was an
22 investigation and the Tribunal should have some rough
23 idea of what the nature of the investigation is.

24 THE CHAIRMAN: But is there any relevance to the existence of
25 some other investigation if that other investigation
26 turns out to be unfounded, for example? In other words,
27 it is a bit difficult for us to say whether or not it is
28 relevant until we know what the outcome is, isn't it?

29 MR TIDSWELL: With respect, I do not think that is quite
30 right. I think we say that the attitude that the OFT
31 took to the existence of that investigation was wrong in
32 principle and they should have taken into account the
33 existence of Chapter I allegations when they were looking
34 at, for example, things like exclusionary contracts and
35 the effects they would have. One cannot just put the
36 possibility that there may be a Chapter I infringement
37 completely to one side, which is effectively what they
38 did, we say, and go ahead and look at exclusionary

1 contracts in isolation. It is a question of looking at
2 all of the activity in that market, given the market
3 share of the dominant party and other things going on. I
4 appreciate that that cannot and should not lead the
5 Tribunal to be going into the nature of that
6 investigation in any detail and making particularly any
7 findings about whether or not it was likely to result in
8 infringement. But nonetheless we say we are entitled to
9 challenge the OFT's approach to the Chapter I
10 investigation because we say they simply failed to take
11 it into account. In doing that, what we thought and what
12 we advanced here - I do not believe we have had an answer
13 to this point, which is why we were slightly surprised by
14 the submission made in written submissions by Wiseman -
15 was a compromise, that it would be helpful here, that all
16 we need to show is the existence of a reasonable
17 suspicion. That is clear from the redacted papers and
18 the non-confidential version that the Tribunal has in
19 Chapter I and there was no reason why the Tribunal should
20 not have those as a reference point for showing there was
21 a reasonable suspicion, there was a Chapter I inquiry.

22 I am a little bit confused about whether we are on
23 common ground with Wiseman, because we thought that they
24 had that redacted version in the Chapter I papers but
25 maybe we are quite wrong about that. But we are only
26 talking here about using (I think they are quite
27 substantially redacted) redacted versions of the Chapter
28 I application to substantiate it. The threshold we have
29 to get to is just the fact of a reasonable suspicion and
30 the investigation being opened, we say for our argument.

31 That is where we are on that. I am not sure that I can
32 take that any further.

33 I have no further points.

34 THE CHAIRMAN: Thank you, Mr Tidswell.

35 LORD GRABINER: I do not want to prolong the exercise but I
36 do want to clarify one point. I think, and Mr Tidswell
37 will correct me and no doubt you will as well if I am
38 wrong, but I think that what he was suggesting in answer

1 to one of your questions, Sir, was that he would not be
2 seeking leave to amend his case in the light of any
3 further recovery that was given in this case.

4 THE CHAIRMAN: That is the impression that I got.

5 LORD GRABINER: If that really is what is being said, that
6 really proves our case, because the only justification
7 for the provision of more recovery is in order to enable
8 them to make a further or better case, but what he
9 appears to be suggesting is, 'I do not really need this
10 material for now, I only need this material if you send
11 it back'

12 THE CHAIRMAN: What he is saying is that he does not want to
13 make any new points and is suddenly going to argue
14 something that has not occurred to anybody so far, but in
15 his submission it is better for the Tribunal and fairer
16 for the points that have been made so far to be fully
17 explored with the benefit of knowledge of the underlying
18 figures. I think that is the general thrust of the
19 argument.

20 MR TIDSWELL: That is absolutely right, Sir. Also to add to
21 that, we would expect the process the experts went
22 through to provide the Tribunal with the benefit of any
23 of the outcome and the supply of that information. Lord
24 Grabiner's point is what is the point of it all. We
25 would say we would expect the experts to be able to find
26 --

27 THE CHAIRMAN: -- to enable the experts to have a full
28 picture of this.

29 MR TIDSWELL: And that would be the vehicle by which the
30 Tribunal would have the information.

31 LORD GRABINER: The other point, which I hope my friend
32 is not going back on, is what we were told last time,
33 which represents an important part of the argument today.
34 Mr Green said last time 'We are not, and we wish to
35 clarify this, asking you to make any findings of fact
36 yourself'. As I understand it that is the premise of the
37 substantive appeal.

38 THE CHAIRMAN: I think what he meant by that was that he is

1 not asking us to find whether or not there was a dominant
2 position or whether or not there was an abuse.

3 LORD GRABINER: They would all be matters for the OFT?

4 THE CHAIRMAN: They would be essentially matters for the OFT,
5 but if it became relevant to find as a fact that the
6 matters that were investigated were this that and the
7 other matter or that there were no notes for a particular
8 meeting, those would still, technically speaking, be
9 findings of fact but they would not be findings of fact
10 on the substance. I think that is what Mr Tidswell was
11 saying just now.

12 MR TIDSWELL: Indeed, Sir. I am not entirely sure that I
13 can speak for Mr Green as to what he meant, but certainly
14 I understood him to be saying he was not asking you to
15 make findings of fact in relation to --

16 THE CHAIRMAN: Well as Lord Grabiner said, we will know
17 roughly what we mean I think.

18 Very well. Thank you.

19 Ruling to follow at a later date
20 _____