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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

22 May 2012

Before:

LORD CARLILE OF BERRIEW CBE QC
MARGOT DALY
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) **TESCO STORES LTD**
(2) **TESCO HOLDINGS LTD**
(3) **TESCO PLC**

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING (DAY 12)

APPEARANCES

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

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

1 Tuesday, 22 May 2012

2 (10.00 am)

3 MS LISA OLDERSHAW (continued)

4 Cross-examination by MR MORRIS (continued)

5 **LORD CARLILE:** Good morning.

6 Good morning, Ms Oldershaw, or good evening rather,

7 I think it's 9 o'clock with you.

8 **A.** Yes, it is.

9 **LORD CARLILE:** Are you seated comfortably, do you have

10 a drink of water in front of you and are you ready to go

11 on?

12 **A.** Yes, thank you.

13 **LORD CARLILE:** That was three questions at once but I'm sure

14 Mr Morris is only going to ask you one at a time.

15 Mr Morris.

16 **MR MORRIS:** Good evening, Ms Oldershaw.

17 **A.** Good morning.

18 **Q.** Could you take document bundle 2, please, the yellow

19 spine and if you go to tab 83 [Magnum]. This is the

20 Asda internal email we were looking at yesterday right

21 at the end of the day and I was asking you about that

22 document. I had put to you that you had told

23 Dairy Crest and McLelland that Tesco would go back down

24 on stilton prices unless Asda moved up. You remember

25 that I put that to you?

1 **A.** Yes, I remember you put that to me.

2 **Q.** If you go over the page, it's the sentence:

3 "... others have indicated will move back down..."

4 You I think didn't accept that you had said that.

5 Let me put this to you, the reason you gave information

6 about stilton was to give confidence to the other

7 players, the other retailers, that you would be

8 participating in the initiative; that's right, isn't it?

9 **A.** I didn't give any information on stilton to Dairy Crest

10 or McLelland because they were not suppliers of that

11 line to Tesco.

12 **Q.** You knew that the processors were likely to pass on that

13 information, in particular to Asda, in order to keep

14 Asda in line?

15 **A.** I didn't supply any information.

16 **Q.** Now, if we move on to now look at what happened in the

17 remainder of November, your discussions continued with

18 McLelland up to 22 November, and we see that if you go

19 to document 87 [Magnum]. This is an email from

20 Tom Ferguson to Rob Hirst copied to you:

21 "Rob

22 "Please find enclosed my completed control document

23 which will cover our complete range. I will therefore

24 plan to increase costs on the Tesco own label range from

25 the 1st of December and also move the deli range from

1 the same date. As agreed I will start packing the Tesco
2 named creamery range at the new retails protecting your
3 existing margin and I would plan to deliver the new
4 retails from the 1st of December. On the Scottish mild
5 and medium pre-packs I have included suggested retails
6 on the control document, we can agree on your new retail
7 position on these lines by Wednesday next week and then
8 pack for delivery on the 1st of December.

9 "This completed movement will allow us as a business
10 to confidently commit to our 2p per litre increase on
11 milk from the 1st of December."

12 Then we will see attached to that a spreadsheet,
13 this is his control document, what he calls his control
14 document. It's one of these where the -- no, it
15 doesn't, I'm wrong on that. Yes, it does, it goes over.
16 So pages 179 and 181 are the continuation, and 180 and
17 182 go together, I think that's right [Magnum]. Do you
18 see that?

19 **A.** Yes.

20 **Q.** Just whilst we're there, so I can identify just for
21 clarity, on the first page, 179, you have the deli lines
22 which are underneath the contract lines, that's right,
23 isn't it?

24 **A.** Yes.

25 **Q.** Then in the email he's referring to own label range and

1 he refers to named creamery and Scottish mild and
2 medium?

3 **A.** Yes.

4 **Q.** What we were talking about there is the bottom quarter
5 of that first page, from Tesco Caledonian downwards.
6 That's right, isn't it?

7 **A.** Named creamery would be anything with Caledonian in it.

8 **Q.** Yes, so in that list, from Tesco Caledonian downwards,
9 those are the Tesco own labels, all of them; that's
10 right, isn't it?

11 **A.** Yes.

12 **Q.** Some of them are named creamery and some of them are
13 general own label?

14 **A.** Yes.

15 **Q.** The Caledonians are the named creamery and the others
16 are the general own label which he also refers to in the
17 email; that's right, isn't it?

18 **A.** Yes. Yes.

19 **Q.** So what we see from that email is that, eventually,
20 agreement was reached between you and McLelland as to
21 what was going to happen on the Tesco own label range,
22 that's right, isn't it? You've agreed -- by this stage
23 you've agreed named creamery, and we'll see in a moment
24 that the remainder, which you've -- the Scottish mild
25 and medium pre-packs, which are the general own label,

1 we'll see in a moment that you agree those as well, but
2 he's putting forward to you the position for those as
3 well. That's right, isn't it?

4 **A.** Can you just clarify the question?

5 **Q.** Sorry, yes. If we go -- I'm trying to -- if we go back
6 to the email, he says:

7 "As agreed I will start packing the Tesco named
8 creamery range at the new retails..."

9 **A.** Yes.

10 **Q.** So you agreed at that point the retails for --

11 **A.** Named creamery.

12 **Q.** For named creamery. Then on Scottish mild and medium:

13 "... I have included suggested ... [in] the control
14 document, we can agree on your new retail position ...
15 by Wednesday next week ..."

16 In a moment we'll see that you give that
17 confirmation I think at document 88, yes, we'll come to
18 that in a moment.

19 But if we go back to the spreadsheet, if you go over
20 to the third page of the spreadsheet and you do as I've
21 done, which is put a sort of marker down the bottom
22 quarter which matches the ... All those 1 December
23 dates on the third sheet are the dates for the Tesco own
24 label that you see on the first sheet?

25 **A.** Yes.

1 Q. What you actually see there, when you look at prices,
2 although this is the document of course where the header
3 is slightly -- but you see two alternative prices for
4 the proposed retail, and the middle column, "Recommended
5 Retail", is the cash margin maintenance, yes? I'm on
6 the third page of the spreadsheet at the bottom.

7 A. Yes. My headers are blacked out.

8 Q. Are they both?

9 A. Yes.

10 Q. Okay. Well, my header, the first of those two
11 blacked-out ones plainly says "Recommended Retail" as
12 far as I can see. The second one is more ambiguous but
13 we believe that would be "Percentage Margin".

14 If you go right to the bottom of the page, you'll
15 see "Current Retail", £7.49?

16 A. Yes.

17 Q. Then to the right you'll see £7.69, that's 20p per kilo?

18 A. Yes.

19 Q. Then you'll see £7.86 which is a higher figure and which
20 I suggest is likely to be the percentage margin
21 increase. Yes, we believe it says "Retail Protecting
22 Percentage Margin" and we can clarify that if need be.

23 So what you have there is an agreed position on the
24 named creamery range, and let's see if we can sort out
25 mild and medium which you will see in a moment do get

1 sorted out.

2 You'll see here that this email is sent to Rob Hirst
3 and it appears that agreement was reached with
4 Rob Hirst, but you were copied in to the email. That's
5 right, isn't it? This is an occasion where Tom Ferguson
6 deals directly with Rob Hirst, you can see that from the
7 email, yes?

8 **A.** He's informing Rob Hirst, he's giving Rob Hirst some
9 information in the email.

10 **Q.** Yes. Then he says:

11 "As agreed ..."

12 And then he says:

13 "... we can agree on your new retail position ..."

14 The only question I have is do you recall why on
15 this occasion Tom Ferguson was dealing directly with
16 Rob Hirst?

17 **A.** I don't, no.

18 **Q.** Anyway, you don't recall?

19 **A.** No.

20 **Q.** Very well.

21 **A.** No, I don't recall.

22 **Q.** I'll put this to you, the purpose of reaching this
23 agreement on the own label was to ensure that the
24 industry-wide £200 per tonne initiative was going to
25 work; that's right, isn't it?

1 **A.** Sorry, can you just repeat that again?

2 **Q.** The purpose of you finally reaching agreement on these
3 own label lines was to ensure that the industry-wide
4 £200 per tonne initiative worked?

5 **A.** The £200 per tonne cost price increase to give
6 2p per litre back to the farmers, yes.

7 **Q.** Yes. As a result of this email or this agreement,
8 McLelland could finally be satisfied that it would be
9 able to achieve the objective of passing its
10 2p per litre back to the farmers; that's right, isn't
11 it?

12 **A.** That's what it says there, yes.

13 **Q.** And what he says in the email is that he can now
14 confidently commit to his 2p per litre increase. In
15 order to do that, Mr Ferguson had needed all the
16 supermarkets to do their bit, hadn't he?

17 **A.** I can't comment on that.

18 **Q.** Well, if he hadn't got all the supermarkets to agree, he
19 wouldn't have been able to confidently commit to his
20 2p per litre increase, would he?

21 **A.** That's McLellands. He possibly could have made
22 the McLellands contribution, I can't say he didn't,
23 but...

24 **Q.** What I would suggest to you is that in particular,
25 without Tesco's agreement, he certainly would not have

1 been able to pay the 2p per litre on milk from
2 1 December; that's right, isn't it?

3 **A.** Without us paying more for cheese he would have
4 struggled, yes.

5 **Q.** If you go over to -- I hinted in 87 there's a reference
6 to mild and medium. If we go over to document 88 --

7 **LORD CARLILE:** Just before you do, Mr Morris, we looked
8 earlier at the previous email which is at the bottom of
9 the page. The email you've been examining seems to
10 result from the previous email, doesn't it?

11 **MR MORRIS:** Well, it is obviously -- it's a month later,
12 21 October. We're going back to document 52 [Magnum]
13 now. I'm not sure that I can particularly speculate as
14 to why it was written as a forward or a reply to that
15 and I wasn't going to ask any questions.

16 **LORD CARLILE:** All right.

17 **MR MORRIS:** The only thing I would say is this, that the
18 control document that is attached to this is a later
19 version of the control document that was attached to
20 document 52, and it may be in that context, unless you
21 wish me to ask anything --

22 **LORD CARLILE:** No, I don't. Thank you.

23 **MR MORRIS:** If you go to document 88 [Magnum], this is now
24 five days later. I'll read it to you again, this is
25 from Tom Ferguson to you, the 27th:

1 "Good morning Lisa

2 "I will contact you this morning to confirm the
3 retails on mild, medium and generic mature. I have
4 updated the control document with the named creamery
5 retails, ie Caledonian mature at £6.82 and £6.62 per
6 kilo. We have started to pack at these retails in
7 preparation for delivery from the 1st of December.

8 "Cheers Tom (put your feet up now and relax)."

9 What we see there is that the mild, medium and
10 generic mature, this is following on from the sentence
11 in the previous email about Scottish mild and medium
12 pre-packs. This is where he now puts to you -- he's put
13 to you the named creamery figures on the 22nd, and he
14 now puts to you in an updated spreadsheet the -- no, he
15 says he will contact you to confirm the retails on mild
16 and medium and, again, the spreadsheet is sent. This
17 time you will see, if you go over to the spreadsheet and
18 you go to the first page I have of the spreadsheet,
19 which is a horizontal -- landscape spreadsheet, and it's
20 got -- mine has got blue boxes in it.

21 **A.** Excuse me, my copy is virtually unreadable.

22 **LORD CARLILE:** Probably got a redacted version.

23 **A.** That's not clear, is it? I can't read any figures on
24 there or can't read the names properly.

25 **MR MORRIS:** That's a shame. I know you have a version I've

1 got which is a bit -- you haven't got a fully --

2 **A.** I've got a white copy which is clearer now.

3 **Q.** Thank you very much. If you go again to the bottom bit

4 of the table, from Tesco Caledonian downwards, when you

5 go to the columns of prices, "Recommended Retail" and

6 the one which has the blacked-out column, you'll see

7 that in respect of each cheese only one line is filled

8 in. Can you see that? It jumps between the two. So

9 Tesco Caledonian extra mature coloured 300 grammes, the

10 first one, there's a figure in the right-hand of the two

11 columns but not in the left-hand. Okay? Are you

12 following me?

13 **A.** No.

14 **Q.** Let's take it from the bottom. Go to the bottom of the

15 page, Tesco generic coloured mature 1 kilogramme, yes?

16 **A.** Yes.

17 **Q.** If you go right across to the "Recommended Retail"

18 column, yes?

19 **A.** Yes.

20 **Q.** You'll see a figure there of £4.44?

21 **A.** Yes.

22 **Q.** Then in the next column you'll see there's nothing

23 there, it's a blank for that line?

24 **A.** Yes.

25 **Q.** Then if you go up one to Tesco Caledonian extra mature

1 white, you'll see the reverse. You'll see nothing in
2 [REDACTED] but you will see
3 a figure, which I think I can read out, [REDACTED]
4 [REDACTED] -- I can't, I'm sorry. I don't know.

5 Anyway, the point I'm making is in respect of
6 those -- I haven't counted how many there are, but
7 I imagine there's about 15 cheese lines there, the
8 bottom of the page, from Tesco Caledonian downwards,
9 yes?

10 **A.** Okay.

11 **Q.** Somebody will tell me.

12 What I'm putting to you is that in respect of some
13 of them there is a figure in the "Recommended Retail"
14 column and in respect of the others there is a figure in
15 the other column, the blacked-out column?

16 **A.** Yes, there is.

17 **Q.** The reason I'm putting that to you is that -- what I'm
18 suggesting to you is that at that point it was agreed in
19 respect of the named creamery -- well, in respect of the
20 named creameries you were going to go up by figures in
21 the right-hand column, and in respect of the more
22 general generics or standard own label you were going to
23 go up by cash margin only?

24 **LORD CARLILE:** Which reflects the email.

25 **MR MORRIS:** Yes, which reflects the email.

1 **LORD CARLILE:** We can see the two examples referred to in
2 the email.

3 **MR MORRIS:** If you then -- just to complete the picture, if
4 you go to document 89 [Magnum], just quickly.

5 **MISS ROSE:** Sir, can I just ask a question. I am genuinely
6 confused about what is the reason for the blacking-out
7 of the column. On the initial document I had thought
8 maybe it was simply a bad copy, but it's clear from this
9 version of document 88 that that heading has actually
10 been redacted.

11 It does appear in this document that the heading has
12 actually been redacted and I would like clarification
13 whether the heading has been redacted and, if it has
14 been redacted, I would like an unredacted copy of this
15 so that we can verify what the heading actually says.

16 **LORD CARLILE:** I thought --

17 **MR MORRIS:** Can I assist, attempt to assist?

18 **LORD CARLILE:** You can, but if I can help you, I understood
19 the unredacted version was "Retailing Maintaining
20 Percentage Margin".

21 **MISS ROSE:** Sir, I haven't seen an unredacted version.

22 **MR MORRIS:** Sorry, my instructions are that these are not
23 redactions at all. These are -- the document itself has
24 got some form of boxing or highlighting on it in its
25 original form and when it's copied, sometimes it comes

1 out very black and sometimes it comes up so that you can
2 see it. But my instructions are that there is no
3 redaction, yes.

4 If you go back to document 52 [Magnum], I can
5 demonstrate the point very quickly. Because this is
6 still the control -- what McLellands called the control
7 document, and in a version, I hope, of the spreadsheet
8 in 52 --

9 **LORD CARLILE:** "Retail Protecting Percentage Margin".

10 **MR MORRIS:** Yes, but the point -- yes. Anyway. So -- and
11 interestingly, if you go over to page 13 [Magnum], you
12 can see that there's some sort of hatching on
13 "Recommended Retail" there but not on the other one. We
14 believe that when you get to documents 87 and 88 that
15 the reason there's something that looks like a redaction
16 for "Retail Protecting Percentage Margin" is because
17 there was some hatching on the document or something has
18 come out wrong with the copying.

19 **LORD CARLILE:** Well, we know what it says anyway.

20 **MR MORRIS:** Certainly, as far as I'm aware, it has not been
21 redacted by anybody.

22 **MISS ROSE:** Thank you. I am grateful for that
23 clarification.

24 **LORD CARLILE:** It is going to be unredacted if necessary,
25 I can assure you, along with a lot of other things that

1 we've been looking at.

2 **MISS ROSE:** Yes. The other notable thing about this
3 document is that there's a blue box around the column
4 that says "Retail Protecting Percentage Margin", but
5 there's not a blue box around the "Retail Protecting
6 Cash Margin" even though what we're now looking at is
7 the final prices for the cheeses, and that again is very
8 difficult to understand.

9 **LORD CARLILE:** If it's any help, and I'm sure we won't be
10 contradicted by my colleagues, we would regard it as
11 proper and necessary in arriving at a decision that
12 these columns should be unredacted so, if necessary, we
13 shall so order.

14 Right.

15 **MR MORRIS:** If we go now to 89 -- what we have in 87 and 88
16 are two spreadsheets that McLelland are sending you,
17 that's right, isn't it? At documents 87 and 88, 22 and
18 27 November, those are spreadsheets with prices for the
19 Tesco own label that McLelland is sending to you?

20 **A.** Yes.

21 **Q.** If you go to document 89 [Magnum], what you then see is
22 an email on the same day from you to Simon Hossack who
23 is -- well, you can tell us, who is Simon Hossack?

24 **A.** He was my admin assistant so he would actually input
25 price changes on to the Tesco system.

1 **Q.** Yes, and you copy that back to Tom Ferguson as well, and
2 it's headed "Cost and Retail Price Changes":

3 "Here are more cost changes and retails to be
4 changed as stocks run out -- so you will need to keep
5 this well in control and liaise with the suppliers."

6 If you go over the page then, there's then
7 a spreadsheet which you have prepared, and these are the
8 15 or so Tesco own label McLelland products, that's
9 right, isn't it?

10 **A.** Yes.

11 **Q.** What you have there is you've got the RSP that you've
12 settled on in the middle column?

13 **A.** Yes.

14 **Q.** I can tell you this, and I hope you will agree, if need
15 be I have a document which -- if you compare the prices
16 in that RSP column with the prices back at document 88
17 [Magnum], which is McLelland's final suggestion, and
18 this is the first spreadsheet attached to document 88,
19 the prices that jump around between the two columns,
20 starting from 7 -- I can't read that -- 7.66 down to
21 4.44, you will find that those in fact match the prices
22 in your spreadsheet at 89. I don't -- I prefer not to
23 have to take anybody through that, but we have got
24 a document where we have written on document 89 the
25 prices from 88. It's because they're not in the same

1 order exactly of cheeses.

2 So, for example, the first one, Tesco cheddar --
3 this is on your document 89 [Magnum] -- cheddar Scottish
4 mild coloured small at 4.12, if you go to -- I think it
5 is the fifth one down in document 88, Tesco Scottish
6 coloured mild 300 grammes, you'll see that says 4.12?

7 **A.** Yes.

8 **Q.** So essentially you can see that by 27 November you had
9 made your decisions on your retails for all the
10 remaining Tesco own label brands supplied by McLelland?

11 **A.** Yes. It was -- yes.

12 **Q.** It's fair to say that, at last, by that time your job
13 was done?

14 **A.** Yes, I would put all the costs and retail through, yes.

15 **Q.** The reason I put that is -- well, certainly as regards
16 your job with McLelland it was done?

17 **A.** McLelland, yes.

18 **Q.** Because Mr Ferguson says, "put your feet up now and
19 relax".

20 Now, could I ask you just for a moment to go back to
21 document 81 [Magnum], just to remind you of that
22 document. I don't wish to -- just give me a moment.
23 I think it may be -- yes, sorry, it's 78 I think, no
24 it's not. 79 [Magnum]. You'll remember this, this is
25 your conversation with Jim McGregor, and I put it to you

1 yesterday that you were told by Jim McGregor about
2 Asda's future pricing intentions in that conversation;
3 that's right, isn't it? Do you remember me asking you
4 those questions?

5 **A.** Oh, yes.

6 **Q.** I think in your witness statement you say that
7 Mr McGregor might have said something to you about Asda?

8 **A.** I can't recall in detail this conversation. He could
9 have done. I can't...

10 **Q.** My question for you is this, at the end of November, 22
11 and 27 November, when you or Rob Hirst were finally
12 persuaded to move your own Tesco own label McLelland
13 cheeses, you took into account the information you had
14 received from Jim McGregor about Asda on 8 November?

15 **A.** No, I would have made my decision on those prices.
16 I would have referred to Tom's spreadsheet, as I did the
17 Dairy Crest spreadsheet, to make my decision on where
18 I was going to set my retails.

19 **Q.** The decision you took in relation to your own Tesco own
20 label cheddars was taken before you had seen Asda's
21 prices in store?

22 **A.** I can't recall.

23 **Q.** If you go to document 83 [Magnum] and you read the
24 penultimate paragraph on the first page, this is Asda
25 discussing own label:

1 "... own label ... Tesco, Safeway and [Sainsbury's]
2 have commenced phasing in ..."

3 Then "Kwik Save and Morrisons", then:

4 "We will propose increase for December 2nd subject
5 to others moving earlier."

6 The reason I put that to you is that that shows that
7 by the time you took your decision on your own labels on
8 27 November Asda had not yet moved its own own label
9 products. It looks that way, doesn't it?

10 **MISS ROSE:** Sir, I have to object to the premise of this
11 question. This is an internal document from Asda dated
12 13 November proposing a date for the Asda move. There
13 is no positive evidence from the OFT in this case about
14 the date Asda actually moved its prices although of
15 course there easily could have been. In my submission,
16 it's not a fair question to put to this witness who has
17 just said that she cannot recall whether Asda's prices
18 were in store.

19 **LORD CARLILE:** Well, it amounts to a question as to what she
20 knew at the relevant time.

21 **MR MORRIS:** Yes, I've asked the question. Was the answer
22 "I don't recall" or "I can't recall"? I was just
23 wondering whether that might refresh the memory --

24 **LORD CARLILE:** The document of itself doesn't take us any
25 further.

1 **MISS ROSE:** No, sir. But what it does do is to reveal an
2 unfairness in the way that the OFT puts its case because
3 the OFT could have got positive evidence of this date
4 and instead it proceeds by insinuation.

5 **LORD CARLILE:** We're mindful of that general criticism which
6 I'm sure you're going to --

7 **MISS ROSE:** Yes, sir, but this is a specific concrete
8 example.

9 **LORD CARLILE:** We're mindful of that, thank you.

10 **MR MORRIS:** What I've just referred you to, does that assist
11 you in your recollection of whether, when you moved, you
12 had seen Asda in store.

13 **A.** No, it doesn't.

14 **Q.** What I suggest to you is that when you made this
15 decision finally, on 27 December, you had been given
16 confidence to make that decision by the information you
17 had been receiving from processors about what other
18 retailers were going to do?

19 **A.** I made my retail decisions based on what was best for
20 Tesco and delivering my KPIs against what was out there
21 in the market place and balancing the basket policy.

22 **Q.** You took no account of information you had about others?

23 **A.** No.

24 **Q.** Can I just pick up on a couple of points of detail. In
25 your evidence yesterday, you said that if the Asda

1 Smart Price was higher than Value, you would move up to
2 match that price and McLelland would have known that.

3 Do you remember we were discussing Smart and Value?

4 **A.** Yes.

5 **Q.** And that was your evidence?

6 **A.** Hmm-hmm.

7 **Q.** Just for the reference it's page 138, lines 15 to 17,
8 and pages 159 to 161 of Day 9.

9 I'm going to suggest to you that that recollection
10 of yours might be mistaken. Would you go to your
11 witness statement bundle, which is bundle 2A? It may be
12 worth you having also document bundle 1 to hand. I'm
13 not going to take you to it but if you have that out.

14 What I would like to take you to is the exhibit
15 document, exhibit document 30, which we looked at
16 yesterday. It's the exhibits to the witness statement,
17 tab 30. 2A and it's J and it's 30 [Magnum].

18 You're obviously with me, Ms Oldershaw.

19 **A.** I think so.

20 **Q.** Yes, we're just waiting for everybody else to --

21 **LORD CARLILE:** The Tribunal is being slow, Ms Oldershaw. My
22 apologies. We're there.

23 **MR MORRIS:** If you go to the third grouping down, you will
24 see there Tesco Value mild coloured cheese extra large.

25 **A.** Yes.

1 Q. Are you with me? The left-hand sub-group is F51KA?

2 A. Yes.

3 Q. I find this table very difficult to read because they're
4 not -- anyway, for whatever reason. If you look at the
5 first line of that set, you will see that the price was
6 at 2.49 per kilogram from 25 November 2001. That's
7 right, isn't it?

8 A. Yes.

9 Q. Then the next line is, it shows that you moved up to
10 2.69 on 14 November 2002?

11 A. Yes, it does.

12 Q. What I'm going to show you or suggest to you is that
13 that price of £2.49, which didn't move upwards until
14 November 2002, had been lower than Asda's price since at
15 least September 2002. So for the period from
16 September 2002, you had been lower.

17 If you go to document bundle 1, and you go to tab 10
18 [Magnum]. I've got the wrong bundle now. Tab 10 is
19 a number of pages headed "Out of Line Report", I don't
20 think we've been to it before. This is a Tesco out of
21 line report.

22 If you go to the second and third pages, the second
23 and third, and in fact fourth and fifth, are instances
24 where Tesco's prices are greater than Asda's, do you see
25 that at the top of the page? I'm looking at the second,

1 third, fourth and fifth pages of tab 10, not the first
2 page, I'll come back to the first page in a moment. I'm
3 just making sure that we all understand what we're
4 looking at.

5 So that's an out of line report where you are
6 higher, is that right?

7 **A.** Yes.

8 **Q.** It covers a whole variety of products, not just cheese.
9 Now, if you go to the first page, the first page is
10 a report where Tesco is cheaper than Asda. That's
11 right, isn't it?

12 **A.** Yes.

13 **Q.** It says -- I think it says for week 2002, 29, I'm
14 assuming that means week 29 in 2002. If you go to the
15 left-hand bit of the -- on the fourth line down, this
16 shows 12 September 2002?

17 **A.** Yes.

18 **Q.** Now, if you count seven lines down you will see
19 a product, cheapest cheddar mild coloured -- I don't
20 know what "nom" stands for, 700 grammes per kilogramme?

21 **A.** Nominal weight, random weight it means.

22 **Q.** I'm suggesting to you that that is -- I've forgotten the
23 name now -- the Tesco Value large coloured that we --
24 it's the product we've just been looking at in document
25 LO/30. We can see that because, number one, it's in

1 an F51KA category, and you see the Tesco price there at
2 2.49; that's right, isn't it?

3 **A.** Yes. Yes.

4 **Q.** The reason the word "cheapest" is used is because it's
5 comparing Value and Smart Price. It's not using the
6 word "Value" or "Smart Price" because it's the economy
7 range, that's right, isn't it?

8 **A.** Yes, that's correct, yes.

9 **Q.** What that shows is that on 12 September you were lower
10 on that Value product than Asda and you did not --

11 **A.** The only thing, I can't remember whether 700 grammes
12 would have been our extra large or whether our extra
13 large would have been over a kilo, so I'm not sure on
14 that.

15 **Q.** Very well.

16 **A.** If that does... yes, I'm not sure if that does -- I'm
17 not sure if that is the extra large product.

18 **Q.** We might need to check that.

19 **A.** I'm not saying it's not but I can't be sure.

20 **Q.** Very well. Leave that to one side. I would suggest
21 that, if it does, it shows that you were out of line and
22 you didn't move up between September and November, so
23 that's two months. But can I also invite you to look at
24 the left-hand column. The left-hand column is headed
25 "Weeks Less"?

1 **A.** Yes.

2 **Q.** Am I right in indicating that that shows the number of
3 weeks for which you have been lower than Asda?

4 **A.** I presume so from reading this report, yes.

5 **Q.** So, in fact, what this shows is that, far from you
6 invariably moving up to match Asda Smart Price when Asda
7 was higher, you were content to be lower for
8 a considerable time; that's right, isn't it?

9 **A.** At that point in time I was, yes.

10 **Q.** That's why I suggested that your recollection yesterday
11 might be mistaken. It looks now, having looked at them,
12 I may have refreshed your memory that your recollection
13 yesterday was mistaken?

14 **A.** No, I don't agree that it was mistaken because at the
15 time of all these price changes, £200 per tonne,
16 McLelland would have been well aware that I would have
17 been under margin pressure, if -- and by then they have
18 seen that a lot of my lines were not in store at cash --
19 sorry, percentage margin maintenance, so they would have
20 known I would have been taking a margin hit on those.

21 So, yes, I fully stand by my statement that they
22 would have assumed I would have moved up to claw back
23 some margin.

24 **Q.** Well, your evidence --

25 **A.** And that's in fact what I did (inaudible -

1 overspeaking).

2 **Q.** Your evidence yesterday was not confined to a particular
3 incident. Your evidence yesterday, and we can go back
4 to it immediately, was that in general you would not
5 wish to stay lower than Asda on a Smart Price product?

6 **A.** No, in general I wouldn't.

7 **Q.** Well, there it is.

8 In your evidence you say that there came a point in
9 time when -- I'm now talking about the 2002 initiative.
10 There came a time when John Scouler eventually told you
11 to accept the proposal; that's right, isn't it?

12 **A.** The cost price proposals, yes.

13 **Q.** Can we have a quick look at paragraph 65 of your witness
14 statement. It's a short question, but if you just look
15 at it. It's 2A, paragraph 65. If you want to just
16 quickly read that whole paragraph to yourself.

17 **A.** Sorry, is it 65?

18 **Q.** 65, bottom left at page 22 [Magnum].

19 (Pause)

20 **A.** Yes.

21 **Q.** If you look at the last two sentences, you say that:

22 "John Scouler told me I must accept the cost price
23 increase. As can be seen from the documents I discuss
24 below, I finally told my suppliers at the end
25 of October."

1 What you don't do in that is you don't say precisely
2 when John Scouler told you to accept. Can you remember
3 when that was?

4 **A.** I can't, no, sorry.

5 **Q.** I would suggest to you that that happened some time
6 before the end of October, and would suggest to you that
7 it happened some time around 16 October. Is that
8 something that helps refresh your memory?

9 **A.** No. I can't recall.

10 **Q.** What I would suggest to you is that by the time you were
11 working on document 64 [Magnum], by that time the waves
12 of the 4th and the 11th and the 18th, for your
13 increases, had already been agreed in principle. Would
14 you think that's possible?

15 **A.** I can't remember the date so I can't comment, sorry.

16 **Q.** Very well.

17 The other thing that you say in that paragraph is
18 that in the course of the events between September and
19 the end of November you kept Mr Hirst and Mr Scouler up
20 to date with what was going on with regard to the £200
21 per tonne increase.

22 **A.** Yes.

23 **Q.** What I would suggest to you is that, in the course of
24 doing that, you must have kept them up to date with all
25 the information that you were getting, suggesting that

1 other retailers were participating in the initiative?

2 **A.** I would give them in-store price checks.

3 **Q.** No, I'm talking about the information before things were
4 in store, for example, Mr Ferguson's email of
5 21 October. I'm suggesting to you that you would have
6 kept them informed, in the course of keeping them up to
7 date, of the receipt of that email?

8 **A.** Can you show me the email, please?

9 **Q.** It's document 52 again [Magnum].

10 **A.** As I repeatedly said yesterday and on Friday, I took no
11 heed of information like this from suppliers, I just
12 treated it as speculative, and I certainly wouldn't be
13 passing speculative information on to John and Rob.

14 **Q.** So you are saying, are you, that regardless of whether
15 you -- what account you took of it, you did not say to
16 John or Rob, "By the way, I've received an email from
17 Tom Ferguson about the £200 per tonne initiative"?

18 **A.** The £200 per tonne initiative, if it was in relation to
19 cost, then yes I might have passed that information on
20 to John. But not speculative information on other
21 retailers' prices, no, I wouldn't have passed that on.

22 **Q.** So you did not tell either of them that you'd received
23 this email?

24 **A.** I don't believe so, no.

25 **Q.** I would suggest to you that's highly unlikely and that

1 your recollection there is mistaken and that the
2 likelihood, the overwhelming likelihood, is, regardless
3 of how you treated it, you would have kept Mr Scouler
4 and Mr Hirst, particularly Mr Hirst, informed of the
5 information that you were receiving, specifically here
6 and more generally, about what other retailers were
7 doing?

8 **A.** I don't agreed with that statement.

9 **Q.** Very well. I just have some final questions on 2002 and
10 then we can move on to cheese 2003.

11 As you know, I've put to you that on various
12 occasions in October and November 2002 you gave
13 processors information about your future pricing
14 intentions. Those are documents 63 [Magnum], 70
15 [Magnum], 71 [Magnum], 73 [Magnum], 79 [Magnum] and 83
16 [Magnum], and I don't propose going back through them.

17 What I put to you is that when you made those
18 disclosures, you knew that those processors were talking
19 to your competitors in the course of trying to achieve
20 an across-the-market price increase. That's right,
21 isn't it, that when you made the disclosures to the
22 processors you knew that they were talking to the other
23 processors -- to the other retailers?

24 **A.** About cost price increases, yes. About cost price
25 increases, yes, they would have been.

1 Q. I would suggest they were talking also about retail
2 price increases, and you knew that?

3 A. I wasn't focused on what other retailers were talking to
4 suppliers about, as I've said before.

5 Q. You knew that the processor was going to pass on the
6 information about your intentions to the other
7 retailers?

8 A. I did not, no.

9 Q. At the very least, you realised that it was likely that
10 they would pass that information on?

11 A. I didn't, no.

12 Q. And I suggest to you that that was a risk you were
13 prepared to take?

14 A. Everything I gave my suppliers about Tesco product,
15 I trusted that they would keep that information to
16 themselves.

17 Q. I would suggest to you that it was obvious that this
18 would happen and at the very least you were shutting
19 your eyes to what was plainly obvious?

20 A. That's not the case.

21 Q. Would you agree that, in all the circumstances, you
22 should have realised it was likely to be passed on?

23 A. No.

24 Q. Now, we've also been through the other occasions when
25 the OFT says you received information from your

1 competitors about their retail pricing intentions, and
2 those are -- that's document 52 [Magnum] and two other
3 instances, it's document 79 [Magnum] and I can't
4 remember quite the other document. But it's a general
5 question.

6 When you received the information from the
7 processors about the other retailers' pricing
8 intentions, you knew that this was your competitors'
9 future information?

10 **A.** I did not, no. As I've repeatedly said, I treated
11 everything as speculative and hustle and I just ignored
12 it.

13 **Q.** You knew that that information had been deliberately
14 leaked by the other retailers?

15 **A.** No, I didn't.

16 **Q.** Let me put this to you then: you must have suspected
17 that to be the case?

18 **A.** I didn't, no.

19 **Q.** It was obvious that it was coming from the other
20 retailers and you were shutting your eyes to what was
21 obvious?

22 **A.** I was not, no.

23 **Q.** You took no steps to reject this information, did you?

24 **A.** Because I didn't view it as having any substance, no.

25 **Q.** And that information gave you reassurance that your

1 competitors were going to increase their retail prices?

2 **A.** I took no reassurance from it because I didn't treat it
3 as valid.

4 **Q.** And you took that information into account when you came
5 to determine your decisions on Tesco's retail prices?

6 **A.** I made my decisions based on my KPIs and Tesco price
7 basket policy.

8 **Q.** Can I ask you one other question, a general question.
9 We've seen lots of documents in this case showing that
10 there were a number of communications to and fro of
11 pricing information. What I would like to suggest to
12 you is this, that in the context of this initiative in
13 which Tesco was keen to participate, in reality it is
14 likely that there were many more such disclosures and
15 receipts of pricing information between you and the
16 retailers via the processors?

17 **MISS ROSE:** Again, sir, the question should not be put that
18 it is likely. If he wants to put the question, he
19 should put that there were more disclosures.

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

21 **MR MORRIS:** I'll put the question again.

22 I would suggest to you that the documents we've seen
23 do not represent the complete picture and that there
24 were many more such disclosures and receipts of
25 information happening between you and the other

1 retailers via the processors?

2 **A.** I communicated prices I needed to my suppliers who
3 packed specific products for Tesco.

4 **Q.** Okay, shall we move on to cheese 2003. These, as you
5 will be aware, concern the events in the late summer and
6 the early autumn of 2003 concerning McLelland. Do you
7 recall that?

8 **A.** Yes.

9 **Q.** If you have document bundle 2, I think we're wholly in
10 document bundle 2 now, to hand, what I'm going to do is
11 just, if I may, summarise the background and see if you
12 agree from recollection. In August and September 2003,
13 you were unhappy with the margin you were achieving on
14 your sales of McLelland's brand Seriously Strong; that's
15 right, isn't it?

16 **A.** Yes, in general, and specifically on one line I believe.

17 **Q.** That's what I'm talking about. What I'm suggesting is
18 you were unhappy specifically with the margin you were
19 achieving on Seriously Strong rather than McLelland's
20 lines generally; do you remember that?

21 **A.** Yes. Yes, I do.

22 **Q.** You had indicated to Stuart Meikle, who by that time was
23 dealing with your account, that if the position did not
24 improve, Tesco would reduce the volume of
25 Seriously Strong that it purchased. Do you remember

1 that?

2 **A.** Yes.

3 **Q.** At the same time McLelland asked Tesco for an increase
4 in its cost price of £200 per tonne on all of its
5 McLelland cheese lines?

6 **A.** Yes.

7 **Q.** If you go to document 98 [Magnum], you will see that
8 that is a letter from Jim McGregor in fact asking you
9 for an across-the-board -- when I say across-the-board,
10 across their range price increase, and they were looking
11 for £200 per tonne.

12 Now, the only way that you could accept a cost price
13 increase of £200 per tonne on all your McLelland lines
14 without seriously affecting your margins would have been
15 if you were able to raise your retail prices; that's
16 right, isn't it?

17 **A.** If I had a cost price, I would always seek to increase
18 the retails, yes.

19 **Q.** And this was not just a cost price increase on one or
20 two lines, this was all McLelland's lines which
21 represented a fairly substantial part of your cheese
22 business by that time. It wasn't the biggest but it was
23 substantial, wasn't it?

24 **A.** Yes, they were a player in there, yes.

25 **Q.** And what I'm saying to you, I think you said "yes", is

1 that if you didn't also have a retail price increase, on
2 all the lines, it would seriously affect your margins?

3 **A.** It would have impacted, yes.

4 **Q.** But given the competitive position in the market, you
5 needed to have some confidence that your key retailer
6 competitors would raise their prices too before you
7 decided to raise your retail prices?

8 **A.** No, not neces -- no.

9 **Q.** So you're suggesting, are you, that you would have
10 accepted £200 per tonne, raised your retail prices alone
11 and then come back down again when you saw that nobody
12 followed you?

13 **A.** If I viewed the cost price as justified, yes, that's
14 what I would have done.

15 **Q.** I suggest to you that McLelland knew at the time that in
16 order to persuade you to accept a cost price increase,
17 they would have to persuade you that you could raise
18 your retail prices. That's the first -- do you agree
19 with that?

20 **A.** No, not how you've put it, no.

21 **Q.** We'll come back to that in a moment when we look at
22 a document. I'm also going to suggest to you that in
23 order to persuade you to raise your retail prices, they
24 realised that the best way to achieve that would be if
25 the other retailers also raised their prices, retail

1 prices?

2 **A.** I set my retail prices based on obtaining as near to my
3 KPIs on margin as I could.

4 **Q.** You didn't really answer the question I asked which was,
5 you would have realised at the time that McLelland knew
6 that the best way to get this cost price increase
7 through from their point of view, with you, was to seek
8 to persuade everybody to go up on retail.

9 **A.** I don't know what McLelland thought at the time.

10 **Q.** And you didn't know then?

11 **A.** Didn't know then what?

12 **Q.** I'm not asking about what you know now, I'm saying what
13 did you realise at the time? I'm putting to you that
14 you must have realised at the time that McLelland knew
15 the best way to get this through was for everybody to go
16 up?

17 **A.** At the time I realised that McLelland were asking for
18 a cost price increase and that, if I felt the cost price
19 increase was justified, then I would have to -- I would
20 look to increase my retails.

21 **Q.** They were suggesting also, weren't they, that you would
22 also raise your retail prices?

23 **A.** Suppliers do that in a standard format. If a cost price
24 increases, then they show you what the retail price
25 could be to (a) protect your margin, and (b) cash margin

1 maintenance.

2 Q. Can I ask you some questions. Remember some time ago
3 I asked you about your competition law compliance
4 training that you received. Do you remember that?

5 A. Yes.

6 Q. Now, the position is this, that by September 2003, we've
7 now moved on a year, you had received further and fresh
8 compliance law -- competition law compliance training,
9 do you remember that?

10 A. I don't remember any exact dates for that training,
11 sorry.

12 Q. If we go to the pleadings bundle, which is -- mine is
13 marked P, I will endeavour to refresh your memory.

14 A. Yes, I've got it.

15 Q. If we go to tab -- we've looked at this before I think.
16 If you go to tab 10, page 7 [Magnum], if I read to you
17 paragraphs 37(b) and 39. 37 gives a summary of the
18 training and (a) is the 2000 training for the
19 Competition Act, and under (b) you'll see the heading
20 "Enterprise Act 2002 Training (2003)":

21 "The primary purpose of this training was to retrain
22 all food and nonfood buyers and anyone negotiating
23 prices with suppliers on the impact of competition law
24 on their buying and pricing practices in the light of
25 the introduction of the Enterprise Act."

1 There was a new piece of legislation which came into
2 force.

3 "A copy of the presentation slides ... (updated in
4 2007) is attached to annex 6C... Copies of the
5 post-training ... [is] Annex 6D..."

6 I'll take you to those in a moment.

7 Then at the bottom of the page, the question was
8 when Lisa Oldershaw had received training, and the first
9 sentence of that 39 says:

10 "Tesco's internal records indicate that
11 John Scouler, Rob Hirst and Lisa Oldershaw attended the
12 Enterprise Act 2002 training [which is 37(b)] on..."

13 And then it says 28 May for you.

14 **A.** Yes, it does, yes.

15 **MISS ROSE:** Can you read the last sentence as well.

16 **MR MORRIS:** Well, I've asked about that before. That was
17 the earlier -- I'm not sure it's entirely relevant but I
18 can read it if you want:

19 "Lisa Oldershaw recalls attending training on the
20 Competition Act around 2000".

21 It's not -- I'm asking about what happened in 2003,
22 and I think I'd already put the last sentence when I
23 raised --

24 **LORD CARLILE:** You did.

25 **MR MORRIS:** Now, that training -- when you had that

1 training, you might remember, on 28 May, you would have
2 had a Powerpoint presentation at the time, do you
3 recall?

4 **A.** I don't recall the detail but it's likely we did, yes.

5 **Q.** If you take up volume 6, I can just show you a little
6 bit of the content of that training.

7 **A.** I've not got it yet.

8 **Q.** That's fine, I'll wait. It's volume 6, tab 6,
9 pink-backed volume 6, tab 6. And what I'd like you to
10 do is just go to C and D. I'm going to take you to D
11 first, for a reason I will explain. 6C are some slides,
12 I imagine it's a Powerpoint presentation or some form of
13 slides. The reason I'm not taking you to 6C first is
14 that we are told that this is a version of the 2003
15 training but updated in 2007. So it is not clear what
16 the updating comprised, but there was a set of slides
17 and I'm going to suggest to you that, when you had your
18 training, the slides you were presented were this or
19 approximately this because of the updating.

20 If you go over to 6D [Magnum], 6D is a document that
21 you were given after your training in 2003 because
22 that's what the particulars say. So this is a document
23 you received after your May training. Can I just
24 identify one or two points on that document:

25 "Competition Act training, summary notes. Core

1 message, do not discuss RSPs where it's your intention
2 or the effect is to fix prices."

3 Then it says why, and in the middle sentence there
4 you'll see:

5 "The Enterprise Act which came into force on June 20
6 this year means that as well as company fines,
7 individuals involved in price fixing will also receive
8 criminal penalties."

9 Just pausing there for a moment, the big change that
10 had been brought in by the Enterprise Act was the
11 introduction of criminal penalties for individuals, and
12 I would suggest that was one of the main reasons why
13 people were being retrained. Do you recall that?

14 **A.** Not specifically, no.

15 **Q.** Then:

16 "There is no need to change your usual good buying
17 behaviour as the price fixing legislation has not
18 changed, only the potential penalties."

19 Then if you look at "Key Dos and Don'ts", if you go
20 down, it says about -- it says -- this is the fourth do:

21 "Do discuss what is in the public domain.

22 "Do let suppliers know pricing info for label
23 changes, volume management."

24 Then the next two:

25 "Do keep records of when suppliers have tried to

1 discuss RSPs with you."

2 Do you see that?

3 And:

4 "Do reply to unsolicited information on RSPs to
5 state that you are not interested and keep the copy of
6 your reply."

7 Then:

8 "Do ask for help when you need advice."

9 Then at the bottom, it says:

10 "If in doubt about the legal position you are faced
11 with, call..."

12 Then it lists a whole load of people.

13 Then over the page:

14 "If you need support with a supplier negotiation or
15 a difficult margin related problem, consult your line
16 manager or other experienced SBMs in your division."

17 SBM is senior buying manager, is that right?

18 **A.** Yes.

19 **Q.** Which is you at the time?

20 **A.** Yes.

21 **Q.** Do you recall seeing that document?

22 **A.** No.

23 **Q.** But you don't -- but you would have received it and you
24 would have got those messages about what you were to do?

25 **A.** If this was delivered on the training on that date, then

1 I attended the training so I would have received it if
2 it was given out on that date, yes.

3 Q. Yes, I think the suggestion is it must have been given
4 out after the date. This is a summary.

5 If you go back now to the document at 6C, this is --
6 this might refresh your memory. I'm going to suggest to
7 you that, in particular, if you go to page 7 [Magnum],
8 that refers to the criminal penalties that we've already
9 seen.

10 Then if you go to page 11 [Magnum], you get a list
11 of dos and don'ts. You see at the bottom of it, you see
12 again:

13 "Keep a note of all RSP discussions with suppliers."

14 Then over the page at page 12 [Magnum]:

15 "Remind your suppliers of the Competition Act if
16 they persist in inappropriate discussions of retail
17 price. Stop the meeting if necessary.

18 "Escalate any concerns about discussions of RP
19 through line management within category's or direct to
20 Bal Dhillon in the Corporate Secretariat.

21 "Do reply to unsolicited information on RSPs by
22 stating you are not interested and keep a copy of your
23 reply, eg 'I want to make it clear that this nonpublic
24 domain information was not requested. I do not want to
25 receive this type of information again. I want to

1 remind you that it is Tesco policy not to discuss future
2 retail prices with any supplier'."

3 **MISS ROSE:** Sir, I'm sorry to intervene, but this document,
4 as the index explains, is a 2007 document. The version
5 of the Powerpoint that was used in 2003 is the preceding
6 tab, which is tab B.

7 **MR MORRIS:** No, that's not right. Let's go back.

8 **MISS ROSE:** I'm sorry, we do need to clarify this because
9 that's what the index to the bundle says.

10 **MR MORRIS:** The index to the bundle says that but it does
11 not say, in the answer to the question at 37(b), that
12 that was the version -- what it says at 37(b):

13 "A copy of the presentation slides used for this
14 training in 2003 (updated in 2007) is attached at
15 annex 6C."

16 **LORD CARLILE:** Aren't we much more interested in what
17 Ms Oldershaw thought? If she went to a training and she
18 didn't pay the blindest bit of notice to it, it wouldn't
19 help us very much. On the other hand, if she says that
20 certain matters were drawn to her attention or she was
21 aware of them, it may help us.

22 **MISS ROSE:** Sir, what I've said is correct. If you would
23 just like to go over the page in the same tab -- sorry,
24 tab 9, you will see at paragraph 6.1.

25 **LORD CARLILE:** Tab 9 of what? This bundle?

1 **MISS ROSE:** The pleadings bundle. We're looking at the
2 response to the request for particulars.

3 **LORD CARLILE:** Okay, back to that.

4 **MR MORRIS:** It does say that.

5 **MISS ROSE:** Yes, can I just finish the point, thank you.

6 **LORD CARLILE:** Go on.

7 **MISS ROSE:** It's tab 9, paragraph 6.1:

8 "Below is a list of documents relevant to Tesco's
9 competition law compliance policy."

10 And as you'll see, B:

11 "A copy of the presentation material used in
12 connection with the Enterprise Act 2002 training in
13 2003."

14 That's annex 6B which I've just pointed out.

15 Then:

16 "The material subsequently updated to reflect
17 developments in the law following Toys & Kits."

18 And the 2007 version is 6C.

19 The point is that the matters that have just been
20 put by Mr Morris are from the updated 2007 version, not
21 the version that was seen by Ms Oldershaw in 2003. He
22 needs to put the version behind 6B.

23 **MR MORRIS:** It may be a matter for submission afterwards,
24 sir, I don't really want to get bogged down in it. The
25 fact of the matter is, if you go to slide 3 of tab B, it

1 says:

2 "New legislation is coming."

3 **LORD CARLILE:** Well, can I repeat, Mr Morris, the Tribunal
4 is going to be much more interested in the evidence as
5 to what Ms Oldershaw knew, whatever document it appeared
6 in. It may not have appeared in any document at all.

7 **MR MORRIS:** Can we go to 6D. That is a document which
8 I understand Tesco say was sent to you as a summary of
9 your 2003 training?

10 **LORD CARLILE:** I'm sorry, Mr Morris, you're missing my
11 point. It may not matter at all whether she received
12 that document. What we need to know is whether the
13 propositions, which happen to be contained in that
14 document, are propositions she accepts she knew or not
15 at the material time.

16 **MR MORRIS:** If you go to document 6D, and you look at the
17 lines I've highlighted about keeping records and
18 replying to unsolicited information, were you informed
19 of those instructions at the time?

20 **A.** I can't recall the detail, sorry.

21 **Q.** If I may, I'd like to reserve my position on what was
22 available at the time.

23 I'm going to suggest to you, Ms Oldershaw, that in
24 the course of your training you would have been told
25 those things, "Key Dos and Don'ts"; that's the case,

1 **A.** No, I couldn't confidently say I can recall, no.

2 **Q.** All right. I'm just going to put a few things to you
3 and you can tell me whether you recall or not.

4 One of the main themes of that investigation had
5 been particularly the relationship between the
6 supermarkets and their suppliers. You don't recall
7 that?

8 **A.** No.

9 **Q.** The Competition Commission recommended a code of
10 practice should be established as to how supermarkets
11 should behave in their relations with suppliers, do you
12 remember that?

13 **A.** No.

14 **Q.** In March 2002 such a code of practice was brought into
15 force?

16 **A.** I can't recall these details, sorry.

17 **Q.** You can't recall the code of practice at all, is that
18 your evidence?

19 **A.** Sitting here now, no, I can't.

20 **Q.** It was a requirement of that code that Tesco should
21 receive training, that buyers -- that Tesco and buyers
22 should --

23 **LORD CARLILE:** If she can't remember the code, how could she
24 remember this?

25 **MR MORRIS:** I'm trying to refresh her memory whether she

1 remembers any training on the subject.

2 My question is this, if I may lay the foundation, it
3 was a requirement of the code that there should be
4 training in respect of the code, and I'm going to
5 suggest to you that you received training on the code of
6 practice in 2002 or 2003?

7 **A.** I received training on what I call Competition
8 Commission. I can't be clear on specific dates, sorry.

9 **Q.** I'm going to suggest to you, and it might refresh your
10 memory, that the training you received about the code of
11 practice was different from the training you received
12 about the Competition Act?

13 **A.** I can't remember that level of detail on training
14 course, sorry.

15 **LORD CARLILE:** It's a bit like remembering which JSB course
16 you went on in 2002, isn't it, Mr Morris?

17 **MR MORRIS:** I think it's only right that I should put those
18 questions as the distinction between the two types.
19 That's what I'm trying to...

20 Let's get back to the events of 2003.

21 You say you don't recall the Competition Commission
22 enquiry, but in your witness statement you recall it,
23 don't you? Can I take you to your witness statement in
24 bundle 2B. This is J2, this is your third witness
25 statement. Paragraph 24, at page 7 of bundle 2B, tab J2

1 [Magnum].

2 **A.** Sorry, can you just reference the page again?

3 **Q.** Yes, it's bundle 2B, tab J2, page 7.

4 I apologise, it is J1, it's at the beginning.

5 That's my mistake. It's bundle 2B, the same bundle, tab
6 J1, near the beginning. Paragraph 24. Do you have that
7 paragraph?

8 **A.** Yes.

9 **Q.** Hold on, I'm just waiting for the Tribunal.

10 It's 2B, sir. It's paragraph 24 of that witness
11 statement.

12 In the second sentence of that paragraph 24, page 7,
13 the second sentence of that witness statement, you're
14 referring to a document which we'll come to in a moment
15 that's got the point:

16 "My recollection is that this shorthand phrase came
17 from the various Competition Commission investigations
18 into the activities of supermarkets and grocery
19 retailing which had emphasised the need for Tesco to be
20 fully compliant with competition law, in particular the
21 Competition Commission's Supermarkets report issued in
22 2000."

23 So when you wrote this witness statement in March,
24 you did recall the Competition Commission investigation
25 and reported --

1 **A.** I don't recall -- I don't recall the detail, sitting
2 here now.

3 **Q.** Your evidence a moment ago was that you didn't recall it
4 at all, and I'm suggesting to you that you do recall it?

5 **A.** I don't recall it in detail.

6 **Q.** Or, alternatively, you didn't pay much attention to what
7 was being drafted here?

8 **A.** I don't know the detail of the content of the course.

9 **Q.** Ms Oldershaw, why did you introduce into your evidence
10 a reference to a Competition Commission investigation
11 which you now say you don't recall?

12 **A.** I'm not sure.

13 **LORD CARLILE:** You see, the point that's being put is that
14 only two months ago you said that you did recall it.

15 **A.** I recall the Competition Commission training. Yes,
16 I can read what it says there, yes.

17 **MR MORRIS:** There have been a lot of occasions this morning,
18 Ms Oldershaw, when you are conveniently answering that
19 you cannot recall, and I'm suggesting to you that you do
20 actually recall these things. That's right, isn't it?

21 **A.** I do not recall detail of training in 2002, no.

22 **Q.** You recall that you were trained on the matters that
23 I referred to before the break, don't you?

24 **A.** Yes, I've said I received training.

25 **Q.** Yes, and I'm suggesting --

1 **A.** I said I received training, I cannot remember the detail
2 of that training.

3 **Q.** I'm suggesting to you -- my first question to you after
4 the break was, do you recall the Competition Commission
5 investigation? And you said no. And I'm suggesting to
6 you that you knew full well about it, and I'm also
7 suggesting to you that you, as the senior buyer, were
8 fully aware of the code of practice?

9 **A.** I don't remember the details, no.

10 **Q.** Do you remember the existence of a code of practice?

11 **A.** I can't tell you what the document said. I've received
12 training on the way we should work, I can't remember the
13 details of that training.

14 **Q.** The question I asked you was a slightly separate
15 question, which was do you remember that there was
16 a code of practice? Dealing with things like --

17 **A.** Sitting here now, I cannot recall.

18 **Q.** Very well.

19 Can we go now to paragraph 140 of your witness
20 statement [Magnum], I'm going to go back to the events
21 of 2003.

22 **LORD CARLILE:** The other witness statement?

23 **MR MORRIS:** Yes, the main witness statement. I'm conscious
24 of time and I'm going to obviously try to go to the
25 events.

1 We see there in paragraph 140 that you had a meeting
2 with Mr Meikle on 4 September 2003?

3 **A.** Yes.

4 **Q.** You agree with that?

5 **A.** Yes.

6 **Q.** At the same time, we'll need document bundle 2 open, and
7 if you go to tab 100A, that's a presentation that was
8 made to you at that meeting; that's right, isn't it?

9 **A.** Yes.

10 **Q.** If you go to page 4 -- if you go back a page -- go to
11 page 1 [Magnum], the agenda, you'll see the two separate
12 issues of "Cost Recovery" and "Seriously Strong", do you
13 see that on the agenda?

14 **A.** Yes.

15 **Q.** If you then go to page 4 [Magnum], dealing with "Cost
16 Recovery", you have the:

17 "£200 per tonne cost increase required on all
18 business from 1 October."

19 Then the second line is:

20 "Protect margin by moving retail prices in line with
21 cost increase."

22 So Mr Meikle was suggesting to you that you should
23 raise your retail prices in line, wasn't he?

24 **A.** Yes.

25 **Q.** At 101 [Magnum], you see a different presentation. This

1 is the presentation that Mr Calum Morrison made to
2 Sainsbury's on the next day; that's right, isn't it?
3 You've seen that document before?

4 **A.** Yes, I have, yes.

5 **Q.** In your second witness statement at paragraph 143 -- and
6 I'm keeping both of these files open now because we're
7 going to be jumping to and fro between them -- at
8 paragraph 143 [Magnum], you say:

9 "I do not recall having received a similar
10 presentation from McLelland in 2003."

11 Don't you?

12 **A.** I don't even recall receiving this, yes, anything that
13 looked like this, yes.

14 **Q.** At the time that you made your witness statement, you
15 had not seen the presentation that had been made to you;
16 that's right, isn't it?

17 **A.** Well, I'd seen it on 4 September, yes.

18 **Q.** Yes, but you hadn't seen it -- you hadn't remembered
19 it -- you don't refer to it in that witness statement.
20 What then happened was that it was found amongst the
21 documents, subsequent to your witness statement, and
22 then you deal with that in your third witness statement?

23 **A.** I think I said I don't recall receiving this document.

24 **Q.** No, you didn't receive that document. What I'm going to
25 suggest to you is that you now accept that you did

1 receive a presentation, you yourself. It is the case
2 that the two presentations are not the same, but I'm
3 going to suggest to you that they are broadly similar in
4 the sense that they both --

5 **LORD CARLILE:** Isn't that for us to judge? For example, in
6 the second presentation, the one made to Sainsbury's,
7 there is the passage at the bottom, the last bullet
8 point on page 18, which certainly isn't in the one made
9 to Ms Oldershaw.

10 **MR MORRIS:** That's correct, very well. I won't go on to
11 deal with degree.

12 Both presentations, both of them related to
13 McLelland's request for a £200 per tonne cost price
14 increase, that's right, isn't it?

15 **A.** Yes. Well, elements of them are, yes.

16 **Q.** And both of them proposed an equivalent increase in
17 retail prices?

18 **A.** As would be the norm, yes.

19 **Q.** I'm going to suggest to you that the proposal Mr Meikle
20 made to you was for a total market move, by which he
21 meant that all retailers would move their costs and
22 retail; not just you but everybody else would?

23 **A.** I gathered he would be approaching all retailers to
24 increase their cost prices.

25 **Q.** Yes. If you go to document 112 [Magnum], this is the

1 Tesco briefing note which I'm sure you've seen before.

2 At the top of the page, after the first sentence:

3 "I had a meeting with Lisa on 4th September at which
4 we discussed the £200 increase. We ran through all the
5 arguments as to why we were looking for an increase at
6 that time. Lisa requested a further explanation..."

7 Then if you go down seven lines you'll see:

8 "At the close of the meeting, my understanding was
9 that Lisa had accepted the cost increase on the basis
10 that we would work to increase retail prices across the
11 market to maintain retailer margin."

12 What that sentence shows, and confirms what you have
13 just said, is that what he had been discussing with you
14 at that meeting was for an increase in retail prices
15 across the market?

16 **A.** No, I didn't confirm that. I confirmed the cost price
17 element.

18 **MISS ROSE:** It's [draft] lines 23 to 24 where she said:

19 "I gathered he would be approaching all retailers to
20 increase their cost prices."

21 That was in response to a question whether it was a
22 cost element --

23 **MR MORRIS:** No, it's not actually.

24 **MISS ROSE:** Sir, yes, it is.

25 **MR MORRIS:** You may be... yes, very well.

1 The previous line -- anyway, I'll carry on with my
2 questions.

3 I'm going to suggest to you that he said that you
4 discussed a -- well, put it this way, he -- what he had
5 been suggesting to you or discussing with you was an
6 increase in retail prices across the market because that
7 is in fact what is recorded in his note?

8 **A.** That's not what I recall we discussed. He wanted a cost
9 price increase, which I certainly would never agree to
10 at a first meeting, and then he showed me how I could
11 protect my percentage margin by increasing my retails
12 accordingly.

13 **Q.** He wanted a cost price increase, and he also put to you
14 the suggestion that you should raise your retail prices,
15 you've accepted that?

16 **A.** As all suppliers do when they ask for cost price
17 increase --

18 **Q.** And you accepted he would be going to the other
19 retailers about a cost price increase?

20 **A.** He was Tesco national account manager, he came to me for
21 a cost price increase which I assumed that he would --
22 McLellands would go to all retailers and ask for
23 a similar cost price increase. He then showed me what
24 he thought my -- suggested what my retails could be,
25 Tesco retail, to protect my margin, ie I could put them

1 up to protect my margin.

2 Q. When he came to you and asked you for a cost price
3 increase, he at the same time suggested to you that you
4 should raise your retail prices, you've accepted that?

5 A. Yes.

6 Q. You've just accepted that he told you or he discussed
7 the fact that he would go to the other retailers and ask
8 for a similar cost price increase?

9 A. Not necessarily him; McLellands would be asking for
10 a cost price increase of all retailers, yes.

11 Q. It is inevitable, isn't it, that just as when he comes
12 to you and says, "I want a cost price increase,
13 I propose you also raise your retails", that when he or
14 his colleagues at McLelland went to the other retailers
15 to suggest a cost price increase, he would have made the
16 same suggestion?

17 A. I don't know what they discuss with their other
18 retailers, I'm not privy to those conversations.

19 Q. I would suggest to you that you must have realised at
20 the time that, even if he said to you, on your evidence,
21 "I'm going to go to the others to get a cost price
22 increase", since he'd at that very minute suggested that
23 you should go up on retail, he would have done exactly
24 the same with the others?

25 A. At the time, retail prices for McLelland's products were

1 far from my mind because, you know, I did not feel they
2 justified the cost price increase.

3 Q. That didn't answer the question that I asked,
4 Ms Oldershaw, with respect.

5 I'm suggesting to you that once he indicated to you,
6 as you have now accepted, "I am going to go to the
7 others to ask for a cost price increase --"

8 **MISS ROSE:** I'm sorry, once again, she did not accept that
9 he indicated to her that he would go to the others for a
10 cost price increase.

11 **LORD CARLILE:** I have a question, Ms Oldershaw. Just have
12 a look at the document and count down six lines. Do you
13 see a sentence starting "At the close of the meeting"?

14 A. Yes.

15 **LORD CARLILE:** Let's just look at that sentence:

16 "At the close of the meeting, my understanding
17 [that's Mr Meikle's understanding] was that Lisa had
18 accepted the cost increase on the basis that we [that's
19 McLelland] would work to increase retail prices across
20 the market to maintain retailer margin."

21 First of all, do you accept that he said to you that
22 he would "work to increase retail prices across the
23 market"?

24 A. No, I don't accept that.

25 **LORD CARLILE:** You don't accept that?

1 **A.** No.

2 **LORD CARLILE:** Had he said that, would you have thought
3 there was anything wrong with him working to increase
4 retail prices across the market?

5 **A.** Yes, I would, yes.

6 **LORD CARLILE:** Because?

7 **A.** Because I need to set my retails independently.

8 **LORD CARLILE:** Right. Okay, thank you.

9 **MR MORRIS:** Can I just pick up on that last answer.

10 A constant refrain of your evidence has been "I set my
11 retail prices independently", that's right, isn't it?
12 "I need to set them independently".

13 **A.** Yes, based on market knowledge on the price basket and
14 the allowance that I could be out of line for two weeks,
15 yes.

16 **Q.** You've said many times that you didn't pay attention to
17 what the suppliers were telling -- saying to you about
18 what your competitors were going to do, and you said you
19 just followed your own KPIs; that's right, isn't it?

20 **A.** Yes.

21 **Q.** But your key KPI was the basket policy, matching what
22 your competitors were doing, wasn't it?

23 **A.** It was one of my KPIs, yes.

24 **Q.** Well, I believe that in answer to a question raised by
25 the Tribunal: which of the KPIs prevailed? I believe

1 your answer was that the basket policy prevailed. I can
2 give the reference, if need be.

3 **A.** They asked what was more important, price or my margin,
4 and for Tesco plc it would be -- they set out a price
5 policy publicly, we would have to adhere to that.

6 **Q.** Yes, and I'm suggesting to you that every time you say,
7 "I had to set my prices independently", I suggest to you
8 that that is not a fair representation of what you were
9 doing because information about -- not just about what
10 your competitors had done in store, but information
11 about what they would be doing, was highly material to
12 your basket policy KPI?

13 **A.** What was material -- what was important to the basket
14 policy was matching prices that were out in store.

15 **Q.** If you knew -- if you were about to make a retail price
16 increase but believed that or knew that your competitors
17 were not going to raise their prices, that would make
18 you out of line and that would mean you would go up and
19 come back down again and, therefore, that was a highly
20 material consideration to your decision, wasn't it?

21 **A.** No, if the cost price was justified, and I'd taken the
22 cost price, I would raise my retail. And then I had two
23 weeks, if I was uncompetitive in the market, then I'd
24 have had to match, for example, Asda price in store on
25 that line.

1 **Q.** Very well.

2 Your evidence is that at that meeting, and I'm going
3 back to the meeting of the 4th, you did not formally
4 commit Tesco to agreeing to the cost price increase of
5 £200 per tonne; that's your evidence, isn't it?

6 **A.** Definitely. Definitely not, yes. Definitely not, we
7 didn't commit, sorry.

8 It is my evidence, we definitely did not commit,
9 yes.

10 **Q.** Yes, too many negatives in there.

11 But you didn't say no either, did you?

12 **A.** No. At the first meeting, typically I listen to what
13 suppliers have to say and then I would ask for further
14 justifications.

15 **Q.** Yes. In fact, what I suggest is that you indicated to
16 Mr Meikle that you would agree provided that McLelland
17 managed to work -- to increase the retail prices across
18 the market?

19 **A.** That's not what happened. I did not feel that their
20 request for a cost price increase was justified, so, you
21 know, I wouldn't have -- I would never have put any
22 conditions on anyway, but I wasn't even discussing
23 retails because at that time, you know, I did not think
24 they were justified in asking for a cost price increase.

25 **Q.** I'm going to suggest to you that when you gave your

1 indication that you -- recorded by Mr Meikle in his
2 note, you indicated to Mr Meikle that he needed to get
3 the other key retailers to move their retail prices
4 before you would agree to the cost price increase?

5 **A.** I did not say that to Stuart Meikle.

6 **Q.** Your recollection is absolutely clear on that, is it,
7 now? It's not even possible that his note is correct?

8 **A.** In regards to I'd asked him to move everybody else in
9 the market?

10 **Q.** The sentence that the chairman read out to you, I'm
11 suggesting to you that that is an accurate record of
12 what was said at the meeting, and I'm asking you --

13 **A.** And I'm saying it's not.

14 **Q.** It's not. And you recall that it's not?

15 **A.** Yes.

16 **Q.** You now recall that it's not?

17 **A.** Well, I would not say that. I would not say that.

18 **Q.** Now, if we carry on in the document, you also see, in
19 line 3, that:

20 "Lisa requested a further explanation as to why we
21 had arrived at the figure of £200 and I subsequently
22 emailed this to her detailing the fact that butter, curd
23 and powder are currently being sold at £200 per tonne
24 above mild and that £200 was required to redress the
25 balance and make sure that we continued to manufacture

1 cheese."

2 You accept the accuracy of that sentence, don't you?

3 **A.** I asked for further justification on why they wanted
4 a price increase, yes.

5 **Q.** I'm conscious of time, but if you go to document 110
6 [Magnum] --

7 **A.** Yes.

8 **Q.** -- you see at the bottom half of that email, it's not
9 the top half, it's the bottom half, that is an email of
10 12 September. And that is precisely what he did, he
11 sent you the explanation; that's right?

12 **A.** He sent me an explanation, yes.

13 **Q.** It pretty well matches -- the explanation matches what's
14 in the note, doesn't it? Because it's --

15 **A.** Yes, the content is similar, yes.

16 **Q.** In your evidence, you say that the fact that Mr Meikle
17 provided you with this further explanation means that at
18 the meeting you can't have agreed or you had not agreed
19 to accept the cost price increase, that's right, isn't
20 it?

21 **A.** Yes, I would never accept a cost price increase on the
22 first meeting.

23 **Q.** I'm going to suggest to you that the giving of the
24 explanation is quite consistent with you having given an
25 indication that you would agree if the other retailers

1 would move as well?

2 **A.** That's not correct.

3 **Q.** The reason he sent the explanation was to push you to
4 follow through on the indication that you had given at
5 the meeting on 4 September?

6 **A.** He sent the information because I requested a further
7 breakdown of why he was asking for what I thought was
8 a poor request for a price increase, or an unjust
9 request for a price increase.

10 **Q.** There's no suggestion that you thought it was unjust, is
11 there?

12 **A.** Well, unjust -- I didn't -- I didn't think that they --
13 I didn't think them wanting to put more margin into
14 their business was a good enough reason for me to give
15 them a cost price increase.

16 **Q.** Very well. What then happens is on 24 September, this
17 is document 104 [Magnum], he sends you a spreadsheet of
18 proposed prices. So we're now 12 days after --

19 **A.** Sorry, 104?

20 **Q.** 104, yes.

21 **A.** Okay.

22 **Q.** "In anticipation of our cost increase... I have attached
23 a file detailing our new case costs by lines."

24 At paragraph 148 of your witness statement [Magnum],
25 and in the interests of saving time I'd rather not take

1 you, you say that this shows that Mr Meikle was getting
2 very frustrated with you. That's your evidence?

3 **A.** I believe so, yes.

4 **Q.** I'm going to suggest to you there's no sense of
5 frustration, he was trying to get you to move on the
6 price increase which at the meeting of 4 September you
7 had conditionally indicated you would accept?

8 **A.** I hadn't -- I had never indicated I would accept that
9 cost price increase.

10 **Q.** Now, on 26 September, that's two days later, you had
11 a conversation with Mr Meikle, and that is recorded back
12 in 112, document 112 [Magnum], at the Tesco briefing,
13 and that is the sentence -- we are now about 12 lines
14 down, or ten, "Lisa rang me", are you with me?
15 Right-hand side, ten lines down.

16 **A.** Yes.

17 **Q.** I'll read it to you:

18 "Lisa rang me last Friday and I told her that it was
19 our understanding [that's McLelland's] that Asda would
20 move retail prices from Monday 29th September. That
21 being the case she said she would enter her new case
22 costs on Monday/Tuesday to be effective [from]..."

23 I'm going to not read the date out for the time
24 being, but from a date.

25 You accept that in that conversation on 26 September

1 Mr Meikle did tell you that Asda would be moving their
2 retails up with effect from the following Monday?

3 **A.** Can I refer to my witness statement, please?

4 **Q.** Yes, paragraph 151 [Magnum]. If you just read that,
5 perhaps you would like to read that to yourself.

6 (Pause)

7 Can I summarise -- please correct me if I'm wrong,
8 I'm sure I will be corrected. Your evidence is that you
9 did not respond about your own case costs, but you
10 accept that Mr Meikle did make those comments about
11 Asda:

12 "In fact I said no such thing [that's the case
13 costs], I had not agreed to increase McLelland's cost
14 price at this stage. I took Stuart's comments as more
15 negotiating tactics. I did not place any reliance on
16 Stuart's claimed expectations."

17 **A.** Yes, he could have said that and, if he did, that's how
18 I would have taken them.

19 **Q.** And you would have known that Mr Meikle would have had
20 this information because you knew he was speaking to
21 Asda about the market move, the total market move?

22 **A.** No, I would have presumed he was just speculating.

23 **Q.** Well, if we go back in the documents, you will -- well,
24 put it this way. I would suggest that you knew it was
25 likely that he was speaking to Asda at this time,

1 particularly in circumstances where you accepted that,
2 at your first meeting, he indicated -- you knew that
3 they would be going to others to seek a cost price
4 increase?

5 **A.** Yes, as I've confirmed, I realised McLellands would be
6 going to other retailers to talk about the cost price
7 increases, yes.

8 **Q.** And that would include Asda. This information --

9 **MISS ROSE:** I'm sorry, I don't think there's any evidence
10 that Mr Meikle spoke to Asda.

11 **MR MORRIS:** I'm asking the witness whether she -- she knew
12 that she (sic) was going to speak -- whether there's
13 evidence or not, the question is she knew she (sic) was
14 speaking to the other retailers --

15 **LORD CARLILE:** The form of the question was unexceptionable.

16 **MR MORRIS:** I'm grateful. You're watching the transcript
17 more carefully than my memory.

18 Can I just take you to -- just to make the point, if
19 you go to 106 [Magnum].

20 **A.** Paragraph or?

21 **Q.** No, document. I'm sorry, I'm jumping about.

22 This is an internal email from McLelland, it says:
23 "Further to my telephone conversation with Tom [this
24 is Gerry Doyle] who confirmed that Asda will be moving
25 to new retails effective from Monday the 29th."

1 I'm going to suggest to you that, in fact, Asda was
2 talking, McLelland was discussing this with Asda at the
3 time, which confirms your understanding of what was
4 likely?

5 **A.** No.

6 **Q.** You just did accept that they would have been talking to
7 the other retailers, and I'm suggesting to you that one
8 of those retailers they would have been talking to was
9 Asda?

10 **MISS ROSE:** Sir, I think one of the reasons there's
11 a confusion here is that some of the time Mr Morris is
12 putting that Mr Meikle was talking to Asda and some of
13 the time he's putting that McLelland were talking to
14 Asda. He needs to be precise as to which is the
15 allegation because there is no evidence at all that
16 Mr Meikle spoke to Asda.

17 **MR MORRIS:** Sir, with respect, if I may make a general
18 point. I'm conscious of time, I would ask that the
19 interruptions are kept to a minimum. I have a flow of
20 questions, I have no doubt that if the Tribunal believes
21 my questions improper they may pull me up, but I am
22 endeavouring to get through --

23 **LORD CARLILE:** Let's get on at the moment.

24 **MR MORRIS:** I'm going to suggest to you that the information
25 that you have accepted that Mr Meikle gave you about

1 Asda was future pricing information that McLelland had
2 received from Asda?

3 **A.** I didn't know that and I wouldn't have taken it like
4 that. With everything else I have said over the past
5 few days, it's just -- to me, whatever I read from
6 suppliers is speculative, it's just their assumptions.

7 **Q.** You certainly could not have been sure at that time that
8 that information was not future pricing information
9 received from Asda?

10 **A.** I wouldn't have thought that deeply about it because
11 I just dismissed things like that.

12 **Q.** At paragraph 151 of your witness statement [Magnum], you
13 say:

14 "I did not place any reliance on [the
15 information]..."

16 I'll just get the paragraph, 151:

17 "I did not place any reliance on Stuart's claimed
18 expectations, I could easily check the prices in store
19 on Monday and decide what to do."

20 **A.** Yes, that's in line with what I've just said.

21 **Q.** That information about Asda would have included products
22 like McLelland's Seriously Strong, wouldn't it?

23 **A.** I don't know.

24 **Q.** Well, if it was a general statement about Asda moving,
25 Asda sold Seriously Strong, presumably?

1 **A.** Yes, everyone sold Seriously Strong, yes.

2 **Q.** And deli as well?

3 **A.** I'm not sure about deli.

4 **Q.** Now, the information Mr Meikle gave you about Asda in
5 that conversation was also useful at that time because
6 it gave you confidence that Asda was going to go along
7 with the price increase that McLelland were seeking from
8 all retailers?

9 **A.** It wasn't useful because I would just dismiss
10 information like that, so therefore it's not useful.

11 **Q.** You gave real weight to that information about Asda
12 because, in response, you said that you would enter your
13 new case costs on Monday or Tuesday?

14 **A.** I didn't say that. That is just not something I would
15 ever say. I didn't think the cost price was justified
16 so I certainly wouldn't be changing any cost prices on
17 that basis.

18 **Q.** So Mr Meikle is making that up in his notes, is he?

19 **A.** It's not a true reflection of what happened. I don't
20 know if he's -- yes, I can't comment on why he wrote
21 that.

22 **Q.** When you received the information about Asda, even
23 comments or claimed expectations, you didn't rebuff
24 Mr Meikle and say to him that this was inappropriate
25 information, did you?

1 **A.** No, because I just thought it was his speculation.

2 Everyone is entitled to an opinion.

3 **Q.** I'm going to suggest to you that, in the light of -- I'm

4 going to suggest to you that, in the light of the

5 compliance training you had had just a few months

6 previously, you would have been aware of the dangers of

7 receiving future price information, wouldn't you?

8 **A.** Yes, if it was -- I don't know how you'd ever

9 substantiate it, but, yes, if it was solid evidence

10 from -- retailer based, yes, but I viewed this just as

11 speculation and Stuart's assumption of what he thought,

12 so, therefore, I didn't view it as fact.

13 **Q.** But you didn't know for sure that it wasn't fact, did

14 you?

15 **A.** No, you -- no, that's why I treat everything as false.

16 **Q.** And because you didn't know it for sure, and given your

17 recent compliance training, I am suggesting to you that,

18 if you were concerned about this, you would have

19 responded in the light of your training and said,

20 "Stuart, watch it"?

21 **A.** I wasn't concerned because I ignored it. On another

22 occasion when I was -- when he sent me something

23 I deemed to be factual and something I shouldn't be

24 receiving, I did exactly what you just said there.

25 **Q.** We'll come back to that in a moment.

1 **A.** I deemed this as speculation.

2 **LORD CARLILE:** Mr Morris, can I just flag up that one of the
3 things we may be assisted by when you address us is the
4 evidential weight to be given to this document, given
5 that Mr Meikle has not been called to give evidence, and
6 he could have been called by either side. I just flag
7 that up as an issue you might like to deal with later,
8 because it appears to be a very important document.

9 **MR MORRIS:** We're obviously aware of the point.

10 Mr Meikle's note records that you said that you
11 would enter your case costs, and you say that you didn't
12 say that. That's right, isn't it? The sentence --

13 **A.** It's right because I did not agree with their request
14 for a cost price increase.

15 **Q.** Yes, so you say that the note here, and this is the
16 point, the chairman's point, you say the note here is
17 not accurate and that you didn't say that you would not
18 enter your case costs?

19 Oh, no, sorry. Let me just -- yes.

20 It's the sentence:

21 "That being the case, she said she would enter her
22 case costs Monday."

23 And you say that wasn't said.

24 Now can I put to you this, and this is a rather
25 double negative: in the response to the statement of

1 objections and the response to the supplementary
2 statement of objections, you did not say "I said no such
3 thing", there was no mention of what you now say at
4 paragraph 51 of your witness statement [Magnum], where
5 you say:

6 "In fact I said no such thing..."

7 **A.** But how can I put new case costs in the system when I've
8 not even agreed the cost price increase?

9 **Q.** What I'm suggesting to you is that your recollection
10 now, in October 2011, is the first time that you have
11 ever said in this case that you didn't mention the case
12 costs. That's right, isn't it? Can you explain why you
13 didn't deny that you had said that when you were
14 addressing this earlier on in 2007 and 2009?

15 **A.** I can't comment, no.

16 **Q.** You see, what I'm going to suggest --

17 **A.** I did not confirm any case costs because I haven't
18 agreed the cost price increase. I would never say
19 something like that, it's just not my buying habits,
20 it's just not what I would do in any cost price
21 negotiation, especially when I didn't agree or think the
22 cost price increase was justified.

23 **Q.** Now, I'm going to suggest that the information you
24 received about Asda was information that Asda was
25 content to have passed on to you and that you realised

1 that at the time?

2 **A.** No, I didn't.

3 **Q.** Asda was also facing a request for a cost price increase
4 at the time, weren't they?

5 **A.** I presume so, yes.

6 **Q.** They would equally have been keen to raise their retail
7 prices whilst not risk -- risking being out of line?

8 **A.** I can't comment on Asda's strategy.

9 **Q.** I'm going to suggest to you also that the information --
10 well, I was asking you what you must have realised at
11 the time?

12 **A.** Again, you know, I didn't spend my time thinking about
13 what retailers -- contents of other retailers' meetings
14 with suppliers.

15 **Q.** So are you suggesting that what other retailers were
16 going to do was -- again, you're suggesting that it was
17 completely irrelevant to you?

18 **A.** Yes. If I deemed the cost price increase to be just and
19 put it through then I would try and put my retails up.

20 **Q.** And the information that Mr Meikle gave you about Asda
21 was not confined to products that were labelled by
22 McLelland, it was a general statement about Asda, wasn't
23 it?

24 **A.** I don't know what statement he was making. Can you...

25 **Q.** Well, it's the "I told her" -- sorry:

1 "... it was our understanding that Asda would move
2 retail prices..."

3 **A.** You would have to ask Stuart Meikle what he meant by
4 that.

5 **Q.** On the next -- on the Tuesday, 30 September, Mr Meikle
6 told you that, in fact, Asda had not started to move.
7 If we go back to 112 [Magnum]:

8 "On Tuesday morning I had a discussion with Lisa and
9 told her that Asda had not moved retail prices as
10 expected but that Safeway and Sainsbury's had started to
11 move and that I still believed Asda would move."

12 Again, you don't dispute here what Mr Meikle told
13 you in that conversation. At paragraph 152 of your
14 witness statement [Magnum] you deal with this, and
15 I would suggest that, at paragraph 152, you accept that
16 he was telling you that but essentially you didn't
17 believe what he was telling you:

18 "As I state at paragraph 48 above, suppliers
19 would --"

20 Is that right?

21 **A.** I'm a bit confused with what you're asking me.

22 **Q.** Sorry, what I'm suggesting to you -- let me -- at
23 document 112 [Magnum], Mr Meikle records that he had
24 a discussion with you and that he had told you that Asda
25 hadn't moved as expected but Safeway and Sainsbury's had

1 started to move and that he still believed Asda would
2 move. The question I'm putting to you is that you do
3 not dispute that that is what he told you?

4 **A.** I can't remember.

5 **Q.** Well, I'm suggesting that your witness statement -- what
6 you say in summary, again, is that -- what you say in
7 152 [Magnum] is this was Mr Meikle's assessment, his own
8 assessment of what would persuade you to accept the cost
9 price increase. But I'm suggesting to you that -- I'm
10 trying to see how much of Mr Meikle's note you are --
11 you actually dispute as to what was said.

12 Do you dispute -- from your recollection, do you
13 accept that what is recorded there -- I've lost it now:

14 "On Tuesday morning I had a discussion with Lisa and
15 told her that Asda had not moved retail prices as
16 expected..."

17 **A.** I don't know if he said that or not.

18 **Q.** Okay. Then, in dealing with Sainsbury's and Safeway, in
19 paragraph 152 [Magnum], you say:

20 "Stuart Meikle may well have thought that I would
21 not want to be uncompetitive. There was a better chance
22 of persuading me to accept a cost price increase if I
23 saw that other retailers had increased their retail
24 prices in store, allowing me to manage the impact on my
25 margins."

1 You refer there to in-store prices as evidence of
2 other people moving; that's right, isn't it?

3 **A.** Sorry, I'm finding the way you're phrasing this very
4 confusing.

5 **Q.** I'm -- at paragraph 152, you're commenting on -- let's
6 go back to the paragraph. This is the second sentence,
7 that:

8 "He states that I indicated in response that I would
9 not enter my new case costs 'without evidence of Asda
10 moving on retail prices'."

11 **A.** That says that, yes.

12 **Q.** "As I state at paragraph 48 above, suppliers would
13 frequently tell me what they expected [and I won't read
14 it all out]... I would tell the supplier that I would
15 wait and see the increase in store at the relevant
16 retailer before making any decisions."

17 **A.** Yes.

18 **Q.** I'm going to suggest to you that new labels on new stock
19 which had been printed but were not yet in store would
20 also provide such evidence, wouldn't they?

21 **A.** If accompanied by a till receipt which, if they weren't
22 in store, they couldn't be.

23 **Q.** I'm suggesting to you that he would send you labels as
24 non -- printed but not in store, labels on new packs
25 that they had packed, he would send you those as

1 evidence of a price move.

2 **A.** I believe he did it once and that's when I --

3 **Q.** Yes, if we go to document --

4 **A.** That's when I rang him and said it wasn't suitable to do
5 that.

6 **MISS ROSE:** Sir, can I just put one thing on the record. It
7 was said by Mr Morris a little earlier that
8 Ms Oldershaw's statement that she did not say she would
9 enter her case costs was not something that had been
10 denied in the response to the statement of objections.

11 That is not correct. For the Tribunal's note, it is
12 appeal bundle volume 4, tab T, paragraphs 8.13 to 8.15,
13 and specifically at 8.15 [Magnum], in respect of the
14 statement:

15 "Lisa told me she would not enter her new case costs
16 without evidence of Asda moving on retail price."

17 The response that's given is that this is simply
18 Stuart Meikle's interpretation of Lisa Rowbottom's
19 negotiating stance described --

20 **MR MORRIS:** Sir, I'm sorry, I must now at this stage -- this
21 is yet another example of an interruption which is
22 unfounded, it is talking about a different sentence of
23 Mr Meikle's note. If the reference is given, my junior
24 will check it and we will come back on it, but it is not
25 appropriate to start making submissions in

1 cross-examination. The point is -- it was about not
2 a statement "I wouldn't enter", it was a statement
3 "I would enter case costs", which was the previous
4 conversation.

5 **LORD CARLILE:** Well, I have carefully noted the
6 intervention. We'll have another look at that later.

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

8 **LORD CARLILE:** We need to get on. We will have
9 a five-minute break for LiveNote at 12.30, we will then
10 resume and we will continue until 1.30 when we will
11 finish.

12 **MISS ROSE:** Just to be clear, I will need about 20 minutes
13 for re-examination.

14 **LORD CARLILE:** I'm troubled by the witness' position.

15 I presume you want to finish it today, don't you,
16 Ms Oldershaw?

17 **A.** Yes, I need to finish it today, sir.

18 **LORD CARLILE:** Right. We may have to go on then until 1.50
19 but we'll have to stop by then, we really will. So can
20 you both bear this in mind?

21 **MR MORRIS:** Yes, I totally am trying to.

22 **LORD CARLILE:** I think we're now on a guillotine.

23 **MR MORRIS:** I understand that, and I will try -- and I would
24 invite Miss Rose, if possible, to restrain and perhaps
25 deal with matters in re-examination or submission

1 later --

2 **LORD CARLILE:** Let's get on.

3 **MISS ROSE:** Sir, I don't want to waste time, but the
4 difficulty is that we've repeatedly had questions put on
5 a false factual basis and that's the main reason for my
6 interventions.

7 **MR MORRIS:** I do not accept that submission. The question
8 I asked was on a correct factual basis and I will
9 demonstrate that in --

10 **LORD CARLILE:** Now let's please get on.

11 **MR MORRIS:** Document 110 [Magnum], Mr Meikle sent you by
12 fax -- are you with me, Ms Oldershaw?

13 **A.** Yes.

14 **Q.** Mr Meikle sent you by fax copies of Safeway and
15 Sainsbury's labels showing price increases on Safeway
16 Savers mild and on Sainsbury's Isle of Bute?

17 **A.** Yes, that's what it says there, yes.

18 **Q.** Those labels rang alarm bells for you according to your
19 evidence?

20 **A.** Yes.

21 **Q.** Because you recognised at that time that those prices
22 would not be visible in store?

23 **A.** I can't recall why they rang alarm bells, but something
24 wasn't right about those labels. I didn't feel they
25 were public knowledge --

1 Q. Yes, because you recognised at the time -- I just asked
2 the question -- that those prices were not yet visible
3 in store because they were pristine labels?

4 A. I believe so, yes.

5 Q. Your evidence is that, if a supplier was providing you
6 with evidence of an in-store price as part of a price
7 check, the supplier would normally have provided the
8 till receipt as confirmation?

9 A. Yes, it was usual, yes.

10 Q. You were well aware that this was likely to be
11 inappropriate information about Asda's price moves which
12 had not yet appeared in store?

13 A. Safeway and JS.

14 Q. Yes. I'm going to suggest to you that you didn't make
15 any objection to the receipt of that?

16 A. Of the Safeway and JS labels?

17 Q. Yes. Did you or didn't you object to the receipt of
18 those labels?

19 A. Yes.

20 Q. I'm going to suggest to you that you didn't. You had
21 recently received training on compliance which covered
22 this issue, hadn't you?

23 A. I'd received recent Competition Commission training,
24 yes.

25 Q. If you had been concerned about such inappropriate

1 disclosure, you would have made a written note of the
2 problem as required by that training?

3 **A.** I can't recall the content of the training.

4 I highlighted it to Stuart Meikle and I also at the time
5 raised it with my superiors and then I tabled it to
6 bring up at a meeting approximately a week later,
7 I believe --

8 **Q.** Okay.

9 **A.** -- with the heads of McLellands.

10 **Q.** You made no note of the fact that you objected at the
11 time, did you?

12 **A.** I can't recall if I did.

13 **LORD CARLILE:** We'll break now for five minutes.

14 **MR MORRIS:** Very well.

15 (12.32 pm)

16 (A short break)

17 (12.40 pm)

18 **MR MORRIS:** I was asking you questions about your objection
19 or complaint to Mr Meikle about these labels, and I'm
20 going to just put to you that not only did you not make
21 a note of the inappropriate disclosure at the time, but
22 that you didn't send any written objection to McLelland
23 at the time, did you?

24 **A.** I can't recall if I sent any written objection but
25 I certainly highlighted the issue to Stuart Meikle and

1 internally to Tesco as well.

2 **Q.** So is your evidence that you did send one, or you can't
3 recall, or that you accept that you didn't send one?

4 **A.** I can't confirm either way. What I can confirm is that
5 I called Stuart Meikle and I raised it internally at
6 Tesco.

7 **Q.** Nor did you raise it in any subsequent correspondence
8 with Mr Meikle in the days which ensued, did you?

9 **A.** Not that I can show you anything.

10 **Q.** Nor did you raise it with Mr Ferguson, did you?

11 **A.** I raised it in the meeting with John Scouler, with the
12 head of McLellands, Alastair Irvine and Jim McGregor.

13 **Q.** That wasn't my question, my question was whether you
14 raised it with Mr Ferguson directly?

15 **A.** I can't recall if I did or didn't.

16 **Q.** You say you raised it with Mr Scouler but he didn't make
17 any note of the issue either, did he, as far as you are
18 aware?

19 **A.** I don't know.

20 **Q.** You didn't destroy the email or the labels?

21 **A.** I can't recall.

22 **Q.** I'm suggesting to you, Ms Oldershaw, that your
23 recollection here, your recollection now is mistaken.
24 You did speak to Mr Meikle, we'll see that in a moment,
25 but you didn't object to having received this

1 information?

2 **A.** I received labels I deemed I shouldn't have. I objected
3 by calling Stuart Meikle and I raised the issue
4 internally to Tesco at my highest level, John Scouler.

5 **Q.** You spoke to Mr Meikle on the 30th but you didn't tell
6 him -- didn't object to having received this
7 information?

8 **A.** I believe I did, yes.

9 **Q.** The Sainsbury's and Safeway labels were not enough to
10 persuade you to move because you were more concerned
11 with your position as against Asda; that's right, isn't
12 it?

13 **A.** Because I wouldn't have used them, because it wasn't in
14 the public domain. I acknowledge I shouldn't have
15 received them, I highlighted to the sender and
16 internally that I shouldn't have received them, and
17 I did not act on them because they were not -- it was
18 not information that was in the public domain.

19 **Q.** I suggest to you that they gave you useful information
20 which informed your thinking about what you were going
21 to do about your prices?

22 **A.** I did not act on these labels.

23 **Q.** This was firm evidence, labels, of future prices, and as
24 such they reduced uncertainty you had about whether
25 others would be increasing their prices?

1 **A.** I believed them to be factual information of knowledge
2 not in the public domain and that's why I highlighted
3 the issue.

4 **Q.** And I'm suggesting to you that, knowing that they were
5 that sort of information, they informed your decisions
6 that you subsequently made about your retail prices?

7 **A.** I don't believe they did, no.

8 **Q.** You must also have realised that Mr Meikle was providing
9 these labels consistently with Sainsbury's wishes?

10 **A.** I would think quite the opposite, to be honest.

11 **Q.** I would suggest to you that Mr Meikle was unlikely to
12 breach Sainsbury's and Safeway's confidence without at
13 least an indication from these retailers that it was
14 okay for him to do so, to pass it on?

15 **A.** I wouldn't believe any retailer would ever give that
16 okay to a supplier. I certainly wouldn't.

17 **Q.** Very well. Can we go to document -- we're now moving on
18 to 2 October, and go to document 113 [Magnum]. This is
19 an email from Stuart Meikle to you at 11.18 on the
20 morning of 2 October and he says:

21 "Lisa,

22 "Sainsbury's have moved retail prices across more of
23 their own label products. Details as below.

24 "JS Isle of Bute."

25 Et cetera, et cetera.

1 Then he says:

2 "I have copies of the labels so let me know if you
3 need them faxed to you."

4 Yes?

5 **A.** Yes, it says that.

6 **Q.** You say in your witness statement that at the time you
7 believed those prices to be in store?

8 **A.** Yes.

9 **Q.** But in fact the likelihood is that these were prices
10 which Sainsbury's had put in motion but were not yet
11 clearly in store because, in his email, he is referring
12 again to labels which he could fax to you as he had done
13 on 30 September?

14 **A.** Or labels which he could get from in store. After I'd
15 spoke to him, I wouldn't envisage he would send me
16 information I've already rejected and said is
17 unsuitable.

18 **Q.** That's... but he refers here to labels and not till
19 receipts, and I suggest to you that, if these products
20 had moved in store, he would have sent you till receipts
21 as he had done on the day before?

22 Your evidence is that you required till receipts,
23 isn't it?

24 **A.** Often required till -- yes, they often sent till
25 receipts, yes.

1 Q. You required till receipts as proof of it being in
2 store; that's right, isn't it?

3 A. It was proof it was in store, yes.

4 Q. Yes, but he wasn't doing that here. He was indicating
5 he had copies of the labels.

6 Can I take you back to 111 [Magnum]. At 111, this
7 is the day before, this is the same person sending you
8 an email:

9 "We have picked up some more retail price movement
10 today. JS have increased the price on [and then two
11 products].

12 "I have faxed a copy of this receipt to you (please
13 ignore the price for the chicken Fajita Wrap, [REDACTED]
14 [REDACTED])."

15 A. Yes.

16 Q. And the reason I refer to that is merely to establish
17 the point that what is being sent here is a till
18 receipt, not a label?

19 A. Yes, it was on that occasion, yes.

20 Q. What I'm suggesting to you is that where it was in store
21 he sent you a till receipt, but where it was not in
22 store he sent or offered to send you a label? That's
23 what he did at --

24 A. They often photocopied cheeses on the photocopier,
25 believe it or not they did, so you could get the label

1 that way.

2 **Q.** You didn't ask for till receipts in respect of these
3 products, did you?

4 **A.** I can't recall if I did or I didn't. At that stage
5 I wasn't interested in retail prices, I hadn't even
6 agreed the cost price increase. At this stage I still
7 didn't feel it was justified. So retails weren't even
8 on my agenda at this stage.

9 **Q.** They were on Mr Meikle's agenda because he was sending
10 you this information, wasn't he?

11 **A.** Yes, from that email, yes.

12 **Q.** And in the previous email.

13 Now, if we go to -- what happened then is -- if you
14 go to 114 [Magnum] -- you reply on 2 October about half
15 an hour later and you say:

16 "Can you please produce me a matrix of all your
17 lines, who stocks what and what retails they are
18 currently at."

19 **A.** Yes.

20 **Q.** You're asking for a full matrix in response to the
21 partial information that he's given you on the email
22 before, which is in fact also on the same page at 114?

23 **A.** It relates to all the little bits of information Stuart
24 was giving me. He was just bombarding me with
25 information. I wanted a factual account of what was out

1 there in store and that's why I requested the matrix.

2 **Q.** When you asked him that, you must have realised that he
3 would give you future pricing information where he had
4 it?

5 **A.** No, I didn't, because suppliers often did in-store price
6 checks for us. McLellands did us an in-store price
7 check every week. You know, they used to go out in
8 stores, if you've seen them, they used to check what
9 retail prices various lines were at in all the retailers
10 and send that through on a regular basis.

11 **Q.** What I'm suggesting to you is that at that time, and
12 given what Mr Meikle had been sending you by then, you
13 would have been aware that there was a risk that he
14 would send you future information where he had it?

15 **A.** No, I didn't. I --

16 **LORD CARLILE:** Of course the inference from that question,
17 Mr Morris, is that the contents of the email, the words
18 of the email at the top of the page are completely
19 misleading and deliberately so.

20 **MR MORRIS:** No, that's not that, with respect. I accept
21 that the question is for current, but I'm suggesting
22 that at the time that that email was sent, given
23 Mr Meikle had been sending future information, that
24 Ms Oldershaw would have been aware, given his practice,
25 that he'd send what he had.

1 My next question was going to be or is this, that in
2 that email, given everything that Ms Oldershaw said had
3 happened, there's no express warning to Mr Meikle,
4 "Don't send me anything future"?

5 **A.** I'd already spoken to him about the label issue and I'd
6 asked him for current prices, not what are other
7 retailers' future prices going to be. I'd asked him for
8 current prices which he'd find out in store.

9 **Q.** Very well.

10 If we then go to document 115 [Magnum], which is his
11 response, it's:

12 "The attached is a matrix of our pre-pack and deli
13 brands showing the prices across the multiples. I have
14 included the old/current retail and the new retail price
15 where relevant. I will keep this updated as changes
16 become visible and also let you know on any own label
17 moves that we identify."

18 If you go over the page to the spreadsheet you will
19 see in respect of each retailer there are two columns,
20 and the left-hand column is "Old Retail" and the
21 right-hand column is "New Retail".

22 Your evidence at paragraph 157 [Magnum], I'm again
23 conscious of the time. If you would allow me to
24 summarise it, your evidence is that you understood the
25 words "New Retail" in the spreadsheet to be current

1 retail and "Old Retail" to be prices prior to the £200
2 per tonne increase?

3 **A.** Yes. If there's only an "Old Retail" column, ie Tesco,
4 that's what it is now. But if there's an old and a new,
5 like Sainsbury's, the old retail was what it was, say,
6 a week ago, and the new retail is what they've recently
7 moved to in store.

8 **Q.** What you had asked for, as the chairman rightly pointed
9 out, was current retails. But what Mr Meikle responded
10 in his email was that he expressly distinguishes not
11 between old and new but between old/current and new
12 retail prices. That's what he says in his email?

13 **A.** I read this to be current retail, and where it says
14 "old", what the price was a week ago. All the
15 information is in the public domain or has been in the
16 public domain.

17 **Q.** So you read his email to say not old/current retail and
18 new retail, but old/current retail and new/current
19 retail?

20 **A.** That's how I'm reading the table, yes.

21 **Q.** No, the email. Go back to the words of the email, if
22 you would.

23 **A.** Yes, so for Sainsbury's the old retail is what it was --
24 the old retail in the "Old Retail" column is what it was
25 last week before it moved, but for Tesco the old retail

1 is actually the current retail, which is what it says
2 there in the email.

3 **Q.** Yes, but --

4 **A.** Because there has been no price change on Tesco.

5 **Q.** I'm suggesting to you that you must have realised that
6 in the email, Mr Meikle described those prices as
7 "old/current" in order to identify the prices which were
8 the current prices, which you had specifically asked
9 for, and that the words "New Retail" did not mean
10 new/current retail?

11 **A.** I've just told you how I read it and it's not what
12 you're saying.

13 The old/current is, I'll say again, for Sainsbury's,
14 in the "Old" column, that's their price, for example,
15 last week. For Tesco, in the "Old Retail", because he
16 was optimistic of a price change because we would take
17 the cost price increase, that is at my current retail,
18 and that's how I read that matrix and the email.

19 **Q.** Now I'm putting to you, and this is the last time I'll
20 put it, if you understood the matrix in the way you
21 understood it, the email would have read "Old/Current"
22 and "New/Current", but it doesn't, does it?

23 **A.** That's how I read it, that's my understanding, and
24 whether it's grammatically correct or not that is my
25 understanding and that is my true belief on those prices

1 on that table.

2 **Q.** When Mr Meikle said he would keep it updated as changes
3 became visible, he was referring to the fact that the
4 prices were not yet in store but would become visible
5 when they reached the store?

6 **A.** No, he was referring to he would update it as prices --
7 changes happened in store. For example, on this list,
8 the "New Retail" column for Asda is blank, so when he
9 saw a retail price change in the Asda store, he would
10 therefore fill in the relevant cell on the spreadsheet.

11 **Q.** Can you take up bundle 4 at tab T, if you go to page 151
12 [Magnum], paragraph 8.5(h), this is when Tesco address
13 this email in that paragraph, and it says:

14 "Tesco received inappropriate information from
15 McLelland about competitors' future prices on
16 30 September, 2 September and 6 October. Lisa Rowbottom
17 escalated her concerns to John Scouler."

18 Now, at that stage -- you had been asked about
19 matters at that stage, I presume?

20 **A.** Yes, I would have been, yes.

21 **Q.** So my question is, why there is it accepted that the
22 information was inappropriate?

23 **A.** What information is inappropriate?

24 **Q.** The information in this email at tab 115 [Magnum] which
25 the OFT suggests is future information in relation to

1 Sainsbury's and Safeway, and which you now say was
2 in-store information?

3 **A.** Because I believe since then I've seen some -- I believe
4 I've seen some in-store price change data from another
5 source but I can't remember.

6 **Q.** Right. Well, I'm not sure what you're referring to, but
7 you're saying it's now based on new material?

8 **A.** No, I don't...

9 **Q.** Can I put this to you. At the very least, given the
10 terms of this email, you must have had -- and given the
11 extent to which we've been debating the words in the
12 email, you must have had some doubt as to whether this
13 was future or in-store information?

14 **A.** Not after I'd spoken -- after I'd spoken to Stuart
15 I wouldn't have deemed he would have sent me any more
16 improper information, inappropriate information.

17 **Q.** I'm suggesting to you that you made no objection to
18 receiving this information?

19 **A.** If I believed it wasn't inappropriate, I wouldn't have
20 objected, no.

21 **Q.** I'm suggesting to you that if you had really objected in
22 respect of -- on the 30th, first of all, you would have
23 gone back to him because at the very least this is
24 doubtful as to whether it's future or in store?

25 **A.** On 2 October I was also sent the JS list as well as the

1 matrix it would seem. So in this bundle, it doesn't
2 refer to which piece I deemed to be inappropriate.

3 **Q.** Are you now saying that the information at 113 [Magnum],
4 that might be the information that was inappropriate?

5 **A.** It might have been. From reading this, I don't...

6 **Q.** There was no objection made to that information either?

7 **A.** I can't recall specifically. Specifically, sitting
8 here, I can recall the labels very clearly. And sitting
9 here, I do believe that that is not future -- the matrix
10 is not future pricing intentions.

11 **Q.** Very well.

12 **MISS ROSE:** I'm really sorry to intervene yet again but
13 I have to say that in their defence in this appeal at
14 paragraph 256 [Magnum], the OFT stated that the document
15 at 113 was evidence that these cheeses were on the shelf
16 in store at 2 October 2003, which is inconsistent with
17 the case now being put.

18 **MR MORRIS:** That is correct, sir. I'm putting it because,
19 having looked at it further, I'm on the document, I'm
20 putting the question to the witness on the basis about
21 the labels and the reference to the labels.

22 **MISS ROSE:** Sir, then it appears that the case that is now
23 being put is inconsistent --

24 **LORD CARLILE:** I've got that message.

25 **MISS ROSE:** -- with the defence and we've not been given any

1 notice of their change of position, no application to
2 amend.

3 **MR MORRIS:** Well, if need be, I will make an application to
4 amend at the appropriate moment and no doubt Miss Rose
5 can make observations about the lateness of that
6 application.

7 **LORD CARLILE:** I've just made a careful note of your
8 observations, Miss Rose, which are obviously important.

9 **MR MORRIS:** Now, when you received the information about
10 Sainsbury's in document 115 [Magnum], you must have
11 realised that Mr Meikle was providing this information
12 about Sainsbury's consistently with Sainsbury's wishes?

13 **A.** No, not at all.

14 **Q.** This was the third such disclosure of Sainsbury's
15 information. The first was at document 110 [Magnum],
16 that's the first set of labels. The second is at 113
17 [Magnum], which is the longer list of products. The
18 third now is on the same date, about five hours later,
19 in this matrix.

20 I'm suggesting that, in those circumstances, it is
21 unlikely that Mr Meikle would be breaching Sainsbury's
22 confidence without at least some indication that the
23 retailers were happy for that to happen, for the passing
24 on to happen?

25 **A.** From the way I behaved as a retail buyer, I find that

1 very unlikely.

2 Q. Well, how did you behave?

3 A. I would never, I would never give suppliers permission
4 to pass on my retail information, and I can only surmise
5 that other buyers and other retailers would act the
6 same.

7 Q. But you never told them not to, did you?

8 A. Not specifically. It was a given. Suppliers shared
9 their confidential information with me about new product
10 developments, their strategy. They gave me prices on
11 tenders. I didn't then go to the other suppliers and
12 share that information. It was just -- it was
13 a business relationship. You trusted to hold each
14 other's information.

15 Q. You trusted them.

16 A. On that respect, to hold your information, yes. But
17 I didn't trust them, I just -- as I keep saying, as you
18 keep pointing out, anything they sent to me with regard
19 to other retailers I just took as their speculation.

20 Q. Can we now go to the meeting on 6 October at
21 paragraph -- which you deal with at paragraph 162 of
22 your witness statement [Magnum]. You deal with it in
23 fact starting from 159 [Magnum].

24 162:

25 "We returned to our commercial discussions and

1 John Scouler resolved the deadlock at the meeting by
2 proposing that we consider the two issues, cost price
3 increase [ie generally, if I may interject] and margin
4 on Seriously Strong separately. He was convinced by the
5 justification for the £200 per tonne cost price increase
6 and agreed to accept it, leaving my issue with the poor
7 margins on Seriously Strong branded cheese to be dealt
8 with separately after the meeting."

9 So that's what you say.

10 **A.** Yes.

11 **Q.** So it's right that the Seriously Strong issue was not
12 resolved at the meeting?

13 **A.** No.

14 **Q.** "I told McLelland that if I could not improve the
15 margins I was generating on Seriously Strong, then Tesco
16 would have no choice but to de-range it."

17 That I think meant you were going to take it out of
18 about 50 per cent of your stores?

19 **A.** Reduce the number of stores it was in, yes.

20 **Q.** "We agreed to work out a plan for Seriously Strong
21 separately."

22 Now, you say that at that meeting objections were
23 raised with McLelland about inappropriate disclosure of
24 future pricing information, don't you?

25 **A.** Yes.

1 Q. I'd like to explore that in a little more detail. How
2 well do you remember now what was actually said at the
3 meeting? Can you cast your mind back to it now?

4 A. Yes.

5 Q. You can remember?

6 A. I can remember some of the meeting.

7 Q. Some of the meeting, yes. It's not -- it's
8 understandable.

9 What I'm going to suggest to you is that, at the
10 meeting, Mr Irvine mentioned the fact that they knew
11 that other retailers were going to go up and it was that
12 which caused John Scouler to complain. Does that sound
13 right?

14 A. Yes, I believe so, yes.

15 Q. Can we just look at what Mr Irvine and Mr Scouler say
16 about this. Can you first of all go to volume 2B, tab
17 K, paragraph 13 [Magnum]:

18 "In developing the case for such cost price increase
19 across the board, we also discussed future developments
20 on the retail market in general terms."

21 Then if I can take you to the sentence on the fourth
22 line:

23 "I stated that in McLelland's view this cost price
24 increase would in turn result in an increase in the
25 retail price of cheese by all grocery retailers. I gave

1 no details and revealed no other retailers' future
2 pricing intentions."

3 Then over the page:

4 "When I raised this, the discussion was cut short by
5 John Scouler. He intervened very firmly stating that
6 Tesco would not discuss the future retail pricing
7 intentions of other retailers. The manner in which
8 Mr Scouler made this point indicated he was
9 communicating a general Tesco policy that was not
10 specific to McLelland or to the discussion I had just
11 started."

12 Then if you go to 18 [Magnum], then he deals with
13 the Seriously Strong issue, and at 16 he says:

14 "We could not reach agreement on Seriously Strong."

15 So that's in line with what you just said. Then at
16 18 he says:

17 "There were no further substantive discussions. The
18 meeting ended on a cordial note. I cannot now recollect
19 whether Lisa Rowbottom raised the specific issue of any
20 emails or faxes from Stuart Meikle."

21 So his evidence is that Mr Irvine raised the issue
22 of future retail prices of other retailers in general
23 terms, Mr Scouler immediately intervened very sharply
24 and nothing further was said, and he has no recollection
25 of you raising any issue about emails from

1 Stuart Meikle. That's his evidence, isn't it?

2 **A.** That's what it says there, yes.

3 **Q.** If you go to 2A, tab H [Magnum], this is Mr Scouler,
4 paragraph 90 [Magnum]. It's the same bundle that your
5 witness statement is in, your main one.

6 If you go to paragraph 90, it's at page 25,
7 Mr Scouler says:

8 "I recall an attempt to persuade Tesco to accept the
9 cost price increase. McLelland suggested that Tesco's
10 margins could be preserved by an increase in retail
11 prices. They suggested that if Tesco went first the
12 rest of the market would follow. I recall that
13 I objected to this, stating that Tesco did not want to
14 hear about what other retailers would do. I suggested
15 that McLelland put in place some competition law
16 compliance training."

17 He makes no mention of any issue about earlier
18 emails from Mr Meikle, does he?

19 **A.** Not there, no.

20 **Q.** And he doesn't mention the fact that -- neither of them
21 suggest that you were the one who intervened first on
22 the issue?

23 **A.** Not from what I've just read, no.

24 **Q.** Your evidence at paragraph 161 of your witness statement
25 [Magnum], which is in the same bundle, forward to J. At

1 paragraph 161 -- I'm now trying to move quickly -- your
2 evidence in line 5 is, after Mr Irvine raised the
3 suggestion about others following, you say:

4 "I immediately objected and this sort of discussion
5 was inappropriate. I recall that John intervened in
6 support."

7 Then you go on to say, and I'm trying to paraphrase
8 because of time, that you mentioned the issue of labels?

9 **A.** That's my recollection of the meeting, yes.

10 **Q.** I'm going to suggest to you that, in the light of
11 Mr Scouler and Mr Irvine's evidence, your recollection
12 of the detail of what happened at that meeting is
13 mistaken?

14 **A.** That's my recollection of the meeting and I don't
15 believe it's mistaken.

16 **Q.** I'm going to suggest to you, it's a long time ago --

17 **A.** In my briefing document to John Scouler I had tabled
18 Competition Commission compliance training on the basis
19 of the label issue.

20 **Q.** We'll come to that in a moment.

21 I'm suggesting to you, at the very least, given how
22 long ago it is and given the clear evidence of two other
23 witnesses, that your recollection might be mistaken?

24 **A.** I don't believe it is, no.

25 **Q.** It's not possible?

1 **A.** I don't believe it is, no. I believe that's a fair and
2 accurate recollection.

3 **Q.** I'm suggesting to you that it was Mr Scouler who was the
4 person who raised the competition law issue, and that
5 you made no reference at that meeting to any earlier
6 emails from Mr Meikle. Sorry, emails -- yes, any emails
7 or labels from Mr Meikle.

8 **A.** I believe I definitely raised the label issue.

9 **Q.** Can we then go to document 110, which is the document
10 that you say -- well, let me just first of all go to
11 paragraph 160 of your witness statement [Magnum]. Could
12 you do that for me? 160. You say there:

13 "I recall that I prepared a one-page briefing for
14 John highlighting the margin issue for Tesco on
15 Seriously Strong and presenting the other figures for
16 McLelland."

17 That's right, isn't it?

18 **A.** Yes.

19 **Q.** At that time you hadn't seen any document, and what then
20 happened is that there was a further review of the
21 documents and a further document was in fact revealed,
22 which is document 110A [Magnum].

23 **A.** Yes.

24 **Q.** You address that document in paragraphs 19 to 25 of your
25 third witness statement [Magnum], and if I can, I will

1 not go to those paragraphs in the light of time.

2 You say that the document at 110A is a copy of the
3 document which you had referred to in paragraph 160 of
4 your witness statement [Magnum]?

5 **A.** Yes.

6 **Q.** And you say that the reference in that document over the
7 page to "Competition Commission training desperately
8 needed" shows that before the meeting you had raised
9 with John Scouler the issue of Stuart Meikle having sent
10 you inappropriate information the week before?

11 **A.** Yes.

12 **Q.** I'm going to suggest to you that your recollection of
13 what this document is might not be accurate. Do you
14 think that's possible?

15 **A.** This is a briefing document that I would typically
16 prepare for John before a meeting.

17 **Q.** Very well. Now, just let me put the --

18 **A.** So I can't see how it can't be accurate.

19 **Q.** Okay, well let me just put one or two points to you
20 because I'm keen to deal with it.

21 The first point is that in your witness statement
22 your initial recollection was that you had prepared
23 a one-page briefing?

24 **A.** It is one page, yes.

25 **Q.** Well, this isn't, this is --

1 **A.** Well, this -- they're referred to as one page.

2 **LORD CARLILE:** I suppose it depends on the size of the print
3 you print it off in, doesn't it?

4 **MISS ROSE:** And whether it's one or two sides on a page.

5 **LORD CARLILE:** Yes. I mean, shall we move on from that
6 point?

7 **MR MORRIS:** Yes.

8 As regards the specific issue of Seriously Strong,
9 all the witness evidence indicates that that issue had
10 been raised on 6 October, but that the issue that Tesco
11 had told McLelland at the meeting, you were considering
12 de-ranging Seriously Strong, but that the issue had not
13 been resolved at the meeting. That's right, isn't it?

14 **A.** They weren't told at the meeting about the de-ranging.
15 They'd been told prior, they'd been told quite a lot
16 prior to that meeting.

17 This issue had been going on a long time about
18 Seriously Strong.

19 **Q.** Yes, but my main point is this, that it was -- all the
20 evidence shows that the issue had not been resolved at
21 the meeting, that no decision had been taken. That's
22 right, isn't it?

23 **A.** In terms of how we would address the poor profitability
24 for Tesco, Seriously Strong against its high sales and
25 volumes for McLelland, that hadn't been addressed, no.

1 Q. I took you a moment ago to your witness statement, and
2 you agreed with me, as Mr Irvine had said too, that that
3 issue was deferred to be dealt with after -- later?

4 A. Yes, that was for me and the account manager to work
5 through.

6 Q. And no decision had been taken at that stage, at the
7 meeting, to de-range. You've just said you didn't even
8 mention de-ranging?

9 A. It had already been mentioned. They already knew they
10 were due to be de-ranged I think some time in October,
11 I believe.

12 Q. You're now saying that you had told them that you were
13 going to de-range them, that you'd taken the decision.

14 Let me just put the point very quickly to you.

15 Paragraph 3 on page 2 of document 110A [Magnum]:

16 "Diminishing profitability of Seriously Strong,
17 especially in light of such fantastic --"

18 Sorry, are you with me? I'm gabbling now because
19 I'm conscious of the clock ticking:

20 "Diminishing profitability of Seriously Strong
21 especially in light of such fantastic growth and also
22 against its peers, failed to be addressed and as
23 a result distribution is cut by half from [the] end [of]
24 October 2003."

25 What I'm suggesting to you is that that records a

1 decision on the Seriously Strong issue and not
2 a proposal to discuss the issue?

3 **A.** This is a briefing document for John to paint the
4 picture of the supplier he is about to see.

5 **Q.** Very well. The point I'm making generally is this, I'm
6 going to suggest to you that it is possible that this
7 document, all of it or at least the bottom half of it,
8 was written after the meeting rather than before the
9 meeting?

10 **A.** No.

11 **Q.** It's not possible? Not even possible?

12 **A.** No, it's a document used in a supplier meeting.
13 I wouldn't then go back and update it with random
14 things. It's ludicrous to suggest that.

15 This is a briefing document for my senior manager to
16 paint a picture about the supplier he was going to see.
17 He didn't want full details, he needed to get a good
18 overview. He always asked for the points that I wanted
19 to get across in the meeting, and this is what this is.

20 **Q.** No decision had been taken on the Seriously Strong issue
21 either before or at the meeting, and this document
22 records a decision having been made and, in the light of
23 that, that is why I'm suggesting to you that this
24 document --

25 **A.** I actually believe seeing, in one of Stuart Meikle's

1 fantastic summaries, internally, that he does reference
2 about the delisting of product.

3 **Q.** I'm sure that the issue of the possibility of delisting
4 was raised, it's plainly in the documents. What I'm
5 suggesting to you is that this document on that second
6 page records a decision, and I'm suggesting to you,
7 because it records a decision, this is a document which
8 postdates the meeting of 6 October?

9 **A.** It could be informing John of a decision that was made
10 before the meeting so he's armed with everything that's
11 happening.

12 **Q.** This is the first time you're now suggesting that that
13 issue was decided at the meeting.

14 Can I just move on and finally deal with the
15 Competition Commission training --

16 **A.** The issue of the margin wasn't dealt with at the
17 meeting. They'd failed to address this issue for months
18 and months and months, and this was, for want of
19 a better word, their punishment for not addressing it.

20 **Q.** So you've punished them before the meeting, have you?

21 **A.** No, it hasn't -- "cut by half from the end of October",
22 we're now sitting at 6 October.

23 **Q.** At paragraph 162 of your witness statement [Magnum], you
24 say:

25 "We resolved the deadlock. We would consider...

1 I told McLelland that if I could not improve the margins
2 I was generating on Seriously Strong, then Tesco would
3 have no choice but to de-range. We agreed to work out
4 a plan separately."

5 Your evidence before you discovered this document,
6 or before you were shown it again, was that you had not
7 taken a decision to delist at that stage. Your evidence
8 is that you told them that you would if the margin issue
9 couldn't be sorted out.

10 **A.** Yes.

11 **Q.** And now you're telling me --

12 **A.** No, I'm telling you just that. If they couldn't -- they
13 were due to be delisted, they had another chance to make
14 it right, and then that could be reversed. But as it
15 stood, because they hadn't made a decision, then they
16 would be delisted.

17 **Q.** I will leave that point there.

18 Can I ask you about the "Competition Commission
19 training desperately needed", can I put two points to
20 you.

21 **A.** Yes.

22 **Q.** The first point is that I'm going to suggest to you that
23 that could equally be a reference to issues arising out
24 of the code of conduct which itself had emerged from the
25 Competition Commission enquiry, given that the words are

1 "Competition Commission"; that's right, isn't it?
2 Nothing to do with future pricing, it's to do with the
3 code of conduct?

4 **A.** That's just a phrase I and other buyers use for that
5 kind of training, competition Commission training.

6 **Q.** And I would secondly suggest that if, as I suggest is
7 possible, this document postdates the meeting, what it
8 does is it -- the reference to Competition Commission
9 training reflects John Scouler's intervention at that
10 meeting and not something that you had thought of before
11 the meeting?

12 **A.** This was not written after that meeting. This was
13 a briefing document for that meeting.

14 **Q.** Very well.

15 Can we move on to document 117 [Magnum] and 118
16 [Magnum]. Let's go to 118, this is the updated
17 spreadsheet:

18 "Please find attached an updated spreadsheet
19 including the new retail prices that Asda will run on
20 McLelland random weight branded lines."

21 I suggest to you that the attachment and the
22 reference to "will run" indicates that these were Asda's
23 future prices?

24 Do you agree that the reference to the words "will
25 run" show that he was telling you about Asda's future

1 prices?

2 **A.** I believe the spreadsheet is in-store prices.

3 **Q.** If you go back a page at 117, where he is giving you
4 in-store prices, he is giving you a very clear statement
5 about that fact because he says -- this is the
6 Seriously Strong prices:

7 "These prices are taken from the Asda website. We
8 will buy some product from store this morning and I can
9 fax receipts to you as confirmation."

10 So where they are in store, a few hours earlier, he
11 is saying "I am going to send you -- these are from the
12 websites, it's public knowledge and I'm going to send
13 you receipts, till receipts".

14 A few hours later -- not even a few hours, less than
15 two hours later --

16 **A.** Which document? You're going so fast.

17 **Q.** 117 -- I'm trying to go fast. 117 is an email on the
18 same morning from the same person to you at 8.55 in the
19 morning, are you with me now?

20 **A.** Yes.

21 **Q.** That email:

22 "Quick update on the retail price position of
23 Seriously Strong.

24 "Asda..."

25 He gives some figures.

1 **A.** Yes.

2 **Q.** "These prices are taken from ... I can fax the
3 receipts ..."

4 What I'm suggesting to you is, if you contrast 117
5 and 118 and the words "will run" in 118, it is obvious
6 that what he is telling you in 118 about random weight
7 lines is future prices?

8 **A.** I don't believe that was obvious to me at the time, no.

9 **LORD CARLILE:** The guillotine is about to fall.

10 **MR MORRIS:** I know. I have to just put my case as shortly
11 as I can.

12 **LORD CARLILE:** Well, you've put it pretty solidly so far.

13 **MR MORRIS:** I just haven't got to the end, I'm afraid.

14 Can I suggest to you, you say now that this is
15 in-store prices but you, in fact, when this issue was
16 dealt with in the response to the statement of
17 objections which you have verified, at volume 4 -- I'll
18 put the point to you. In that paragraph,
19 paragraph 8.29(d) [Magnum], you accepted that this was
20 an inappropriate communication. Why have you changed
21 your evidence in respect of that?

22 **A.** That's my view just sat here now, ten years later.

23 **Q.** And you've no explanation for why you initially accepted
24 that it was an inappropriate communication?

25 **A.** Not that I can recall now, no.

1 Q. When you received this information, you knew perfectly
2 well that this was useful information as to Asda's
3 future pricing?

4 A. No.

5 Q. You realised that Asda had passed this information to
6 Mr Meikle knowing he would probably signal its contents
7 to the other retailers?

8 A. No.

9 Q. And you regarded --

10 A. As I said before, I didn't think retail -- I can't
11 believe retailers would act in that way because
12 I certainly wouldn't act in that way.

13 Q. I put to you that you regarded this information as
14 a credible signal of Asda's intentions?

15 A. As I'm sat here now, I believe that's an in-store price
16 check.

17 Q. Even though you didn't believe it back in 2007 and 2009,
18 did you?

19 A. Obviously not, according to my statement, no.

20 Q. You made no objection to receiving this observation
21 despite what you say had happened at the meeting the
22 previous day?

23 A. I can't recall.

24 Q. If you had objected to this, receiving this information,
25 everything you've told the Tribunal, you would have gone

1 back to Mr Meikle and said, "I have told you, do not
2 send me this information"?

3 **LORD CARLILE:** Well, we've got the point.

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

5 I have one other document which is 9 October.

6 I don't know whether I --

7 **LORD CARLILE:** You've had two and a half days to
8 cross-examine, Mr Morris. We really do have to finish.
9 It's half past twelve midnight in New Zealand.

10 **MR MORRIS:** I understand that.

11 **LORD CARLILE:** You can make submissions, I suspect they'll
12 be on similar lines.

13 **MR MORRIS:** Very well.

14 If I could just point out to the witness, what then
15 happened is that then, following receipt -- document 123
16 [Magnum], on 9 October, you sent back your future retail
17 pricing prices, didn't you?

18 **A.** Yes, because we'd agreed the cost price on the 6th.

19 **Q.** When you had a discussion at document 121 [Magnum], 122
20 [Magnum], amongst the things -- what happened is you had
21 a discussion with Mr Meikle. At document 121, if you
22 look at that:

23 "Following our conversation I have updated the
24 attached spreadsheet on all the points that we
25 discussed."

1 There's a spreadsheet then attached with prices. Do
2 you see that?

3 **A.** Yes, there's a spreadsheet there, yes.

4 **Q.** It's possibly my last point. In that discussion that
5 you had with Mr Meikle -- I'm not talking about what
6 happened when you finally sent the information back at
7 123 -- in that discussion, you discussed your deli
8 prices?

9 **A.** Deli cost prices I would have done, yes.

10 **Q.** Well, deli retail prices are marked -- in the schedule
11 attached to 121 [Magnum], you can see that he has filled
12 out a deli retail price following all the points that
13 you discussed.

14 **A.** There is a deli retail price in there but it doesn't
15 mean I asked for it.

16 **Q.** I'm going to suggest to you this, that you discussed all
17 McLelland products on, I think it's the 8th, including
18 deli, and that there was no reason for you to be
19 discussing your deli retail price with Mr Meikle
20 because --

21 **A.** I don't believe I discussed my deli retail price with
22 Mr Meikle.

23 **Q.** Very well.

24 **A.** Because, as you pointed out, there's no need.

25 **Q.** I think I've put that, at document 123 [Magnum], what

1 then happens is you send back your retail prices, your
2 decided retail prices to Mr Meikle and that reflects the
3 discussion you had. When you sent that, you knew that
4 he would pass that information on to other retailers?

5 **A.** Absolutely not.

6 **Q.** It never occurred to you --

7 **A.** The retail information I give suppliers for Tesco
8 products, I trust remains between me and that packer,
9 that supplier.

10 **Q.** And you were sending that information in circumstances
11 where, two days previously, you had received from
12 Mr Meikle the future pricing intentions of one of your
13 competitor retailers?

14 **A.** That's not how I viewed it.

15 **Q.** I'm putting to you that you knew by then, quite clearly,
16 that Mr Meikle was talking to other retailers and you
17 took no steps whatsoever, given everything that you had
18 complained about, about compliance and the like and his
19 conduct, you took no steps whatsoever when you sent that
20 email to say, "Whatever you do, Tom, you mustn't pass
21 this on to anybody"?

22 **A.** No, I didn't put that at the bottom of the email.

23 I just took it as a given.

24 **Q.** Amongst the information you gave was information in
25 relation to deli prices which, to be ...

1 If you go to the email, you say in the email at 123
2 [Magnum] -- this I hope is the last question, sir -- you
3 say:

4 "With the exception of ... deli as I need to
5 discuss."

6 So you fairly point -- I'm hoping I'm being fair and
7 pointing out -- the deli price --

8 **A.** Sorry, I don't know where you are.

9 **Q.** I'm sorry, document 123 [Magnum]. This is the email
10 that you send which we say is your disclosure of your
11 future pricing intentions to McLelland and the
12 spreadsheet includes random weight and it includes deli.
13 I'm not going to take you; the deli spreadsheet does
14 have the words "on hold" on it, I accept that, but
15 nevertheless in your email you give the dates when they
16 will move and you say:

17 "With the exception of Seriously Strong deli as
18 I need to discuss."

19 Are you with me? The last line of that email. It
20 may be you're not following me?

21 **A.** I can't verify --

22 **Q.** No, can you go to the email, Ms Oldershaw?

23 **A.** Yes, I'm looking whether the deli line is on this list.

24 **Q.** Well, I'm trying to help you by saying that the deli
25 line -- the two deli lines have got -- one has got

1 a price in it and they've both got "on hold" in the "New
2 Cost Effective From" date?

3 **A.** There are deli lines on here and then it's blank, "New
4 Retail Price" is blank.

5 **Q.** Yes, and the one below, Seriously Strong white six times
6 2.5kg, has got a figure of £6.83 in it. Are you with
7 me?

8 **A.** And it's on hold.

9 **Q.** Yes, I accept --

10 **A.** It's on hold and all other deli lines don't have a price
11 by them.

12 **Q.** No, I'm accepting -- I'm not arguing with you. I'm
13 trying to put the position fairly to you that you say --

14 **A.** And I'm saying I did not share deli pricing. I've left
15 the cells blank apart from one which is on hold, so
16 there's no effective date on that.

17 **Q.** Can I just ask you one final question, if you go back to
18 the email.

19 **A.** So I did not share my deli retails.

20 **Q.** Ms Oldershaw, I entirely understand that that's your
21 evidence and I entirely understand it's very late.
22 I want to take you to the email. At the front of the
23 tab, in the last sentence it says:

24 "Costs on Seriously Strong pre-pack will move on
25 [blank]. Costs on all other McLelland lines (with the

1 exception of Seriously Strong deli as I need to discuss)
2 will move on [blank]."

3 My question for you is, what did you need to discuss
4 with McLelland about the deli price?

5 **A.** I can't be specific but it would probably be around
6 promotion or poor margin performance, I would guess.

7 **Q.** I'm suggesting to you that that sentence indicates that
8 you were discussing deli retail prices with McLelland
9 and that there was no reason to do so?

10 **A.** And I dispute that.

11 **MR MORRIS:** Very well.

12 **LORD CARLILE:** Thank you, Mr Morris.

13 **MR MORRIS:** I thank the Tribunal for their indulgence.

14 **LORD CARLILE:** Now, you're going to have some questions from
15 Miss Rose who appears for Tesco. I think the camera is
16 just going to be moved.

17 **A.** Okay.

18 **MISS ROSE:** Sir, I'm going to remain seated if that's all
19 right.

20 **LORD CARLILE:** That's fine with us.

21 Re-examination by MISS ROSE

22 **MISS ROSE:** Ms Oldershaw, I would like to take you back to
23 volume 1 of the documents bundle and to a document which
24 you may recall since we spent some time on it. It's
25 document 52 [Magnum].

1 **A.** Sorry, I missed the number.

2 **Q.** Document 52. You will recall this email, I think?

3 **A.** Yes.

4 **Q.** It was put to you by Mr Morris on a number of occasions
5 that you must have appreciated that the information in
6 this email was accurate because, had it not been, it
7 would have become obvious the following day. Do you
8 recall that being put to you?

9 **A.** I do, yes.

10 **Q.** The information here includes the information that:

11 "Other parties are confirming that they will protect
12 cash margin on this occasion..."

13 And the information:

14 "Sainsbury's are confirming that the new retails on
15 branded pre-pack will be in place Tuesday this week [ie
16 the following day]."

17 Yes?

18 **A.** Yes.

19 **Q.** Can you turn to document 54 [Magnum], please, this is an
20 email from Mr Ferguson of McLelland to Sarah Mackenzie
21 of Sainsbury's on the following day. Do you see that,
22 22 October?

23 **A.** Yes.

24 **Q.** "I can confirm your retail movement on Seriously Strong
25 today..."

1 "250gm has moved from £1.79 to £1.85 per pack (£240
2 per tonne)..."

3 Is that maintaining cash margin?

4 **A.** No, I suspect that's probably percentage margin. Cash
5 margin would have been 200.

6 **Q.** You said in cross-examination in relation to document 52
7 that Sainsbury's was not top of your list for price
8 check information?

9 **A.** No, they were typically more expensive.

10 **Q.** They were typically more expensive than Tesco, is that
11 the point?

12 **A.** Yes.

13 **Q.** Which company was top of your list for price check
14 information?

15 **A.** Asda.

16 **Q.** Would Mr Ferguson have been aware of that?

17 **A.** Yes.

18 **Q.** Can we now go to document 64 in this bundle [Magnum],
19 your internal working notes.

20 **A.** Yes.

21 **Q.** To the Word document, the cheese £200 per tonne plan
22 which gives dates. You have said that you chose the
23 timing for these price increases based on workload. Can
24 you explain what you mean by that?

25 **A.** It wouldn't be possible for myself to work through all

1 the prices and, more importantly, my admin assistant to
2 physically input all the cost and retail prices into the
3 system within the timeframes to deliver on one day, for
4 example.

5 **Q.** So what did you do?

6 **A.** I just basically split them up into what I saw as
7 workload groups, I suppose, manageable workload groups
8 in sub-groups.

9 **Q.** How did you choose which products went into which date?

10 **A.** I think I probably left the more expensive or costly
11 items to the end so, basically, the bigger volume lines
12 I left nearer the back end so we could be working on
13 those through the various weeks.

14 **Q.** Why did you do that?

15 **A.** I did that to delay any margin loss impact primarily.

16 **Q.** Were you asked by your suppliers to adopt these dates or
17 was that something you chose to adopt?

18 **A.** These are my dates. The suppliers would want their
19 bigger volume lines to go as soon as possible.

20 **Q.** Can you now please take up bundle 2, and if you could
21 turn to document 79 [Magnum], you will recall this was
22 a note from Jim McGregor to Alastair Irvine and
23 Tom Ferguson relating to a conversation that he had with
24 you on 8 November 2002?

25 **A.** Yes.

1 Q. You said when you were being cross-examined that the
2 date of the Tesco cost price increase for own brand was
3 still uncertain at this date, do you remember that?

4 A. Yes.

5 Q. It was put to you by Mr Morris that that was untrue
6 because you had agreed the date on 30 October, do you
7 remember that?

8 A. Yes.

9 Q. Can you now, please, turn to document 87 [Magnum]. This
10 is Mr Ferguson's email to Mr Hirst copied to you on
11 22 November, so that is two weeks later than the
12 meeting -- than the conversation between yourself and
13 Mr McGregor. Do you have any comment to make about the
14 date on which you finalised the cost price increase for
15 Tesco own label range?

16 A. They were moving on 1 December.

17 Q. But when would you have decided to do that?

18 A. Between 8 and 22 November.

19 Q. You were asked some questions about the Asda Smart Price
20 changes.

21 A. Yes.

22 Q. In particular, why it was that Tesco increased the price
23 of some of its Value products to match Asda's prices
24 when that wasn't required by the basket policy.

25 A. Yes.

1 **Q.** You replied that you were under margin pressure. Can
2 you please take up volume 2A of the appeal bundle.
3 Behind tab J there are a number of numbered tabs. Can
4 you go to tab 30, please [Magnum].

5 **A.** Yes.

6 **Q.** Now, for each -- we've looked at this document before,
7 and it shows the changes on Tesco's Value cheddars in
8 2001, 2002 and 2003 for different lines, yes?

9 **A.** Yes, correct.

10 **Q.** If we just go through them, the first one, which is mild
11 white cheese small, we see that in November 2001 the
12 selling price was £2.89?

13 **A.** Yes.

14 **Q.** And that that went to £2.69 in November 2002, so that
15 was a 20p decrease?

16 **A.** Correct, yes.

17 **Q.** Why would you have cut the price on that line?

18 **A.** It would have been to match Asda's in-store price.

19 **Q.** And what would have been the impact of that on your
20 margin?

21 **A.** It would have been millions of pounds.

22 **Q.** Positively or negatively? That may sound like an
23 obvious question.

24 **A.** Sorry, negatively, yes.

25 **Q.** The next line, mild white cheese medium, we see that was

1 £2.79 in November 2001 and that goes down to £2.69, so
2 that's a 10p decrease, yes?

3 **A.** Yes.

4 **Q.** Again, why would you have decreased the price of that
5 line?

6 **A.** It would have been to match Asda.

7 **Q.** Again, what would have been the effect of that on your
8 margin?

9 **A.** It would have been a significant negative increase,
10 probably in millions of pounds.

11 **Q.** Okay. If we leave the mild coloured cheese extra large
12 for a minute and go on to white full flavour cheese, we
13 see that that was at £3.79 in April 2000 and that then
14 goes down to £3.69 in November 2002. Again, why was the
15 price of that cheese reduced?

16 **A.** It would have been to match, I suspect, Asda or another
17 competitor.

18 **Q.** Again, what would the impact of that have been on your
19 margins?

20 **A.** It would have been a negative impact.

21 **Q.** Then the next one, Tesco coloured Value medium full
22 flavour, we see the same thing, £3.79 in 2000, £3.69 in
23 2002, are your answers to my questions the same?

24 **A.** A negative impact, yes.

25 **Q.** There are two that are different. If you go back up the

1 table, Tesco Value mild coloured cheese extra large, you
2 increased the price from £2.49 to £2.69.

3 **A.** Yes.

4 **Q.** Again, what would have been the significance of that
5 £2.69 price point?

6 **A.** That would have been a -- that would have had a positive
7 effect on my margin.

8 **Q.** Why would you have chosen that price point?

9 **A.** Because by being at that price point I was matching
10 a competitor but was still in line with our basket
11 policy because I wasn't more expensive.

12 **Q.** Would that competitor have been likely to be Asda?

13 **A.** More than likely, yes.

14 **Q.** Finally, Tesco Value white full flavour cheese
15 mega-pack, we see a similar picture, £3.49 and it goes
16 up to £3.69. So again --

17 **A.** Yes, the answer would be the same, yes.

18 **Q.** So overall, looking at the Value situation, what was the
19 position for your margin as at November 2002 given the
20 price changes that had been made by Asda?

21 **A.** Generally it would have been a negative impact.

22 **Q.** Would that have been something that Mr Ferguson would
23 have been aware of?

24 **A.** Yes.

25 **Q.** And what would the assumption have been from that, that

1 you would be likely to do in relation to cheeses where
2 Asda's price was not lower than Tesco's?

3 **A.** Well, you would have to claw back margin from anywhere
4 you could. A simple way to do that would just be to
5 align any price you were cheaper than Asda to the same
6 price.

7 **Q.** Is that something that Mr Ferguson would have
8 understood?

9 **A.** From his time in the cheese market and Tesco and Asda,
10 yes, definitely.

11 **Q.** Can we now go to documents bundle 2, please.

12 Still on the subject of Value cheese, you indicated
13 in your evidence that you had been confused and unsure
14 as to the date on which McLelland started packing Value
15 cheese for Tesco, do you recall that?

16 **A.** Yes, I do. Yes.

17 **Q.** If you go to tab 126 [Magnum], this is an email from
18 Stuart Meikle to you dated 3 November 2003. Now parts
19 of it are in blue for reasons I do not understand, but
20 nevertheless. The first sentence:

21 "Hi Lisa

22 Please find outlined below the details of the plan
23 to start packing... at..."

24 What do you conclude from this?

25 **A.** Their plan to start packing Tesco Value at the new

1 cheese plant.

2 **Q.** If you go down four paragraphs, do you see the paragraph
3 that starts:

4 "One point to note is that we may be able to
5 improve --"

6 Can I just ask the Tribunal to re-redact --

7 **LORD CARLILE:** Read it out.

8 **MISS ROSE:** Thank you.

9 "One point to note is that we may be able to improve
10 the [REDACTED] cost on the 300g Value mild packs by
11 [REDACTED]. I am waiting on final
12 confirmation of the commercial benefit this will provide
13 to you and I will give you a call as soon as I have
14 a definite proposal. Can you also please confirm if you
15 require new line forms completed for all these lines?"

16 Can you explain what this was about?

17 **A.** This was an example of things we would typically
18 challenge the suppliers to do, so to take costs out of
19 the way we were producing and supplying cheese, so we
20 would work with them or they would work on projects to
21 reduce -- to make the production more efficient to
22 reduce case costs.

23 **Q.** The effect of that would be to reduce your cost price,
24 is that right?

25 **A.** It would, yes. And we referred to it as our buy for

1 less plan, so we were always looking to buy for less,
2 and this is an example of something we were working with
3 McLellands on.

4 **Q.** Then just before the end:

5 "██████████."

6 What is ██████████, do you know?

7 **A.** Yes, ██████████ was a project that McLellands were
8 working on for Tesco, and basically it was to devise
9 a cheese that had the maximum legal allowance of water
10 content in that cheese --

11 **Q.** This is cheese that is not cheddar, is that right?

12 **A.** It's a cheese -- we could call it cheese but we couldn't
13 call it cheddar, so it was perfect for a Value cheese
14 option, and in that way we could get a lower cost price
15 because water is a lot cheaper than milk solids.

16 **Q.** We can see the impact, is that right? He says:

17 "I will keep you updated on this and confirm the
18 date where we reduce your supply price by ██████ per
19 tonne."

20 Is that right?

21 **A.** Yes, which was quite a nice saving.

22 **Q.** So that initiative was going to cut your cost price by
23 ██████ per tonne?

24 **A.** Yes.

25 **MR MORRIS:** Sir, this wasn't --

1 **LORD CARLILE:** Yes, Mr Morris, this arises directly from
2 cross-examination.

3 **MR MORRIS:** Does it?

4 **LORD CARLILE:** I think so.

5 **MISS ROSE:** It certainly does.

6 **LORD CARLILE:** I recollect that it does.

7 **MR MORRIS:** No, I was going to make the point about leading
8 actually. The last question was a ...

9 I wasn't going to submit the point about not
10 arising.

11 **LORD CARLILE:** Well, it's saving time. We'd have got to the
12 same point.

13 **MR MORRIS:** Very well.

14 **MISS ROSE:** Can we now go to document 112 in volume 2
15 [Magnum], it was suggested to you that the information
16 that you were given, according to Mr Meikle, when it
17 says:

18 "Lisa rang me last Friday and I told her it was our
19 understanding that Asda would move retail prices from
20 Monday 29th September."

21 That you would have known that information was
22 accurate factual information about your competitor's
23 future retail pricing information, you recall that being
24 put to you?

25 **A.** I do, yes.

1 **Q.** Do you see a little further down, in fact he says:

2 "On Tuesday morning I had a discussion with Lisa and
3 told her that Asda had not moved retail prices as
4 expected."

5 Do you see that?

6 **A.** Yes, I can see that.

7 **Q.** Document 110A [Magnum], it was suggested to you that
8 some or all of this document was written after and not
9 before the meeting that you had on 6 October, do you
10 recall that being put to you?

11 **A.** Yes, I do.

12 **Q.** Was it your common practice to write briefing notes for
13 Mr Scouler before meetings?

14 **A.** Yes. If he was meeting with one of my suppliers,
15 I would write the briefing document for that meeting.

16 **Q.** Did you have any normal practice for the way you would
17 present such documents?

18 **A.** This was my normal practice so I would summarise --
19 sorry.

20 **Q.** Sorry, how did that --

21 **A.** I'd summarise the financial performance and this
22 information would be from Tesco, various Tesco systems,
23 and then I would summarise the general state of play or
24 anything John needed to be aware of, and also points
25 that I wanted to get across in that meeting.

1 Q. Generally when would you produce a document like this?
2 How long in advance of a meeting?

3 A. Oh, probably only a day or so before.

4 Q. Now, at the bottom of the page there is a little
5 handwritten note, do you see that, where it says "Milk
6 19.2p"?

7 A. Yes.

8 Q. Whose writing --

9 A. That's my writing.

10 Q. When do you think that was put on the document?

11 A. During the meeting.

12 Q. Why do you say that?

13 A. Because that piece of paper was probably the only thing
14 I took into the meeting and I would have just made
15 a note of -- it looks like -- to me it looks like the
16 price McLellands were paying for milk versus Dairy Crest
17 were paying their farmers for milk.

18 Q. It was suggested to you that this was a later document
19 because it includes at paragraph 3, over the page:

20 "Diminishing profitability of Seriously Strong
21 especially in light of such fantastic growth and also
22 against its peers, failed to be addressed and as
23 a result distribution is cut by half from
24 end October..."

25 I think you said that actually the point of this

1 meeting was to give them a last chance to avoid that
2 occurring and that otherwise it would happen?

3 **A.** Yes.

4 **Q.** Can I just ask you to go to document 103 [Magnum], this
5 is a document dated 16 September 2003, so that's three
6 weeks before this meeting, isn't it?

7 **A.** Yes.

8 **Q.** From Mr Meikle to Mr Ferguson and Mr McGregor.

9 Again, sir, can I take it that I can read out what
10 is in the blue boxes?

11 **LORD CARLILE:** Yes.

12 **MISS ROSE:** [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 Do you see that?

19 **A.** Yes.

20 **Q.** Does that accord with your recollection of what you told
21 Mr Meikle in around September 2003?

22 **A.** It did, yes.

23 **Q.** Finally, on document 110A [Magnum], "Competition
24 Commission training", what did you understand that
25 phrase to mean when you used it?

1 **A.** Competition Commission training to me was receiving any
2 information on future pricing intentions of other
3 retailers or to do anything that could be price fixing
4 within the market.

5 **Q.** Deli prices. Can I ask you to take up volume 2B of the
6 appeal bundle, please. Your third witness statement, if
7 you can go to paragraph 27 [Magnum], here you discuss
8 document 123 which you were recently shown by Mr Morris,
9 yes?

10 **A.** Yes.

11 **Q.** You say:

12 "For the purposes of this statement, I've marked
13 with a D the deli cheese lines in the copy of the
14 spreadsheet. As can be seen from the spreadsheet, the
15 'New Retail Price' column is blank for all the lines
16 marked with a D, other than Seriously Strong white for
17 which there is a £6.83 price. However the £6.83 figure
18 is not a future retail price I intended to implement but
19 a suggested retail price included in the original
20 version of the spreadsheet Stuart Meikle emailed to me
21 on 8 October 2003."

22 And you refer to that document.

23 We can see your annotated spreadsheet, if you go to
24 tab 10 behind this witness statement, and we can see
25 where you've put the Ds down the side.

1 assistance concerning the status of the contents of
2 third party documents in the context of
3 cross-examination which goes mainly as to credit.

4 Shall I repeat that?

5 The status of the contents of third party documents
6 in the context of cross-examination which goes mainly as
7 to credit.

8 I hope that's a reasonably clear question.

9 **MISS ROSE:** Yes.

10 **LORD CARLILE:** Right. Thank you all very much for coming
11 down here for these two and it seems like more than
12 a half days of hearing. I hope it's worked reasonably
13 well for everyone, it has for us, and we're grateful for
14 all the assistance you have given in this rather cosy
15 room. We will of course revert to our palatial
16 quarters -- please don't tell the Department of Justice
17 I said that -- at Victoria House for the rest of this
18 case.

19 Thank you, 10.30 tomorrow.

20 (2.06 pm)

21 (The hearing adjourned until
22 Wednesday, 23 May 2012 at 10.30 am)

23

24

25

1	INDEX	
2	MS LISA OLDERSHAW (continued)	1
3		
4	Cross-examination by MR MORRIS (continued)	1
5		
6	Re-examination by MISS ROSE	119
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		