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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23 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 13)

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.

Wednesday, 23 May 2012

1

2 (10.30 am)

3 (Proceedings delayed)

4 (10.45 am)

5 **LORD CARLILE:** Good morning. Our apologies for the delay
6 this morning. One of our members was delayed.

7 **MISS ROSE:** Sir, may we call John Scouler.

8 MR JOHN SCOULER (sworn)

9 **LORD CARLILE:** Do sit down, Mr Scouler. There's water in
10 front of you. If you're still giving evidence when we
11 adjourn, just remember not to talk to anybody at all
12 about your evidence until it's concluded.

13 Examination-in-chief by MISS ROSE

14 **LORD CARLILE:** Yes, Miss Rose.

15 **MISS ROSE:** If Mr Scouler has the bundles within reach, that
16 should be all right.

17 Can I ask you to find in the pink volumes,
18 volume 2A. If you could turn to tab G at the front of
19 that volume [Magnum], you see there a document headed
20 "First Witness Statement of John Scouler", and over the
21 page, is that your signature?

22 **A.** Yes, sir.

23 **Q.** Are the contents of that witness statement true?

24 **A.** Yes, sir.

25 **Q.** If you turn over to the next tab, tab H [Magnum], do you

1 **A.** Yes, sir.

2 **Q.** You are currently commercial director for packaged
3 foods, is that right?

4 **A.** Yes, it is.

5 **Q.** In 2002 and 2003 you were category director for dairy
6 and deli?

7 **A.** Yes.

8 **Q.** At that time your immediate boss was Dido Harding who
9 was commercial director for dairy?

10 **A.** Yes.

11 **Q.** She reported to John Gildersleeve, who was commercial
12 and trading director, and on the main board?

13 **A.** Yes.

14 **Q.** Now, immediately beneath you was Rob Hirst who you
15 describe as "my category manager for dairy"?

16 **A.** Yes.

17 **Q.** He reported to you, and Lisa Oldershaw -- or
18 Lisa Rowbottom as she was then known -- was part of your
19 team?

20 **A.** Yes, that's right.

21 **Q.** You say that she generally reported to Rob Hirst in the
22 first instance?

23 **A.** Yes.

24 **Q.** But she would have also reported to you directly from
25 time to time; that's right, isn't it?

1 **A.** That would be correct, yes.

2 **Q.** Now, both you and Mr Hirst were involved in all dairy
3 products, including both fresh liquid milk and cheese?

4 **A.** Yes.

5 **Q.** As far as the events of the autumn of 2002 are
6 concerned, which we will be coming to, the events
7 from September to November, Mr Hirst was very much
8 involved in the day-to-day discussions on the cost and
9 retail prices at the time?

10 **A.** Yes.

11 **Q.** Now, on dairy products, the persons who took ultimate
12 overall decisions were the two senior people I've just
13 referred to, John Gildersleeve and Dido Harding?

14 **A.** Yes.

15 **Q.** But you were the senior person within what was known as
16 the dairy team?

17 **A.** Yes, I was the category director for the department.

18 **Q.** Thank you. Both you and Rob Hirst covered all dairy
19 products and that's -- apart from cheese and milk, there
20 would be butter and spreads, yoghurts, desserts, the
21 full range?

22 **A.** Not quite the full range. The two areas that we didn't
23 have responsibility were yoghurts and desserts, they
24 were part of a different category of convenience foods,
25 but we had responsibility for the primary dairy

1 products. In addition, we also had responsibility for
2 cooked meats and hot chicken.

3 Q. You had then -- or Rob Hirst had reporting to him
4 different buyers for different products within that
5 group?

6 A. Yes.

7 Q. And Lisa Oldershaw, as we know, was principally involved
8 in cheese, British cheese?

9 A. Yes, principally for all cheese.

10 Q. I just want to ask you a few questions about your
11 suppliers. Tesco was the largest supermarket retailer
12 at the time; that's right, isn't it?

13 A. Yes.

14 Q. In general, the three main dairy processors were at the
15 time Express, Wiseman and Dairy Crest?

16 A. Yes, Arla were also a supplier of milk at the time,
17 I thought, as well.

18 Q. But of the three I mentioned, only Dairy Crest was
19 substantially involved in cheese?

20 A. Yes, that's correct.

21 Q. Lisa Oldershaw has told the Tribunal already, as far as
22 cheese was concerned, Tesco purchased about twice as
23 much cheese as any other of the other retailers?

24 A. Approximately, I think that would be correct, yes.

25 Q. Your main competitors at the time were Asda and

1 Sainsbury's?

2 **A.** Yes, I had a number of competitors, but probably my
3 principal two competitors were Sainsbury's and Asda.

4 **Q.** The main processors who supplied cheese were
5 Dairy Crest, Kerrygold, McLelland, North Downs and
6 Kraft, do you agree with that list?

7 **A.** Yes, that would be a good list.

8 **Q.** Dairy Crest was one of your two largest suppliers of
9 cheese at the time?

10 **A.** Yes.

11 **Q.** And it would be fair to say, wouldn't it, that for
12 Dairy Crest, Tesco was Dairy Crest's most important
13 customer for cheese?

14 **A.** I wouldn't know that. Given that they were one of my
15 biggest suppliers, and I was one of the biggest
16 customers, or probably the biggest customer in the UK,
17 I would probably assume they were but I wouldn't know
18 that factually.

19 **Q.** McLelland at that time was a cheese supplier of growing
20 importance, is that a fair way of putting it?

21 **A.** Yes, they were.

22 **Q.** I would suggest to you that, for McLelland, Tesco was
23 their most important customer?

24 **A.** I wouldn't know for sure but, again, if I was to assume
25 or to make a judgment, I would assume we were probably

1 one of their, if not their biggest customer, but
2 I wouldn't know factually if that would be the case.

3 **Q.** In those relations between you and the processors,
4 between Tesco and the processors, I would suggest that
5 the bargaining power, the commercial power, was with
6 Tesco?

7 **A.** I think we had strong bargaining powers but I wouldn't
8 say we had unique bargaining powers that left us in
9 a very strong position, but we had a good position in
10 the market place.

11 **Q.** Yes, but I'm not talking about -- I'm talking about
12 particularly in your relationship with the processor.

13 I'll put it this way. I suggest to you that Tesco
14 could always delist or de-range, or threaten to do so,
15 in respect of a processor if it thought that that would
16 be a useful way of exerting bargaining power over the
17 processor?

18 **A.** Ultimately, we could do that action but it wasn't
19 something that was often done or repeated.

20 **Q.** You might reduce -- you might threaten to do so, and
21 would it be fair to say that that issue of delisting was
22 one of the concerns that had been raised during the
23 Competition Commission's investigation into supermarkets
24 in 1999 and 2000?

25 **A.** I don't know what that -- I'm not sure about that

1 judgment.

2 Q. Very well.

3 Can I put this to you, I would suggest that
4 realistically, putting it the other way around,
5 processors would not threaten to cut off supplies to
6 Tesco, would they?

7 A. Yes, they could. They could quite rightly refuse to
8 supply Tesco if we refused to accept a cost price
9 increase so that was in their -- if that was what they
10 wanted to do, they could do that.

11 Q. I would suggest to you that if they did threaten that,
12 it was not much of a threat to Tesco, was it?

13 A. It could be a threat to Tesco if the product wasn't
14 available on the market and I couldn't get access to
15 different product and, therefore, the only sole supplier
16 could have been that supplier and, therefore, I might be
17 in a difficult negotiating position because the only
18 source of product I could potentially get was from that
19 supplier.

20 Q. I suggest to you that, if that was threatened, you would
21 readily be able to find someone else to supply you,
22 given Tesco's market position?

23 A. I wouldn't suggest so in all cases because of certain
24 products that only certain suppliers can provide.

25 **LORD CARLILE:** How broad a proposition is this? Are we just

1 talking about dairy or are we also including things like
2 Special Brew?

3 **MR MORRIS:** I'm talking about -- sorry?

4 **LORD CARLILE:** Are we also including things like
5 Special Brew?

6 **MR MORRIS:** No, I was talking about cheese.

7 **LORD CARLILE:** Cheese, right. So the questions are confined
8 to cheese.

9 **MR MORRIS:** Yes.

10 If you go to your witness statement at paragraph 30,
11 subparagraph (d), that's on page 9.

12 **A.** Sorry, which?

13 **Q.** The witness statement is the pink bundle, and it's
14 tab H. This is your second witness statement. If you
15 look down on the right-hand side there's various tabs
16 and you should -- you've got it, sorry.

17 Paragraph 30(d) [Magnum]. At paragraph 30, you
18 start on page 8:

19 "When approaching us for cost price increases
20 suppliers would use a number of tricks of the trade."

21 In (d) you suggest that one of the tricks of the
22 trade was:

23 "If negotiations were not going well, suppliers
24 might apply pressure by threatening to stop supplying
25 some or all of their products if we did not accept the

1 cost price increase."

2 **A.** That would be the case.

3 **Q.** I'm suggesting to you that, actually, if that happened
4 at all it happened extremely rarely?

5 **A.** Yes, I would agree with that. It wouldn't happen
6 particularly often.

7 **Q.** The reality is that for cheese the products supplied
8 are, to use an economic term, readily substitutable. So
9 if you have a generic cheese that you're getting, or
10 a Value cheese, from one supplier, you could go and get
11 it from another supplier if there was a problem; I don't
12 mean a technical problem, if there was a problem with
13 the negotiations?

14 **A.** Yes, there are certain cheeses that you could replace,
15 but there are also other cheeses that are very unique
16 and that customers like and would make a decision not to
17 stop in and shop with us and go somewhere else if they
18 didn't feel that product was available, so it wouldn't
19 be quite as straightforward as -- certain products
20 I would have to maintain and keep (inaudible).

21 **Q.** Now, you say in your witness statement that your contact
22 with the processors, it would be obvious, was at
23 a senior level of management, their equivalent -- well,
24 at a senior level, so that your contact at Dairy Crest
25 was with Bill Haywood?

1 **A.** That would be correct.

2 **Q.** And your contact at McLelland was with Alastair Irvine?

3 **A.** That would be correct.

4 **Q.** The day-to-day contact between Tesco and the processor
5 would take place at the level of account manager and
6 buyer?

7 **A.** Yes, on the majority of occasions.

8 **Q.** We know, and the Tribunal has heard, in the case of
9 cheese that meant Lisa Oldershaw for Tesco, and in the
10 case for Dairy Crest and McLelland, Neil Arthey and
11 Tom Ferguson?

12 **A.** Yes.

13 **Q.** In each case and at each level, I would suggest that
14 trust was an important part of the relationship; would
15 you agree with that?

16 **A.** I think we always had an inherent cynical view of
17 suppliers, and "trust" is a very dangerous word to bring
18 into business, and I wouldn't describe the word as
19 having a trusting relationship, I'd have it as a healthy
20 business relationship, but I wouldn't use the word
21 "trust" to define it.

22 **Q.** But from the processors' point of view, it was important
23 for the processor that Tesco trusted it or him or her?

24 **A.** I'm not sure. Again, I would use the word "trust",
25 I think I would want that supplier to be a good supplier

1 because it had a very good service level, it provided
2 regular products, they were proactive in producing new
3 products for me. So I think they would be the stronger
4 characteristics of the way I define a good supplier.

5 **Q.** The question I asked was slightly different. I'm trying
6 to look at it, for example, from Mr Arthey's point of
7 view. It was important for him to build up
8 a relationship of trust with Tesco and with
9 Lisa Oldershaw?

10 **A.** Again, I'm not sure I'd use the word "trust". I think
11 you would attempt to have a good working relationship
12 with Lisa because that would be good practical sense in
13 terms of developing the business. I'm not sure I'd use
14 the word "trust" though.

15 **Q.** I'm moving on now. Of the raw milk produced by farmers,
16 about 50 per cent of it went into the production of
17 fresh liquid milk, is that right?

18 **A.** I think -- I thought the figure that the farmers
19 produced in terms of 25 per cent of milk production went
20 into the supermarkets --

21 **Q.** Yes.

22 **A.** Sorry.

23 **Q.** No, carry on.

24 **A.** Sorry, can you just say your question again? I'm
25 a little bit confused.

1 Q. Yes, I was going to come to that. I'm trying to
2 distinguish between --

3 LORD CARLILE: He put to you that 50 per cent of the raw
4 milk went into the production of fresh liquid milk?

5 A. I think approximately that figure is correct.

6 Q. It may help if I clarify. I'm talking about all fresh
7 liquid milk, I'm not talking about fresh liquid milk
8 sold through the supermarkets.

9 My next question was, of that 50 per cent, about
10 half of it was sold through supermarkets?

11 A. Okay, that would feel about accurate.

12 Q. So that supermarket fresh liquid milk accounted for
13 about 25 per cent of raw milk production.

14 Can I just take you back to paragraph 32 of your
15 witness statement [Magnum], I'm going back to the issue
16 of trust. You say in paragraph 32, although you just
17 said you wouldn't use the word "trust", you say:

18 "There was no transparency as to the cost price of
19 the cheese lines we purchased from suppliers. We would
20 not know whether or not any other retailer had in fact
21 accepted a proposed cost price increase. We were
22 dependent on the claims made by the suppliers and our
23 trust of them for information on cost prices."

24 Does that cause you to in some way temper or modify
25 the answer you gave a few moments ago about the word

1 "trust"?

2 **A.** I think I was referring to trust in the broader sense,
3 in terms of giving trust in a wholehearted way, but
4 I would trust somebody to give me a specific piece of
5 information. What I didn't want to be characterised as
6 having a very trusting relationship, "I trust you with
7 anything" type. So certain pieces of information, then
8 I would trust and assume that were to be correct.

9 **Q.** I've jumped back and I apologise for that.

10 I'm going now to the proportions of raw milk. This
11 is really for the benefit of the Tribunal. So we know
12 50 per cent goes into fresh liquid milk, of which half
13 goes into supermarket. Then of the remainder of the
14 farmers' raw milk, I would suggest about 25 per cent
15 went into cheese production?

16 **A.** I think that figure would be correct.

17 **Q.** Would you agree that, in terms of commercial strategy
18 and pricing, cheese is a much more complex product than
19 liquid milk?

20 **A.** Yes, it is. Yes, it is.

21 **Q.** That's because there's an array of products falling into
22 different categories and hundreds of different lines,
23 that's one of the reasons?

24 **A.** That would be one of the reasons.

25 **Q.** I don't intend to go into the detail with you as the

1 Tribunal has already heard a lot of evidence and I think
2 we're all now better educated than we were. In
3 paragraph 24 of your witness statement, you refer to
4 Tesco own label products at the time. Have a quick look
5 at it [Magnum]. You say:

6 "Most of Tesco's own label cheeses which Tesco sold
7 at the time were random weight."

8 You point out there that, in that case, suppliers
9 needed to be told the retail price for labelling
10 purposes?

11 **A.** Yes, that's correct.

12 **Q.** But at the time Tesco also sold fixed weight pre-pack
13 and deli, that's right?

14 **A.** Yes, that's correct.

15 **Q.** They weren't price labelled by the processor?

16 **A.** No, they weren't.

17 **Q.** Just by way of gloss, I gather it's now the case that
18 many, if not -- apart from Value lines, standard own
19 label products are in fact now fixed weight rather than
20 random weight?

21 **A.** I understand that to be the situation, yes.

22 **Q.** Can you just bear with me a moment.

23 (Pause)

24 You were involved with this case when it was being
25 investigated by the Office of Fair Trading; that's

1 right, isn't it?

2 **A.** Yes, I gave a witness statement. I've given two witness
3 statements.

4 **Q.** You've actually given that witness statement -- you were
5 referred to that witness statement this morning. Just
6 to summarise the contents of that witness statement,
7 effectively, both in 2007 and in 2009, you read over the
8 relevant parts of this formal document that Tesco put
9 in, called the response, and you then -- and you've done
10 so also today. You then verified certain passages in it
11 as being true because they were passages that were
12 within your knowledge; that's right, isn't it?

13 **A.** Yes, that would be correct.

14 **Q.** At paragraph 35 of your witness statement [Magnum], you
15 refer to your knowledge -- to Tesco's competition law
16 compliance policy. You see that in the middle:

17 "Tesco had a competition law compliance policy at
18 the time. I ensured that all of my buyers received
19 training. I cannot remember exactly when I received
20 this training but I recall it was training on key issues
21 to watch out for."

22 In fact the position is, and I'll just ask you the
23 question but it's in the documents, that further
24 enquiries were made, and you now recall attending --
25 you -- sorry, you received some training in about

1 2000 -- actually that's not...

2 You received some initial training, and then you
3 received some training on the Enterprise Act
4 in April 2003, can you remember that?

5 **A.** I can't specifically remember any training, but over the
6 past ten years I've had various training; as different
7 new parts of legislation have been introduced, and we've
8 brought that into Tesco, I've had different parts of
9 training. I can't specifically remember that date or
10 that time.

11 **Q.** Now, by 2002, the issue about the farmers' farmgate
12 price and their complaints about it had been around for
13 a number of years, hadn't it?

14 **A.** Yes, as I understand, a number of years, farmers were
15 complaining about the price they were receiving for milk
16 from processors.

17 **Q.** I'm going to put this to you: back in April 2000, that
18 was two and a half years before the events we're going
19 to talk about, Farmers for Action had been agitating for
20 an increase in the raw milk price?

21 **A.** I wasn't employed by Tesco at that time. I understand,
22 having talked to people in Tesco, that at the time they
23 were frustrated over a number of years, so I couldn't
24 specifically give the date.

25 **LORD CARLILE:** Mr Morris, I don't want to inhibit you at

1 all, but please bear in mind that all this background
2 we've been over before --

3 **MR MORRIS:** I'm leading to one specific question. I'm
4 conscious of it, I also was entirely conscious of the
5 fact Mr Scouler was not actually around in 2000 and
6 that's why I asked him in that way. I'll move on as
7 quickly as I can, there's just one particular question.

8 I'm just going to tell you some information you may
9 or may not have been aware of at the time. At that
10 time, in April 2000, Tesco had some correspondence with
11 the Office of Fair Trading about the competition law
12 implications of the FFA. Now, you presumably weren't
13 aware of that at the time?

14 **A.** No, I wasn't.

15 **Q.** My question is, did you subsequently become aware of
16 specific competition law concerns surrounding the issue
17 of Farmers for Action and milk price initiatives?

18 **A.** No.

19 **LORD CARLILE:** How big a general issue is competition law in
20 the supermarket industry?

21 **A.** I think people were very aware of competition law,
22 particularly with pricing, and very aware of the need to
23 deal in public facts, so it was very commonly
24 understood. Part of the benefit, you know, I had had
25 and was aware of at the time before -- I worked for

1 Kraft before I joined Tesco, so I worked as a supplier
2 to Tesco and to Asda, so I was very aware of, you know,
3 those types of discussions which were either appropriate
4 or not appropriate.

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

6 **MR MORRIS:** It's right I think from the answer that you
7 can't recall receiving specific guidance on the need to
8 act with particular caution when it came to dealings
9 with the Farmers for Action?

10 **A.** I remember having a number of discussions about dealing
11 with Farmers for Action, about the fact that they could
12 lie to you, they could misquote you, they weren't
13 a recognised union, they didn't have a ballot to
14 nominate -- the then leader I think was a chap called
15 David Handley, who was the leader of Farmers for Action,
16 so I'd be careful, this is quite a militant group who
17 I think had had its roots in the petrol disputes
18 a couple of years before, so I had to be very wary of
19 any discussions I had with those people just for
20 practical good reasons.

21 **Q.** Can I ask you to go to pink bundle number 4. I would
22 leave the other two out. It's a different bundle on
23 your shelf.

24 **LORD CARLILE:** You will find you're shuffling bundles like a
25 (inaudible), Mr Scouler, by the time your evidence is

1 finished.

2 **MR MORRIS:** Can you go to page 39, tab T [Magnum]. I will
3 read 3.15 to you because that's the background:

4 "On 25 April 2000, the OFT confirmed Tesco's
5 analysis, stating explicitly that 'This sort of
6 concerted arrangement whereby parties indicate their
7 willingness to follow a particular course of action
8 would appear to fall within what we would regard as an
9 agreement or concerted practice within the meaning of
10 the Chapter I prohibition...'"

11 That's legal language saying it would fall within
12 the competition law prohibition.

13 "This response, coupled with the advice received
14 from its legal advisers, bore out Tesco's earlier
15 expectation that it could not, and would not, take the
16 action proposed by FFA."

17 That's in 2000, you weren't there, I entirely accept
18 that.

19 Go to the next paragraph, however:

20 "In addition to obtaining specific confirmation from
21 the OFT on particular issues, Tesco had already
22 implemented a competition compliance programme prior to
23 the events in the SO."

24 That's prior to 2002.

25 It's the next sentence I want to put to you:

1 "Furthermore, during the period under investigation,
2 the senior commercial team for dairy received additional
3 guidance as to the need to act with particular caution
4 in dealings with FFA and other interested parties."

5 What I'm suggesting to you from that, and it may be
6 that you now don't recall, is that you were one of the
7 senior commercial team for dairy in the period -- during
8 the period of investigation, that you received
9 additional guidance as to the need to act with
10 particular caution, and I'm there referring to
11 particular caution in competition law terms when dealing
12 with the FFA and other interested parties. Does that
13 refresh your memory?

14 **A.** I can't recall receiving additional specific training
15 with regard to that. As I sort of referred a little bit
16 earlier, I remember having various conversations about
17 how difficult the FFA were and to tread very carefully
18 because of also the practical reasons, as people like
19 the NFU and the Scottish NFU didn't want -- they wanted
20 to be the farming lobby group. So any discussions that
21 you had with a third group potentially could upset the
22 NFU and the Scottish NFU. But not with regard to
23 competition, I don't remember training --

24 **LORD CARLILE:** Whilst we're on this document, do you agree
25 with the next paragraph, paragraph 3.17, or not?

1 (Pause)

2 **A.** Yes, completely.

3 **MR MORRIS:** Can we go to paragraphs 15 to 17 of your witness
4 statement. You can probably put that bundle away,
5 I would put that bundle perhaps just on top of the shelf
6 there and we'll go back to the two main ones.

7 So paragraphs 15 to 17 of your witness statement,
8 I think you've got it, tab H [Magnum]:

9 "As is common across Tesco, I monitored my team's
10 performance on the basis of several key performance
11 indicators, the most important of which from my
12 perspective were:

13 "Sales growth;

14 "Compliance with Tesco's basket policy; and

15 "Maintaining percentage margins on the cheese lines
16 for which I was responsible.

17 "I expected my buyers to achieve an average retail
18 margin of [a certain figure which I'm not sure whether
19 I can or can't read out] on their products, given that I
20 needed to achieve an overall margin of [another figure]
21 across the deli and dairy ...

22 "As a category director, my performance was measured
23 both on my team's KPIs, as well as specific KPIs that
24 were relevant to category directors. These were sales,
25 profitability and market share."

1 So your performance was measured against the team's
2 KPI -- their performance on their KPIs, and you had your
3 own KPIs?

4 **A.** My KPIs were in essence a sum of their KPIs, so
5 basically, as the head of the function, their KPIs
6 summed together would be my overall sales profitability
7 targets. I would have some additional targets around
8 developing people, introducing new products, things
9 along those scales. But the financial measures would be
10 a sum of my team's individual elements.

11 **Q.** At least for your team's performance, two of the three
12 most important KPIs I think were maintaining percentage
13 margin and compliance with the basket policy, I think
14 that's effectively what you say in paragraph 15?

15 **A.** Yes, I think I say in paragraph 15 that there's three
16 primary measures, the sales performance of the business,
17 the profitability of the business, and then using the
18 basket to maintain competitive price position.

19 **Q.** I just want to ask you about the basket. There was
20 a notional basket of products, and we've heard a lot
21 about that. The basket policy was, just to be clear,
22 that on those products within the basket Tesco would not
23 be more expensive than its cheapest competitor?

24 **A.** That would be the case.

25 **Q.** In general, your suppliers knew of the existence of the

1 policy?

2 **A.** Yes, they did, and I think that policy probably would
3 have existed for other retailers as well. They'd have
4 followed us too.

5 **Q.** That was my next question, thank you.

6 The top 200 to 300 cheese lines were within the
7 basket at that time?

8 **A.** I can't remember the actual number of lines that would
9 have been in the basket at that time but I would have
10 expected there would have been a number of lines in
11 there, but I wouldn't be able to give you the accurate
12 figure, I'm sorry.

13 **Q.** Under the basket policy you could be out of line for
14 a period, but if you were out of line beyond the period
15 then you were effectively -- you had a period, a leeway,
16 to get back in line?

17 **A.** Yes, you did. You didn't want any products to be out of
18 line, but the reality of the market place meant there
19 was a lot of products up and down, out of line.

20 **Q.** Now, in paragraph 21 of your witness statement, and
21 again I'm not sure about where we are on... no, it's 20
22 [Magnum]. You refer to a period there in line 3 --

23 **LORD CARLILE:** We've had evidence about that already so I
24 don't think that's --

25 **MR MORRIS:** Yes, we have.

1 My question is, it's the case that at some stage,
2 for some products, the permitted period was reduced --
3 was a shorter period, a period of 24 hours, that's
4 right, isn't it?

5 **A.** At the time there was a much narrower list of products
6 which were the most popular products, like bread,
7 bananas, that I think if Sainsbury's or Asda reduced the
8 price the next day on one of those products then you
9 would have to go and match that price because of fear of
10 them running an advertising campaign at the weekend
11 saying that Sainsbury's bananas might be cheaper than
12 whoever's bananas. So therefore there would be a small
13 list of products, commonly known as KVIs I think,
14 products that would be used within that, and we used
15 various lists over the last ten years to define that
16 very small list.

17 **Q.** Can you recall whether in 2002 and 2003 Value cheeses
18 were within that narrower list?

19 **A.** I can't remember completely, being honest. I can't
20 remember to be sure.

21 **Q.** Very well. So the basket policy dictated -- it required
22 prices to come down if your competitor was cheaper, but
23 I suggest to you that the basket policy didn't lay down
24 any requirement that you should increase your prices in
25 line with your competitors, that's right, isn't it?

1 **A.** Yes, it was a marketing-led strategy. They would like
2 us to have prices that were cheaper, but commercially if
3 the price basket had indicated that a competitor was at
4 a higher price, you might go up to match that higher
5 price, or fear that they may come down and you lose an
6 opportunity in terms of profitability.

7 **Q.** But that was a "might"; you had a discretion as to
8 whether you did or not?

9 **A.** Sure, you could be making a good profit from that
10 product, and the price that you've got in the market
11 place is more competitive. Your competitors may not
12 have even picked it up, the fact that you were cheaper
13 than them. So by raising the price potentially you
14 might have lost a competitive advantage on those
15 products.

16 **Q.** What you would or would not do in that circumstance
17 where the competitor was higher -- and when I say what
18 you would or wouldn't, whether you would match or not
19 match -- was not public knowledge? Public knowledge; in
20 other words, your competitors wouldn't know, your
21 suppliers wouldn't know what you would do in that
22 situation?

23 **A.** Sorry, can you just rephrase the question? I'm a little
24 bit unclear of the question.

25 **Q.** You said that the basket policy -- I've (inaudible) --

1 that people or your suppliers knew that if Asda came
2 down you would go down, because that was the basket --
3 they knew of the existence of the basket policy and
4 matching downwards?

5 **A.** Yes, they would assume that to be the case.

6 **Q.** What I'm putting to you is that what you would or would
7 not do if Asda were higher was not a matter of knowledge
8 within the industry amongst your suppliers or your
9 competitors in any --

10 **LORD CARLILE:** From what I gathered, it was a matter of
11 discretion, wasn't it? If Asda's price went up, you may
12 or may not raise your price, subject to the details of
13 the item concerned, the market conditions, what you were
14 buying it for and all the rest of it?

15 **A.** Yes, sir. Precisely. Thank you.

16 **LORD CARLILE:** So there was no rule as such.

17 **A.** No.

18 **MR MORRIS:** Now, for your buyers, there was an obvious
19 tension between the percentage margin KPI and the basket
20 policy, would you agree with that?

21 **A.** Yes, there would be.

22 **Q.** So it would follow from that tension, you obviously -- I
23 won't -- that a buyer would be reluctant to accept
24 a cost price increase unless the buyer believed he or
25 she could raise the retail price too?

1 **A.** I think our buyers are now and have always been trained
2 not to try to accept price increases, to try and, you
3 know, manage, negotiate away cost price increases
4 consistently every day, and that would be the -- because
5 at some stage in the future, you know, the cost price
6 could go back down or up. So every time a supplier
7 would raise a price increase it would be a difficult
8 negotiation.

9 **Q.** What I'm going to suggest to you is that the buyer would
10 be reluctant to accept the cost price increase if the
11 buyer thought that his or her competitor retailers might
12 not also raise their prices on the product?

13 **A.** I think the way we've always been trained and always
14 have trained the buyers is to look at price increases
15 for the merit of the price increase first and foremost,
16 so what might be driving the price increase? Could it
17 be a change in the commodity price, could it be a change
18 in oils, packaging, labour, a shortage of supply? So
19 each negotiation would be held on its merits depending
20 on what -- you know, whether it was justified or not.

21 **Q.** Let's assume for a moment it is justified and that
22 particular supplier, or, as we'll come to in 2002,
23 another reason, that on the merits it's a no brainer, if
24 I can use it colloquially, it's obvious that it's
25 justified. Even in that situation, I'm suggesting to

1 you, because of the tension between the percentage
2 margin KPI and the basket policy, even in that
3 situation, the buyer would be reluctant to accept it if
4 the buyer thought that the competitor retailers would
5 not or might not also raise their prices on the
6 equivalent product because, if they did, they would be
7 out of line?

8 **A.** I think the buyers were always concerned to raise
9 prices, it's not a thing you wanted to do lightly, and
10 it's always a difficult situation and a difficult
11 decision to be made. So they would be -- they wouldn't
12 be keen to raise prices if at all possible. But if they
13 had accepted a cost price, then in the majority of
14 cases, given the financial KPIs, they would have to
15 raise the retail price if they had accepted the cost
16 price.

17 **Q.** Yes, but then they would have the difficulty -- if they
18 had accepted it, and they did want to go up, they would
19 then have the problem of the basket. In that situation,
20 if -- they would be up against it in two weeks' time
21 because they'd go up, and then they'd find nobody else
22 had gone up, then they would have to come back down
23 again and then their margin would have been squeezed.

24 So what I'm suggesting to you, which is I think the
25 question I asked, is that even where the cost price is

1 justified, there would be a reluctance to accept it
2 because of the concern that competitor retailers might
3 not also raise their prices?

4 **LORD CARLILE:** We're having a bit of a seminar on the laws
5 of the market place at the moment, Mr Morris, which
6 I think the Tribunal understands pretty well, if I may
7 say so.

8 **MR MORRIS:** Very well. I was asking -- I'm not sure
9 I actually got an answer to the question I asked but
10 I will move on.

11 Can I put this to you: in general, when Tesco did
12 accept a cost price increase and increased its retail
13 prices at the same time, Tesco would seek to maintain
14 its percentage margin?

15 **A.** Yes, that would be the primary KPI.

16 **Q.** Can I put this to you. I would suggest to you that
17 outside the specific events of autumn 2002 and autumn
18 2003, suppliers, if and when they were ever suggesting
19 retail prices, where there was going to be a cost price
20 increase, they would not generally be suggesting retail
21 prices based on a cash margin maintenance alone?

22 **A.** That would be correct.

23 **Q.** Can I move now to the events of 2002 and, in section D
24 of your witness statement, you deal with them. Section
25 D starts from paragraph 36 onwards [Magnum].

1 **LORD CARLILE:** Section C, 36.

2 **MR MORRIS:** Section C, it is section C.

3 At paragraph 36, you say that you did accept a cost
4 price increase for cheese in 2002, and that was a cost
5 price increase of £200 per tonne for all cheeses
6 supplied by all processors?

7 **A.** I think I'd have to -- I couldn't tell you specifically
8 by line, that we accepted £200 by line for every single
9 line that we accepted, but the broad assumption was we
10 did accept a price increase on cheese products in 2002,
11 in the time that you're referring to. But I couldn't
12 specifically say every line had £200 or to that figure,
13 I wouldn't know that.

14 **Q.** Yes, the cost price was about £200 per tonne for each,
15 and it wasn't just in relation to one processor, it was
16 all the main processors. So it wasn't just on your
17 Dairy Crest or your McLelland cheeses?

18 **A.** It was, but there were other products that didn't
19 receive a cost price increase. It may have been an
20 imported product, cheese product. Again, the £200
21 definition, I'm a bit concerned because I can't tell you
22 specifically -- I would assume it was within that region
23 but I couldn't tell you specifically within that because
24 I wouldn't have known the detail.

25 **Q.** At paragraphs 39 to 41 [Magnum], you give evidence about

1 market conditions in relation to raw milk at the time,
2 and can I summarise it as follows. Throughout 2002,
3 there was an oversupply in raw milk and demand remained
4 static; that's right, isn't it?

5 **A.** Yes, that's correct.

6 **Q.** There was also a glut of cheese on the market?

7 **A.** Yes, that was the case as well.

8 **Q.** Yes, and this was the situation as the winter was
9 approaching?

10 **A.** Yes, that's the case.

11 **Q.** In that previous period, prior to the events we're
12 talking about, the cost prices of cheese had generally
13 declined; would you agree with that? You don't say that
14 in your witness statement but I'm asking you as
15 a question?

16 **A.** I don't know, sorry.

17 **Q.** Could you go to document 16 in the other bundle?

18 **A.** Sorry, can I just check, a clarification, which
19 document? The yellow?

20 **Q.** Yes, the yellow bundle, tab 16. And if you go to the
21 fourth piece of paper, it's slide 1/10 which has "Cheese
22 Market" on it [Magnum].

23 I think you're at the right document, it's
24 horizontal.

25 Just to tell you what this is, this is

1 a presentation by Dairy Crest to Asda on 17 September.
2 If you go to the fourth piece of paper, and then you go
3 to the -- it's a graph which says "Cheese Market". If
4 you look at that graph, those are figures for bulk
5 cheddar, and it shows that from July 2001 to August 2002
6 there had been a decline in the bulk cheddar price,
7 that's the cost price, and "stocks very high", you'll
8 see as the second ...

9 So what I'm suggesting to you is that there was an
10 oversupply of cheese at the time as well as milk, and
11 a gradual fall in the cheese price?

12 **A.** Yes.

13 **Q.** I'm sure you don't remember the detail now.

14 So the position at the time was that the -- the
15 expectation was that normal market forces in those
16 conditions would not lead to an increase either in the
17 prices for raw milk or in the prices for cheese?

18 **A.** Yes, that would be the case.

19 **Q.** Yes, and if something -- I'll put this to you, if
20 something was to be done to reverse that position, it
21 would need some form of active market management?

22 **A.** Can I ask you to repeat the question again, please?

23 **Q.** Can I take you to document 29, it's probably easier --
24 if you go to document 29A [Magnum] in the same bundle,
25 this is a presentation that Mr Reeves of Dairy Crest

1 made and I think we now -- somebody will correct me. It
2 was made in September and it's an internal Dairy Crest
3 presentation, and he is discussing the cheese price
4 increase, September 2010 (sic), which we will be leading
5 on to in a moment.

6 There his slides, "Need for Change", the slide on
7 the first page:

8 "Current market is unsustainable.

9 "Stocks in UK at all time high...

10 "Milk producers are making losses.

11 "Processors are making losses."

12 It's just reflecting what I just put to you.

13 Then if you go over the page, he says "Management of
14 Change". He says:

15 "Market driven change will not happen in the near
16 future, due to high stocks.

17 "Dairy Crest unable to break the market alone.

18 "The market must be actively managed to prevent
19 short-term imbalances creating long-term distortions."

20 I know this document represents his view, but if you
21 wanted to reverse -- since normal market forces wouldn't
22 lead to an increase, if you wanted there to be an
23 increase he suggested there would have to be some sort
24 of active management of the market?

25 **A.** Yes, that would be his opinion I guess at the time.

1 **Q.** We'll come back to that in a moment, if we may. Can I
2 ask you to put that to one side for the moment, we'll be
3 coming back.

4 Go back to your witness statement. At paragraph 26
5 [Magnum] you say:

6 "I find it strange that the OFT puts so much weight
7 on the word 'initiative' in the parts of its case I have
8 seen. Initiative meant different things at different
9 times to different people in 2002 and 2003. What it
10 certainly did not mean was any kind of arrangement
11 between retailers to fix the retail price of cheese
12 which is what the OFT seems to mean by that term."

13 You were aware at the time that the word
14 "initiative" was being used in respect of the events
15 of September and October, is that right?

16 **A.** I think the word "initiative" has been used on a number
17 of occasions for a number of different things, so not
18 specifically this, but it could have been with regard to
19 the farming plight situation, the poor -- the issue that
20 the farmers were facing against the declining price. So
21 "initiative" could have been used in that phrase, and it
22 could have been used...

23 **Q.** My simple question was this, can you recall what you
24 took it to mean at the time?

25 **A.** I'm not sure I took it to mean anything at the time, if

1 I'm -- I don't think I took it any time. The only time
2 it may have been with regard to be used would be around
3 helping the initiative of the farmers, to try and
4 support the farmers a little bit more. That may be the
5 reference that I used but I couldn't fully remember that
6 would be the case.

7 **Q.** That would be the 2p per litre for the farmers, would
8 it?

9 **A.** That was, exactly, when Tesco decided to raise the price
10 of milk and put 2p back to farmers.

11 **Q.** Your raising the price of milk wouldn't have got the
12 2p per litre back to the farmers, would it?

13 **A.** No, but it was being sympathetic to the farmers' plight,
14 and it was being seen as trying to be supportive by
15 asking the processors at the time to pay the farmers
16 back a further 2p.

17 **Q.** Very well.

18 Can we move on specific to the events, and the
19 Tribunal is well aware of them. Essentially, at the end
20 of the late summer, the FFA were agitating for an
21 increase in their farmgate price of milk, that's right,
22 isn't it?

23 **A.** Yes, that's correct.

24 **Q.** And there were protests and blockades both of
25 processors' depots and distribution centres and Tesco's

1 depots. Depot may not be the right word, but there were
2 blockades -- you can give me the right word?

3 **A.** Yes, there had been some action, some protests outside
4 the depots. I don't think it had quite got to the point
5 that product couldn't get in and out of the depots, but
6 they were standing at the sort of picket line saying "We
7 would like a better price for our milk".

8 **Q.** Would it be fair to say that that was causing
9 substantial disruption to Tesco's business leading to
10 significant damage to Tesco?

11 **A.** It had the potential to do that. So if the protests had
12 then led to the depots being blockaded coming into a key
13 critical period of Christmas, and our inability to get
14 the products out of the depot to our shops, then it
15 would have a big business implication for us.

16 **Q.** Yes, and what I suggest to you is that in fact it was so
17 serious that it was regarded as a crisis?

18 **A.** I think it had the potential to be a crisis, but at that
19 time it wasn't a crisis, but it had the potential to be
20 a crisis with Christmas looming.

21 **Q.** Yes. I won't go to it, but in paragraph 37 of your
22 witness statement [Magnum] you refer to it as the
23 "farming crisis".

24 Essentially, your senior management were very
25 concerned?

1 **A.** Yes, they were.

2 **Q.** And they put you under pressure at the time?

3 **LORD CARLILE:** Well, the boss made a unilateral decision,
4 didn't he, whilst you were away?

5 **MR MORRIS:** Yes, I was going to go to that.

6 Can we just go -- we'll take it most quickly if we
7 go to volume 4, tab T again. So that's the one that you
8 put on your shelf. I was right that I thought that
9 might be the next one we go back to. I haven't now got
10 it here so you'll have to wait until I catch up.

11 If you go to tab T at page 53 [Magnum], I'm going to
12 read or ask you to look at -- from 4.17, page 53, I'm
13 skipping a little bit in the story here because the
14 Tribunal is very familiar. But essentially there was
15 a meeting between Terry Leahy and Ben Gill, there were
16 then public announcements immediately following, and at
17 that point Tesco announced publicly that it was
18 supporting the farmers, and was supporting them in their
19 being paid 2p per litre more by the processors; that's
20 right, isn't it?

21 **A.** That's correct.

22 **Q.** At 4.17 it says:

23 "At the time of the above announcements [you] were
24 on a business trip in the United States."

25 Then 4.18:

1 "During the very early morning of the 3rd, whilst on
2 the Arizona leg, Dido Harding received the news of the
3 meeting. She informed John Scouler and Rob Hirst early
4 that morning. The Tesco team was shocked and to
5 a degree irritated by the news."

6 You would agree with that, would you? Perhaps you
7 would like to read on.

8 **A.** Yes, that would be the case.

9 **Q.** Then if we go to 4.20. I'm jumping about, I don't want
10 to read it all, but I'm conscious of time:

11 "During the course of the 3rd and the following two
12 days there were a number of times when the Tesco team
13 discussed privately Tesco's position, in particular to
14 work out how to implement senior management's wishes."

15 So this is I think whilst you were in America. It
16 is probably coming back to you now a little bit because
17 specific events generally bring...

18 Then at 4.21:

19 "As the Tesco team were absorbing the new position
20 and internally deciding a strategy there were
21 negotiations with Arla."

22 That's in relation to fresh liquid milk.

23 Then bottom of 4.21:

24 "Rob Hirst in particular took a strong line that the
25 processors had benefited from the decrease in prices

1 during the spring and should now absorb the 2p per litre
2 increases. However, it transpired during the
3 negotiations that Arla was not prepared to accept any
4 reduction of its margins. Tesco's team was in a very
5 difficult negotiating position in this regard."

6 I entirely accept we're talking about fresh liquid
7 milk at the moment.

8 "From a public relations perspective it would not
9 have been possible for Tesco to subsequently back down
10 and say that the processors were refusing to fund the
11 price increase. Apart from the negative public
12 reaction, Tesco would have faced a very vicious backlash
13 from the farming lobbying community. Therefore, the
14 team in the United States had effectively been boxed in
15 by the press release. It became obvious to all that
16 Tesco would have to pay a higher cost price to the
17 processors. However, Tesco couldn't do this without
18 increasing its retail prices if it were to maintain
19 margins. While Tesco did want to help the farmers, and
20 was not looking to increase its margins, it did have
21 very clear obligations to its shareholders. Margins
22 were a KPI for the buying team, they would have been
23 very reluctant to agree any decrease. This meant taking
24 a margin hit which was not an attractive option."

25 You would agree obviously with all that description.

1 Then if you go to -- yes, do you?

2 **A.** I would agree with what's written there, yes.

3 **Q.** Then at 4.25 [Magnum]:

4 "Tesco's internal thinking on whether it should
5 increase retail prices [again on fresh liquid at this
6 stage] was largely complete by the return journey from
7 the USA. The decision to raise retail prices had been
8 taken in principle late on the Thursday, however the
9 final decision seems to have been taken in the morning
10 on the Friday, 6th September, once the team were back in
11 the offices in the UK."

12 That's right, isn't it? That all accords with your
13 recollection?

14 **A.** Yes.

15 **Q.** Then 4.26:

16 "Following that decision, on the morning of Friday,
17 6 September, the Tesco team took the necessary steps to
18 implement the price increase as quickly as possible.
19 The new prices went live in the stores on the 9th."

20 That's fresh liquid milk.

21 I would invite you, whilst you're there, just to go
22 to one further paragraph. If you go forward to 4.43,
23 which is on pages 62 and 63 [Magnum], subparagraph (d)
24 on page 63:

25 "After Tesco's press announcements, and the

1 processors' refusal to fund an increase in farmgate
2 prices out of their margin, it quickly became obvious
3 that Tesco would increase its retail prices."

4 And then (i), and this is just an elaboration:

5 "When the news reached Dido Harding they had ...
6 Dido Harding recalls a conversation with
7 John Gildersleeve where this was made clear to him."

8 That's right, isn't it? That's the sequence of
9 events and you would agree with that?

10 I think I'm on the other side of the page perhaps.

11 **A.** Sorry, I would just like clarity about what you would
12 like me to agree to in terms of --

13 **Q.** I would like you to agree, or to accept that 4.43(d)(i)
14 represents the position of what happened.

15 **A.** Can I just check, is that page 63 you're referring to?

16 **Q.** Yes, page 63. The particular point there is that
17 John Gildersleeve had told Dido Harding?

18 **A.** I'm not sure I can comment on a conversation that took
19 place between two people that I wasn't part of, sorry.

20 **Q.** You were there in America at the time?

21 **A.** Yes.

22 **Q.** Just to put it simply to you, this is one of the
23 paragraphs that you read when you did your first witness
24 statement and did verify as being true?

25 **A.** There would have been a conversation that took place,

1 but the contents of that conversation I can't verify.

2 Q. So Dido Harding didn't tell you that -- it doesn't --
3 that John Gildersleeve had instructed her?

4 A. I can't really remember.

5 Q. Okay. That's what happened with liquid milk. What
6 I suggest to you then is that you realised at that point
7 in time that 2p per litre on all farmgate milk would
8 mean -- ultimately mean a cost price increase for cheese
9 as well?

10 A. At the time we made the decision that we felt that we
11 had put, so to speak, the ball in the processors' court
12 by saying we've called on all the processors to raise
13 the price by 2p, we're now asking the processors to deal
14 with that. So it was a bit like saying actually the
15 responsibility is now with the processors.

16 Q. At the very least you realised that, in respect of
17 cheese, processors would be seeking a cost price
18 increase on cheese products as well as on milk?

19 A. Subsequently yes, but at that time the decision was
20 around the farmgate price and to put the responsibility
21 back on the processors.

22 Q. If you go to paragraph 44 of your witness statement.
23 You can put volume 4 back probably on the side for
24 a moment, whichever you prefer.

25 You refer to the public announcement in the first

1 sentence of paragraph 44 [Magnum], then you say you:

2 "... started to come under pressure to accept a cost
3 price increase in relation to milk, and we sought to
4 recoup that by increasing retail prices for milk."

5 In the next sentence you say:

6 "It was obvious to the industry that arithmetically
7 a 2p per litre increase for milk would translate into
8 a £200 per tonne increase for cheese, milk, powder and
9 butter."

10 **A.** Arithmetically that would be correct, but at the time
11 what we were stating was it was about liquid milk and
12 there was no reference -- it was about asking the
13 processors to raise the price back based on that.

14 **Q.** I would suggest to you that you realised at the time
15 that not only would the processors be asking you for
16 2p per litre on their cost price for liquid milk, but
17 they would be at least asking you for £200 per tonne
18 extra for milk, powder, butter and cheese?

19 **A.** At the time, I refer back to the situation, it was
20 absolutely clear about liquid milk. We were asking the
21 farmers -- we were asking, sorry, the processors to pay
22 the farmers back 2p per litre, and it was very much
23 focused at liquid milk.

24 **Q.** Can I just -- I'm not sure you answered the question
25 that I asked but can we just explore that by reference

1 to what has become known as the pooling effect.

2 An increase in the retail and cost price of liquid
3 milk passed back to the farmers would not have been
4 sufficient to meet the objective that your senior
5 management have called for of paying 2p per litre on all
6 raw milk, would it?

7 **A.** Well, it wouldn't, but it had the desired objective of
8 putting the responsibility back to the processors to
9 increase -- the responsibility back to farmers (sic), as
10 opposed to a Tesco situation. It was back with the
11 processors, so it was a bit like a hot potato, I guess,
12 just putting it back to the processors to say, "It's now
13 back to you to try to resolve the situation".

14 **Q.** But you -- I suggest to you that you realised that the
15 processors wouldn't take it lying down, that if they had
16 to get all the 2p per litre back on all raw milk, they
17 would be -- I've asked you this before -- they would be
18 looking, at least looking to you for an increase of £200
19 per tonne in cheese?

20 **A.** It subsequently came to light, but at that time it was
21 very much the processors, and that sort of -- refer to
22 Rob Hirst's recommendation. I think in the witness
23 statement he said that actually it felt like it was in
24 the processors' margins to give back to the farmers at
25 that stage --

1 Q. In that --

2 A. -- because of the price.

3 Q. Sorry to interrupt you.

4 In that passage he was talking about milk, not about
5 cheese?

6 A. At the discussions that we were having publicly, and the
7 press statements, these were all discussions around
8 liquid milk. Cheese hadn't entered the conversation.
9 It was about liquid milk at the time.

10 Q. Can I just take you to document 8A in the document
11 bundle [Magnum]. This is a note made by somebody called
12 Tim Smith from Express who was noting various events.
13 8A, not 8.

14 If you go down to the bottom of the page, "Friday
15 6th September", at that point the decision on retail
16 milk had been taken. It records that:

17 "Rob Hirst rang Diana Thompson... said he would be
18 calling again Monday 9th to inform her that Tesco would
19 be increasing retail... prices."

20 That's milk, you agree with that?

21 A. Yes, I do.

22 Q. Then he said:

23 "Also said he would need to change the agenda of the
24 supplier meeting planned for the 13th to 'how we can
25 help the farmers'."

1 What I'm suggesting to you is that you and he
2 realised that you would have to go beyond milk and into
3 cheese because you would not be able to achieve the
4 objective of 2p per litre on all raw milk if you didn't?

5 **A.** Sorry, I didn't interpret it that way. He would have --
6 the reason we had set up the dairy supplier forum at the
7 time was to try and open Tesco's approach to the
8 farmers, and given we'd made such a huge public
9 statement only three or four days ago, that was likely
10 to be on the agenda about what had prompted this
11 discussion by Tesco. So, therefore, I think he would be
12 referring to it in the context of the press release that
13 we had made, and that was public news because we'd made
14 two press statements.

15 **Q.** It is right, isn't it, as we shall see in a moment, that
16 the need to extend the initiative, and I'll use that
17 word if I may, extend the initiative to dairy products
18 other than liquid milk was discussed at length at that
19 meeting?

20 **A.** Through the course of expectations, discussions, people
21 were asking what might be the next logical step; if
22 Tesco has raised the price of milk, what might it do
23 with other sectors?

24 **Q.** Yes, and I'm suggesting to you that, never mind who
25 raised it first, essentially the central subject

1 discussed at that meeting was the extension of the
2 initiative from fresh liquid milk to cheese and other
3 dairy products; that's right, isn't it?

4 **A.** There was discussions, a number of discussions during
5 that meeting, and there was discussions around what
6 would happen to cheese given that announcement.

7 **Q.** Sorry, the question I asked was that the central subject
8 discussed at the meeting was the extension of the
9 initiative from fresh liquid milk to cheese and other
10 dairy products, is that right?

11 **A.** That was one of a number of subjects that was discussed
12 during that dairy supplier forum. I'm not sure I would
13 go so far as to say it was the total central point.
14 I think the 2p that Tesco had called on the farmers was
15 the central -- was one of the points that was discussed,
16 along with red tractor, farmgate, marketing. A variety
17 of different subjects that we did at that meeting.

18 **Q.** Very well. I'm going to go to that meeting shortly,
19 before I do so can I put -- sort of just discuss the
20 general situation you were in at the time.

21 The announcement made by senior management had put
22 you and the rest of the dairy team in a very difficult
23 position; that's right, isn't it?

24 **A.** I'm not sure -- on reflection, I'm not sure it had,
25 because what it did was it put the responsibility back

1 to the processors, and the spotlight that had been on
2 Tesco at the time then moved very much to the processors
3 about what they would do, so the farmers had supported
4 it.

5 **Q.** It was a benefit to Tesco as a company as a whole to do
6 that, I think that's what you're saying, because you'd
7 moved the spotlight away?

8 **A.** Yes.

9 **Q.** But what I'm saying is it put you and the dairy team, in
10 practical terms, in a difficult position; I think that
11 was essentially what was said in the passages that we
12 read. Would you agree with that?

13 **A.** I think there would have been questions about how that
14 2p would get back and whether Tesco would be accepting
15 a cost price increase, and subsequent discussions about
16 how we'd do it. But at that time, responsibility fell
17 firmly back on to the processors.

18 **LORD CARLILE:** We need to have a LiveNote break in a moment.
19 You choose.

20 **MR MORRIS:** Can I just... I think actually -- I think I'd
21 like to break there, if I may, because I've got some...

22 **LORD CARLILE:** We'll break until 12.05.

23 (11.55 am)

24 (A short break)

25 (12.05 pm)

1 **MR MORRIS:** I was just asking you some general questions and
2 I'd asked you about being put in a difficult position.

3 I would suggest that you knew early on, and
4 certainly following the Dairy Supply Group meeting, that
5 there would have to be a cost price increase for cheese?

6 **A.** I'm not sure I did at that stage. I don't think I did
7 at that stage.

8 **Q.** Okay, I'll do it in two stages. So you're saying you
9 didn't know -- you didn't realise before the Tesco Dairy
10 Supply Group meeting, is that right?

11 **A.** That's correct.

12 **Q.** And are you now saying that you didn't know even after
13 the Tesco Dairy Supply Group meeting?

14 **A.** There would have been a request or a challenge back
15 about who would pay the £200, but that was not
16 determined at this stage.

17 **Q.** I'm going to suggest to you that you realised at that
18 time, and you realised that the cost price increase
19 would be across all your cheese lines and not just one
20 or two products?

21 **A.** Sorry, can I just ask for clarification of the timing on
22 that, please.

23 **Q.** I'm saying that -- I'm putting to you that at least
24 after that meeting, so we're now at 13/14 September, you
25 realised there would have to be a cost price increase

1 across all your cheese lines?

2 **A.** There might have had to be a cost price increase on
3 certain areas but not on all areas at that time. I was
4 pretty open-minded at that time.

5 **Q.** When it was put to Lisa Oldershaw in her evidence that,
6 in all her discussions with the processors which ensued
7 after September, there was never any suggestion by her
8 that the processors should -- and I'm talking about the
9 cheese processors -- should absorb the 2p per litre
10 which your bosses had called for. She replied:

11 "Not that I can recall, no."

12 My question for you is, do you agree with that?

13 **MISS ROSE:** Sir, I'm sorry. That really is not being put on
14 a fair basis because Ms Oldershaw was talking about
15 discussions in October, and this is a question being put
16 with reference to 13 September.

17 **LORD CARLILE:** Well, you're putting the question --

18 **MR MORRIS:** I'll put the question generally. I'm going to
19 put to you that, at no time, did you suggest, you or
20 Lisa Oldershaw or anybody else, suggest to the
21 processors that they should absorb some of the
22 2p per litre?

23 **A.** No, I disagree with that. I think at the time our
24 statement was that the request would be that the
25 processors/suppliers would have to find a route to get

1 that money back to the farmers.

2 **Q.** I'm asking you, following the Tesco Dairy Supply -- so
3 you're saying after the Tesco Dairy Supply Group
4 meeting, you or Lisa Oldershaw said to one or more
5 processors that the increase in farmgate price should
6 come out of their, the processors', margin?

7 **A.** I didn't have those discussions, I don't know what Lisa
8 would have said, but at the time, coming out of the
9 dairy supplier forum, we would have felt that the
10 request was still firmly on the shoulders of the
11 processors to find a way back to farmers, but an
12 acceptance that they would put us under pressure to find
13 that 2(?) as well.

14 **Q.** I'm not asking you particularly what you felt, I'm
15 asking what you did. I'm asking you whether, at any
16 time, you or anyone else within the dairy team,
17 obviously as far as you are aware, ever suggested,
18 following the 13 September meeting, that the
19 2p per litre should be funded out of the cheese
20 processors' margin?

21 **A.** I wouldn't have had those conversations. I can't speak
22 on behalf of -- I apologise, I can't speak on behalf of
23 Lisa, what she said.

24 **Q.** So you didn't say that because you didn't have the
25 conversations?

1 **A.** That's correct.

2 **Q.** And you can't speak on behalf of Lisa?

3 **A.** That's correct.

4 **Q.** I put to you the fact that she said she could not recall
5 that ever happening, just to tell you what her evidence
6 was. In fact, I suggest to you that the notion that you
7 would have gone back to the processors and said, "We're
8 not funding it" would have been a very damaging and
9 dangerous line for Tesco to take from a PR point of
10 view?

11 **A.** That's why we were holding the line which then said that
12 we're calling on the processors/suppliers to pay that
13 back to that area --

14 **Q.** Yes, and -- sorry, do finish your answer, please.

15 **A.** I'd finished. At the time we were calling the
16 processors/suppliers to pay the 2p back to the farmers.

17 **Q.** Yes, and then they came to you and said, "We want £200
18 per tonne", and if you had gone back to them and said
19 "Sorry, chaps, we're not going to support you", that
20 would have been, I would suggest, a line that you could
21 not possibly have taken because what would have happened
22 is that the processors would have then gone back to the
23 farmers and said, "Tesco are not supporting the
24 increase"?

25 **A.** In terms of the sequence of events, I think that is too

1 early in those sequence of events to have made that
2 judgment. At the time it was -- the public domain was
3 the 2p, the press release, at the time we were debating
4 so...

5 Q. What I'm suggesting to you is that the reality is that,
6 at the least following the meeting, and before, the only
7 way you could meet the differing demands was if there
8 was an across-the-board increase in retail prices by
9 Tesco and its main competitors?

10 A. No, that's not the case.

11 Q. Okay. Let's look at that in a little more detail, shall
12 we? The first thing I would suggest is that it was
13 inevitable that there was going to be a cost price
14 increase?

15 A. At the time we were still asking the processors to pay
16 it back to farmers out of their -- out of their margins.

17 Q. What was that answer? You were?

18 Can you point to any evidence which suggests that at
19 the time, by which I mean post the meeting, you were
20 asking the processors to pay it back to the farmers out
21 of their margins?

22 A. I didn't need to. The public statement had been made by
23 Tesco that the request was that you need to pay this
24 from your margins.

25 Q. The public statement didn't say that. The public

1 statement is at tab 6 [Magnum], I won't go back to it,
2 but my question was relating -- I'm suggesting to you
3 that in relation to cheese, after the meeting, you never
4 asked the processors to pay it out of their margin, and
5 I'm suggesting to you that your recollection that that
6 happened is mistaken?

7 **A.** No, because subsequent conversation that took place when
8 Lisa hadn't accepted a cost price, then I asked her
9 later in October -- sorry, I apologise, I may be quite
10 wrong with the date, but I'd asked Lisa to accept the
11 cost price. So she was very firmly of the view at that
12 time that the processor was responsible for paying that
13 back. I wouldn't have an individual discussion with the
14 supplier at that stage about what they were going to do
15 with their pricing.

16 **Q.** Can we just go back to document bundle, tab 6 [Magnum],
17 this is the announcement, second of the two
18 announcements. In fact it's tab 7 [Magnum].

19 **A.** Sorry, are you referring --

20 **Q.** I mean the document -- yes, I think it's that bundle.
21 Tab 7.

22 **LORD CARLILE:** Yellow spine, bundle 1. It's flag 6 and
23 then 7, the two statements.

24 **MR MORRIS:** I'm not going to take you through 6. If you'd
25 like to cast your eye -- 6 is the longer announcement,

1 if you go to tab 6. Then there's one the next day but
2 I'm just exploring your suggestion that you were calling
3 for the processors to pay it out of their margin. If
4 you read the announcement at tab 7:

5 "... we are today calling on all milk processors to
6 pay them at least two pence per litre more because of
7 the need to sustain the UK dairy industry."

8 There is nothing there suggesting that the
9 processors should pay that 2p per litre out of their
10 margin, is there?

11 **A.** No.

12 **LORD CARLILE:** What about the first bullet point in tab 6?

13 **MR MORRIS:** "Involving Tesco in detailed discussions..."

14 Is that the one?

15 **LORD CARLILE:** Yes.

16 **MR MORRIS:** "Whilst Tesco cannot directly deliver this price
17 increase we can help to create a more sustainable
18 industry... We are already working hard to bring this
19 about by:

20 "Involving Tesco in detailed discussions with
21 processors and producers to discuss issues, including
22 pricing, explore opportunities and encourage
23 communication throughout the supply chain."

24 There's nothing there, I would suggest, about
25 processors being the ones to fund it all, is there?

-
- 1 **A.** Well, I think by the statement that was made on the two
2 press releases, it's quite clearly saying, while Tesco
3 cannot have a direct influence, Tesco is committed to
4 helping it. It was saying the processors -- the
5 assumption would be the processors should pay this
6 because the price of milk had dropped by 3p to 3.5p
7 since March and there was an acceptance that the prices
8 had not gone down and that Tesco had not changed the
9 price down. Therefore, the processors and suppliers
10 were potentially sitting on better margins because the
11 price they had paid to the farmers over the period of
12 time had declined so the general assumption was being --
13 is that the processor was doing better from this and
14 therefore the assumption would be the processor should
15 pass this back.
- 16 **Q.** You said in your answer a moment ago that, while Tesco
17 cannot directly deliver, it is committed to helping.
18 How could Tesco help?
- 19 **A.** Tesco could help by growing sales, introducing new
20 products, people understanding what the opportunities
21 are, those type of things.
- 22 **Q.** That was all, was it? That would help get 2p per litre
23 back on all milk?
- 24 **A.** It was very much (inaudible) at the time and the
25 decision was it was the processors' responsibility.

1 There wasn't -- I think it was -- this was the
2 discussion, the debate at that moment in time which was
3 said, quite rightly, that we request and calling on the
4 people to help the farmers and pass them on
5 a 2p per litre increase.

6 **Q.** You said, "Over to you, the processors", is that right?
7 "It's up to you now"?

8 **A.** I don't think I said -- I'm not sure I would use the
9 phrase "up to you" but we would refer back to what we
10 had asked and use the statement as being, you know,
11 that's what we've said, Tesco, and corporately we would
12 say, "We support the request to get farmers back
13 2p per litre".

14 **Q.** The first thing that the processors did when you said,
15 "Over to you", was to come immediately back to you and
16 say, "Can you pay us £200 per tonne more", didn't they?

17 **A.** That may have been, but that would have been later on
18 the sequence of events.

19 **Q.** That is for -- for you, it is one week after the Tesco
20 Dairy Supply Group meeting. My questions I'm asking you
21 are about events from, at the latest, after the Tesco
22 Dairy Supply Group meeting. I'm suggesting to you, at
23 that point, you realised that there was going to be
24 a cost -- in order for this initiative that your senior
25 executives had called for, there would have to be, not

1 necessarily tomorrow, but in order for the initiative to
2 work, there would have to be an increase in cost price
3 of cheese at £200 per tonne?

4 **A.** Yes, but -- when I was first asked that question, if
5 I recall the question being asked correctly, you asked
6 me, a week before going into the Dairy Supply Group, was
7 I sure I was going to accept £200 and that's why sort
8 of ... Having finished the dairy supplier forum,
9 I think I was more aware of the challenges that would
10 face Tesco to take a £200 increase to support the
11 farmers.

12 **Q.** Very well. I think, to be fair, I asked you both.
13 I think I asked you both the situation before -- you
14 realised at the time of the announcements and I think
15 you answered the way you did, and then I think, and
16 we'll check the transcript, I think I did ask you from,
17 at the latest, immediately following the Tesco Dairy
18 Supply Group meeting, it was at that stage at the latest
19 you realised that you would have to pay £200 per tonne
20 more?

21 **A.** I didn't realise I'd have to pay £200. I knew that
22 I would be under -- that I would -- that the processors
23 may well come -- sorry, the processors and suppliers may
24 well come and ask Tesco for a £200 increase as a result
25 of some of the discussions.

-
- 1 **Q.** I've suggested to you, and I've been over the ground,
2 that you would not have gone back at that point and
3 said, "We're not going to fund it"?
- 4 **A.** I don't know what Lisa may or may not have said at the
5 time --
- 6 **Q.** I'm talking about you from the bigger picture. If you
7 had gone back and said, "I'm not funding this", your
8 bosses would not have permitted you to do that because
9 of the PR problem that would then be caused because
10 Dairy Crest and the processors would complain?
- 11 **A.** No. I would deliberately not -- from a commercial point
12 of view, I would deliberately say nothing and require
13 (sic) back to the statement and leave it to the trading
14 teams for the discussions.
- 15 **Q.** Can I ask you, let's assume that we get to the stage
16 where you do realise you're going to accept a £200 per
17 tonne cost increase at some point in time.
- 18 **A.** It certainly would be one of the possible outcomes that
19 I could have to accept.
- 20 **Q.** Let's assume that's going to happen and I'm going to put
21 to you three options as to what Tesco could then do.
22 First -- and I'll just list the options, if I may.
23 First, you could decline to increase your retail prices
24 at all; secondly, you could increase your retail prices
25 without knowing whether your competitors would increase

1 their retail prices and without having any idea that
2 they would; or, thirdly, you could increase your retail
3 prices once you knew or had a degree of confidence that
4 your competitor retail prices -- would increase their
5 retail prices too? Those are the three options I'm
6 suggesting to you. Would you agree that those are, in
7 practical terms, the three options that faced you once
8 you had a £200 per tonne cost price increase in front of
9 you?

10 **A.** I'd agree with options one and two but I wouldn't know
11 what my competitors would do, so I don't understand
12 option three. I'm unclear on option three.

13 **Q.** Okay. Well, the option three I put to you was that you
14 could increase your prices once you knew that your
15 competitors were going to increase their retail prices
16 or you had at least a degree of confidence that they
17 would?

18 **A.** Well, I think we would have to accept whether the price
19 increase was valid in the first case and, therefore,
20 that you made the decision that you should take the
21 price increase and that you would assume that other
22 retailers potentially were also being hit with the cost
23 price increase.

24 **Q.** Yes, I'm not suggesting -- I'm not necessarily -- I'm
25 not suggesting at this stage that you necessarily agreed

1 that the third option is what you would have done. I'm
2 going to ask you about that in a moment but I'm just
3 enumerating the options.

4 Let's deal with the first option first. The first
5 option is that you were not going to accept a £200 per
6 tonne cost price increase across -- I'm not going to say
7 all the lines -- the broad range of your lines with all
8 your processors without being able to increase your
9 retail prices at the same time?

10 **A.** Could you just help me to understand the question in
11 terms of what date you're referring to here, please?

12 Sorry.

13 **Q.** Well, I'm talking about, for example, once the £200 per
14 tonne cost price increase has been tabled, which is end
15 of September.

16 **A.** Okay.

17 **Q.** And you are being asked for -- I think this is fair,
18 Mr Scouler. You are being asked by Dairy Crest and all
19 the other processors to pay £200 per tonne more for the
20 vast majority of your British cheeses. That's the
21 scenario I'm at and I'm suggesting to you that, in those
22 circumstances, you would not have accepted that -- let's
23 assume it's justified. You would not have accepted that
24 without increasing your retail prices by an equivalent
25 amount, approximately equivalent amount?

1 **A.** Not necessarily because, if we raised the prices, we
2 might have been uncompetitive but you would raise your
3 prices in line with the cost that you had absorbed in
4 most cases.

5 **Q.** Yes. At the time, I'm -- at that time Tesco was
6 purchasing approximately 90,000 tonnes of cheese per
7 annum?

8 **A.** I don't know the figure, sorry.

9 **Q.** I think that's a figure that we have been having
10 discussions with. I think it's not going to be
11 disputed. 80,000 to 90,000, let's say. It sounds about
12 right, does it?

13 **A.** I couldn't give you the figure back for 2002, sorry.

14 **Q.** Perhaps you would bear with me and assume that that's
15 correct. If that is correct, a £200 per tonne cost
16 price increase across all or the vast majority of your
17 lines with no increase in retail prices would have cost
18 your company between £16 million and £18 million per
19 annum?

20 **A.** On those assumptions and that calculation, that would be
21 right.

22 **Q.** Yes, and I'm suggesting to you that because of -- it was
23 that figure, you would not accept that, I don't know how
24 you would call it, hit on your bottom line, I don't
25 know, that sort of level of cost and that's why I'm

1 suggesting to you that you would not have accepted that
2 cost price increase without also raising your retail
3 prices?

4 **A.** Yes and no, depending on the profitability of the
5 category at the time. If I was over my margin, so I was
6 performing better, my sales were ahead, my profits were
7 ahead, that's 16 or 18 million I may already be ahead of
8 that budget so therefore I could have afforded to
9 potentially do that. It would not be a good scenario,
10 to be clear(?). But if I had to accept a cost price
11 with no retail price, then that happens. It's not an
12 ideal situation but that's the volatility of the market.

13 **Q.** Yes but it was an awful lot of money.

14 **A.** Certainly a lot of money, yes.

15 **Q.** It wasn't a cost price increase that you were
16 negotiating with an individual processor who is horse
17 trading with you on some of his lines and it might cost
18 you a bit and you're horse trading; this is across the
19 board, this is a blanket sum, call it 17 million because
20 it splits the difference, of £17 million. That would
21 have been a big issue for you?

22 **A.** Yes, it would have been. 17 million is a material sum.

23 **Q.** I'm suggesting to you that that was not something that
24 you would have considered at the time, considered doing?

25 **A.** Probably not.

1 **Q.** The second option is you accepting it but raising your
2 retail prices, for example, raising them first without
3 anybody else raising. I'm suggesting you wouldn't do
4 that either?

5 **A.** Can I just check my understanding of the question again?

6 **Q.** Yes.

7 **A.** Sorry.

8 **Q.** This is the second option. The second option is that
9 you accept the cost price increase of £200 per tonne and
10 you decide that you will raise your retail prices
11 without any knowledge or comfort that your competitors
12 would do the same?

13 **A.** Absolutely not. Unfortunately I have to do that every
14 week on the assumption -- if I've had a cost price
15 increase or a negotiation and that my retail prices go
16 up, I'm then exposed and, you know, I have to then make
17 a decision a week or two later or three weeks later or
18 three days later depending on the circumstances. So
19 I wouldn't ...

20 **Q.** Were you ever faced, other than in autumn 2002, with
21 a situation where you were being asked for effectively
22 a cost price increase of £17 million? Can you recall
23 any other occasion when that happened on cheese?

24 **A.** Specifically on cheese, no.

25 **Q.** When you say you did this every week, I'm not talking

1 about individual lines, I'm talking about this request
2 for the £200 across the board, I'm going to use it. I'm
3 suggesting to you, given the magnitude of that cost
4 price increase, you would not have made a decision to
5 make an equivalent retail price increase across the
6 board without having any indication that your
7 competitors might do the same?

8 **A.** But I would have had separate negotiations with separate
9 suppliers on separate cheese products. So I would never
10 raise the price of, you know, 2,000 lines or 1,000 lines
11 in one week because it would cause stores disruption.
12 It would cause a lot of issues potentially within that.
13 So I wouldn't contemplate it in that way. I would have
14 to contemplate it in the spirit of a price by price
15 discussion.

16 **Q.** May I just put the question again. Assume you have
17 accepted £200 per tonne on all lines, or the majority.
18 The question was, given the magnitude of that cost price
19 increase that you've just accepted, you would not have
20 made a decision to make an equivalent retail price
21 across those lines without having any indication that
22 your competitors might do the same?

23 **A.** Then I would have to use my judgment to sense whether
24 this price increase was being driven across the rest of
25 the market and there was a call for people to raise

1 their prices.

2 **Q.** The reason you wouldn't do that is because, accepting
3 the cost price and putting your retail prices up across
4 the board was too risky and it would leave you exposed?

5 **A.** Yes, that would be the case.

6 **Q.** If in fact your competitors did not raise their retail
7 prices, either you would then be out of line or, most
8 likely, what would happen is that, after the expiry of
9 the period allowed by the basket policy, you would have
10 to come back down again?

11 **A.** Yes, or I could take the decision to leave the price out
12 of policy and have done that on situations and have done
13 that in examples where a price would go out of policy
14 for a number of weeks if there was a justified reason.
15 But in the majority of cases you would bring it back in
16 line with the competitors --

17 **Q.** Yes, and once you brought it back down, you would then
18 be faced with the prospect of being stuck with the cost
19 price increase that you had already accepted?

20 **A.** Yes.

21 **Q.** Yes, and in that event, you would be suffering or you
22 would sustain the £17 million or £18 million that you
23 had agreed to pay without being able to recoup that from
24 a retail price increase?

25 **A.** Yes, but I could potentially recoup money in other ways,

1 so whether that be marketing investment, promotional
2 money. So I could -- quite often, in the past I may --
3 I've had to accept a price increase from a supplier, the
4 price has gone up, the price has not changed in the
5 market price, my margin has declined as a result of that
6 and I've had to go back to the supplier and find other
7 ways to do that. So, you know, additional promotions,
8 marketing support, you know, a volume incentive to take
9 account for the new volumes and, therefore -- but the
10 cost price has gone up but the retail price in the
11 market place has stayed exactly the same.

12 **Q.** Can we explore that for a moment. Can I just clarify,
13 what you're talking about now is you accept a cost price
14 increase, you go up yourself, the market doesn't move,
15 you come back down and then you go back to the processor
16 and seek to get monies back, effectively, by other
17 means. Is that what you're talking about?

18 **A.** That could be one of the routes we do.

19 **Q.** Let's assume that that is. What you're suggesting is
20 that then you would go back to all the processors, with
21 whom you had just agreed to pay £200 per tonne more, for
22 the particular purpose of that money being paid back to
23 the farmers, and ask them for some effective alleviation
24 by some volume discounts or other payments, the basic
25 cost price stays the same but some form of discounts or

1 rebates or promotional deals which would effectively
2 lower your cost price. That's what you're suggesting,
3 is it?

4 **A.** Not in all cases but in some cases that is exactly what
5 would happen.

6 **Q.** You're saying that's what would have happened in this
7 case once you'd accepted the £200 per tonne cost price
8 increase and accepted it from all the processors?

9 **A.** That wasn't my decision. That would have been Lisa's
10 accountability to -- under the support of myself and Rob
11 to help her achieve her profit targets, so she might
12 have chosen to do something else, to deliver her profit
13 in a different way that she may have -- for example,
14 where she may have done more promotions on products that
15 have a higher margin and therefore the mix of those
16 sales compensates for those things. That would be her
17 responsibility, not mine --

18 **Q.** Are you suggesting that she could have recouped the £200
19 per tonne on every tonne of cheese supplied by every
20 supplier that you had just agreed to pay?

21 **A.** Well, I give -- a practical example of that is when we
22 had a cost price increase on milk and the price didn't
23 go up in the market a couple of years before and,
24 therefore, we had to live with the fact that it had an
25 impact on the margin. I think the figure was probably

1 £20/£25 million, if I recall the figure correctly, and
2 therefore the category had to live with that
3 20/25 million challenge and had to find different things
4 to recover that.

5 **Q.** Can I ask the question again. Are you suggesting that
6 she or you could have recouped the £200 per tonne on
7 every tonne of cheese from every supplier which you had
8 just agreed to pay?

9 **A.** No, that would be unlikely.

10 **Q.** What I'm going to suggest to you, this idea that this
11 would have alleviated is just entirely inconsistent with
12 what was going on. The processors could not afford to
13 allow you to go back on your acceptance of the £200 per
14 tonne because then they wouldn't be able to pass back
15 the 2p per litre to the farmers. If you started eating
16 away and saying, "Well, of course, Dairy Crest, I accept
17 that I've agreed to pay £200 per tonne upfront but give
18 me 60 of that back through promotions --" I don't know,
19 I'm just plucking a figure out of the air and possibly
20 to your benefit because I would suggest it wouldn't be
21 remotely even that, but let's say, "Give me £60 per
22 tonne on all your lines back in terms of rebates", that
23 would have completely undermined the entire initiative
24 because net the processors would be receiving £140 per
25 tonne and the objective of passing through back to the

1 farmers would not be achieved?

2 **A.** No but the working assumption at the time from my team
3 was that this money was held within the processors'
4 margins because the price had dropped off and the money
5 was sitting there, so why would Tesco accept a cost
6 price in its first instance? So what Lisa may well have
7 done is accepted some price increases on certain
8 products but she may not have accepted it on other
9 products because her profitability with that supplier or
10 what they were doing, something else, might have allowed
11 her not to take a blanket approach.

12 **Q.** There is no suggestion at all in any of the
13 documentation relating to the initiative that the
14 processors would allow the extra revenue coming from
15 them, from the £200 per tonne, to be reduced by these
16 volume discounts or rebates which you are now
17 suggesting, is there? There's no suggestion in any of
18 the documentation?

19 **A.** No, but common business practice and negotiating with
20 suppliers would result in, you know, quite often cost
21 prices going up, cost prices coming back down,
22 negotiating for advertising fees. It's a regular form
23 of negotiation that would take place on a basis.

24 **Q.** But Mr Scouler, this was not remotely a regular
25 occurrence, what was happening in autumn 2002, was it?

1 **A.** No, it wasn't.

2 **Q.** No, it was highly unusual. Can you think of any other
3 occasion when you negotiated with every one of your
4 processors at the same time for a unifying cost price
5 increase across all your products?

6 **A.** You're making -- sorry, I think the assumption has been
7 made that every single supplier had a price increase of
8 £200 per tonne and I'm not sure that would be the case.

9 **Q.** I think the general assumption so far has been that that
10 was what it was. Obviously, if it wasn't, it can be
11 found out.

12 You see, I'm suggesting to you that this additional
13 monies idea, of a way of alleviating your having to come
14 back down, just makes no sense in the context of what
15 was going on at the time and it wouldn't have happened.

16 **MISS ROSE:** I'm sorry to interrupt, but just to recall, the
17 only evidence in this case relates to two of Tesco's
18 suppliers, namely Dairy Crest and McLelland, and I'm
19 concerned at the way this is being put.

20 Can I also put on the record that the figure of
21 90,000 tonnes of cheese is not British cheese, it's all
22 cheese, and it includes the bulk cheddar, much of which,
23 as we've heard, was not British cheese. I'm asking to
24 be supplied with a more appropriate figure but I don't
25 have it at the moment.

1 **LORD CARLILE:** No, the figure I recall was, in money,
2 £280 million worth of cheese, but I think that was all
3 cheese as well.

4 **MR MORRIS:** No, retail sales was 212, I think, on British
5 lines, 212 million.

6 **LORD CARLILE:** Right, well there certainly was --

7 **MR MORRIS:** Can I just say on that issue, sir, that we are
8 endeavouring to get some agreed facts on it, and
9 I hope -- I'm sure both sides will do that, and we'll
10 make the distinction if we can between British and
11 nonBritish. The figure I used, I used illustratively.

12 **LORD CARLILE:** We'll look forward to some agreed facts.

13 **MR MORRIS:** Yes. If I might invite the Tribunal -- the last
14 time the Tribunal made such an observation, it did the
15 trick.

16 **LORD CARLILE:** Absolutely. Let's do it again.

17 **MR MORRIS:** Yes.

18 I'm putting to you that any of those additional sums
19 that you talk about would eat into the £200 per tonne
20 which they needed to pass back to the farmers and, for
21 that reason, would not have happened?

22 **A.** I don't know the facts supplier by supplier so I can't
23 comment. I would be surprised if we didn't go back as
24 a commercial team and try and negotiate other ways to
25 mitigate potential profitability losses.

1 Q. You make no mention of this issue in any of your witness
2 evidence, do you? This negotiating --

3 A. I'm trying to respond to the question, sorry, rather
4 than -- I'm trying to respond to the questions as
5 opposed to...

6 Q. Is there any reason why this issue wasn't canvassed in
7 your witness evidence?

8 A. I'm trying to be helpful. I'm trying to endeavour to
9 answer the questions that you're putting to me, sorry,
10 that's what -- I'm endeavouring to do my best to try and
11 present the situation as I saw it.

12 Q. So what I'm suggesting to you is that you would not have
13 agreed to accept that £200 per tonne cost price increase
14 across the board without at least having some comfort
15 that your competitor retailers would also increase their
16 retail prices?

17 A. I would never have -- I wouldn't ever have the word
18 "comfort" because it's such a volatile market. If I put
19 a price increase in there I'd have no comfort knowing
20 that they would either match or respond. I would hope
21 they would match or respond in a period of time but I'd
22 never be confident that would happen.

23 Q. I'm suggesting to you that you would only accept it if
24 you could have sufficient confidence that your
25 competitors were also going to increase their prices as

1 well?

2 **LORD CARLILE:** If it was your knowledge that everybody was
3 going to have to pay the increased price for milk, so
4 everybody was in the same boat so far as cost price was
5 concerned, would you have drawn any assumptions from
6 that as to what would happen to retail prices in other
7 people's stores?

8 **A.** Yes. If we look at what happened on liquid milk, where
9 we had accepted a cost price, you would make the
10 assumption that everybody else had received the same
11 cost price. But the truth is that in this job, this
12 industry, you never know whether you've negotiated the
13 better price, the worst price or whatever, because
14 that's the sort of slightly challenging nature of being
15 a buyer, is you never know whether you've negotiated the
16 best price for your business or the worst price for the
17 business.

18 But going back to the question, the subject about
19 £200 increase across all cheeses, you would assume that
20 the other retailers would have to raise their price at
21 some stage because they would be under similar financial
22 challenges that we would be under.

23 **LORD CARLILE:** You would make that assumption, would you?

24 **A.** Not in all cases because you could, you know --
25 depending on the dynamics at the time, because some

1 retailers may be having a more successful period of time
2 and therefore their sales are up, they're not chasing
3 profits so much and, therefore, they may accept the cost
4 price without moving the retail price, because, to refer
5 you to my slightly earlier answer which says, look, that
6 category could be doing very well and therefore it could
7 afford to absorb certain things at certain times, so
8 I think it works case by case.

9 **Q.** Can I, just for the record, in response to Miss Rose's
10 observation about the number of cheese lines that were
11 being subject to the £200 per tonne, just for the
12 record, Day 8, page 53, lines 17 to 21, Lisa Oldershaw
13 is asked:

14 "This is the period when you were heavily involved
15 in the £200 per tonne price increase in respect of all
16 your cheese lines; that's right, isn't it?"

17 And she said "Yes". So we would suggest that the
18 increase was across all the lines.

19 We also know, don't we, that she was writing to six
20 of her processors about it saying that she'd accepted
21 it, but we'll move on if we may.

22 Can I go to the Tesco Dairy Supply Group meeting
23 now. You deal with this at paragraphs 45 to 72 of your
24 witness statement, which is in bundle 2A [Magnum]. It
25 may be worth having that open.

1 I'm not going to -- have it open, I think is the
2 answer, and we will probably dip in and out as best we
3 can.

4 You're aware, I'm sure, that there are four sets of
5 notes made of this meeting, made either at the time or
6 nearby. If you have the document bundle open at the
7 same time next to you, and perhaps have it open at
8 number 12, this is --

9 **A.** For clarification, it's bundle number 4?

10 **Q.** No, I call -- no, I'm sorry, yellow spine is the
11 documents bundle. I think probably again, for your
12 comfort, you might want to put the other one to one
13 side, to your left, and just have the two open. I'm
14 grateful. Thank you. If you go to tab 12 [Magnum]; 12,
15 13 and 14 are the bundles (sic).

16 Just by way of background, the supply group was
17 a forum for all those in the supply chain, that's right,
18 isn't it? I don't really -- if I can just ask you some
19 general questions. The idea for it had been set up some
20 time before?

21 **A.** Yes, the forerunner of it had been sort of meat clubs
22 and produce supplier clubs, it had worked in other parts
23 of the business, so the suggestion we should try and
24 roll it out into the dairy category.

25 **LORD CARLILE:** Yes, we heard earlier that this was modelled

1 on the meat clubs.

2 **MR MORRIS:** The original proposal had come from Rob Hirst,
3 I think?

4 **A.** No, the original proposal had come from Dido Harding,
5 who was the boss at the time who had heard the good work
6 that had been done in the meat clubs, and that, for
7 dairy, we might want to try and follow a similar model.

8 **Q.** Thank you.

9 Now just as to who was at the meeting, from Tesco
10 you and Rob Hirst attended?

11 **A.** That's correct.

12 **Q.** And there was a junior person who attended, people seem
13 to recall; is that fair, do you recall that?

14 **A.** I'm unclear. There may have been a junior person there
15 but I don't remember at the time.

16 **Q.** There were about 30 or 40 people you say were there, and
17 there were farmers and suppliers?

18 **A.** Yes, that's correct.

19 **Q.** And there were suppliers who didn't supply you?

20 **A.** Yes, that's correct.

21 **Q.** I think Glanbia might have -- I think Glanbia were
22 represented and they didn't supply you at the time.

23 Or maybe they weren't.

24 You say you took no notes of the meeting yourself?

25 **A.** That's correct.

1 Q. Do you recall whether Mr Hirst or the junior person took
2 any notes?

3 A. I can't recall, I'm sorry.

4 Q. Can I ask you this, do you recall whether there was
5 actually a conscious decision not to take notes?

6 A. No, not at all. I wish we were that organised.

7 Q. Would it be fair to say that your recollection of the
8 events of the meeting is at this time, obviously with
9 the time that has elapsed, is partial?

10 A. I think that would be fair.

11 Q. In your witness statement, you say you can recall
12 certain parts and then you say you can't recall other
13 parts?

14 A. That would be fair.

15 Q. Now, you've been referred to the notes of the meeting,
16 the various notes. I think it's also fair to say that,
17 in your witness statement, what you're doing is
18 disputing the OFT's interpretation of what is written in
19 those notes?

20 A. Yes.

21 Q. So if you, for example, go to paragraph 55, line 3
22 [Magnum], "I disagree with the interpretation"; 58, line
23 2 [Magnum], "I disagree with the interpretation"; 67,
24 line 1 [Magnum], "I disagree with the interpretation".

25 So you're not saying that the contemporaneous notes

1 are not an accurate record by the person who wrote them
2 of what they believed was said at the time?

3 **A.** They may -- to the best of their knowledge they may have
4 taken -- you know, their best recollection of the notes
5 that they had taken at the time may have misinterpreted
6 things, there was a lot of people in the room, and -- or
7 may have done a good factual job. I can't speak on
8 behalf of their notes.

9 **Q.** The original idea for the meeting might have been for
10 a general open forum for discussion of dairy industry
11 matters, but I suggest to you that, by the time of the
12 meeting, the main topic was the 2p per litre farmgate
13 price rise?

14 **A.** Yes, that was one of the key things that was discussed
15 at the meeting.

16 **Q.** Well, I'll put the question to you. I would suggest to
17 you it was the main topic, not just one of the things
18 that was discussed, it was the main topic.

19 **A.** I'm not sure how you define "main". To try and help,
20 I think it was probably the strongest topic of all the
21 topics they were discussing, if that helps a bit.

22 **Q.** You also seem to -- paragraph 51 of your witness
23 statement [Magnum]:

24 "Because the timing of the meeting coincided with
25 the growing concerns about the unsustainably low

1 farmgate prices several participants at the meeting,
2 especially the farmers, were anxious to talk about their
3 problems."

4 Now, are you there suggesting that it was the
5 farmers and others who were there who first raised the
6 issue of the 2p per litre farmgate price?

7 **A.** No, sir, because we had raised it in the press release
8 earlier and had made a statement about the fact that
9 we'd called on processors. At that time there was
10 a general understanding that the farmers were looking
11 for an increase of -- well, some farmers were actually
12 looking for an increase of 4p to restore profitability,
13 but the recognised industry figure that the farmers
14 needed against the price they were paying was 2p more to
15 get to that.

16 **Q.** What I'm suggesting to you is that it was Tesco's idea
17 to raise this issue at the meeting -- that you raised it
18 right at the outset, rob Hirst in particular?

19 **A.** Rob did obviously talk about it in his introduction.
20 Because it was such a big statement it would be -- it
21 would be seen to be wrong not to have referred to it.

22 **Q.** If you go to document tab 13 [Magnum], this is in the
23 documents bundle, this is the note made by Arla. The
24 first heading is "Tesco" and the items are listed. It's
25 all about the farm price being too low.

1 **A.** Can I just check my understanding, is that the document
2 which has F, and then a little line underneath that says
3 "Tesco":

4 "Notes from Tesco Milk Supply Group, Holiday Inn
5 Heathrow"?

6 **Q.** Yes. I can't see the F, but it's a single page
7 document, yes. You have the names of the companies
8 represented and then you have:

9 "Tesco concerns expressed at the last meeting that
10 the farm price was to low."

11 "Too" is wrongly spelt. You are with me on that?

12 **A.** Yes, I've got it, thank you.

13 **Q.** I'll read that in a moment.

14 By this time of the meeting, the fresh liquid milk
15 price had gone up, that's right, isn't it?

16 **A.** Yes, it had.

17 **Q.** I'm suggesting the real issue was how was the initiative
18 to be extended beyond fresh liquid milk to other dairy
19 products?

20 **A.** Yes.

21 **Q.** What I'm going to do, I'm going to put to you a number
22 of propositions about what happened at that meeting and
23 see if you can agree with what I put to you.

24 The first proposition is that a price increase on
25 other dairy products, including cheese, was discussed at

1 the meeting?

2 **A.** Yes.

3 **Q.** The second proposition is a possible increase in the
4 retail price for cheese was discussed at the meeting?

5 **A.** It was discussed in the context that, if a cost price
6 and a retail price went up, that would make cheese
7 products from the UK potentially uncompetitive against
8 international imports.

9 **Q.** I think the answer to my question, which was a general
10 question, is yes? A possible increase in the retail
11 price for cheese was discussed at the meeting?

12 **A.** I apologise if I'm, sorry, deliberately hesitant.
13 I would say it was -- yes, in the way to try and create
14 more value, how do you charge a higher premium for
15 UK-based products.

16 **Q.** So your evidence is that it wasn't discussed in the
17 context of the 2p per litre at all?

18 **A.** No, that would be wrong. No, it would be. It would be
19 referred to.

20 **Q.** Thank you. The third proposition is this, Tesco
21 indicated at the meeting that it was contemplating
22 increasing its own retail prices for cheese?

23 **A.** I don't recall that being said. It may have been said
24 but I don't recall that being said.

25 **Q.** So it's possible it was said?

1 **A.** I don't recall it being said.

2 **Q.** The third proposition is that Tesco indicated that it
3 would be willing to raise its own retail prices only if
4 it could remain competitive with its competitors
5 including Asda?

6 **A.** I don't recall that being said.

7 **Q.** I would suggest to you -- I'll put it this way. Is it
8 possible that it was said?

9 **A.** I would be surprised if it was said.

10 **Q.** Can we go to the Express note at 1/14 [Magnum].

11 **LORD CARLILE:** Tab 14.

12 **MR MORRIS:** It's my 1 again. Document 14. Tab 14. I'm
13 just going to read the passages to you. On the third
14 page, it's the second piece of paper which is headed
15 "How is money passed back through the likes of
16 DFOB/First Milk?"

17 Have you got that page? It's on the right-hand
18 side; I think it's that one that you're looking at
19 there. See it? Or maybe not. No, go back. It's the
20 second piece of paper in tab 14. I'm looking for
21 a piece of paper that starts:

22 "How is money passed back through the likes of
23 DFOB/First Milk?"

24 **A.** Yes, I've got it. Thank you.

25 **Q.** Then you have the heading "Discussion":

1 "R Hirst -- go back 4/5 weeks view coming back to
2 Tesco was that come October current farmer milk prices
3 would perhaps be difficult to hold at even the current
4 low levels. A poor summer for farming and winter
5 prospects therefore very difficult. This contrasted
6 with Tesco's view in March that there may have been an
7 easing upwards of prices in October. Tesco did not want
8 a repeat of the problems of 2000 and Tesco wanted to do
9 something plus they were concerned about the knock-on
10 effect on animal welfare standards and did not want to
11 see it 'go down the pan'."

12 There you have a recognition that, by October,
13 farmer prices for milk were low and the problems in 2000
14 were the problems with the FFA. You would presumably
15 agree with that? And Tesco wanted to do something about
16 it, okay? That's what Rob Hirst is saying there. Would
17 you agree with that?

18 **A.** Yes.

19 **Q.** Then if we read the next paragraph:

20 "Challenge to processors was that Tesco wanted to
21 see a better return to farmers and the decision
22 therefore taken..."

23 Now, can I pause there, I suggest to you that the
24 words "decision therefore taken" is a decision by Tesco
25 taken.

1 "... to facilitate a price increase back to the
2 farmer (this kind of action probably won't be repeated).
3 All retailers have moved except for Safeway (internal
4 price problem but down to Safeway to solve)."

5 Now, at that stage, they're talking about Tesco's
6 decision to facilitate in relation to a price increase
7 of liquid milk, would you agree with that?

8 **A.** Yes, I would.

9 **Q.** Then it says:

10 "The challenge to processors was to put 2 [pence per
11 litre] on all milk but recognising that supermarket milk
12 is only 25% of total."

13 That is the figure that -- probably where I got it
14 from -- we referred to earlier.

15 "Want processors to settle this quickly with farmers
16 so that they are confident going into the winter."

17 Now, that sentence recognises -- Rob Hirst
18 recognises there that the rise in liquid milk prices
19 will not be sufficient to meet the 2p per litre; that's
20 right, isn't it? The challenge to processors was to put
21 2p on all milk --

22 **A.** Yes, it was.

23 **Q.** Then it reads:

24 "The price since March has dropped 3.25ppl and
25 processors are therefore expected to help in achieving

1 the price increases. Fresh milk was the easiest to
2 start moving forward and Tesco [is] looking to
3 processors for a response in the next two weeks. Accept
4 that it is a complex situation but liquid simplest to
5 kick start and Tesco now looking at other areas."

6 What I'm suggesting there is that Rob Hirst is there
7 clearly referring to action to be taken in other dairy
8 products including cheese. Liquid milk has been the
9 easiest to start, the other areas are complex and those
10 other areas include cheese?

11 **A.** All of my interpretation of that would read as
12 a reminder to the broader group that the actual price
13 that was being paid to farmers had dropped by 3.25 and
14 that it was in the responsibility of the processors to
15 pass that back to the farmers. I think that's --

16 **Q.** I see why you're saying that about the first sentence.
17 I accept that that's the "expected to help". By all
18 means say what you wish to say but the proposition that
19 I'm asking you is that, he was asking processors to come
20 up with a way to make a similar price increase for other
21 dairy products?

22 **LORD CARLILE:** Choose a moment, Mr Morris.

23 **MR MORRIS:** I'll ask that question and perhaps ask for an
24 answer and then I'll pause if I may.

25 Do you want me to repeat the question?

1 **A.** Please.

2 **Q.** Rob Hirst was asking the processors to come up with
3 a way to make a similar price increase, the increase
4 that had happened on liquid milk, for other products
5 including cheese? "Looking to processors for a response
6 in the next two weeks"?

7 **A.** At the time -- as I interpret that note, what he's
8 clearly stating, and it had been his opinion, is that
9 this is in the processors'/suppliers' margins and they
10 needed to pass this back to the farmers.

11 **Q.** The words, "Tesco now looking at other areas", what do
12 you think that means? I'll put it this way, I would
13 suggest that Tesco are looking at products other than
14 milk?

15 **A.** Yes, I think "Tesco now looking at other areas" is now
16 looking at it to say what are the other companies who
17 are involved in the production of milk? So I remember
18 having another discussion, I think around about that
19 same time, about milk powder that was being purchased by
20 Nestle, one of the biggest suppliers and, you know, what
21 other sectors are involved? So this is not just broadly
22 within Tesco, this is a bigger broader issue than just,
23 you know, Tesco.

24 **Q.** I'm suggesting that the words "other areas" means other
25 areas than liquid milk. If you just accept -- ie cheese

1 and -- I'm sure it was butter and other things, things
2 other than liquid milk. "... Liquid simplest to kick
3 start ... now looking at other areas." You'd agree with
4 that, would you?

5 **A.** Well, I'm not sure. I didn't write the notes so I can't
6 have an opinion(?).

7 **MR MORRIS:** All right. I think...

8 **LORD CARLILE:** Right. Don't discuss your evidence during
9 the adjournment with anyone.

10 **A.** Yes, sir.

11 **LORD CARLILE:** We'll rise today at 4.30. I want to raise
12 something but you go next, Miss Rose.

13 **MISS ROSE:** The question I simply wanted to ask was, can we
14 have an indication of how we are progressing and how
15 long Mr Morris expects to continue cross-examining this
16 witness for?

17 **LORD CARLILE:** Can you assist?

18 **MR MORRIS:** I will try. We are progressing reasonably well.
19 I would hope to finish today. Perhaps I can give you
20 a better idea at 2 o'clock. Sir, I will endeavour to do
21 so, I think everybody would like that to happen. I have
22 a certain amount of area -- I'm not quite halfway
23 through my notes. That's where I'm at.

24 **LORD CARLILE:** Thank you.

25 **MR MORRIS:** We did start at 10.45.

1 **LORD CARLILE:** Yes, I understand that.

2 I wanted to raise something which relates to the
3 matter I raised about evidence yesterday. I've been
4 refreshing my memory of section 4 of the Civil Evidence
5 Act 1995, not because it necessarily applies directly to
6 this Tribunal but because we have to find templates
7 somewhere if we can. The OFT have relied on
8 a considerable amount of documentary, strictly speaking,
9 hearsay and I and my colleagues would find it helpful
10 if, when counsel come to make their final submissions,
11 we're addressed on the extent to which we should take
12 into account the sort of criteria that are listed in
13 section 4.

14 We have in mind that there are a number of
15 witnesses, and I cite particularly Mr Meikle, Mr Arthey
16 and Mr Hirst, who have not been called to give evidence.
17 Reading section 4, it may be a reasonable question from
18 the Tribunal as to why those witnesses were not called
19 to give evidence because the answer to that question may
20 help us to assess the way in which we deal with
21 cross-examination founded on documents written by those
22 witnesses. I hope that's reasonably clear.

23 **MISS ROSE:** Yes, sir, and indeed we will certainly be
24 dealing with that issue.

25 **LORD CARLILE:** I thought you might or I was sure you would

1 but I would like both sides to deal with that issue,
2 please.

3 **MR MORRIS:** Very well. Thank you.

4 (1.05 pm)

5 (The short adjournment)

6 (2.00 pm)

7 **MR MORRIS:** We were looking at document 1/14 I think,
8 document 14 in the bundle of documents you have
9 [Magnum]. We were on the second sheet on the third
10 page. Your evidence at paragraph 58 [Magnum] of your
11 witness statement, it's dealing with the passage --
12 perhaps I can go -- have both paragraph 58 and the
13 document open. If you would go to the document first,
14 I'm going to take you to the passage which starts
15 "Cheese and spread values", which is at the bottom of
16 that page we've just been looking at.

17 Please by all means read that, perhaps to yourself,
18 and then I'd like to just take you to your witness
19 statement.

20 (Pause)

21 If you then go perhaps, just for completeness, to
22 paragraph 56 of your witness statement [Magnum], you set
23 out:

24 "The OFT says that Mr Hirst gave a clear and direct
25 indication that Tesco was contemplating increasing its

1 prices."

2 Then it sets out that paragraph that you have just
3 read, and then there's another little bit about other
4 extracts. Then in 58 [Magnum] you say:

5 "I don't recall discussing. I disagree with the
6 OFT's interpretation."

7 Then if you look at the middle part of paragraph 58,
8 I'm just picking up your evidence, you say:

9 "He [that's Rob Hirst] definitely did not say that
10 Tesco was going to increase its retail prices, whether
11 just on Tesco Value cheese products or on cheese lines
12 more generally, or even that Tesco was contemplating
13 increasing its cheese lines."

14 So your evidence is that he didn't give any
15 indication that Tesco was going to or contemplating
16 increasing its retail price. The OFT's case is that the
17 evidence shows clearly that Mr Hirst did indicate that.

18 If we go back to the "cheese and spread values"
19 paragraph, which everybody -- we've all looked at quite
20 a lot. The first point I want to put to you is this, is
21 that the reference to "cheese and spread values" in the
22 first sentence is a reference to prices generally and
23 not to Value products.

24 Before you answer that question, you might care to
25 look at the rest of the paragraph where the word "value"

1 is used in the first line, and then "value products" in
2 the third line between quotation marks, and "price
3 problem" in the fourth line, "dairy victim of shopping
4 basket values very difficult to move".

5 So what I would suggest to you is that where Value
6 products are being referred to, Value, they are in
7 quotation marks, but actually the reference to values,
8 cheese and spread values and basket values is
9 a reference to prices generally? Would you agree with
10 that?

11 **A.** No. The reason why I don't agree with that is that
12 values, as in "cheese and spread values", is not an
13 expression that I would have heard of or used in Tesco.
14 Value is very clearly what Value is in Tesco language,
15 which is about Value ranges. That's why I drew the
16 conclusion in my witness statement to suggest that it
17 was cheese and spread Value lines as opposed to the
18 broader interpretation, as I understand it, about values
19 markets.

20 It's not a phrase that you'd heard using around
21 Tesco, "values", it's not a -- it's more about Value
22 product.

23 **Q.** In a sense it's:

24 "Cautiously optimistic that Tesco can now start to
25 move retail prices forward in this area but Tesco still

1 needs to sell 'value products' ..."

2 I would suggest that the "but" is used in
3 contradistinction to the first part of the sentence, and
4 that what the note records as being said is that
5 Rob Hirst is cautiously optimistic that Tesco can start
6 to move retail prices forward in cheese and spreads
7 generally.

8 **A.** My impression from reading the document would suggest
9 that cheese and spread Value lines had got to such --
10 had been and had at times got to such historical lows
11 that they'd get practically -- a phrase that we'd use is
12 something called insult pricing, that you would maybe
13 see a packet of cheese spread for 10p and you'd think
14 how can you possibly make any money out of that, or
15 whatever.

16 That's why I take the comment and think that he
17 referred to, to the best of my knowledge, cheese and
18 spread Values.

19 **LORD CARLILE:** Does this appear in any of the other notes?

20 **MR MORRIS:** That's the point I'm about to -- the reference
21 to "value products" does not appear in the other notes,
22 but the reference to "cautiously optimistic" does.

23 If I can just take you to document 13 [Magnum], if
24 I can put these two bits of the notes to you and then
25 perhaps ask you to consider your understanding. If you

1 go to document 13, you've seen at 14 the words
2 "cautiously optimistic" which we've just looked at. At
3 document 13, page 1, under the heading "Discussion",
4 second bullet point:

5 "Tesco/processors cautiously optimistic that there
6 is a mood to address the problem with cheese."

7 I would suggest to you that there's no reference --
8 there's no separation out within that sentence of Value
9 products as a separate sub-category.

10 If you then go back again to document 12 [Magnum],
11 and you will either have a manuscript or a typed-out
12 version, I think in your witness statement you attached
13 a typed-out version and it may be worth having a look at
14 that.

15 What have you got at the beginning of tab 12?

16 **A.** Unfortunately I just have the --

17 **LORD CARLILE:** Manuscript.

18 **A.** Manuscript, yes.

19 **MR MORRIS:** You've just got the manuscript, fair enough. If
20 you go to the first page of the manuscript, you'll see
21 something which says -- a number of -- in the left-hand
22 margin, the word "bottle", it looks like "bottle".

23 I think it is "bottle" actually. Are you with me?

24 **A.** Yes.

25 **Q.** If you then go four or five lines down or four or five

1 bullets down, it says, and your witness statement, I
2 think, in the transcription says:

3 "Mood to see [and then arrow upwards, so I would say
4 "increases"] in other products butter/cheese."

5 Have you got that sentence?

6 **A.** Yes, I've got that sentence.

7 **Q.** What I put to you is that those two notes record the
8 fact that Mr Hirst said there was a mood to see an
9 increase in butter and cheese generally, or cautiously
10 optimistic that there is a mood to increase, and that he
11 was not, when he was talking about cautiously optimistic
12 to move retail prices forward, he was not limiting
13 himself to Value products.

14 In the light of those two notes, would you agree
15 with that proposition?

16 **A.** My interpretation of the documents that I see is my
17 belief he was referring to cheese and spread Value lines
18 as opposed to the broader cheese and butter range that
19 may have been discussed.

20 **LORD CARLILE:** I should have asked my question more
21 precisely, Mr Morris, but is there any reference in the
22 other notes to the striking expressions, "crashed over
23 the last three years" and "Tesco selling at a loss"?

24 **MR MORRIS:** No, I don't think there is.

25 **LORD CARLILE:** Okay.

1 **MR MORRIS:** Can I put this to you, even assuming that you're
2 right -- and you don't remember -- you're interpreting
3 the notes, you don't have a recollection one way or the
4 other?

5 **A.** No, I'm interpreting the notes.

6 **Q.** Even if he was talking about Value products only, then
7 the note at 14 [Magnum] is an indication that Tesco can
8 start to move retail prices on Value products, he's
9 optimistic that they can?

10 **A.** Not necessarily, I would say that what he was
11 highlighting was that the Value products in our range
12 are -- the price is so low on them, it gets to the point
13 that there just doesn't become any common sense to
14 either price them at that bracket(?), and the market
15 readjusts in the next six months, or whatever happens,
16 and the prices return to normal. Because they crashed
17 over a length of period, I believe what he's
18 interpreting here is the cheese and spread.

19 **Q.** If this note is right, and you are right on what the
20 word "value" means, this note records the fact that
21 Mr Hirst gave an indication that Tesco was going to be
22 able to move its Value products up, doesn't it?

23 **A.** I don't think he went as far as to say "We're going to
24 move our Value products up". But if you look at the
25 economics, then it would believe that there must be

1 a desire in the market place that those prices may well
2 rise, and I think if you were to suggest to a group of
3 farmers in the audience that there was never going to be
4 a price increase and that these Value products would
5 always be priced at this, it would be pretty difficult
6 for farmers to stomach, I would suggest.

7 **Q.** If he said, "I am cautiously optimistic that I can now
8 start to move Value products up", he would be giving an
9 indication that he would be moving up, or was
10 contemplating moving those products up, wouldn't he?

11 **A.** Factually, as you've described, yes.

12 **Q.** If he gave that indication, that in itself would be an
13 important indication because it would indicate that
14 other cheese product categories would also be liable --
15 likely to move up?

16 **A.** No, because again if I take you back to the meeting, and
17 the audience that was in that meeting, there was
18 a selection of farmers and processors. The one thing
19 that you wouldn't say to them is either, "I'll accept
20 a price increase", or "I wouldn't accept a price
21 increase", because if Rob was to stand up there and say,
22 "I'll take a price increase on cheese", I think if I was
23 a farmer, I'd be saying to my processor, "These Tesco
24 people are supposed to be tough and you don't get any
25 deals from them, now this man has stood up and said

1 he'll take a price increase from you and that's not how
2 I understand the situation". So I think we were very
3 cognisant of the audience that we were there, very clear
4 to be making sure that we were not being drawn on
5 anything.

6 **Q.** The reason I ask that question is because Value is or
7 was your economy range?

8 **A.** That's correct, sir.

9 **Q.** And you had different quality categories?

10 **A.** Yes.

11 **Q.** You had Value, you had standard own label and then you
12 had I think named creamery and Finest?

13 **A.** That's correct.

14 **Q.** The price position of Value is and was very important to
15 Tesco, presumably?

16 **A.** Yes, it is, and is today as well.

17 **Q.** What I suggest to you is that it was important that you
18 would keep sort of relative differentials between Value
19 and other ranges, so you wouldn't want Value and
20 standard own label to be priced close to each other
21 because it would defeat the whole purpose?

22 **A.** Well, the reality is in the market place they are in
23 some categories because you have different bench marks
24 for different products and, you know, we may have chosen
25 to benchmark a price against another comparable product.

1 If I may explain, we have a kitchen process in Tesco
2 when we buy competitor samples and we look at the
3 samples, we break them down and we compare those
4 products to those products. Therefore, from
5 a commercial perspective, it's your job, after doing an
6 analysis of the product in the kitchen, to match the
7 correct product. So sometimes what happens is you could
8 be matching a Marks & Spencer product, but because their
9 product quality is comparable, and you've chosen to
10 actually charge slightly more than that, and the
11 differential between that and the brand can actually be
12 quite narrow, therefore it looks sometimes illogical to
13 the customers. They see a range of products and they
14 think, well, if that's 10p, why is that not?

15 The principle of the hierarchies is correct, as
16 Mr Morris suggests, but in practice it's quite different
17 because of the different rules that apply.

18 Q. Could you just go over the page, and bottom of -- I'm
19 back in document 14 [Magnum]. Right at the bottom, the
20 last R Hirst comment on the back of the page you've been
21 looking at:

22 "Looking at other dairy segments £1,850/tonne for
23 cheese can't be right but how can the price be moved
24 forward? Recognition that prices paid next
25 January/February for mild cheddar could reflect change

1 in milk prices now."

2 I put to you that that is a further indication of
3 Rob Hirst indicating that he wants the price to move
4 forward, ie up? That's for cheese generally, that's not
5 Value products, is it?

6 **A.** No, but I -- I've sort of gone back to the principle of
7 saying he was trying to be empathetic towards the
8 farmers, I think recognised in the public domain, cheese
9 prices were quoted at the cost -- as I was shown earlier
10 this morning on those charts, that £1,850, if you take
11 production costs, doesn't feel like it's quite
12 a difficult price to be charged. But that was the
13 nature of the market at the time, sir.

14 **Q.** In paragraph 58 of your witness statement [Magnum], you
15 say in the middle, just before the sentence "He
16 definitely did not say", you say:

17 "Rob may well have said that he thought the retail
18 prices for Tesco was so low that they were likely to
19 start to go up again but would have been no more than
20 his general opinion of where the market was at."

21 I would suggest to you that the words we have been
22 looking at are not a general statement of where the
23 market was at, they are a statement of what Rob Hirst
24 was saying and an indication of what Rob Hirst was
25 indicating that he was contemplating doing?

1 **A.** I think, I go back to what I said a little bit earlier,
2 I apologise, but I think he's trying to accept the fact
3 that those prices are very low in the market place and
4 we have, as Tesco, as a big supplier, have to recognise
5 that those prices are very low at historical conditions.

6 **Q.** Yes, and when he says he's cautiously optimistic that
7 Tesco can now start to move retail prices forward, he is
8 giving information about what Tesco is contemplating,
9 isn't he?

10 **A.** No, I think he's referring to --

11 **Q.** Very well. He's not saying cautiously optimistic that
12 other people might start to move their prices, is he?
13 He's saying cautiously optimistic that Tesco can do so.

14 I've put the question and you're obviously not
15 accepting what I'm putting to you. Perhaps I can move
16 on.

17 Then the last part of that quote:

18 "The decision was taken on liquid milk because it
19 was:

20 "Highly visible."

21 Now, "the decision was taken on liquid milk", he's
22 talking about Tesco's decision there, isn't he?

23 "The decision was taken on liquid milk because it
24 was:

25 "Highly visible."

1 **A.** Sorry, could you just --

2 **Q.** I'm back on the "Cheese and spread values" paragraph.
3 Yes, I'm in the document, not your witness statement,
4 I apologise. I'm in the bottom quote on the second
5 sheet, right at the bottom of that page. I think it's
6 on the other side of the page. I think maybe go back
7 a page maybe. Yes, bottom right. Is that the "Cheese
8 and spread values" paragraph?

9 **A.** It is, sir.

10 **Q.** If you go to the last sentence:

11 "The decision was taken on liquid milk because it
12 was:

13 "Highly visible.

14 "Gave a big kick start to the process.

15 "But need to follow through on other markets."

16 The decision that's being referred to there is
17 Tesco's decision taken on liquid milk, isn't it?

18 **A.** Yes, that's right.

19 **Q.** And the "need to follow through on other markets" is
20 again referring to Tesco following through on other
21 markets?

22 **A.** I wouldn't necessarily interpret it like that.

23 **Q.** Not necessarily?

24 **A.** I'm trying to give an opinion, I'm trying to help, maybe
25 I shouldn't, but I'm trying to suggest that other

1 markets, as in other people within the industry, had to
2 do more than just Tesco.

3 **Q.** Can we go to paragraph 57 of your witness statement
4 where you deal with two other passages in these notes
5 [Magnum], 57 at the bottom. This may just deal with it
6 rather than going to the document:

7 "I have seen that the OFT also relies ... on similar
8 references in Arla's note: 'Tesco/processors cautiously
9 optimistic that there is a mood to address the
10 problem...'"

11 Then:

12 "'ask the customers to pay for it'."

13 I'm going over the page, are you with me? Then:

14 "The OFT relies ... [on] the Dairy Crest note to
15 'mood to see [increase] in other products ...
16 butter/cheese' and 'ultimately consumers pay'."

17 Now, I'm going to suggest to you that those passages
18 show two things. First, they show that generally what
19 was being discussed was retail prices, would you agree
20 with that?

21 **A.** With reference to the comment "Ultimately consumer
22 pays", yes, I would.

23 **Q.** Secondly, they show that all retail prices were being
24 discussed, by which I mean everyone. It was
25 a recognition that the initiative would require everyone

1 to move. "Ask the customers to pay", "ultimately
2 consumers pay", I would suggest to you is an indication
3 that what was being talked about was an across-the-board
4 retail price increase?

5 **A.** I can't remember that.

6 **Q.** Can I then deal with the fact that the notes record
7 discussion about imports and the red tractor scheme, you
8 recall that?

9 **A.** Yes.

10 **Q.** The red tractor scheme was a way of encouraging retail
11 customers to buy British cheese?

12 **A.** Yes, it was. I don't know if you've discussed the red
13 tractor scheme. At the time it was a farm assurance
14 scheme that provided a bit of branding for the cheese
15 product that looked like it was both UK-sourced and
16 passed farm standards and you might be able to --

17 **LORD CARLILE:** We've heard that it wasn't all UK-sourced.

18 **A.** Well, the Scottish NFU, for example, didn't approve it
19 and they didn't support it, so it was only appearing in
20 certain parts of stores and on certain products, it
21 didn't appear in a widespread area.

22 **MR MORRIS:** I would suggest to you that the farmers -- it
23 was a way to encourage them to pay higher prices for
24 British cheese?

25 **A.** No, it's just a way of potentially linking a value

1 associated with it and therefore consumers thinking
2 there was a premium to this product as a result of
3 better farm assurance and products sourced from the UK.

4 **Q.** I'm going to suggest to you that the reason this was
5 being discussed, in the context of a meeting where the
6 dominant topic was the 2p per litre increase, was that
7 if the initiative was going to be supported by an
8 increase in retail prices for cheese made from British
9 farmers' milk, then that would have to deal with the
10 problem that such a price increase might result in
11 imports of foreign-sourced cheese; that's right, isn't
12 it?

13 **A.** Yes, that would be right.

14 **Q.** What I'm suggesting to you is that the red tractor
15 scheme discussion was inextricably linked with the
16 discussions about the 2p per litre farmgate price
17 increase?

18 **A.** I would disagree with that, and the reason why
19 I disagree with that is that we had a broader discussion
20 about how do you command a higher premium for British
21 dairy products, and red tractor was one of the
22 discussions. The other discussion I remember was
23 a discussion around how do you add value to milk, and
24 there was a milk campaign which had -- ironically
25 running again now, the milk moustache -- and they would

1 say, how would you add some more value to the sector,
2 make people buy more of it?

3 It was a broader discussion about, okay, Tesco as
4 the biggest retailer, what can you do to sell more dairy
5 products, how can you charge a better premium for those
6 products and command it in consumers' minds? So it was
7 part of a discussion around how we did a better job with
8 the British products.

9 **Q.** Mr Reeves dealt with this issue in the context of the
10 Dairy Crest briefing document and at a subsequent
11 meeting. The question was put to him, I'm at Day 5,
12 page 97, line 19 --

13 **LORD CARLILE:** Sorry, which day?

14 **MR MORRIS:** Day 5, page 97, line 19:

15 "Question: You helpfully explain that the red
16 tractor label was to provide a quality mark for British
17 cheese and that it was to discourage people moving,
18 effectively, from British cheese if the price for
19 British cheese went up; that's right, is it?

20 "Answer: Yes, I think the farmers were looking for
21 support from consumers to buy cheese made with their
22 milk, and this would have been an easy way for consumers
23 to spot that the cheese was made with British farmers'
24 milk.

25 "Question: Now, the danger of imports being drawn

1 in, I think you've indicated, was because if there was
2 an increase on the retail prices for British cheese
3 there might be a move to the cheaper priced Irish
4 imports?

5 "Answer: Yes.

6 "Question: So all these concerns arise out of the
7 fact that Dairy Crest knew that, in order to get its
8 cost price increase ..."

9 Just to explain to you, this is the £200 per tonne
10 increase.

11 "... there would have to be an equivalent increase
12 on retail prices?"

13 "Answer: That's what we thought, yes. I don't
14 think we knew it but we thought it, yes.

15 "Question: So the discussion of the red tractor
16 logo was all about how to deal with any fall-out from
17 these price increases, the cost price increase and the
18 equivalent retail price increase?"

19 "Answer: Yes, and for our customers to demonstrate
20 a commitment to British products."

21 What I suggest to you he's saying there is that this
22 issue about imports was a potential risk arising out of
23 the £200 per tonne cost price and retail price increase
24 on British cheese; that's what he's saying there, would
25 you agree? That's what he was saying?

1 **A.** If that's what he's saying, that's what he's saying,
2 yes.

3 **Q.** Would you agree with the way he put it?

4 **A.** It may have come into the conversation, I can't
5 remember, for a second time. My memory says that it was
6 discussed as part of a discussion around how you added
7 a premium to the product to sell more product. So it
8 may have come back in the discussion at a subsequent
9 time but I can't remember, sorry.

10 **Q.** Very well. Can we look back at document 14 again. Back
11 to the "cheese and spread values", I hope this is my
12 last question on that.

13 The sentence on document 14, page 3, sheet 2

14 [Magnum]:

15 "Price problem in dairy victim of shopping basket
16 values and very difficult to move out of line with other
17 competitors but [Rob Hirst] senses there is a mood to
18 move some of these prices forward."

19 What Rob Hirst is recorded as saying there is that,
20 although Tesco would like to raise its retail prices, it
21 cannot move out of line. Would you agree with that?

22 **A.** It can move out of line. The policy allows you to raise
23 a price out of line otherwise we wouldn't be able to get
24 a price increase.

25 **Q.** But it was very difficult to move out of line, he said?

1 **A.** It's difficult to move out of line for a length of
2 period but you could move out of time (sic) for a length
3 of period. It would be difficult to be sustainably out
4 of line on a price -- on a product people bought
5 regularly.

6 **Q.** What I'm suggesting to you this sentence records is
7 Rob Hirst indicating that Tesco would like to raise its
8 prices and that they would do so if others moved?

9 **A.** As I interpret it, to me, he's highlighting how
10 difficult it is in a competitive market to move a Value
11 product because of the nature of the size and scale of
12 the product and, you know, a competitor reaction or
13 whatever that might be.

14 **Q.** If you go over the page to the bottom of the next page,
15 there's a note recording what you said:

16 "At the end of the day, we must be competitive
17 highlighting that they are up against Walmart's view of
18 lowering the cost of living for the world so how to
19 tackle other sectors. How is it more sustainable in the
20 next 12 months."

21 You deal with that at paragraph 60 of your witness
22 statement [Magnum]. At the bottom of the page, page 17:

23 "The OFT says that I indicated that Tesco's
24 willingness to increase its cheese prices was
25 conditional on its competitors also doing so.

1 I indicated no such thing. I do not recall making the
2 comment attributed to me in the Express note, but even
3 if I had it would have been no more than a statement of
4 the obvious. Everyone knew that Tesco's basket policy
5 was to match Asda's price in general. I was not making
6 any kind of conditional commitment."

7 So your evidence is you don't recall saying that,
8 and I'm suggesting to you that the note suggests that
9 even though you don't recall it, you must have said
10 something along those lines?

11 **A.** While I don't recall saying it, it wouldn't surprise me
12 if I had said that because, you know, at the time there
13 was a lot of discussions around money coming in from
14 Walmart to support Asda and their aspiration to take
15 a big market share in the UK. It was the most
16 competitive retailer that Tesco at the time had to
17 compete against. So while I don't recall saying that,
18 it may be feasible that I did say it.

19 **Q.** In paragraph 60 [Magnum] you say that -- I think you
20 said "even if I had", but let's assume you did. You
21 say:

22 "It's no more than a statement of the obvious based
23 on the fact that everyone knew Tesco's basket policy."

24 That's what you say, isn't it?

25 **A.** What I was trying to attempt to say, if that's what was

1 being said, was it's a broader discussion around how do
2 you compete against multi national retailers, it's
3 a very competitive market place.

4 **Q.** Yes, but as we discussed earlier, the basket policy
5 dictated what Tesco would do if Asda decreased its
6 prices but did not have anything to say about what you
7 would do if Asda increased its prices?

8 **A.** That would be right.

9 **Q.** Yes, and it was therefore far from obvious what Tesco
10 would do in circumstances where Asda moved its prices
11 up?

12 **A.** Yes, and I think, as I said earlier today, that
13 sometimes we would go up -- in fact on the majority of
14 occasions we would go up to match Asda, but sometimes we
15 wouldn't if we felt the profitability and the sales were
16 doing well on that line.

17 **Q.** What I'm suggesting to you is that from what you and
18 Mr Hirst said about Asda and what others would do, it
19 would have been clear to those attending that what you
20 meant was that Asda would be willing to go up if others
21 went up? Sorry, I apologise. That Tesco would be
22 willing to go up if others went up?

23 **A.** That's not what I intended to say by that statement,
24 I intended to say how competitive the market price was
25 played(?). I wouldn't -- in a group of that number of

1 people, or in any group, I would not suggest that we
2 would go up and match an Asda price.

3 **Q.** What I'm suggesting to you is that, by giving that
4 indication, you were not just making a statement of the
5 obvious but you were giving an indication to those
6 present, subtle or otherwise, that you would be prepared
7 to go up if Asda did?

8 **A.** That was not my intention.

9 **Q.** Put another way, it was a veiled commitment on Tesco's
10 part to pass back a price increase on cheese if the
11 other retailers, specifically Asda, also raised their
12 prices?

13 **LORD CARLILE:** Which passage are we referring to now?

14 **MR MORRIS:** The two passages I'm referring to are the
15 passage at the bottom of -- I'll call it page 4
16 [Magnum].

17 **LORD CARLILE:** I'm just slightly puzzled about the basis of
18 the proposition. We're looking at the J Scouler section
19 near the bottom of the second page --

20 **Q.** And the R Hirst section, both of them. The J Scouler
21 section about the indication, "at the end of the day we
22 must be competitive", highlighting -- in other words,
23 that there's already an indication given that Tesco was
24 contemplating a price increase, that's the first
25 indication. The second indication is, but, of course,

1 we always have to remain competitive with Asda. That is
2 also reflected in the words:

3 "Problem in dairy victim of shopping market values
4 and very difficult to move out of line with other
5 competitors but RH senses there is a mood..."

6 What I'm suggesting is by making those statements,
7 Mr Hirst and Mr Scouler were giving an indication to
8 those present that they would like to move up and they
9 would if others did?

10 **LORD CARLILE:** Right.

11 **MR MORRIS:** Can I just take you, on that topic, to the next
12 document, document 15.

13 **MISS ROSE:** I'm not sure the witness actually had the
14 opportunity to answer that question, sir.

15 **MR MORRIS:** Sorry, I thought I was explaining to --

16 **LORD CARLILE:** I thought the answer was "no".

17 **MISS ROSE:** I think the question was asked, and then you
18 asked for some clarification of the basis for it.

19 **LORD CARLILE:** Yes. I'm sorry, I think the answer was "no",
20 wasn't it? You didn't agree with the proposition?

21 **A.** I disagree with the proposition.

22 **MR MORRIS:** Can I put it again?

23 **LORD CARLILE:** Put it again.

24 **MR MORRIS:** What I'm suggesting is, I'm making those
25 statements that Mr Hirst and Mr Scouler were giving an

1 indication to those present that they would like to move
2 up and that they would do so if others did?

3 **A.** I disagree with that proposition.

4 **Q.** Then I put to you that it was a veiled commitment to
5 pass back a price increase, and you disagree with that.

6 Can you go to document 15 [Magnum].

7 **LORD CARLILE:** I need a little help with this document
8 because I don't have a note as to where it emanated
9 from.

10 **MR MORRIS:** We think it's 16 September and we think it's
11 a Glanbia note. That's what I'm told.

12 **MISS ROSE:** I would like to know how we know that in the
13 absence of any evidence, sir.

14 **MR MORRIS:** Well, we will no doubt deal with it in...

15 I'm instructed it comes from Glanbia disclosure, ie
16 presumably Glanbia disclosure of information in response
17 to requests by the OFT. Yes.

18 **MISS ROSE:** That doesn't help me with the date though, sir,
19 or indeed what it is.

20 **MR MORRIS:** The document says:

21 "At the time of writing, Monday 16th September..."

22 **LORD CARLILE:** Yes.

23 **MR MORRIS:** I would suggest that this is something being
24 recorded by somebody at Glanbia on 16 September:

25 "Activities to increase milk price-NFU/retailers.

1 "Currently there is a move by the NFU to increase
2 the milk price to the EU target price of 20.42ppl.
3 However, because of the strength of sterling, this price
4 would be above the market price (in milk terms) of
5 WMP/Mild Cheddar and SMP. The main focus has so far
6 centred on the Liquid Milk sector and it appears that
7 1.75ppl will be added by the retailers to the retail
8 price. The retailers handle circa 25% of the total milk
9 pool via Liquid. Hence, the average potential across
10 all milk is 1.75ppl [times] 25% [which is] 0.43ppl."

11 Then there's quite a lot of calculations with the
12 various pooling effect.

13 "In addition the processors may increase the
14 doorstep price in line with the retailers."

15 I'm assuming that's a reference to liquid milk.

16 "At the time of writing, Monday 16th September 2002
17 [this is the sentence I wanted to go to] the NFU have
18 switched emphasis to cheese and apparently they made
19 some kind of veiled commitment last Friday to pass back
20 a price increase on cheese if Asda did the same."

21 Now, I'm suggesting to you that last Friday is the
22 date of the Dairy Crest meeting, and I suggest to you
23 that the word "they" is a reference to Tesco, not to the
24 NFU, and this is a report --

25 **LORD CARLILE:** Whoa, whoa, whoa. I'm really troubled by

1 that assertion, just taking -- it's free to the OFT to
2 call whatever evidence they wish.

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

4 **LORD CARLILE:** I think it really would be asking a lot of
5 even the Competition Appeal Tribunal to make that
6 logical leap.

7 **MR MORRIS:** Very well, sir, that's fine. The reason I put
8 it is because it was a point we might have wanted to put
9 and I wanted it to be put to the witness. We will
10 consider your observations. It was a point we would
11 want to put in argument and I wanted to put it to
12 Mr Scouler so that he could comment upon it. But there
13 we are, sir. I shall move on.

14 **LORD CARLILE:** Right, thank you.

15 **MR MORRIS:** The final point on these notes is, if you go to
16 document 14 again and -- yes, if you go to document 14,
17 on the last page [Magnum], this is a reference to you
18 again:

19 "J Scouler -- two routes; either market meltdown and
20 farmers go out or some form of market management."

21 Then again, if you go to the manuscript notes,
22 there's a reference again, it's on the second page of
23 the manuscript notes at tab 12 [Magnum], there's
24 a reference to "some form of market management".

25 You're aware of the point because I think you deal

1 with it in your witness statement?

2 **A.** Yes, I'm aware of that comment.

3 **Q.** What I'm suggesting is what you refer to there is
4 measures to prevent the decreases in farmgate milk
5 prices which were resulting from normal market forces at
6 that time, that's right, isn't it?

7 **A.** That's right.

8 **Q.** Yes, and to temper the draconian consequences for the
9 farmers of those market forces?

10 **A.** Yes.

11 **Q.** You mention market management by governmental regulation
12 as in the former days of the Milk Marketing Board?

13 **A.** Yes, sir.

14 **Q.** I think, possibly in your witness statement, you rather
15 rue the passing of the Milk Marketing Board, is that --
16 I also remember those days. That's a fair --

17 **LORD CARLILE:** I used to represent farmers at the time of
18 the Milk Marketing Board, it was a much more comfortable
19 era.

20 **MR MORRIS:** You say in your witness statement at
21 paragraph 68 [Magnum], that you made a half-joking
22 comment. I would suggest to you that there was no way
23 at the time that there was any prospect of going back to
24 the days of government or statutory regulation through
25 the Milk Marketing Board, was there?

1 **A.** I don't know, I didn't have enough experience of the
2 industry to have a reason as to why it had broken down
3 in the first place other than obviously that things had
4 changed and, you know, what would happen in the future.
5 There was other countries in Europe who were operating
6 other co-operatives and things like that. So I sort of
7 made a comment, and maybe a misguided comment, to
8 suggest that that probably would have to self-regulate.

9 **Q.** It's fair to say that other forms of market management,
10 other than by regulation, might well raise competition
11 law issues?

12 **A.** I wasn't suggesting anything other than some type of
13 Milk Marketing Board or a desire by the government to do
14 something different to support dairy farmers. At the
15 time we were quite -- there wasn't much -- the
16 government was a challenge because there wasn't much
17 voting in farming, and the government was quite
18 apathetic towards the farmers' plight and we would
19 discuss that regularly.

20 **Q.** Under the manuscript notes where it says "Need some form
21 of market management", we have an unclear reference to
22 the words "Anticompetitive [something]". I'm now in the
23 manuscript notes of the meeting at tab 12, and
24 I thought -- if you go to the second page, first sheet
25 [Magnum], it's the passage "Need some form of market

1 management", two thirds of the way down, this is the
2 passage that you refer to in your witness statement.
3 Back of -- bottom of -- there's an asterisk by it, two
4 thirds of the way down that sheet. Do you see the words
5 "Need some form of market management"?

6 **A.** If I could read it correctly --

7 **Q.** Well, attached to your witness statement you did a
8 transliteration?

9 **A.** That's fine, okay, thank you. Sorry.

10 **Q.** What you have listed there are three things,
11 "Anticompetitive [something]", and I entirely understand
12 that the manuscript isn't clear. Then there's
13 a reference to "All buy in" I think it's "DIAL/FMG/DRC"
14 and then there's "Need government intervention/support".

15 **MISS ROSE:** Sir, with respect to Mr Morris, if you look at
16 paragraph 69 of the witness statement [Magnum], the
17 witness does not say that it says "anticompetitive". He
18 says:

19 "The OFT says that the note said 'anticompetitive'.
20 I don't know what the author of that note intended to
21 write but I don't recall any discussion about what
22 'anticompetitive' means."

23 **MR MORRIS:** So you don't recall the word "anticompetitive"
24 being used?

25 **A.** No, I don't remember that.

1 **Q.** You don't remember, very well.

2 You say at paragraph 70 of your witness statement,
3 it is on the same page [Magnum] -- yes, you do:

4 "As expected, nothing practical had come out of the
5 meeting to grow the dairy category."

6 But what came out of the meeting was that, within
7 a matter of days, Dairy Crest was taking positive and
8 detailed steps in order to achieve the objective of the
9 2p per litre increase for raw milk for farmers, that's
10 right, isn't it?

11 **A.** I'm referring to comments I made about how I felt
12 towards the meeting, and I felt disappointed that in
13 essence it had been -- I knew in my heart it probably
14 would have just been a talking shop more than anything
15 deep, and we could have done with that, so I remember
16 feeling a little bit disappointed. But hopefully there
17 would have been some, as I referred to in my witness
18 statement, some PR benefit as a result, and farmers had
19 then seen a human face to Tesco for the first time in
20 the dairy industry, in the same way they had done with
21 the producer clubs and the meat clubs.

22 **Q.** Would you agree, however, that in hindsight that you
23 felt at the time, at the moment you left the room,
24 nothing practical had come out of it? You say that you
25 had set the processors a challenge; that's right, isn't

1 it?

2 **A.** Yes, I'd also set the processors a challenge on a number
3 of occasions before that.

4 **Q.** Well, just answer that question: you set the processors
5 a challenge at that meeting, that's your evidence?

6 **A.** Yes.

7 **Q.** And we know that within days Dairy Crest came up with
8 a proposal?

9 **A.** Yes.

10 **Q.** So whilst you may have thought -- as you left the
11 meeting, a week later, you will have seen that something
12 practical had come out of the meeting?

13 **A.** I'm not sure cost price increase to Tesco felt like
14 a practical solution at the time though.

15 **Q.** Right. Let's go to what came out of it, which is
16 document 25 [Magnum]. This is an email from
17 Colin Beaumont to Rob Hirst on 23 September:

18 "Following our conversation on Friday..."

19 I would just ask you to note as we go through. So
20 there has been a conversation between Rob Hirst and
21 Colin Beaumont on 20 September, the Friday; that's
22 right, isn't it?

23 **A.** Yes.

24 **Q.** "... I can confirm that Dairy Crest are to increase
25 prices on cheese, packet butter and [milk] with effect

1 from [a date].

2 "We are fully committed to passing all revenue
3 gained from this increase to our supplying farmers."

4 So that's the recognition that this is part of the
5 2p per litre initiative, you would agree with that?

6 **A.** Yes, sir.

7 **Q.** "The attached briefing document clarifies all of the
8 issues associated with the increase.

9 "I will contact you tomorrow (Tuesday) to discuss
10 any questions which you may have."

11 My further question then is, assuming he did contact
12 him, there would have been a conversation between
13 Mr Hirst and Mr Beaumont on 24 September as well? The
14 reference to the contact "tomorrow (Tuesday)", is the
15 24th?

16 **A.** Potentially, yes, there could have been.

17 **Q.** Thank you. If you go over the page, this is the
18 document that has come to be known as the Dairy Crest
19 briefing document. I think perhaps the simplest way to
20 do it is to ask you actually to read the whole thing to
21 yourself for a few moments so when I ask you questions
22 it saves me reading it all out and we know what we're
23 talking about. I'm sure you've seen it before, but
24 perhaps you would just like to read it again to yourself
25 for a moment.

1 (Pause)

2 Thank you. This proposal was aimed to get more
3 money back to the farmers by seeking an industry-wide
4 increase in prices for butter, cream and cheese, that's
5 right, isn't it?

6 **A.** Yes.

7 **Q.** 2p per litre translates to £200 per tonne?

8 **A.** Yes.

9 **Q.** We see that Tesco received it on the 23rd. You would
10 have seen a copy of this document at that time, wouldn't
11 you?

12 **A.** I don't remember seeing a copy of this note at the time.

13 **Q.** It was sent to Rob Hirst and it was sent to Chris Rigby,
14 and Lisa Oldershaw in her evidence said that it is
15 likely that she also received a copy. In those
16 circumstances, I would suggest to you that either you
17 also received a copy or one of those people would have
18 shown you a copy at the time? Never mind about your
19 recollection today; it's likely, isn't it?

20 **A.** I don't recall receiving the Dairy Crest briefing
21 document myself although I may have been shown a copy.

22 **Q.** I would suggest to you that you would have discussed
23 this proposal with your team, with Rob Hirst and
24 Lisa Oldershaw, when you received it, that's likely,
25 isn't it?

1 **A.** It would be possible and also -- depending if I -- I may
2 have been out for two or three days, buyers get lots of
3 correspondence, at a weekly meeting, I may have seen it
4 quickly or I may have seen it -- I couldn't tell you,
5 sorry, sir.

6 **Q.** This was a pretty big issue at the time, wasn't it?
7 This wasn't just regular correspondence, this was the
8 big issue on the agenda. This was the farmers' protest,
9 the public call by Tesco for the increase. It was out
10 of the ordinary, would you agree with that?

11 **A.** Yes, I would.

12 **Q.** I would also suggest to you that you would have known
13 that the same proposal was being sent to the other major
14 retailers at that time?

15 **A.** I wouldn't have assumed anything, but it's possible it
16 would have been sent to all the other retailers as well.

17 **Q.** Ms Oldershaw accepts that she realised it would have
18 been sent to the other retailers because the proposal
19 was for a market-wide cost price increase?

20 **A.** Yes, and it's also written with a clear comment around
21 media policy, knowing this document might have been sent
22 to a number of people, because it's an unusual comment
23 to make.

24 **Q.** Now, you say in your evidence at paragraph --

25 **LORD CARLILE:** 76 or 77? [Magnum]

1 **MR MORRIS:** Yes, thank you:

2 "I have now reviewed the Dairy Crest briefing
3 document. I do not agree with the OFT's conclusion that
4 the Dairy Crest briefing document is a proposal for
5 market-wide cheese retail price increases. This
6 document looks to me like Dairy Crest's first formal
7 request for a higher cost price for cheese and other
8 dairy products supplied to Tesco against the background
9 of a need to increase the farmgate price to 2ppl."

10 I would suggest to you that this document is much
11 more than a request for a higher cost price. It is
12 Dairy Crest's proposal for an industry-wide price
13 initiative, not just a request to you for a cost price
14 increase. Would you agree with that?

15 **A.** No, because the document had been sent to Rob Hirst and
16 it had been stated that this is looking for Dairy Crest,
17 for a formal request for a higher cost price on cheese.

18 **Q.** And the other products presumably?

19 **A.** Yes.

20 **Q.** I'm suggesting to you that it was, and you would have
21 realised, that this proposal also involved retailers
22 raising their retail prices?

23 **A.** I wouldn't have.

24 **Q.** Okay, and I would suggest to you this is apparent from
25 the terms of the document itself.

1 Can we look at the heading "Transparency". Under
2 the heading "Transparency", and you have read it through
3 again so I wasn't proposing -- Dairy Crest was
4 suggesting to the addressees of this document that they
5 should only increase retail prices by an amount that
6 would maintain retailers' cash margin and not by an
7 amount which would maintain percentage margin. That's
8 right, isn't it?

9 **A.** Yes.

10 **Q.** Regardless of the amount of the increase, this document
11 clearly envisages that there is going to be a retail
12 price increase of some amount, doesn't it?

13 **A.** Yes, it does.

14 **Q.** The reason why Dairy Crest is recommending an increase
15 by cash margin only is because it would ensure that,
16 when the retailers did raise their retail prices by £200
17 per tonne only, they would not be profiting unduly from
18 the 2p per litre increase ultimately fed back through.
19 Would you agree with that?

20 **A.** Yes, I would.

21 **Q.** Perhaps more importantly they would not -- if they
22 raised by percentage margin rather than cash, they would
23 be seen to be profiting, or "profiteering" is the word
24 used, from the 2p per litre increase?

25 **A.** Sorry, just clarification, who would be profiteering?

1 Q. The retailers.

2 "It should be noted that in the current climate cash
3 margin maintenance should, in our view, be the rule.
4 Percentage margin maintenance will only create
5 accusations of profiteering."

6 A. But this isn't my words, this is Dairy Crest's words.

7 Q. No, I'm looking at the document. Sorry, I think we're
8 confused -- do you have the Dairy Crest briefing
9 document itself open?

10 A. Yes.

11 Q. I'm reading from the heading "Transparency", that's
12 where we're at cross-purposes. I think you've agreed
13 that this passage is envisaging a retail price increase
14 in general, and what it says is:

15 "It should be noted that in the current climate
16 [that's presumably the climate with the farmers] cash
17 margin maintenance should, in our view, be the rule.
18 Percentage margin maintenance will only create
19 accusations of profiteering."

20 That's right. So what that's saying is that if you
21 went by your normal percentage margin -- if you went up
22 by percentage margin, you would be making some profit
23 above the £200 per tonne because the price increase
24 would -- the price would go up by more than the £200 per
25 tonne?

1 **A.** Yes, I understand your question. Yes, that would -- or
2 I could take a reduced price of, say, £180 per tonne
3 therefore and protect my percentage margin as opposed to
4 taking the £200, yes.

5 **Q.** I think the concern, the profiteering concern, if you
6 read the next bit:

7 "It is clearly vital that neither retailer or
8 processor is seen to benefit from this process in margin
9 terms."

10 So if you went higher than £200 per tonne, or 20p
11 per kilo, at the retail level, the farmers would say,
12 "Well, I'm only getting 2p per litre but you're getting
13 more", and that would be the accusation of profiteering?

14 **A.** Yes, it could, but I could also negotiate a price of
15 £180 per tonne, and the retail price would go by 200,
16 and the farmers wouldn't know what price I had or hadn't
17 paid Dairy Crest.

18 **LORD CARLILE:** Then Dairy Crest would take the hit rather
19 than Tesco?

20 **A.** Yes.

21 **MR MORRIS:** But that would also be percentage margin.

22 If you then look at the heading "Timing", further
23 down, are you with me in the document:

24 "We have promised to pay our farmers all revenue
25 recovered from the market from the date RSPs and costs

1 have moved."

2 RSPs is clearly a reference to retail prices, isn't
3 it?

4 **A.** Yes, it is.

5 **Q.** What is being considered there is a market move in
6 retail selling prices as well as cost prices?

7 **A.** Yes, it is.

8 **Q.** This move in the market that's referred to there is
9 reflected in the -- if you go to the heading "Raw Milk
10 Pricing..." at the top:

11 "If we are successful in persuading the market to
12 move the resultant revenue gained will enable us to
13 increase raw milk prices in total between 1.00 and
14 1.5ppl."

15 What I'm suggesting to you is that those two
16 references show that what Dairy Crest was doing in this
17 document was seeking to persuade the market to move at
18 retail as well as cost?

19 **A.** Yes, you can see that from that.

20 **Q.** So it is clear that, from Dairy Crest's point of view,
21 what they had in mind is a proposal for a move at both
22 levels?

23 **A.** Yes.

24 **Q.** Under the heading "Media --" And what I suggest to you
25 in the light of your last answer is that you must have

1 realised at the time that this was a proposal by
2 Dairy Crest for a move at both levels?

3 **A.** Yes.

4 **Q.** Can I just ask you -- can I just ask you about the
5 "Media Policy" paragraph:

6 "We have already made public statements about our
7 intentions to review butter, cheese and cream pricing.
8 Please note that we will never comment on any aspect of
9 individual retailer business decisions, intentions or
10 discussions."

11 You see that paragraph?

12 **A.** Yes.

13 **Q.** If you go to paragraph 81 of your witness statement
14 [Magnum], you say:

15 "I would expect all my suppliers to keep Tesco's
16 future pricing information confidential and Dairy Crest
17 would have known this. I have seen that the Dairy Crest
18 briefing document has a heading 'Media Policy' under
19 which it says [and then it quotes]. I believe this
20 states both what Tesco expected from Dairy Crest and
21 what the two parties understood the confidential
22 relationship to be."

23 I would suggest to you that that passage about media
24 policy has nothing to do with confidentiality of
25 retailer information generally but is dealing with

1 matters -- public announcements and press releases,
2 would you agree with that?

3 **A.** If I read this correctly, it looks like it's covering
4 both elements, a media statement and also a commitment
5 to never recalling any individual retailer discussion.

6 **Q.** Mr Reeves gave evidence about this at Day 5, page 71,
7 and it's put to him:

8 "Question: You explain in paragraph 13 of your
9 witness statement [Magnum] that Dairy Crest's intention
10 ... had already been made public ... Now, the paragraph
11 headed "Media Policy" in that document [this is the
12 paragraph you're now looking at], can you confirm that
13 it just related to public statements, that is press
14 announcements, as you explain in your statement?

15 "Answer: Yes. I think what it was trying to do was
16 to say that we wouldn't talk to Farmers for Action
17 specifically about which customers had given us
18 increases and which hadn't.

19 "Question: It wasn't about confidentiality of
20 retailer information generally?

21 "Answer: No, it wasn't."

22 So Mr Reeves' view was that it was just concerned
23 with press and public announcements. In the light of
24 that answer, would you agree with what Mr Reeves said?

25 **A.** I would expect that any correspondence that I have with

1 any manufacturer would be kept on a confidential basis.
2 I don't know what his intent was for that because
3 I haven't spoken to him or had a discussion with him
4 about that.

5 **Q.** I understand it's your evidence about your general
6 expectation. I'm asking you about whether that "Media
7 Policy" -- I'm suggesting to you that's got nothing to
8 do with confidentiality of information as between you
9 and your suppliers but is actually dealing with
10 something different, which is public announcements.

11 **A.** I don't know, sorry.

12 **Q.** Very well. Can I just ask you two or three general
13 questions about the proposal I've now -- can I suggest
14 to you that this proposal, the Dairy Crest proposal, was
15 highly unusual, wasn't it?

16 **A.** Yes.

17 **Q.** It was a proposal for a price increase on all your
18 cheese, butter and cream lines at the same time?

19 **A.** Yes.

20 **Q.** It was for a uniform £200 per tonne, that was unusual?

21 **A.** Yes.

22 **Q.** And it proposed -- when it referred to retail price
23 increases, it was suggesting that the retail price
24 increase should be limited to maintaining cash margin
25 only, and that was unusual?

1 **A.** Yes, it would be unusual but not unique. So, you know,
2 we've had price increases and proposals that would have
3 maintained cash margin but not percentage margin before,
4 and have since.

5 **Q.** Its purpose was to pass back up the line, or down the
6 line, 2p per litre to the farmers in the price for raw
7 milk?

8 **A.** Yes.

9 **Q.** That in itself was an unusual justification for a cost
10 price increase on a market-wide basis?

11 **A.** Yes.

12 **Q.** What then happened is that, after Tesco received this
13 document on 23 September, Tesco then engaged in
14 discussions with its processors about Tesco's
15 participation in the initiative described in
16 Dairy Crest's document. Would you agree with that as
17 a statement of what then happened in the ensuing days?

18 **A.** We would have been having individual discussions with
19 individual suppliers if they were proposing price
20 increases.

21 **Q.** With Dairy Crest they were proposing a general £200 per
22 tonne increase?

23 **A.** Yes, and my expectation would be that Rob and the team
24 would have been reviewing this.

25 **Q.** I would suggest that you were kept closely involved in

1 those discussions and negotiations?

2 **A.** Not on the negotiation side, across -- it would be -- at
3 times I would be asked my advice about a cost price
4 increase but not in general terms.

5 **Q.** I'm not asking about "a", I'm talking about this
6 particular negotiation about this £200 per tonne
7 across-the-market -- we know that it was not just
8 Dairy Crest, it was also discussions with McLelland and
9 with others, and I'm suggesting to you that in the
10 period that followed you were kept -- you were closely
11 involved in those -- you weren't negotiating yourself,
12 but you were involved in the events that then happened
13 in relation to those discussions?

14 **A.** Yes, we would have regular discussions around some of
15 the challenges at the time, including the 2p for
16 farmers, that would be a regular discussion point, yes,
17 sir.

18 **Q.** And you would have been kept informed about how things
19 were going?

20 **A.** Can I just clarify the question? Sorry, sir, I just --

21 **Q.** I'm talking about these discussions that happened
22 afterwards -- the discussions that then followed. There
23 were discussions with Dairy Crest, there were
24 discussions with McLelland, the period following
25 23 September, in particular the initial days at

1 Dairy Crest. And I'm suggesting that, to the extent
2 that you weren't involved in the discussions directly,
3 Lisa and Rob, to the extent they were, would have kept
4 you abreast of developments?

5 **A.** Yes, they would have kept me abreast of certain
6 developments.

7 **Q.** We've seen that there was discussions between Rob Hirst
8 and Colin Beaumont on Friday, 20 September. If you go
9 back, we can see that at the beginning. And it looks
10 like there was a discussion between Rob Hirst and
11 Colin Beaumont on Tuesday, 24 September?

12 **A.** Yes, sir.

13 **Q.** Then you attended a meeting with Dairy Crest on
14 25 September, do you recall that? It is not addressed
15 in your witness statement.

16 Perhaps if you go to document 28 [Magnum]. Document
17 28 is an internal Dairy Crest note of a meeting on
18 Tuesday, 24 September. I'll come back to it in a moment
19 for the detail of it, I suspect you may not have looked
20 at this document before. Obviously, if you want to take
21 the time to read the whole thing through, please do.

22 Just at the bottom of that document, paragraph 6, it
23 says -- there's a reference to the red tractor logo, and
24 then this final sentence:

25 "Colin Beaumont to test this proposal with Tesco

1 during a meeting tomorrow, Wednesday 25th September."

2 Now, it looks from that that there was planned to be
3 a meeting between Colin Beaumont and Tesco on the 25th,
4 yes?

5 **A.** Yes.

6 **Q.** Now, if you go to document 128A, you'll need to pick up
7 the other yellow file which is just to the right there,
8 and it's right at the back of that file.

9 **LORD CARLILE:** We'll have a break in a moment, so if you
10 want him to read anything during the break that would be
11 convenient.

12 **MR MORRIS:** Could I just deal with this point -- yes,
13 I might very well want you to read document 28, and
14 certainly the witness might want to as well.

15 **LORD CARLILE:** Document?

16 **MR MORRIS:** No, now I'm going to 128A [Magnum].

17 You won't have seen this document before either, and
18 if you go to the beginning of it, it's a letter from
19 Dairy Crest to the Office of Fair Trading and it's dated
20 9 March 2005.

21 Please stop me if you're not with me.

22 What it is is, throughout the investigation, as
23 you'll know, the OFT sent various requests for
24 information about the events, and this is one of
25 Dairy Crest's answers to the OFT, and it's a letter to

1 Ms Aspinall. There is a letter followed by an
2 appendix 1. Have you got the appendix 1 page [Magnum]?

3 **A.** Yes.

4 **Q.** It says "Responses to the questions enclosed with your
5 letter dated 9 February", at the top. At the top of
6 appendix 1 there is a series of responses sent by Asda,
7 and these are answers to Asda's questions. If you go
8 over two pages to answer 23, the request was
9 effectively:

10 "Please provide any notes/minutes of meeting held at
11 Tesco's Cheshunt premises on or around ..."

12 And that should read "25 September 2002", I think
13 the 5 might be cut off.

14 Are you with me?

15 **A.** Yes.

16 **Q.** What it says is:

17 "Mark Allon (sic) confirmed he attended as the
18 executive director responsible for Dairy Crest's cheese
19 business. Mark believes he was accompanied by
20 Colin Beaumont (sales director responsible for the Tesco
21 account). He also confirmed no minutes were taken and
22 no further documents have been traced."

23 So that confirms who attended that meeting on the
24 part of Dairy Crest. This is Dairy Crest's information.

25 Then if you go over the page to paragraph 46,

1 there's another question about that same meeting, and it
2 says as follows:

3 "Who attended Tesco's Cheshunt premises on or around
4 Wednesday 25th September 2002? In what capacity did
5 each of the participants attend?"

6 It says:

7 "Mark Allon confirmed he attended as the executive
8 director responsible for Dairy Crest's cheese business.
9 Mark believes he was accompanied by Colin Beaumont the
10 sales director responsible for the account and met
11 Rob Hirst and John Scouler of Tesco. See answer to
12 question 23."

13 Now, what I'm suggesting to you is that Dairy
14 Crest's recollection of that meeting that was mentioned
15 was that it did happen on the 25th, and that Mr Beaumont
16 and Mr Allen attended for Dairy Crest and that you and
17 Mr Hirst attended for Tesco. Would you agree that, in
18 the light of that, that is likely to have happened?

19 **A.** Yes, possibly, yes.

20 **Q.** I think, if that's a convenient moment, I'm going to
21 suggest to you that the purpose of the meeting was for
22 Dairy Crest to discuss the initiative further, and if
23 everybody would like to read -- if you read document 28,
24 then I'll be taking you to that document in a moment.

25 **LORD CARLILE:** We'll have a ten-minute break now.

1 (3.12 pm)

2 (A short break)

3 (3.28 pm)

4 **MR MORRIS:** Yes, I was going to ask you some questions about
5 this meeting on 25 September. I don't know if you've
6 had a chance to read document 28?

7 **A.** Yes, I have.

8 **Q.** The point I particularly want to draw your attention to
9 are points 2, 3 and 5. This is an internal meeting with
10 a plan of action, so to speak, for Dairy Crest about how
11 they were going to take it forward:

12 "Each account team to persuade their respective
13 retailers to move a section of their cheese category on
14 the 20th October followed by a three week programme
15 during which the remainder of the cheese category moves.

16 "3. Commercial directors to clear with their senior
17 contacts, by not later than from 4th October,
18 Dairy Crest's intention of making a public statement to
19 the effect that farmers could expect to see retail
20 prices for cheese increasing from mid-October onwards.

21 "NB It would be helpful if some key individual
22 accounts such as Tesco, Sainsbury, Asda, Morrison, or
23 [Safeway] could endorse such a statement.

24 "5. It was agreed that we would communicate to
25 retailers that we would not move individual cost prices.

1 Instead we would provide a total tonnage summary ... and
2 apply a £200 per tonne invoice charge."

3 So what I would suggest to you is that at that
4 meeting on 25 September, Dairy Crest would have raised
5 those three points with you; it's likely, isn't it?

6 **A.** It would be likely. I don't recall the meeting.

7 **Q.** Yes, you don't recall the meeting, but you -- I think
8 you agreed that it was --

9 **MISS ROSE:** Sir, again, it's not appropriate to ask the
10 witness whether this is likely. He can't give evidence
11 about whether it's likely, he can only give evidence
12 about what he recalls. He can't give an opinion about
13 the likelihood of what was discussed at a meeting he
14 can't recall.

15 **LORD CARLILE:** You say you don't remember the meeting?

16 **MR MORRIS:** No, he said earlier, before the break, that he
17 accepted it would be likely that the meeting had taken
18 place, I think.

19 **LORD CARLILE:** Yes, but he says he doesn't remember what
20 happened at it even if it did take place, is that the
21 size of it?

22 **A.** That's correct, sir.

23 **MR MORRIS:** But if I'm going to put in closing that it was
24 likely that these things were raised at the meeting,
25 I would suggest that --

1 **LORD CARLILE:** I think it's only the form of the questions,
2 Mr Morris. You're perfectly free to put to him that he
3 was at a meeting and that certain things were put at the
4 meeting.

5 **MR MORRIS:** Well, I will put that. I will put it directly.

6 **LORD CARLILE:** He's read the document.

7 **MR MORRIS:** You've read the document, you don't recall, but
8 I would suggest to you that these three things were put
9 to you -- were raised by Dairy Crest at the meeting?

10 **A.** I don't recall that, sir.

11 **Q.** I put to you this, that at that meeting you agreed in
12 principle that Tesco would participate in this proposal
13 coming from Dairy Crest and that you would accept the
14 £200 cost price increase?

15 **A.** I don't recall the meeting, sorry.

16 **Q.** Let's look at what Dairy Crest said two days later at
17 document 32 [Magnum]. This is a -- I think it's
18 a Dairy Crest document. This is an Asda document, and
19 it is a note of a meeting between Asda and Dairy Crest
20 on the Friday of that week.

21 Do you want to take a moment to read it through
22 perhaps?

23 **A.** Thank you.

24 (Pause)

25 **Q.** Near the bottom of the page of that note, it records:

1 "Latest position is that JS/Tesco have agreed to
2 move all sectors."

3 I would suggest that the source of Dairy Crest's
4 information were statements you had been making to
5 Dairy Crest at the meeting on the 25th?

6 **A.** I'd be surprised at that statement and, again, I can't
7 recall what was said on the 25th at the meeting.

8 **Q.** I would suggest also that that statement was made on the
9 basis of discussions that Rob Hirst was having with his
10 opposite number at the time?

11 **A.** Sorry, I don't know what Rob Hirst was saying so I can't
12 answer it.

13 **Q.** I've put the question to you.

14 You say you may not recall the actual meeting of
15 25 September, but you must recall, mustn't you, that at
16 around this time you gave Dairy Crest an indication that
17 you were going to participate in the initiative?

18 **A.** I don't remember.

19 **LORD CARLILE:** Can we be clear about what you mean by "I
20 don't remember".

21 The question was:

22 "... at around this time you gave Dairy Crest an
23 indication that you were going to participate in the
24 initiative."

25 Now, that is an assertion to you that Tesco, through

1 you, were agreeing to participate in a concerted
2 initiative to raise retail prices in which other
3 retailers were involved. Are you saying you don't
4 remember whether that happened or not?

5 **A.** What I do remember saying is that we would be open to
6 discussions on cost prices and debates about raising the
7 price, or to take a price increase, and there was
8 obviously live debates about the price.

9 **LORD CARLILE:** Across the board of all the retailers?

10 **A.** No.

11 **LORD CARLILE:** As an individual company?

12 **A.** As an individual company, Tesco, yes.

13 **LORD CARLILE:** Right.

14 **MR MORRIS:** You knew that the proposal, Dairy Crest's
15 proposal, the meat of which I've taken to you in that
16 document, was obviously the subject -- I would suggest
17 the subject matter of discussions going on between you
18 and Dairy Crest at the time. You knew that that was
19 a market-wide initiative, not just -- you've accepted
20 there was a proposal for retail, but I suggest to you
21 that you knew at the time that that proposal was for an
22 increase -- a price increase, and I use the term
23 generally, not only for you but a price increase for all
24 the other retailers?

25 **A.** Yes, I think that there would have been a general

1 discussion around -- negotiation around a cost price
2 increase, yes, sir.

3 **Q.** Just to make sure that I've got the answer to that
4 question: you knew that the proposal was for a price
5 increase not only for Tesco but a price increase for all
6 the other retailers?

7 **A.** I wouldn't have known that factually but I would assume,
8 given the pressure that was happening on the retailers
9 at the time, that people would be under pressure to have
10 a discussion around a cost price increase. But
11 I wouldn't know factually.

12 **Q.** Can I just read to you what Mr Reeves said about the
13 proposal generally. Day 5, pages 63 and 64. He's
14 actually talking -- the questions, just to be fair, at
15 63/22, the questions were relating to the meetings with
16 Dairy Crest and Asda on 17 September. Then the
17 question --

18 **A.** Sorry, can I check I have the right document --

19 **LORD CARLILE:** He's reading from a transcript.

20 **MR MORRIS:** I'm going to read back to you, and I'll try to
21 read it slowly. It's not a very easy thing to read back
22 evidence to another witness, and I understand if --
23 I suspect, if I were in your position, I might not be
24 digesting it all immediately, but tell me if I'm going
25 too fast.

1 This is the question:

2 "It's likely, is it not, that much the same thing
3 would have been said at Dairy Crest's meetings with all
4 the other retailers, Marks & Spencer, Sainsbury's and
5 Tesco?"

6 I'll explain what "the same thing" is in a moment.

7 The answer is:

8 "Yes, it's likely that similar things would have
9 been said but different account teams at Dairy Crest
10 would have treated their customers slightly differently
11 because there's different personalities involved and
12 different customers have different ways of working, but
13 it would be similar, yes.

14 "Question: But you would agree, would you, that all
15 the retailers with whom you [that's Dairy Crest] had
16 meetings at this time, and we've seen that there were
17 meetings with Asda, M&S, Sainsbury's and Tesco, were
18 told first that Dairy Crest was seeking a cost price
19 increase?

20 "Answer: Yes.

21 "Question: And they were told that Dairy Crest was
22 seeking an across industry cost price increase, it
23 wasn't just them?

24 "Answer: Yes.

25 "Question: It was suggested to them that this

1 needed an equivalent retail price increase on cheese?

2 "Answer: Yes."

3 So Mr Reeves' evidence is that each person, each
4 company they went to would have been told that everybody
5 else was being asked for the same cost price increase.
6 And in the light of that answer by Mr Reeves, I'm
7 suggesting to you, in the light of his evidence, that
8 you would have known not only that they were asking for
9 a cost price increase from you, but that it was also
10 being asked for from the other retailers, would you
11 agree?

12 **A.** Yes, I would agree, but I make that assumption on
13 practically every time I got a price increase for
14 a range of products, that why would Tesco be any
15 different in this set of circumstances? Why would Tesco
16 just have to bear the brunt of it? You would assume
17 those price increases would try to be levied across the
18 market.

19 **Q.** What you indicated in response was not just that you
20 would be open to discussion but that actually Tesco was
21 willing to participate in this market-wide initiative.
22 That's right, isn't it?

23 **A.** What I said is that we would be prepared to have
24 discussions around the cost price of cheese but I didn't
25 mention a market or anything like that, that's not what

1 I said.

2 Q. I'll put it another way. In the light of your knowledge
3 of what the proposal was, which you've just accepted,
4 I would suggest to you that you indicated that Tesco was
5 willing to participate?

6 A. At that time I hadn't ruled out Tesco taking a price
7 increase. If that meeting had taken place I would not
8 have ruled out the assumption of Tesco taking a cost
9 increase because that, again, goes back to the principle
10 of, you know, it would have potentially opened up
11 a different area so discussions would have been ongoing.

12 Q. If you had hesitated in your response to Dairy Crest at
13 the time, it would have been extremely damaging for
14 Tesco because Dairy Crest would have complained or
15 raised the fact that Tesco were not willing to
16 participate. So what I'm suggesting to you is you
17 didn't hesitate, I'm suggesting to you that you actually
18 said, "We are willing to participate"?

19 A. I don't recall saying that, sorry.

20 Q. I would suggest that, given what was going on at the
21 time, you must remember one way or the other, and I'm
22 asking you to think again, you must remember that you
23 actually gave an indication that you were willing to
24 participate?

25 A. I can't remember the specifics of it, but I would have

1 been open and prepared to have a discussion around sort
2 of cost prices to support the farmers at that stage.

3 **Q.** Can I just ask you to go to document 33, this is a note
4 made by Colin Stump on the same date, 27 September. If
5 you'd like to read -- this is Colin Stump -- the
6 paragraph numbered 2 [Magnum]:

7 "I had a further lengthy discussion..."

8 To yourself.

9 **A.** Sorry, sir, could I just ask for clarification about the
10 note and who Colin Stump is? Sorry.

11 **Q.** Colin Stump is the chief executive, managing director of
12 Glanbia who, of course, you wouldn't have been dealing
13 with at the time so that's probably why you haven't
14 heard of him.

15 **A.** Thank you.

16 **Q.** He's talking about a discussion he's had with
17 Alastair Irvine in that paragraph. He says:

18 "I had a further lengthy discussion with
19 Alastair Irvine on the same subject. He tells me that
20 Tesco will go if one other major player moves. He also
21 told me that DC are seeing Asda this afternoon. I have
22 asked MG [that's Mark Grahame who I think is somebody
23 else at Glanbia] to call Harvey Bennett later this
24 afternoon to elicit information..."

25 It's the statement "He tells me" -- Alastair Irvine

1 tells Colin Stump that Tesco will move if one other
2 major player moves. And in the light of the questions
3 I've just asked you, I would suggest to you that
4 McLelland had been told that, that Tesco will go if one
5 other -- either by Tesco or by Dairy Crest?

6 **LORD CARLILE:** Well, did you tell McLelland --

7 **A.** Sorry, I was trying to -- no.

8 **LORD CARLILE:** Let's break it down.

9 **A.** Thank you, sir. I don't remember saying that or
10 telling, as is suggested here, Alastair Irvine. So
11 I don't remember and would be very surprised if I was to
12 suggest to Alastair Irvine that I was prepared to take
13 a price increase on the assumption that another major
14 player moves, or something. Yes. I don't recall saying
15 that, sir, sorry.

16 **MR MORRIS:** You would have been aware that the indication
17 that you did give to Dairy Crest about participating
18 would have been passed on by Dairy Crest to other
19 retailers?

20 **MISS ROSE:** I'm continually confused by this word
21 "participation". I don't understand what is meant by
22 "participation".

23 **MR MORRIS:** I don't think I used the word "participation" --
24 I did.

25 **LORD CARLILE:** You used "participating".

1 **MR MORRIS:** Okay. I'm trying to find the transcript that
2 relates to the answer. The answer I think was given
3 that you would have given an indication that you would
4 be prepared to have discussions?

5 **MISS ROSE:** What he has said repeatedly is that he has been
6 prepared to indicate to Dairy Crest that he was open to
7 discussions about the cost price of cheese. That is
8 then transmuted by Mr Morris into him saying that Tesco
9 were willing to participate in something undefined.
10 With great respect, that is not a fair way to question
11 the witness.

12 **LORD CARLILE:** That's right.

13 **MR MORRIS:** Well, I'll put it two ways if I may.

14 I would suggest to you that such indication as you
15 have just accepted you gave to Dairy Crest would have
16 been passed on by Dairy Crest to the other retailers?

17 I'll put it this way --

18 **LORD CARLILE:** You've got to go further than that, haven't
19 you? I think what you're putting --

20 **MR MORRIS:** That he was aware that --

21 **LORD CARLILE:** Yes.

22 I think what's being put to you is that you knew
23 perfectly well, or suspected, that any agreement you
24 reached with Dairy Crest would be passed on to other
25 retailers?

1 That's what it amounts to.

2 **A.** And I would disagree with that assumption and I would
3 expect that my discussions with all my suppliers were
4 kept on a confidential basis, sir.

5 **MR MORRIS:** Even in the circumstances where you knew that
6 this was a discussion that Dairy Crest were having with
7 all the other retailers?

8 **A.** Yes, sir.

9 **Q.** I suggest to you that you must have realised that it was
10 likely that that information would be passed on by
11 Dairy Crest to the other retailers?

12 **A.** It may well have been passed on.

13 **Q.** And that you realised at the time that it may well have
14 been passed on?

15 **A.** No. At the time I have conversations, I have to assume
16 the conversations I have with any of my suppliers have
17 to be on a confidential basis, because I couldn't
18 practically have a commercial discussion if I thought
19 what might go out this room, what might -- I have to
20 have a very clear and confidential based discussion with
21 my suppliers.

22 **Q.** In the light of everything that was going on at the
23 time, and when I say everything that was going on, the
24 fact that there was this proposal, you've just accepted
25 before the adjournment this was a highly unusual

1 situation, are you -- is your evidence that it never
2 occurred to you that what you told Dairy Crest would be
3 passed on to the other retailers?

4 **A.** I'd be naive to think that anything I said to a supplier
5 might not get to a different part of the business or
6 externally. I would assume from a planning point of
7 view, and just a commercial perspective, to try to keep
8 those debates on a confidential basis. Otherwise I'd
9 end up circling(?) any sort of question, what that might
10 be interpreted as.

11 **Q.** But in the context of an industry-wide proposal for an
12 increase, the information that Tesco might be on board,
13 willing to discuss it, whatever level you put it at,
14 I would suggest to you that that was very significant
15 information for the processors who were attempting to
16 achieve the same price increase with their other
17 retailers? That's right, isn't it?

18 **A.** Yes, it would be.

19 **Q.** You said you assumed that it would be kept confidential,
20 but you didn't say expressly at the time, "Colin,
21 Mark" -- I think his name's Mark -- "you mustn't pass
22 this on", did you?

23 **A.** I don't even remember the meeting let alone what I would
24 or wouldn't have said. But I wouldn't have, and haven't
25 done in the ten years I've worked for Tesco, said to

1 somebody, "This is a confidential discussion that
2 doesn't go to another retailer". The premise of why you
3 would do business is it's done on a confidential basis.

4 **LORD CARLILE:** Presumably most of your suppliers supplied to
5 companies other than Tesco as well?

6 **A.** Yes, sir, a number of suppliers.

7 **LORD CARLILE:** The last thing they want is to supply only to
8 Tesco, yes.

9 In the general context, forgetting about the cheese
10 price initiative which flowed from blockades by farmers
11 and so on, was it your experience that by and large
12 information about other retailers' pricing intentions
13 was passed on to you?

14 **A.** No, absolutely not.

15 **LORD CARLILE:** Did it ever happen?

16 **A.** No. In the discussion we had earlier, there may have
17 been times in the cut and thrust of negotiations where
18 you think, well, everyone else has accepted the cost
19 price increase, you're the last one to accept it as
20 always, why won't you accept this cost price increase?
21 So there might be commercial manipulation or whatever
22 that might be.

23 **LORD CARLILE:** Normal business practice.

24 **A.** Yes, thank you sir.

25 **MR MORRIS:** I would suggest to you and I'll probably be

1 reverting to this, hopefully briefly, a little bit
2 later, I would suggest to you that these were not normal
3 circumstances, you've agreed, and that in those highly
4 unusual, abnormal circumstances, it was in the interest
5 of processors to pass the information to and fro and
6 that you were aware of that at the time?

7 **A.** I might be aware that companies may talk to each other,
8 companies who you would have to be careful of what you
9 had said. Yes, I would be wrong not to think that some
10 people might talk to other people. You have to be a
11 little bit wary.

12 **Q.** I just want to put this to you, because it is the OFT's
13 case that both at the Tesco Dairy Supply Group meeting,
14 and as recorded by Colin Stump in his note, that you and
15 Mr Hirst gave an indication that you would go up if
16 others went up?

17 You understand that's the case that's being put?

18 **A.** Yes, I do, sir.

19 **Q.** If that had been said, you would have understood that
20 processors would then take that information and go to
21 seek to persuade the other retailers to raise their
22 prices?

23 **A.** Yes, they could do that with that information.

24 **Q.** When they did that, and they sought to persuade the
25 other retailers, they would say, "Come on boys, Tesco

1 will go up if you go up", and they would do that to
2 persuade them to go up too?

3 **A.** Yes, they might well do that.

4 **LORD CARLILE:** Just like estate agents. It's the same
5 practice, isn't it? I've had a bid of X for the house,
6 you've got to pay me more.

7 **MR MORRIS:** Well, I think --

8 **LORD CARLILE:** Isn't that a normal business practice?

9 **MR MORRIS:** Yes, but the question is whether, when the
10 statement is made -- never mind -- that's your bluff and
11 bluster. I'm talking -- suggesting that in this case
12 that this information was coming, as you know.

13 **LORD CARLILE:** Yes, I understand.

14 **MR MORRIS:** In your evidence, you say that after
15 23 September, and after perhaps the events of
16 27 September, Tesco was delaying accepting the cost
17 price increase?

18 **A.** Yes, that's right.

19 **Q.** Can we just be clear, you were not seeking to delay, or
20 delaying, because you, that's you as a company, you
21 personally and Ms Oldershaw and Mr Hirst, it wasn't
22 because you didn't consider the £200 cost price increase
23 to be justified, that wasn't the reason why you were
24 seeking to delay?

25 **A.** It was at the time. Both Lisa and Rob were firmly of

1 the belief still to that point, because they felt the
2 processors should be giving this back, suppliers back to
3 the farmers, and it's not Tesco's responsibility to
4 accept a cost price increase at that time. We were
5 still pushing to say that was the right -- didn't want
6 to accept a rise.

7 **Q.** I've already suggested to you that apart from the
8 reference to what happened on 13 January, there is no
9 evidence in this case -- 13 September, there is no
10 evidence in this case, at any time, that you or
11 Lisa Oldershaw or Rob Hirst, in the course of those
12 negotiations, said "We're not going to pay the £200 per
13 tonne, we'll pay you half of it, quarter of it, you've
14 got to absorb the margin".

15 So I'm suggesting to you that that evidence is not
16 correct and your recollection in relation to that is
17 wrong?

18 **A.** My recollection is on normal business practice, which
19 would suggest that we would push back, kick back, delay,
20 procrastinate, any price increase that we possibly had
21 or being put forward to us. I'm giving it in the
22 context of that's how we would have a normal
23 negotiation. I do recognise the point, it's not
24 a normal negotiation, but they would push back for as
25 long as they possibly could on a cost price increase.

1 Q. In this abnormal situation, you knew exactly why that
2 cost price increase was being sought?

3 A. Yes.

4 Q. And indeed your senior management thought it was
5 justified? They supported it, I'll put it -- that's
6 a better way of putting it.

7 A. They supported a resolution, and what they wanted was
8 not the farmers picketing the depots at Christmas time.
9 So they weren't into the detail about what I may or may
10 not have accepted as part of the cost price increase,
11 the commercial director and the main board director
12 wouldn't have been involved in that level of discussion.

13 Q. You knew that, eventually, probably before Christmas
14 given everything that was going on, there would have to
15 be such a cost price increase?

16 A. Can I just check my understanding of when I was making
17 that assumption, sir, please.

18 Q. At the time that you say you were delaying, whatever
19 time you say that was, and let's say from 27 September
20 to the end of October, I think that's fair because
21 I think we'll come to it in a moment, it was accepted at
22 the end of October, in that period you say you were
23 delaying, and I'm saying -- I'm suggesting to you that
24 throughout that period you knew that the cost price
25 increase would eventually have to be accepted?

1 **A.** I would have accepted we would have to take some form of
2 price increase in some format at that stage in order to
3 potentially resolve it. That was my assumption,
4 potentially going towards the end of it, yes.

5 **Q.** What I suggest to you is that the real reason you were
6 delaying was that you were delaying until you had
7 sufficient confidence that there would be a market-wide
8 retail price increase?

9 **A.** No.

10 **Q.** In this period, I'm now moving to end of September to
11 the end of October, Tesco worked on the detailed
12 implementation of the increase, that's right, isn't it?

13 **A.** Just remind me of the date, please.

14 **Q.** End of September, so after these documents we've been
15 looking at, and end of October 2002, Tesco was working
16 on the detail of the implementation of that cost and
17 retail price increase?

18 **A.** I would assume Lisa would have been working through
19 various negotiations with various suppliers --

20 **Q.** That was my next question. You left the detail of it to
21 Lisa?

22 **A.** Yes, sir.

23 **Q.** She was considering the different dates for the
24 increases?

25 **A.** She may well have done that, yes.

-
- 1 Q. And the particular categories of cheese which would go
2 up on those different dates?
- 3 A. She may well have done that as well, yes.
- 4 Q. She was also considering, and perhaps you may have been
5 brought in on this debate, whether she should increase
6 her retail prices by cash margin maintenance or
7 percentage margin maintenance?
- 8 A. Yes, sir.
- 9 Q. I suggest to you that when it came to -- that she would
10 consult -- she did consult you from time to time on
11 issues that arose?
- 12 A. Yes, that would be the case.
- 13 Q. And you were centrally involved in the decision as to
14 when to accept the cost price increase?
- 15 A. No. I wouldn't have known the specific date of any line
16 with price increase going up, I wouldn't have had that
17 level of detailed knowledge of the negotiations. If
18 I was to have that level of detailed knowledge, that
19 would be a danger that I would be getting drawn into
20 every commercial negotiation going forward. I have to
21 leave that to the buyers, in this case to Lisa and to
22 Rob, to negotiate.
- 23 Q. I'm suggesting to you that there came a time when
24 somebody within Tesco took a decision to -- I'm not
25 talking about individual lines -- to accept the £200 per

1 tonne cost price increase overall?

2 **A.** Yes, we accepted the principle of the cost price
3 increases.

4 **Q.** And that in fact it was you who told Lisa and,
5 presumably, Rob Hirst, that it was time now to go --
6 time now to accept the cost price increase?

7 **A.** Yes.

8 **Q.** That is why my previous question about: you were
9 centrally involved in the decision as to when to go
10 ahead, that was why I asked that question. When I say
11 the decision, I mean the decision in principle to accept
12 the £200 per tonne?

13 **A.** Yes, I'd have accepted the principle of a cost price
14 increase on cheese going up, yes.

15 **Q.** Lisa Oldershaw, in this period -- let's go -- if we go
16 to your witness statement, you say at paragraph -- I'm
17 just putting the point when the decision was taken and
18 then work backwards -- paragraph 80 [Magnum] of your
19 witness statement, page 22:

20 "I recall that Lisa Oldershaw resisted for as long
21 as she could. In fact I recall that a cost price
22 increase was not agreed until late October when
23 I eventually told Lisa that we couldn't delay any
24 further as in doing so we risked further blockades."

25 Are you with me?

1 **A.** Yes, I am.

2 **Q.** Then if you go actually to Lisa Oldershaw's evidence on
3 this at paragraph 65 of her witness statement, which is
4 in tab J [Magnum].

5 **LORD CARLILE:** The same file as your witness statement.

6 **MR MORRIS:** Yes, same file, tab J. I'm grateful, sir.

7 She talks at paragraph 65 about the tension between
8 the pledge and the position of the dairy team. It's
9 page 22 of tab J.

10 **A.** Thank you.

11 **Q.** Right at the bottom left of that, this is in the period
12 of -- that I'm talking about, the September/October
13 period:

14 "I was resistant, I was not convinced it would
15 actually go back to the farmers. I kept John Scouler
16 and Rob Hirst informed throughout my negotiations."

17 You would agree with that, would you?

18 **A.** Yes, I would.

19 **Q.** "John Scouler supported me in delaying acceptance of the
20 cost price increase."

21 You would agree with that?

22 **A.** Yes.

23 **Q.** "I believe this was because my numbers could also have
24 an impact on John's own KPIs. It was only when people
25 more senior than John became uncomfortable with the

1 situation and the pressure began to mount internally
2 that John felt the time had come and told me I must
3 accept the cost price increase."

4 **A.** That's what happened.

5 **Q.** In the period leading up to that point where you say,
6 "Okay" -- I don't know what your words were -- "we have
7 got to go with it, Lisa", for want of a better word. In
8 that period Lisa Oldershaw was in contact with the
9 processors on a regular basis?

10 **A.** Yes.

11 **Q.** She said in fact that so far as Dairy Crest was
12 concerned, she was in contact on a daily basis?

13 **A.** Yes.

14 **Q.** I would suggest that she was keeping you updated about
15 what those conversations and discussions were?

16 **A.** No, I wasn't having daily conversations with Lisa.

17 **Q.** Not on a daily basis, but perhaps on a weekly basis or
18 every few days she would be telling you -- she said:

19 "I kept John Scouler and Rob Hirst informed
20 throughout my negotiations."

21 **A.** Yes, and I think to the best of my memory that would be
22 every few days.

23 **Q.** Amongst the things of which she would have kept you
24 informed was information she was receiving from the
25 processors?

1 **A.** Yes.

2 **Q.** I put to you before, you wouldn't have wanted to move
3 your prices up first and find that the other retailers
4 didn't move?

5 **A.** I never wanted to move my price increases up first.
6 That was a principle.

7 **Q.** Say that again?

8 **A.** I never would want to try move, I'd avoid at all costs
9 trying to put a retail price up, I would try to delay
10 that as long as possible, as I could.

11 **Q.** You were under pressure at the time from your senior
12 executives to -- I've used the word -- to accept the
13 cost price increase, because of the PR position and
14 Christmas coming up?

15 **A.** Yes, I don't remember being recalled on a detailed "Have
16 you taken a price increase on cheese?" discussion, but
17 I remember discussions about how it was going with the
18 farmers and the resolution and what was happening on
19 those type of discussions, but not the detail of a
20 negotiation with my --

21 **Q.** She says:

22 "The pressure began to mount internally ..."

23 I'm suggesting to you that you were coming under
24 pressure from your senior management?

25 **A.** I think I was under pressure from the senior management

1 that if there was a resolution, and what was my views
2 about what was going to happen at Christmas time, and
3 were the farmers likely to picket. So, yes, that
4 subject would be raised.

5 **Q.** Can I put this question to you: if Lisa had come to you
6 during this period and said to you -- if, this is if --
7 "The information I am getting from the processors is
8 that it looks like the other retailers are not going to
9 participate, not going to raise their prices by £200 per
10 tonne", in those circumstances, you would have put
11 Tesco's participation on hold? Sorry, you would have
12 put Tesco's consideration of the £200 per tonne cost
13 price increase on hold, wouldn't you?

14 **A.** Yes.

15 **Q.** And you would have then explained to your senior
16 management that you were not going to move Tesco's
17 prices?

18 **A.** Yes, I may well have done.

19 **Q.** In that event, nothing would have happened?

20 **A.** How do you mean, nothing would have happened?

21 **Q.** The whole thing, the £200 per tonne cost price increase,
22 you wouldn't have raised your prices and neither would
23 the other retailers, and the initiative -- I use the
24 word "initiative" by reference to the 2p per litre --
25 the across-the-board cost price increase would not have

1 happened in that event?

2 **A.** Yes, but they could have still forced the price increase
3 through even if we had refused to accept it.

4 **Q.** In fact --

5 **LORD CARLILE:** If nothing happened, you would have
6 Mr Handley blockading your depots?

7 **A.** Yes, he may have done. He may have done.

8 **LORD CARLILE:** That was the background to this.

9 **A.** Yes, sure.

10 **MR MORRIS:** Your senior management would have been concerned
11 in those circumstances and perhaps would have had
12 another go?

13 **LORD CARLILE:** In the run-up to Christmas.

14 **A.** Yes, that would be the case.

15 **MR MORRIS:** What in fact happened is she gave you
16 information which she had got from the processors that
17 other retailers would be raising their prices by £200
18 per tonne; that's right, isn't it?

19 **A.** That may have happened but I don't recall it.

20 **Q.** Can I just ask you one question about paragraph -- it's
21 paragraph 65 of Lisa Oldershaw's statement [Magnum] or
22 paragraph 80 of yours [Magnum], about when you told Lisa
23 Oldershaw the time had come. We know from
24 paragraph 65 -- I'll go back a moment actually to the
25 previous answer, if I may.

1 You said a moment ago that it may have happened but
2 you don't recall it. If I may, I'm going to ask you the
3 question again.

4 It was such a significant issue about whether you
5 knew or were getting information that the others were
6 participating, I'm suggesting to you that you must
7 recall that happening?

8 **A.** No, I can't say for definite. My assumption is it would
9 probably have happened but I can't say for definite,
10 sir.

11 **Q.** Where you say in your answer "my assumption is it would
12 probably have happened", you would have -- on that
13 assumption, you would have known that information came
14 from the other retailers?

15 **MISS ROSE:** Sorry, he needs to be a lot more clear about
16 what information he's talking about. What was put was
17 that other retailers were participating, that is very
18 unclear. He needs to say exactly what the information
19 is he --

20 **MR MORRIS:** That the other retailers were going to accept
21 the £200 cost price increase and that they were going to
22 raise their retail prices?

23 **MISS ROSE:** He needs to put clearly whether he's saying that
24 he was given information about current prices or future
25 prices.

1 **MR MORRIS:** Sorry, when I said "participating" -- accepting
2 the £200 cost price increase is a question about an
3 increase that they were going to accept -- I'm talking
4 now about before the end of October, and you have said
5 that you assumed getting information that others were
6 participating, and I will clarify that. Getting
7 information that other retailers were going to accept
8 the £200 per tonne cost price increase?

9 **LORD CARLILE:** By applying it to their retail prices?

10 **MR MORRIS:** Well, the first question was cost price.

11 **LORD CARLILE:** I think he's already answered that one. He
12 said "yes".

13 **MR MORRIS:** Yes. The second one is the information that you
14 would have received from Lisa is that the others were
15 going to also increase their retail prices?

16 **A.** I don't recall that, sorry.

17 **LORD CARLILE:** Do you want to add to that: on dates on which
18 you were made aware. Isn't that part of the allegation?

19 **MR MORRIS:** It is part of the allegation.

20 **LORD CARLILE:** Shouldn't it be put in that form?

21 **MR MORRIS:** Yes, by all means.

22 And the information that you received included
23 information as to the date at which the other retailers
24 would be raising their retail prices?

25 **A.** I didn't receive that level of information in terms of

1 dates for specific retailers. If I had, I would be
2 hugely cynical towards it and sceptical towards it, as
3 has always been the stance, and I go back to the earlier
4 comment that I made earlier about it: a wait and see
5 approach.

6 **Q.** By mid-October, I'll put this to you, Tesco,
7 Lisa Oldershaw, had told McLelland that Tesco would move
8 its prices in waves. This concept of waves, when you
9 looked at that Dairy Crest document, you'll have seen
10 the point about 20 October. Document 28. Perhaps just
11 to explain to you what I mean by the word "waves", if
12 you go to paragraph 2 of document 28 [Magnum] --

13 **A.** Sorry, can I just check my understanding which book
14 we're in?

15 **Q.** The yellow bundle in front of you, document 28.

16 **LORD CARLILE:** Yellow 1. Paragraph 2.

17 **A.** Thank you, sir.

18 **LORD CARLILE:** Just read that.

19 (Pause)

20 **MR MORRIS:** It's paragraph 2. Yes, thank you, sir.

21 It's the 20 October start date followed by a three
22 week programme. We know, we'll see later, or you will
23 know, I presume, that eventually what happened was that
24 there were, even from Tesco's point of view, a set of
25 moves in waves starting three different weeks?

1 **A.** "Waves" is an unfamiliar phrase to me, sorry.

2 **Q.** I can understand why. It's picked up from one of the
3 other documents because Dairy Crest use the term with
4 Sainsbury's.

5 What I mean is, I don't want to use the word
6 "stage", that's why I'm using the word "waves". What
7 I'm suggesting to you is that, by mid-October, Tesco had
8 told McLelland that Tesco would move in waves starting
9 from [REDACTED]. You may or may not recall that?

10 **A.** I don't recall it.

11 **Q.** If you go to document 51A [Magnum], just very quickly,
12 you may or may not have seen this document before. This
13 is a McLelland document which we believe is dated
14 somewhere between 16 and 21 October and it records the
15 position as McLelland understand it to be at that time,
16 and you will see this under the heading "Tesco":

17 "Will probably commence moves from [REDACTED]
18 staggered across brand/own label."

19 Do you see that paragraph?

20 **A.** Yes, I do.

21 **Q.** Lisa Oldershaw accepted in her evidence, Day 8,
22 page 155, line 9, that the source of the information in
23 that document was likely to have been her. I'm just
24 putting that --

25 **A.** Yes, okay.

1 **LORD CARLILE:** Mr Morris, can you just pause for a moment.

2 Shall we just take stock of the time and how we're
3 doing. You're plainly not going to finish today.

4 **MR MORRIS:** I'm not.

5 **LORD CARLILE:** We're going to rise not later than 4.30. We
6 can sit at 10 o'clock tomorrow if it's not inconvenient,
7 but I do not wish to inconvenience anyone's life unduly.

8 **MR MORRIS:** I would be pleased if that could happen. I had
9 hoped to get to the end of cheese 2002 today. I'm not
10 sure I will. Cheese 2003 is going to be relatively
11 short.

12 **LORD CARLILE:** Like an hour?

13 **MR MORRIS:** An hour, but I might need another half -- if we
14 started at 10.00 I might need an hour and a half.

15 **LORD CARLILE:** Well, we are where we are. All right.

16 **MR MORRIS:** I'm grateful, sir.

17 **LORD CARLILE:** I think I would like to hold you to an hour
18 and a half tomorrow.

19 **MR MORRIS:** I hear what you say and I will do my very best.
20 The only point I would point out is that the time for
21 the two witnesses has been slightly truncated, through
22 no fault of anybody's. We did initially estimate four
23 days, I'm now three and a half at the end of today, and
24 I will obviously do my very best to meet the Tribunal's
25 wishes. I will revisit tonight to see if I can cut --

1 **LORD CARLILE:** That's all we ask at the moment.

2 **MR MORRIS:** I'm grateful, sir.

3 So Lisa Oldershaw had told McLelland about what
4 Tesco was going to do, and at the same time Lisa
5 Oldershaw had received information from McLelland about
6 what Sainsbury's and other retailers were going to do.
7 We see that from document 52 which is the next document
8 [Magnum].

9 Perhaps you would like to look at that email, it's
10 an email from Tom Ferguson at McLelland to
11 Lisa Rowbottom on the 21st. Do you want to read it
12 through to yourself?

13 **A.** Thank you.

14 (Pause)

15 **Q.** Now, just to summarise very quickly. The first two
16 sentences are a spreadsheet concerning proposed prices
17 relating to Tesco, and the next -- the remainder -- the
18 next sentence:

19 "Other parties are confirming that they will protect
20 cash margin on this occasion but not % margin."

21 That is information that Tom Ferguson is giving
22 Lisa Rowbottom about what other retailers are going to
23 do on the great cash percentage margin debate.

24 Then the next sentence:

25 "The timescales are as we proposed.

1 "... 4th of November for pre-pack and the 11th
2 of November for deli."

3 It's fair to say that there is a debate between the
4 OFT and Lisa Oldershaw about whether that is referring
5 to Tesco's timescales, waves, or the other retailers'.

6 The third sentence is information, clearly
7 information about -- that:

8 "Sainsbury's are confirming that the new retails on
9 branded pre-pack [and just to clarify for you, that
10 means effectively Seriously Strong, certainly as
11 a McLelland product, it's the fixed weight] will be in
12 place Tuesday this week", which was the next day.

13 Have you seen that email before?

14 **A.** I can't remember seeing it before.

15 **LORD CARLILE:** If you had seen that email at the time, would
16 you have reacted to it in any way?

17 **A.** Yes, I mean I would be surprised to see that document at
18 the time.

19 **LORD CARLILE:** Why?

20 **A.** Because what it's suggesting is that Sainsbury's are
21 going to confirm their new retail prices will be in
22 place on Tuesday of next week, which would be not common
23 domain knowledge and therefore I would be getting some
24 information that I shouldn't be getting.

25 **LORD CARLILE:** What would you have done about it if you'd

1 seen it at the time, do you think, if anything?

2 **A.** We would have written back and said it was not the right
3 information to have been sent.

4 **MR MORRIS:** Would Lisa Oldershaw have been aware that that
5 was your policy?

6 **A.** Yes, but also Lisa was obviously very busy and may have
7 not read the note fully and may not have sent a note.
8 Sorry, (inaudible) she didn't send a note so...

9 **Q.** Is it your evidence, never mind about having seen the
10 email, that you were not aware of the information
11 contained in that email at that time?

12 **A.** I don't remember seeing it.

13 **Q.** No, that wasn't the question. The question was, were
14 you aware of the information contained in that email?

15 **A.** No, I wasn't, sir.

16 **Q.** Lisa Oldershaw didn't tell you?

17 **A.** To the best of my knowledge, no.

18 **Q.** Well, I would suggest to you that at the time you were
19 aware that the processors were telling Lisa Oldershaw
20 information about what other retailers were going to do
21 in relation to cost and retail prices?

22 **A.** Yes, as this email suggests.

23 **LORD CARLILE:** Well, the question was put to you that you
24 were aware of that?

25 **A.** That I was aware of --

1 **LORD CARLILE:** The question was:

2 "I would suggest to you that at the time you were
3 aware that the processors were telling Lisa Oldershaw
4 information about what other retailers were going to do
5 in relation to cost and retail prices?"

6 Were you so aware?

7 **A.** I would probably be aware that they had suggested that
8 they had increased cost prices and they were having
9 negotiations with suppliers, but the dates of retail
10 price movements, no, sir.

11 **LORD CARLILE:** So that's a no.

12 **MR MORRIS:** You said:

13 "I would probably be aware that they had suggested
14 that they had increased cost prices and they were having
15 negotiations with [the] suppliers..."

16 The "they" in that answer was the retailers?

17 **A.** No, my apologies, sorry. What I meant to say would be
18 they, as in the suppliers, would be saying "We're
19 getting price increases across the market, Tesco, you
20 have not accepted it, we're managing price increases
21 through everybody else", not what the other retailers'
22 response was to that. I apologise if that's the
23 confusion. It was very much a conversation between
24 ourselves and the processor/supplier.

25 **Q.** I would suggest to you that you knew that the overall

1 schedule was for Sainsbury's to move first, on 21 and
2 22 October, with other retailers moving in subsequent
3 weeks?

4 **A.** No, I wouldn't have known that detail, sir.

5 **Q.** You've said, but couldn't say for definite, that you
6 were probably receiving information that other
7 retailers -- I use the word "participating", I've not
8 gone back to the transcript, but you were probably
9 receiving information about what other retailers were
10 going to do about the cost of retail price increase.

11 **A.** Sorry, you keep -- I would have been made aware that
12 retailers may well be accepting cost price increases,
13 but there was no reference to a retail price movement
14 from any of those retailers. It would have been the
15 supplier saying, going back to my earlier comment, that
16 "Accept a cost price increase because you are one of the
17 last ones to accept it", but not on retail prices.

18 **Q.** When you were told what you were told, you realised that
19 those -- the retailers knew that their information would
20 be likely to be passed on to you and others?

21 **A.** Sorry, can I check my understanding again of that
22 question, sorry?

23 **Q.** The question I'm asking you is about your understanding
24 that when you received the information you received, you
25 would have realised that those other retailers were

1 content for that information to be passed on by the
2 processor to you?

3 **A.** I think the other retailers would be deeply upset if
4 they thought that the processors were passing me
5 information or had any thought to it. I would have
6 thought they would have been very disappointed and
7 surprised.

8 **Q.** Now, we know that Lisa Oldershaw prepared a detailed
9 plan, document, an internal document, I think she called
10 it her cost and retail plan. If you would like to go to
11 document 64.

12 **LORD CARLILE:** Last document of the day. And only five
13 minutes. If you want to leave it to tomorrow morning --

14 **MR MORRIS:** I don't think I do actually. I'm not going to
15 go into it in great detail.

16 Would you like to go to tab 64 [Magnum], this is an
17 internal email from Lisa Rowbottom to her then to-be
18 husband, and you have attached to it two documents that
19 were in fact soft copy attachments. Do you see that?
20 The first two pages are a summary document -- if you go
21 back, you're now at the spreadsheet I think. I'm rather
22 cheekily looking over your shoulder.

23 The first two pages in portrait are headed "Cheese
24 £200 Per Tonne Plan" and "Cost and Retail Moves", do you
25 see that?

1 **A.** Yes, I have that.

2 **Q.** Then you see a whole array of spreadsheets. I won't go
3 into it.

4 **A.** Yes.

5 **Q.** That's a detailed plan. If you go to the blue divider
6 in the spreadsheets -- I said I wouldn't take you but
7 I will very quickly. If you go to the first page there,
8 you will see every line of cheese with every supplier
9 with tables of new cost price, current RSP, alternatives
10 of the two alternative RSPs -- are you following me
11 across the line?

12 **A.** Yes, I am.

13 **Q.** Then the RSP and then the date?

14 **A.** Yes, I am.

15 **Q.** You'll see different dates. If you go back to the first
16 page of the portrait document at the beginning, what you
17 see there is -- this is where my word, if you will allow
18 me to use the word "waves" I will -- the waves of
19 3 November, 10 November and 17 November, and there are
20 categories of cheese to move at different dates. She
21 calls it "Cost and Retail Moves", do you see that?

22 **A.** Yes, I do.

23 **Q.** I suggest to you that she discussed this plan in general
24 terms with you at that time, by which I mean towards the
25 end of October at the latest?

1 **A.** I don't recall seeing this, but my assumption would be,
2 given this level of movement, I would have been informed
3 of that.

4 **Q.** Well, I would suggest that you did see the document,
5 Lisa Oldershaw says that eventually she would have
6 emailed it to you.

7 **A.** Yes, that's what I'm sort of saying, sir. I can't
8 categorically remember, but for this level of scale
9 I would have assumed --

10 **LORD CARLILE:** You would have expected to see this kind
11 of --

12 **A.** I would have expected to see it, thank you, sir. Yes,
13 thank you.

14 **MR MORRIS:** What then happened -- I'm going to break there.

15 **LORD CARLILE:** Okay.

16 Yes, Miss Rose.

17 **MISS ROSE:** Sir, I just need to explore very briefly, and I
18 don't want to keep you because I know you have another
19 commitment, where this leaves us in terms of dealing
20 with timing for closings. Because if there's going to
21 be an hour and a half from Mr Morris tomorrow I may very
22 well not finish my closing submissions by the end of
23 Friday.

24 **LORD CARLILE:** Then we'll allow you to finish them when
25 we -- is it on Monday?

1 **MISS ROSE:** Yes, sir, but I'm just concerned about how that
2 affects the timetable for the rest of the hearing
3 because I have also put in a bid for a half day reply on
4 the Thursday.

5 **LORD CARLILE:** Yes. Well, we'll just take it as it comes.
6 I know that counsel will be as economical as they
7 reasonably can be, given their instructions. I think we
8 just have to take it as it comes. We've all kept pretty
9 close to the timetable.

10 **MR MORRIS:** Sir, I think we're all trying to -- we've seen
11 the target and, if I may suggest, the Tribunal has been
12 very flexible and I will endeavour to be the same --

13 **LORD CARLILE:** The Tribunal recognises you're all trying to
14 keep to timetable.

15 Right. Sorry, that's a very bad old joke.

16 **MR MORRIS:** It was.

17 **LORD CARLILE:** We'll adjourn until 10 o'clock tomorrow
18 morning.

19 Mr Scouler, I'm afraid you can't talk to anyone
20 about your evidence until your evidence is finished, as
21 I said earlier. I know you'll take that seriously.

22 **A.** Yes, sir.

23 **LORD CARLILE:** Thank you.

24 (4.30 pm)

25

1 (The hearing adjourned until
2 Thursday, 24 May 2012 at 10.00 am)
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