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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.

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- 1 Wednesday, 23 May 2012
- 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



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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?

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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

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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:

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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

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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

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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

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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.

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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)

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1 (The hearing adjourned until  
2 Thursday, 24 May 2012 at 10.00 am)  
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