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**IN THE COMPETITION**

**APPEAL TRIBUNAL**

Case No. 1188/1/1/11

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

28 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 14)**

## 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 Monday, 28 May 2012

2 (10.00 am)

3 (Proceedings delayed)

4 (10.30 am)

5 Closing submissions by MISS ROSE (continued)

6 **LORD CARLILE:** Good morning. I hope everybody enjoyed

7 a sun-drenched weekend, or whatever the cliché is.

8 **MISS ROSE:** Good morning. We have also done our homework

9 over the weekend and answered some questions that were

10 posed by the Tribunal. What I want to hand up is three

11 documents, if I can just ask for them to be collated and

12 then --

13 **LORD CARLILE:** Just bear with me.

14 (Pause)

15 I'm sorry, I left my homework in my briefcase

16 outside court.

17 **MISS ROSE:** The dog didn't eat it?

18 **LORD CARLILE:** It's going to be brought to me now. Yes, go

19 on, Miss Rose.

20 I think Ms Lester may have been doing some homework

21 over the weekend, and Mr Piccinin.

22 **MISS ROSE:** Yes, we've all been hard at it, sir.

23 What you have is first of all a supplementary note

24 on Safeway v Twigger, which I hope answers the question

25 that you specifically posed on Friday. I am not

1 proposing to go through these orally, but if you have  
2 any questions having read them then obviously I'm happy  
3 to deal with them. So that's the first one.

4 The second note that you have is a supplementary  
5 note on Toys & Kits. This identifies the key  
6 distinctions between this case and the Toys & Kits cases  
7 in terms of the market context, the suppliers'  
8 proposals, the buyer/supplier interactions and the  
9 quality of the evidence.

10 I would invite the Tribunal to read that with some  
11 care because we submit it's quite significant.

12 The third is a letter from my instructing solicitors  
13 which addresses the question of document 110A [Magnum]  
14 and explains what we have and what we don't have, which  
15 is the original of this document which we believe is  
16 buried somewhere in many hundreds of boxes of archived  
17 materials which are not indexed. But we've identified  
18 here how it was originally produced and --

19 **LORD CARLILE:** We're very grateful for that letter. It's  
20 helpful, I can understand exactly what the position is.  
21 Thank you very much.

22 **MISS ROSE:** Now, returning to my note, we had got to  
23 strand 7, paragraph 222, page 124.

24 **LORD CARLILE:** Is there a hole-punch handy? I just want to  
25 put these with your closing submissions.

1       **MISS ROSE:** Yes, sir.

2       **LORD CARLILE:** Paragraph 222.

3       **MISS ROSE:** Page 124. So this allegation by the OFT is that  
4       in early November 2002, Tesco disclosed to Sainsbury's  
5       via McLelland the fact that Tesco was intending to match  
6       Asda's new price for Smart Price mild and mature  
7       cheddars. So the Tribunal will recall this is the  
8       Smart Price, which was not actually part of the £200 per  
9       tonne initiative. The document on which the OFT relies  
10      for this is document 71 [Magnum], which is at the  
11      beginning of document bundle 2. This is an email from  
12      Mr Ferguson to Sarah Mackenzie of Sainsbury's headed  
13      "Period Seven Commercial Overview", so it's clearly  
14      talking about their annual business plan. This does not  
15      seem to be a document that has anything to do with the  
16      £200 per tonne initiative at all. It's just the normal  
17      business plan.

18               Then he says:

19               "A quick update on the generic cheddar area. Asda  
20      have moved all sizes of Smart Price mild cheddar to  
21      £2.69 per kilo and Smart Price mature cheddar to £3.69  
22      per kilo. This will be matched by Tesco."

23               The OFT invites the Tribunal to draw a whole string  
24      of inferences from this email, first that this was  
25      information that had been provided to Mr Ferguson by

1 Tesco and, secondly, that in providing that information  
2 Tesco was intending that information to be communicated  
3 to Sainsbury's. We submit that the OFT fails entirely  
4 to make out that case, not least because it fails to  
5 establish the first base proposition that this was  
6 information that Mr Ferguson had obtained from Tesco as  
7 opposed to being his assessment of Tesco's likely  
8 reaction to a move in the Smart Price cheddar on the  
9 part of Asda.

10 Now, we set out our points on this at paragraph 223.  
11 The first point is that there is no evidence at all that  
12 Tesco had told McLelland that it would match those  
13 prices, simply no evidence of that. The OFT relies on  
14 what it refers to as the definitive nature of the  
15 statement.

16 **LORD CARLILE:** They used to match Asda's prices anyway,  
17 didn't they?

18 **MISS ROSE:** Yes, it was their basket policy to match.

19 **LORD CARLILE:** That's what I mean.

20 **MISS ROSE:** Yes. What's argued by Mr Morris is he says,  
21 well, Tesco was obliged to match Asda as it dropped its  
22 price, but it wasn't obliged by the basket policy to  
23 match Asda if it raised its price and, therefore, the  
24 definitive statement that Tesco would do that must, says  
25 the OFT, mean that this is specific future pricing

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1 information from Tesco. We say that's a false inference  
2 because, even though it is correct that the basket  
3 policy required Tesco to match the Asda price if it  
4 fell, but it didn't require Tesco to match the Asda  
5 price if it rose, we know what the situation was at this  
6 stage in 2002 which was that Tesco was coming under  
7 immense pressure in relation to its margins because the  
8 cost price for its cheeses was being increased and it  
9 was being urged only to preserve cash margin and not  
10 percentage margin, so it was losing margin, and  
11 therefore would be desperately looking, as  
12 Lisa Oldershaw's evidence was, to claw back margin where  
13 it could.

14 What we'll then come on to see is two further  
15 points: firstly, this information isn't accurate, in  
16 fact Asda did not put up its price on all of those  
17 products, it dropped it on a number of them; and,  
18 secondly, because what Asda actually did was to drop its  
19 price on four of its different lines of Smart Price and  
20 increase on only two, Tesco was under even greater  
21 margin pressure, because even just looking at the  
22 Smart Price, which of course is a very economically  
23 significant range of lines, Tesco was having to cut its  
24 margins to match Asda's new Smart Price, which was  
25 a decrease.

1           So we submit that the OFT has simply failed to show  
2           that this information came from Tesco.

3           Going back to paragraph 223, at (b), we refer to the  
4           fact that the OFT relies on the definitive statement,  
5           "This will be matched by Tesco". However, of course,  
6           again, this is the salesman and the salesman is bound to  
7           use definitive language. He may privately think, well,  
8           there's a 95 per cent chance or a 99 per cent chance  
9           that Tesco will follow Asda's Smart Price because they  
10          do it virtually always. But why should he make that  
11          qualification when talking to his customer? The obvious  
12          thing for him to say is, "This will be matched by  
13          Tesco", because that makes it easier for him to make the  
14          sale. So we say that gets them nowhere.

15          Of course, the Tribunal has now seen abundant  
16          evidence of suppliers making statements to retailers  
17          that are not correct in the course of 2002. We've had  
18          the example of parties will apply cash margin only, not  
19          percentage margin, sent to Tesco on 21 October, when we  
20          know McLelland didn't know what Asda's position was  
21          going to be on cash margin, no qualification given  
22          there, and when we know that the next day Sainsbury's in  
23          fact didn't apply cash margin.

24          So the fact that Mr McLelland (sic) makes this  
25          statement is not evidence at all that it came from

1 Tesco.

2 At (c), we address the changes that Tesco made to  
3 its Value lines to match the in-store prices as part of  
4 the usual basket policy adjustment, and we make the  
5 point some of those were increases but the majority were  
6 in fact decreases.

7 Now, the Tribunal, unlike the OFT when it made its  
8 decision, the Tribunal does have the benefit of direct  
9 evidence on this point from Mr Ferguson of McLelland who  
10 wrote this email. His evidence was that he did not  
11 recall having specific information about Tesco's future  
12 pricing intentions at that stage, and that his comment  
13 to Sainsbury's:

14 "... would have been an assumption made by me on the  
15 basis of my market experience that Tesco would match  
16 Asda's retail price."

17 So that was his evidence to this Tribunal and we  
18 submit that there is no evidence to contradict that.

19 Then we've given you the references to  
20 Lisa Oldershaw's cross-examination, that:

21 "McLelland would have been well aware that I would  
22 have been under margin pressure and they would have  
23 assumed I would have moved up to claw back some margin."

24 In fact the OFT interviewed Sarah Mackenzie, who was  
25 the recipient of this email at Sainsbury's, about what

1 she thought about it. If you go to the notice of appeal  
2 bundle 1, tab D1, you can see what she said. It's the  
3 same volume that has the decision in. Tab D1.

4 **LORD CARLILE:** Page 24?

5 **MISS ROSE:** Page 24 [Magnum]. So "AG", who is from the OFT,  
6 Andrew Groves of the OFT, says:

7 "AG: ... document 15 [that's the document we're  
8 talking about] ... This again appears to be  
9 a combination of publicly available information but also  
10 future information in relation to Tesco. Would that be  
11 the sort of reassurance that you would -- in terms of  
12 what you were just saying actually, in terms [of] when  
13 you saw a retailer moving its prices, would you also  
14 have received assurances, perhaps of a processor, that  
15 other retailers would be following?

16 "SM: I mean, by the fact that Asda have actually  
17 moved in the public domain, that would have given us  
18 assurance anyway, because generally Tesco's then would  
19 follow Asda, so that would have given us the assurance."

20 So her immediate reaction to this is the reaction of  
21 everybody who understands this market and knows this  
22 market, which is, "Well, okay, if Asda have moved their  
23 prices, Tesco will follow them". Because Tesco at this  
24 stage was always playing catch-up to Asda; Asda were  
25 tending to set the lowest benchmark on pricing.

1           "TH: And why would you have expected Tesco to follow  
2           Asda? Because an alternative possibility for Tesco is  
3           to keep its lower price ...

4           "SM: Historically that's what had happened in the  
5           market, that's what we'd seen previously.

6           "AG: But the clarification in the email is a bit  
7           more emphatic than based upon market conditions as such.

8           "SM: I don't understand your point.

9           "AG: The email states this would be matched by  
10          Tesco. Would you say from that, that that is based upon  
11          McLelland's previous understanding of how Tesco  
12          operates?

13          "SM: It probably is, or I'm not sure what Tesco's --  
14          what McLelland's were packing for Tesco's but I think  
15          they may well have been packing their Value cheese ...  
16          they weren't a supplier for us of value cheese."

17          And then they move on.

18          So the OFT in fact have evidence from the recipient  
19          of this email that she didn't believe that this was  
20          future pricing information that had come from Tesco but  
21          that her interpretation of it was exactly the same as  
22          Mr Ferguson who wrote it, and Lisa Oldershaw, that this  
23          was simply information that was obvious to anybody who  
24          operated in this market and reflected the historical  
25          situation.

1           Of course, that evidence can't be tested because the  
2           OFT chose not to call Sarah Mackenzie. But there is, we  
3           say, simply no evidence at all either that this  
4           information emanated from Tesco or that, if it did, it  
5           emanated with intent, or that it was understood by the  
6           recipient, Sainsbury's, to have emanated from Tesco.  
7           Indeed, the only evidence of the intention of the  
8           recipient is that it was not understood to have emanated  
9           from Tesco and certainly not with intent that it would  
10          be passed on.

11           Then coming to paragraph (f) in my note, the OFT  
12          sought to make much of the fact that in her witness  
13          statement there was some uncertainty in Lisa Oldershaw's  
14          evidence about whether or not she might have given  
15          McLelland any information about the prices of  
16          Tesco Value cheese. But she explained in her oral  
17          evidence that that was because, at the time she wrote  
18          her witness statement, she was unsure whether McLelland  
19          were packing Value cheese for Tesco at this date.

20           She recalled that there came a time when McLelland  
21          started to pack Value cheese for Tesco but couldn't  
22          quite remember whether it had already happened as  
23          at November 2002, and the point that she explained in  
24          her oral evidence was that, if McLelland had been  
25          packing Value cheese for Tesco at this time, then she

1           would have given them notice of an increase or a change  
2           in Tesco's retail prices because they would have needed  
3           it for the labelling, but if they hadn't then she  
4           wouldn't have, and that was the source of her  
5           uncertainty.

6                     In fact it became clear during the hearing that  
7           McLelland did not start to pack Value cheese for Tesco  
8           until 2003, and on that basis Lisa Oldershaw was very  
9           clear that she would not have given this information to  
10          McLelland.

11                    We can just turn that up in the transcript. It's  
12          Day 9, page 162. At the bottom of 161, it's put to her  
13          that he's not speculating. She says:

14                    "He was speculating, but he was doing it with  
15          knowledge that I would never turn down a margin  
16          opportunity..."

17                    You can see above, just for your note, at line 5,  
18          she says:

19                    "Why would I have turned down the opportunity, the  
20          percentage margin hungry buyer, why would I have  
21          declined an opportunity to make more margin when by  
22          simply matching an Asda price on a competitive line, I  
23          could achieve that?"

24                    Then he says:

25                    "Question: I would suggest to you that he's not

1           speculating?

2           "Answer: He was speculating, but he was doing it  
3           with knowledge that I would never turn down a margin  
4           opportunity if it was handed to me so clearly.

5           "Question: I suggest that the definitive manner in  
6           which he states this indicates that he had got this  
7           information from you?

8           "Answer: He had not.

9           "Question: As you accepted a few moments ago, Tesco  
10          didn't pack -- sorry, McLelland didn't supply Tesco  
11          Value cheeses at the time; that's right, isn't it?  
12          We've established that?

13          "Answer: As a packed product. As a packed product,  
14          yes.

15          "Question: So there was no need for you to tell  
16          Mr Ferguson of your future retail prices for labelling  
17          purposes?

18          "Answer: No, and therefore he would not have them.

19          "Question: Yes, and I might suggest that that is  
20          why what you're now saying, because you've seen what  
21          there is, is different from what you say in  
22          paragraph 124 of your witness statement?

23          "Answer: I don't believe it's different.

24          "Question: Well, now you're saying you didn't give  
25          this information, and at paragraph 124 you're saying,

1 'I'm not sure whether I did or not'.

2 "Answer: In my witness statement, I think we've  
3 established that I was confused about the packing date  
4 of McLelland's packing Value lines, and it's clearly  
5 shown from my spreadsheet of cost prices and retail £200  
6 per tonne that, at that time, they clearly didn't supply  
7 Value cheeses. Therefore, they would not have --  
8 I would not have given them the retail price of cheese  
9 as I went off the spreadsheet."

10 So that clarified that point. She also confirmed in  
11 her cross-examination that four of the price changes  
12 that she made to Tesco's Value cheeses at that time were  
13 price reductions to match Asda, and the two price  
14 increases also to match Asda were made to make up for  
15 the margin pressure caused by those reductions and the  
16 £200 per tonne initiative generally.

17 That's footnote 429, we don't need to turn it up,  
18 but for the Tribunal's note she confirmed that, and she  
19 also confirmed that Mr Ferguson would have been aware of  
20 that general background which would have made it  
21 overwhelmingly obvious that she would match the rise in  
22 Asda's price where she could.

23 You can see the same thing in her cross-examination,  
24 if you just go to Day 10, page 25. It was put to her  
25 that there had been another occasion earlier in 2002

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1           when the Tesco price on one Smart Price line had been  
2           beneath Asda's for two months. It was put to her that  
3           she did not invariably raise her price to match Asda,  
4           and it was put to her that, therefore, her recollection  
5           was mistaken. That's line 10. She says:

6           "Answer: No, I don't agree that it was mistaken  
7           because at the time of all these price changes, £200 per  
8           tonne, McLelland would have been well aware that I would  
9           have been under margin pressure, if -- and by then they  
10          have seen that a lot of my lines were not in store at  
11          cash -- sorry, percentage margin maintenance, so they  
12          would have known I would have been taking a margin hit  
13          on those.

14          "So, yes, I fully stand by my statement that they  
15          would have assumed I would have moved up to claw back  
16          some margin."

17          So that's strand 7, and we say that, again, the  
18          OFT's case simply doesn't get off the ground because  
19          they have not demonstrated that any information at all  
20          came from Asda, still less -- from Tesco, still less  
21          that it came from Tesco with the requisite intent or was  
22          understood by Sainsbury's as having come from Tesco with  
23          that intent.

24          Then strand 8, this is an allegation by the OFT that  
25          in early November 2002 Asda disclosed to Tesco via

1           McLelland its future pricing intentions for its own  
2           brand cheeses, and that this demonstrates a disclosure  
3           by Tesco of its retail pricing intentions to McLelland  
4           by means of a conditional commitment.

5           So there are two purposes that this is relied on.  
6           Firstly, it is said to be a disclosure by Asda and,  
7           secondly, it's said to be a conditional commitment by  
8           Tesco. These allegations are based solely on an  
9           internal McLelland email of 8 November 2002, which is  
10          document 79 in the documents bundle [Magnum]. So this  
11          is the conversation between Lisa Oldershaw and  
12          Jim McGregor on 8 November:

13                 "Lisa called to state Tesco will not commit to  
14                 moving own brand until they see that Asda have moved and  
15                 therefore will not give us their RSPs. While they're  
16                 relatively confident everything is in place with Asda  
17                 they're taking a 'we won't believe it until we see it'  
18                 stance."

19           The first point to make is that there is no evidence  
20           at all that any information was given to Tesco about  
21           Asda's future retail pricing intentions in that  
22           conversation. The email does not say so. The comment  
23           "relatively confident that everything is in place with  
24           Asda" is hardly surprising given the press article that  
25           appeared only three days before this email on

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1           5 November, which you have at tab 72 [Magnum], which  
2           says:

3                 "Tesco, Sainsbury's, Asda and others will increase  
4           wholesale cheese prices by £200 per tonne as from this  
5           week, and their retail prices will be increased over the  
6           next 2-3 weeks."

7                 So it was already in the public domain that Asda  
8           were planning to increase their retail prices within the  
9           next two to three weeks. So there is, again, simply no  
10          evidence at all that any information was passed to Tesco  
11          about Asda in this conversation or, if it was, that it  
12          was confidential information. Because if information  
13          was passed to Tesco along the lines of: Asda will be  
14          increasing their retail prices over the next two to  
15          three weeks, that was already public information.

16                 So again we say that simply does not get off first  
17          base because no information exchange is established.  
18          That's the point at paragraph 226.

19                 We also make the point about the ambiguity of this  
20          email. Lisa is reported as stating that:

21                 "Tesco will not commit to moving own brand until  
22          they see that Asda have moved and therefore will not  
23          give us their RSPs."

24                 But the second sentence:

25                 "While they're relatively confident that everything

1 is in place with Asda, they are taking a 'we won't  
2 believe it until we see it' stance."

3 It is not clear at all from that email whether that  
4 is something that Lisa said to Mr McGregor or whether it  
5 is simply his interpretation of what she said in the  
6 first sentence, which is, "we won't move our RSPs until  
7 we see Asda have moved in store".

8 The next point to make about that, of course, is  
9 it's entirely consistent with all of the evidence that  
10 this Tribunal has heard from Tesco's witnesses, which is  
11 that they did not act on information about future retail  
12 pricing intentions but that they did indeed wait to see  
13 what happened in store before they took decisions, and  
14 that's all that's being said in this conversation. "I'm  
15 not interested in future retail pricing information,  
16 I'll believe it when I see it. I want to see it in  
17 store". And that's all that Tesco is saying in that  
18 conversation.

19 What the OFT does is they try to in some way connect  
20 this email with the email from McLelland to the Co-op on  
21 4 November 2002, which you have at number 70 at the end  
22 of bundle 1 [Magnum], to say, "Look, McLelland was in  
23 possession of information about Asda and they must have  
24 passed that information to Tesco in this conversation".  
25 So that is the information on 5 November, this is

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1           Stuart Meikle, that, "Asda will move all deli lines and  
2           pre-pack own label on 11 November".

3           But there is simply no evidence at all that  
4           Mr McGregor told Lisa Oldershaw in this conversation  
5           that Asda will move all deli lines and pre-pack own  
6           label on 11 November. There just isn't any evidence  
7           that he said that.

8           There is also, of course, no evidence that that  
9           information at document 70 came from Asda at all, rather  
10          than being a McLelland assessment, or, if it did come  
11          from Asda, it was intended by Asda to be passed on.

12          The final point to make on this is that, even if  
13          future retail pricing information from Asda was in fact  
14          passed by Mr McGregor to Lisa Oldershaw in this  
15          conversation, of which there is no evidence, the one  
16          thing we can say is that it was not information to which  
17          she was giving any credence or placing any reliance on,  
18          and it was not information that she was intending to act  
19          upon in a way that would restrict or distort  
20          competition. Because what she is recorded as saying in  
21          this information was, "I will not commit until I see  
22          what Asda have moved". So what she's actually saying  
23          is, "I'm not interested in retail pricing information",  
24          and that is consistent with what she did because, in  
25          fact, Tesco did not commit to moving their own brand

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1 prices until much later, until late November 2002, when  
2 they were moved with effect from 1 December.

3 There is no evidence from the OFT as to whether or  
4 not Asda's in-store prices had in fact moved by the date  
5 that Lisa Oldershaw decided to move the Tesco own brand  
6 prices. The only document that the OFT referred the  
7 Tribunal to was an internal Asda proposal on  
8 16 September saying, "I propose that we move on  
9 2 December".

10 But one thing we know for sure is that proposals  
11 about move dates changed, they changed repeatedly  
12 throughout this period from the various retailers, and  
13 so the fact that Asda were proposing internally on  
14 16 September to move -- 16 November to move on  
15 2 December tells you nothing at all about the date on  
16 which Asda's prices actually did move. Again, it would  
17 have been a simple matter for the OFT to get evidence on  
18 that question, they only needed to ask Asda for it, but  
19 they never did.

20 So in that situation, we submit again that this  
21 strand does not get off the ground.

22 We can see at paragraph 228 how the OFT deals with  
23 this evidential hole. The OFT says:

24 "McLelland had an opportunity to make  
25 representations on the statement of objections and did

1 not contest this reading of the email."

2 We say that is wholly inadequate given the  
3 constraints that were placed on the early resolution  
4 agreement parties in terms of making factual corrections  
5 which might place in jeopardy their fine(?) discounts,  
6 and in any event, of course, not evidence in these  
7 proceedings. That's strand 8.

8 Strand 9, which is the last 2002 strand, the OFT's  
9 allegation is that, in mid-November 2002, Tesco  
10 disclosed to Asda, either via Dairy Crest or via  
11 McLelland, we're not told which, the OFT doesn't know  
12 which, that if Asda failed to increase its retail price  
13 for stilton, Tesco would reduce its retail price for  
14 stilton. What the OFT relies on is an internal Asda  
15 email by David Storey of 13 November 2002, and that's  
16 document 83 in volume 2 [Magnum].

17 The first thing to note is -- this is the email  
18 I was talking about earlier -- this is the only evidence  
19 that the OFT rely on about the date that Asda moved --  
20 it's actually, I'm sorry, 13 November, it was even  
21 earlier than I said, 13 November. Mr Storey said:

22 "We will propose increase for December 2 subject to  
23 others moving earlier."

24 So it's simply a proposal, there's no evidence of  
25 when Asda did actually move.

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1           Then we come on to stilton, and the OFT rely on the  
2           phrase at the top of the second page:

3           "NB, others have indicated will move back down  
4           unless we follow due to moving two weeks ago."

5           The OFT invites the Tribunal to draw, again,  
6           a pyramid of inferences from this statement. First,  
7           that "others" includes Tesco; second, that this is  
8           information that comes from Tesco; and, thirdly, that  
9           this is information that was transmitted by Tesco via  
10          one or other of the suppliers with the intention that it  
11          should be forwarded to Asda. The OFT asks you to draw  
12          all of those inferences from that phrase which we submit  
13          are plainly inappropriate.

14          So just to follow it through in our note, 231.  
15          First of all, the OFT has no evidence that this  
16          information was provided by Tesco to any supplier. The  
17          OFT simply says that you ought to infer it from the  
18          general pattern of evidence. Secondly, there's no  
19          evidence of Tesco having ever expressed a threat to  
20          anyone, or of anyone telling Asda that Tesco would do  
21          so. Thirdly, the Asda email doesn't name Tesco.  
22          Fourthly, David Storey, of course, was not interviewed  
23          by the OFT but all the email is doing is forwarding  
24          a price audit report, provided by the Asda account  
25          manager at Dairy Crest, Kenton Robbins, recording

1 various retail price increases implemented by several of  
2 Asda's competitors, including Tesco.

3 The email is not evidence of Tesco transmitting  
4 retail pricing intentions via a supplier. Dairy Crest  
5 could readily have deduced that Tesco would reduce its  
6 retail prices for stilton if they were not matched by  
7 Asda because of the basket policy.

8 We then make the point that, in fact, Tesco's  
9 supplier was Long Clawson, Tesco's stilton supplier was  
10 Long Clawson, who is not alleged to have been an  
11 infringing supplier. So it is particularly implausible  
12 that Tesco would have given any information at all about  
13 what it was intending to do about its retail prices for  
14 stilton either to Dairy Crest or McLelland. The OFT  
15 says, "Ah, yes, but Tesco told Dairy Crest what it was  
16 doing with stilton on 30 October", but that's simply the  
17 occasion on which Lisa Oldershaw read through her  
18 categories on the list.

19 So, again, we say strand 9, the OFT fails to  
20 establish any of the elements necessary for an  
21 infringement. It doesn't establish any information from  
22 Tesco, it doesn't establish intent by Tesco, it doesn't  
23 establish transmission by either of the suppliers who  
24 are said to be infringers. It doesn't establish that  
25 Asda understood the information to come from Tesco, or

1           understood it to come from Tesco with Tesco's knowledge  
2           or intent.

3           So all of the elements are not demonstrated in  
4           relation to tab (sic) 9.

5           Sorry, I beg your pardon, Mr Storey was interviewed  
6           by the OFT. You need to correct paragraph 231(d). The  
7           relevant reference is in the strand table, relating to  
8           strand 9.

9           So that's 2002, and I just want to stand back now  
10          and invite the Tribunal to look at what is said to be  
11          the single infringement, because the OFT alleges  
12          a single infringement for 2002. I just invite the  
13          Tribunal to look at the evidence relating to 2002 as  
14          a whole and in the round.

15          First of all, what are the disclosures that the OFT  
16          alleges were made by Tesco in 2002, and what are the  
17          disclosures that the OFT has actually proved were made  
18          by Tesco in 2002?

19          The OFT, in its decision, alleged disclosures of  
20          future retail pricing information by Tesco in 2002 on  
21          five separate occasions. They are, first of all, late  
22          September 2002, that's strand 1, where it was said that  
23          at the Dairy Supply Group meeting Tesco had made  
24          a conditional commitment about its future pricing  
25          intentions. We say that is demonstrated now to be not

1 correct, both from the notes of that meeting and from  
2 the evidence this Tribunal has heard about what was said  
3 at that meeting.

4 Then the very late refinement of that case by the  
5 OFT, also under strand 1, to say, "Well, if it wasn't  
6 said at the meeting, it was said in a series of meetings  
7 between 20 and 25 September between Mr Hirst, Mr Scouler  
8 and various people from Dairy Crest". No evidence at  
9 all that that is the position, no evidence at all of  
10 what was said at those meetings.

11 So we say strand 1 fails, that there is no  
12 disclosure demonstrated by the OFT.

13 The second is 30 October 2002, where Tesco gave  
14 information to all of its suppliers about the dates for  
15 its proposed cost price increases and one specific  
16 retail price in relation to the WeightWatchers cheese.  
17 That is relied on by the OFT both for strands 3 and 6.  
18 That was indeed a disclosure by Tesco but a disclosure  
19 in the context of it just having made the decision to  
20 increase its cost prices on particular dates and the  
21 necessity for it to inform its suppliers of that fact.

22 The third alleged disclosure is early November 2002,  
23 strand 4, and that's document 73 [Magnum], which is the  
24 Safeway email, which simply says:

25 "All major players will be moving by the same amount

1 on the same day."

2 We say the OFT has not shown that that email refers  
3 to any disclosure at all made by Tesco and indeed the  
4 information is patently false.

5 The fourth alleged disclosure is early  
6 November 2002, and that's the McLelland statement,  
7 "Tesco will match Asda", which we've just been looking  
8 at, which is the basis of strand 7. And the Tribunal  
9 has just heard my submissions on that, that there is no  
10 evidence at all that that is information that emanates  
11 from Tesco.

12 The final one is strand 9 that again you have just  
13 heard my submissions on, again no evidence from Tesco.

14 So we submit that when you look at all of the  
15 disclosures that Tesco is said by the OFT to have made  
16 in 2002, in fact there is only evidence that Tesco made  
17 disclosures to its suppliers about its future pricing  
18 information on one occasion. That occasion was 29 and  
19 30 October 2002, when Tesco was informing its suppliers  
20 that it would agree to pay the increased cost prices  
21 from particular dates.

22 We say it is striking that the only disclosure that  
23 the OFT is able to show, having been made from Tesco, is  
24 the disclosure that is a disclosure in the course of  
25 normal commercial business. That is very significant

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1           because the case that the OFT constructed was a case in  
2           which it was said that Tesco was engaged in giving  
3           tip-offs throughout this period, and, very importantly,  
4           in which Tesco was said to have given an important  
5           tip-off in September 2002 which is said to have ignited  
6           the whole process.

7           We say that the failure of strand 1 seriously  
8           damages the OFT's case on intent, and the failure of the  
9           OFT to prove any of the other disclosures by Tesco, with  
10          the one exception, the legitimate commercial disclosure,  
11          again fatally weakens its case on intent. Because what  
12          you are left with is a normal commercial practice by  
13          a retailer.

14          Just to go back to that disclosure, the Tribunal  
15          will have in mind that it starts with Lisa Oldershaw's  
16          email to all of her suppliers on 29 October 2002, which  
17          is document 62 [Magnum]. We submit that this email is  
18          quite important when the Tribunal comes to assess that  
19          in making this disclosure, which is the only disclosure  
20          proved against Tesco, Lisa Oldershaw was intending to do  
21          anything illegitimate.

22          The first point is that this email is sent to all of  
23          her cheese suppliers, including four cheese suppliers  
24          who are not alleged by the OFT to have been engaged in  
25          any unlawful infringing activity. It therefore must be

1 the OFT's case that in this single transmission of  
2 information Lisa was simultaneously seeking to give  
3 legitimate commercial information to four suppliers  
4 whilst intending to give illegitimate information to be  
5 passed on to two of them.

6 The second point is that what she says is:

7 "I will call you all tomorrow with confirmation of  
8 cost price changes and retails where relevant."

9 And that, we say, is exactly what you would expect  
10 to see in the course of her normal business.

11 What she then did was to speak to her suppliers on  
12 the following day, and we know that when she spoke to  
13 Dairy Crest she simply read out the categories from her  
14 document 62 [Magnum], and this is what's recorded at  
15 document 63 [Magnum]. But at this date there is no  
16 evidence that she had ever received any inappropriate  
17 future pricing information from Dairy Crest. It is not  
18 even alleged by the OFT that there had been any  
19 transmission from Dairy Crest to Tesco by this date.

20 So this addresses the point that you raised with me  
21 on Friday, could it be said that she was transmitting  
22 information without sufficient care, knowing that the  
23 supplier was cavalier with the information? Even on the  
24 OFT's case, there was no reason why she should have any  
25 concerns about Dairy Crest protecting the

1 confidentiality of her information. As it turned out,  
2 Dairy Crest passed the information on, but there is  
3 simply no material to suggest even that she should have  
4 suspected it would do that, still less that she should  
5 have known or intended that they would do that.

6 Now, McLelland is said by the OFT also to have  
7 passed on information emanating from this disclosure to  
8 the Co-op, that's tab 70 [Magnum]. On analysis, this  
9 document sits very badly with the OFT's case because we  
10 don't know exactly what Lisa Oldershaw said to  
11 Mr Ferguson when she spoke to him on 30 October. She  
12 may have simply told him the cost -- the timing of the  
13 cost price rises on the McLelland lines, or she may have  
14 done the same thing that she did with Neil Arthey and  
15 taken him through her list at document 64 [Magnum].  
16 What we do know is that McLelland did not pass on the  
17 information that was in the list at document 64 because  
18 all that's said about Tesco is 11 November, random  
19 weight McLelland retails; 18 November, all own label  
20 lines.

21 Now, there are two inferences that could be drawn  
22 from that, either of which is equally likely. The  
23 first -- well, there are three, the third is that this  
24 information didn't come from Tesco at all. But assuming  
25 for a moment this is information from Tesco, the two

1 inferences are firstly that Lisa Oldershaw did do the  
2 same with McLelland that she did with Dairy Crest and  
3 read out all of the categories, in which case it wasn't  
4 passed on, and that then is inconsistent with the OFT's  
5 case that this was a tip-off that was intended to be  
6 passed on. The second is that the only information that  
7 she gave to McLelland is the information that's here and  
8 that was the information that McLelland needed in order  
9 to implement the cost price rises.

10 The OFT's only answer to that is the word "all", and  
11 the point that it says "all own label lines" rather than  
12 "own label lines which are packed by McLelland". But we  
13 submit that it would have been an obvious inference for  
14 McLelland if Tesco was putting up the prices of all the  
15 Tesco own label lines packed by McLelland on that date,  
16 that it was putting up other people's, and, secondly,  
17 that it is wholly unrealistic to suggest that  
18 Lisa Oldershaw should have couched her communication  
19 with McLelland in that way.

20 So we submit that, in fact, document 70 [Magnum] is  
21 also inconsistent with the OFT's case on intent.

22 So those are disclosures made by Tesco and we say,  
23 in fact, on analysis, there's only one and it's in the  
24 normal course of business.

25 The second question is, in 2002, what disclosures to

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1 Tesco were alleged by the OFT and what have actually  
2 been proved? The OFT alleged three disclosures to  
3 Tesco. The first is the McLelland email on 21 October,  
4 that's document 52 [Magnum], and what is now said to be  
5 conversations preceding that email, and that's the  
6 foundation of strand 2, so that's the communication on  
7 21 October. The second is the Dairy Crest email of  
8 4 November, that's document 69 [Magnum], that's the Asda  
9 spreadsheet and information about Asda Smart Price. And  
10 the third is said to be the McLelland phone call on  
11 8 November.

12 We submit that, on proper analysis, none of those  
13 three strands constituted the disclosure to Tesco of  
14 future retail pricing information in any sense relevant  
15 to competition.

16 Now, first of all, document 52, there are two pieces  
17 of information in this email. The first is:

18 "Other parties are confirming they will protect cash  
19 margin on this occasion, not percentage margin."

20 You already have my submission that this is public  
21 domain and, in any event, its effect would be to  
22 restrict a price rise, not increase a price rise,  
23 because it suggests that the market is moving up by less  
24 than you would anticipate. And the second piece of  
25 information is:

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1            "Sainsbury's are confirming the new retails on  
2            branded pre-pack will be in place Tuesday this week."

3            In other words, the following morning.

4            You already have my submission that that first piece  
5            of information is demonstrably incorrect and, therefore,  
6            highly unlikely to come from anyone else and highly  
7            unlikely to affect anybody's conduct. Indeed, the sum  
8            total of this email would be likely to decrease  
9            anybody's belief in the reliability of suppliers as  
10           a source of information.

11           Now, the third piece of information that the OFT  
12           alleges in this email is that they say that the dates  
13           given here, 4 November for pre-pack and 11 November for  
14           deli, are dates that relate to other retailers and not  
15           dates that relate to the projected dates for Tesco's  
16           price rise.

17           However, there is no evidence to support that  
18           assertion. The email itself clearly does not say that.  
19           You can certainly read it as saying that the proposal  
20           was for Tesco's rises to be on those dates, there is  
21           nothing there to suggest it refers to anyone else, and  
22           you now have direct evidence from both Mr Ferguson and  
23           Lisa Oldershaw that they both understood it to be  
24           referring to the dates of Tesco's price rise, and there  
25           is simply no evidence to the contrary.

1           Since this email clearly does not transmit  
2           information about dates that others are moving, the OFT  
3           has been driven to allege that there must have been  
4           conversations some days earlier in which that material  
5           was discussed. Again, there is simply no evidence that  
6           that is the case and that allegation was not even put to  
7           Mr Ferguson.

8           If I can just give you the relevant transcript  
9           references about the dates relating to Tesco's intended  
10          price rises. It's Mr Ferguson, Day 6, page 57, and  
11          Lisa Oldershaw, Day 8, pages 136 to 154.

12          What Mr Morris says is, "Well, actually, Tesco  
13          didn't move its prices on those dates", to which we  
14          reply "So what?" One thing we know about Tesco is that  
15          it changed its mind about the dates it was going to move  
16          its prices and that, in fact, it didn't move its own  
17          brand prices until 1 December which was not its  
18          intention at that time.

19          So that is document 52, and the only piece of  
20          information, in fact the only piece of information in  
21          this entire case, which could be said to be, in  
22          a technical sense, future retail pricing information is  
23          the information in the last sentence of this email, that  
24          Sainsbury's were going to put up the price on branded  
25          pre-pack the following morning.

1           On analysis, that is the only occasion on which  
2           specific future retail pricing information is given to  
3           Tesco, in the whole of this case, 2002 or 2003. It's  
4           talking about the price rise the following morning which  
5           cannot have any distortion -- distortive effect on  
6           competition, and you have the evidence of Mr Ferguson  
7           that, in that situation, he didn't think it made any  
8           difference.

9           Now, interestingly, Mr Morris put this email to  
10          Mr Scouler who had not seen it before and he was  
11          disturbed by it. But he was disturbed by it because he  
12          read this sentence as saying that they were going to put  
13          up the prices on Tuesday next week. That's not perhaps  
14          that surprising that he misread the email having never  
15          seen it before, but if you look at the transcript, it's  
16          Day 11, page 173. This is questioning from the chairman  
17          at line 15:

18          "Lord Carlile: if you had seen that email at the  
19          time, would you have reacted to it in any way?

20          "Answer: Yes, I mean I would be surprised to see  
21          that document at the time.

22          "Lord Carlile: Why?

23          "Answer: Because what it's suggesting is that  
24          Sainsbury's are going to confirm their new retail prices  
25          will be in place on Tuesday of next week, which would be

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1 not common domain knowledge and therefore I would be  
2 getting some information that I shouldn't be getting."

3 So he just misread the email, and Mr Morris did not  
4 seek to clarify that point with him or to ask him if his  
5 answer would be the same if, in fact, all that was  
6 happening was that the price was going to go up  
7 immediately the following morning.

8 **LORD CARLILE:** So 21 October was a Monday?

9 **MISS ROSE:** Yes, Tuesday is the next day.

10 This is 5.00 pm on the Monday telling her the prices  
11 will be in store the next morning. There is literally  
12 nothing that she could do about it, and in any case, no  
13 competitive advantage to her knowing that because she  
14 could check the prices in store the next day. She can't  
15 take a decision in reliance on the future information,  
16 and the information will be public domain the next day.  
17 There is simply no reason to transmit it.

18 Now, that's why Mr Morris sought to construct this  
19 argument that, actually, this is all aimed to build her  
20 confidence that he's a reliable source, but that theory  
21 fails because this email isn't accurate, because we know  
22 that Sainsbury's didn't protect cash margin. So the  
23 message that Lisa gets from this is the same one that  
24 she always takes which is that you can't believe what  
25 the suppliers say until you see it on the shelf.

1           So that's the first disclosure to Tesco. The second  
2 disclosure to Tesco is strand 5, that's the Asda  
3 spreadsheet which you have at document 69 [Magnum].  
4 This simply is not confidential future retail pricing  
5 information, it is an arithmetical mechanistic  
6 application of 20p per kilo to Asda's current retail  
7 prices, so it's a calculation that could have been  
8 performed by anybody on the basis of information in the  
9 public domain.

10           The information that's given here about Smart Price,  
11 "My understanding is that Asda will be applying £200 per  
12 tonne to RSPs of Smart Price mild and mature", is  
13 demonstrably incorrect because we know that what Asda  
14 actually did was to decrease the price of two of the  
15 sizes of its mild and mature Smart Price and increase  
16 the price of only the large size in each case. The  
17 reason I say that is because you've seen the document  
18 where Tesco matched that, that was exhibit 30. If we  
19 just turn it up, it's file 2A, and it's exhibit 30 to  
20 Ms Oldershaw's witness statement [Magnum]. Exhibit 30,  
21 behind tab J.

22           So if you compare this with what's said at document  
23 69, the assertion is:

24           "My understanding is that Asda will be applying £200  
25 per tonne to RSPs of Smart Price mild and mature."

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1           But we can see, if we look at mild, the price of the  
2 mild cheese fell on 9 November and 10 November in the  
3 small sizes and increased only in the extra large size.  
4 Similarly, in mature, the price fell in relation to the  
5 two smaller sizes -- sorry, the white and the coloured,  
6 and it was only the mega pack that increased. So that  
7 information is incorrect.

8           Now, I say you can say with some certainty that Asda  
9 was dropping the price because, of course, Tesco's  
10 basket policy means that Tesco could not have had  
11 a price that was higher than Asda's before this date.

12           So two pieces of information are said to have been  
13 disclosed to Tesco in that email, the first is public  
14 domain and the second is demonstrably false and,  
15 therefore, cannot be categorised as a disclosure of  
16 confidential retail pricing information likely to  
17 distort competition.

18           The final disclosure to Tesco, said to be to Tesco,  
19 is document 79 [Magnum], the phone call with  
20 Mr McGregor, and you already have my submission that  
21 there is simply no evidence at all that any information  
22 was given about Asda, or that it came from Asda, or that  
23 it was not public domain, just a vacuum.

24           So we submit that, on analysis, no genuinely future  
25 retail pricing information was given to Tesco in 2002.

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1           The only information that was technically future was the  
2           information about Sainsbury's given at 5.00 pm on the  
3           Monday, due to come into effect at 9.00 am the following  
4           day. That is the only piece of technically future  
5           information given to Tesco.

6           So when you come down to it, in 2002, you have only  
7           one disclosure by Tesco, as you would expect in the  
8           course of normal business, and one technical disclosure  
9           to Tesco that has no conceivable competitive effect. We  
10          submit that that is not a basis on which the OFT can  
11          construct the edifice of inference that it needs in  
12          order to establish intent by all the various parties in  
13          these chains, and that its case on the 2002 infringement  
14          fails.

15          Before I leave 2002, can I just give you some  
16          references about Tesco's awareness of the plan, because  
17          the question is not simply what the plan was but what  
18          Tesco understood the plan to be. The Tribunal has  
19          extensive evidence on this point from both  
20          Lisa Oldershaw and John Scouler as to how they  
21          understood the Dairy Crest proposal in 2002. In  
22          essence, they understood it as a proposal for a cost  
23          price increase with some suggestions about limiting the  
24          extent of a consequential retail price.

25          Can I just refer you, first of all, to Day 8 of the

1 transcript, this was dealt with by Lisa Oldershaw at  
2 significant length at pages 82 to 108. Can I just show  
3 you page 93, the question at 15:

4 "Question: ... they are suggesting that there will  
5 be a retail price increase? I'm not saying that Tesco  
6 agreed to it, I'm asking you what this document, on its  
7 face, is proposing? What's coming from Dairy Crest?

8 "Answer: A cost price increase with an  
9 acknowledgement that the retailers will probably have to  
10 increase retails.

11 "Question: Yes.

12 "Answer: Not a proposal, an acknowledgement.

13 "Question: Right, perhaps we're now arguing about  
14 words.

15 "I would put it to you that it is at the very least  
16 a suggestion of retail price increases?

17 "Answer: That's your suggestion."

18 Mr Scouler's evidence on this was dealt with at  
19 Day 11, pages 123 to 134, and again I would invite you  
20 to read through that to see what Tesco's awareness was.

21 Also, it was assumed by Tesco that this was  
22 a proposal being made to all retailers, but that was not  
23 in any sense unusual, and this picks up a point that  
24 Ms Potter raised with me on Friday as to whether it was  
25 in any way unusual in 2002 for there to be an

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1 across-the-board proposal.

2 Can I just show you Mr Scouler's evidence on that,  
3 it's Day 11, page 145:

4 "Question: Just to make sure that I've got the  
5 answer to that question: you knew that the proposal was  
6 for a price increase not only for Tesco but a price  
7 increase for all the other retailers?

8 "Answer: I wouldn't have known that factually but  
9 I would assume, given the pressure that was happening on  
10 the retailers at the time, that people would be under  
11 pressure to have a discussion around a cost price  
12 increase. But I wouldn't know factually."

13 Then after some further discourse from Mr Morris, if  
14 you go to 147 at 12, again he asks the question:

15 "Question: ... you would have known not only that  
16 they were asking for a cost price increase from you, but  
17 that it was also being asked for from the other  
18 retailers, would you agree?

19 "Answer: Yes, I would agree, but I make that  
20 assumption on practically every time I got a price  
21 increase for a range of products, that why would Tesco  
22 be any different in this set of circumstances? Why  
23 would Tesco just have to bear the brunt of it? You  
24 would assume those price increases would try to be  
25 levied across the market."

1           So that was completely normal.

2           Finally, there is no evidence in this case that  
3           presentations, similar to those which were made to  
4           Marks & Spencer and Asda, which the Tribunal has at  
5           tabs 17 [Magnum], 18 [Magnum] and 32 [Magnum] of the  
6           bundle, were ever made to Tesco. Simply no evidence.  
7           What there is evidence of from Mr Reeves, who, of  
8           course, was not personally involved in the negotiations,  
9           was that different account teams might take a different  
10          approach with different retailers, depending on their  
11          particular way of doing business.

12          So we therefore submit that the OFT cannot in this  
13          case properly invite the Tribunal to infer from what was  
14          said by Dairy Crest to other retailers that the same  
15          must have been said to Tesco. You know what was said to  
16          Tesco, it was in the proposal, and you've got the  
17          evidence on it as to what Tesco understood the proposal  
18          to be.

19          That concludes my submissions on the 2002  
20          infringement and I'd now like to turn to the 2003  
21          infringement. Perhaps that might be a good moment for  
22          a short break.

23        **LORD CARLILE:** Yes, just bear with me for one moment.

24               (Pause)

25          Yes, we'll break for about a quarter of an hour.

1 (11.35 am)

2 (A short break)

3 (11.54 am)

4 **MISS ROSE:** Sir, can I now turn to the alleged 2003  
5 infringement. We do submit that the OFT's case in  
6 relation to 2003 is even weaker than its case in  
7 relation to 2002. The background to cheese cost price  
8 increases in 2003 is very different from that in 2002.  
9 The first point is that the alleged infringement only  
10 involves one supplier, McLelland, which supplied less  
11 than 10 per cent of the UK cheese market at the time  
12 and, second, McLelland's motivation for securing a cost  
13 price increase was simply to improve its margins. There  
14 was no unusual industrial pressure, desire to improve  
15 the lot of farmers. It's simply a normal commercial  
16 negotiation between McLelland and Tesco.

17 We set out the background at paragraph 234, that  
18 Tesco (sic) was concerned that it hadn't received a cost  
19 price increase that wasn't accompanied by a similar  
20 increase to the farmgate price for several years, and  
21 had not been able to recoup increases in its costs,  
22 including investment in new facilities. At the same  
23 time there was tension between Tesco and McLelland  
24 because Tesco felt that the margins it was achieving on  
25 the Seriously Strong brand were not sufficient, given

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1           particularly the very large quantities of  
2           Seriously Strong that were now being sold in Tesco, and  
3           Lisa Oldershaw was threatening to decrease the  
4           distribution of Seriously Strong as a result.

5           So on 29 August 2003, Stuart Meikle, who by this  
6           time had taken over the Tesco account after Mr Ferguson  
7           was promoted, sent an email to Lisa Oldershaw attaching  
8           a letter from Jim McGregor informing her of McLelland's  
9           proposal to increase cost prices. That's document 99,  
10          if we go to volume 2 [Magnum]. This is the covering  
11          email and the letter seeking a cost price increase,  
12          again a completely normal, standard type of letter.

13          Stuart Meikle was new to this role at the time and  
14          Lisa Oldershaw's evidence is that she did not regard him  
15          as having the same experience, credibility or authority  
16          as others at McLelland, and in particular Mr Ferguson  
17          whom she had previously dealt with and who'd worked in  
18          the dairy industry for some time. The Tribunal will  
19          recall that they heard that Mr Meikle had been  
20          recruited, I think it was from Mars, so his experience  
21          was in confectionery, and Lisa Oldershaw did not have  
22          the same regard for him that she'd had for Mr Ferguson.

23          So the letter explained that McLelland needed a cost  
24          price increase to cover inflated manufacturing costs,  
25          and the email referred to a meeting that was going to be

1 held on the following Thursday, 4 September 2003, to  
2 discuss the proposal.

3 The Tribunal has heard from both Lisa Oldershaw and  
4 Mr Scouler that the standard response of the Tesco  
5 buyer, on being asked for a cost price increase, is to  
6 resist it initially. It is unheard of for Tesco, at the  
7 first meeting, the first occasion on which the supplier  
8 proposes a cost price increase, to agree. That is  
9 exactly what happened at this meeting, Lisa Oldershaw  
10 asked Mr Meikle to provide a written rationale to  
11 explain why he said the cost price increase was  
12 justified. She said to the Tribunal, for her, the two  
13 key issues before she would accept a cost price increase  
14 were, first of all, has the supplier shown that the cost  
15 price increase is justified, and, secondly, do the  
16 market conditions warrant it and what are other  
17 retailers doing in store? What's actually happening on  
18 the shelf?

19 We say that normal practice was followed on this  
20 occasion, and at the same time she was expressing her  
21 concerns about the margins on Seriously Strong and  
22 telling Stuart Meikle that Tesco would have to reduce  
23 its distribution of Seriously Strong if the retail  
24 margin did not improve.

25 You can see from document 97 [Magnum], this is an

1 email of 25 August from Mr Meikle to the senior  
2 management team in McLelland and, if you read through  
3 it, you can see through this the concerns about the  
4 [REDACTED]. So that was the meeting on  
5 4 September.

6 Then, on 12 September, Mr Meikle sent an email to  
7 Lisa Oldershaw giving the rationale for the cost price  
8 increase, and that email is document 110 [Magnum]:

9 "As per our conversations, our rationale can be set  
10 out as follows ..."

11 And various justifications for seeking the cost  
12 price increase are set out. We say that is  
13 a significant email because there is no reason why Lisa  
14 should have asked for it or Mr Meikle should have sent  
15 it if there had already been agreement on 4 September  
16 that Tesco would accept a £200 per tonne cost price  
17 increase. The sending of this email is entirely  
18 consistent with Lisa's account, which is that at the  
19 meeting on 4 September the proposal was made, and her  
20 response was, "You need to show me that it's justified",  
21 and that's why this email was sent.

22 Then, on 16 September 2003, so two days after  
23 this -- sorry, four days after this email was sent,  
24 because this was sent on the 12th, Mr Meikle sent an  
25 email to Mr Ferguson and Mr McGregor summarising the

1 situation with Tesco on Seriously Strong. This is  
2 document 103 [Magnum]. He records here in the second  
3 paragraph the current situation:

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED] [REDACTED]  
7 [REDACTED]

8 So that's what she was saying to him, that they  
9 would have their distribution reduced because of the  
10 current margin performance of Seriously Strong.

11 He then goes on to discuss it, and then he says:

12 "Therefore the two issues that need --"

13 **LORD CARLILE:** Sorry, can you just pause for a moment.

14 **MISS ROSE:** Sorry, yes.

15 **LORD CARLILE:** So what that second paragraph means, in  
16 simple terms, is Tesco will reduce its purchase of  
17 McLelland's Seriously Strong --

18 **MISS ROSE:** Because the margins --

19 **LORD CARLILE:** -- unless the margins increase, because they  
20 have a scale as set out in the previous document.

21 **MISS ROSE:** Yes. And if they're buying a lot of cheese they  
22 expect to get a bigger margin.

23 **LORD CARLILE:** Yes, okay.

24 **MISS ROSE:** But the Tribunal will note there's a striking  
25 similarity to the way it's put there, to the way that

1           it's put in the briefing document that was prepared for  
2           Mr Scouler before 6 October.

3           Then just opposite the second hole-punch:

4           "Therefore the two issues that need resolved [one  
5           assumes he means "need to be resolved"] are

6           "1. Increase the Asda retail price to allow Tesco  
7           to match this and this will restore some margin.

8           "2. Achieve our objective of the £200 per tonne  
9           increase and still meet Lisa's margin expectation."

10          Now, we say the second of those is significant  
11          because document 112 [Magnum], which we're going to go  
12          to in a minute, which the OFT founds its case on, is  
13          a document written by Mr Meikle in early October in  
14          which he claims that he had believed that Lisa had  
15          agreed to pay the £200 per tonne cost price increase on  
16          4 September and had continued in that belief until, in  
17          early October, she had told him that in fact Tesco were  
18          not agreeing to that.

19          Now, I've already made the submission that that  
20          proposition is inconsistent with his own email of  
21          12 September setting out a rationale which would make no  
22          sense if that had already been agreed. But it's also  
23          inconsistent with this email because he is saying that  
24          one of the issues that needs to be resolved is to  
25          "Achieve our objective of the £200 per tonne increase



1 [REDACTED]  
2 [REDACTED]  
3 What's interesting about that is that's exactly the  
4 same assumption being made about Tesco matching Asda  
5 that was made in 2002. The working assumption inside  
6 McLelland is that, if Asda raises its price, Tesco will  
7 match it. That's not said to be based on any  
8 illegitimate pricing information. How could it be,  
9 since at this stage Tesco's position was that it wasn't  
10 accepting any of this?

11 So that, we say, is consistent with the statement,  
12 [REDACTED], from 2002, being, as  
13 Mr Ferguson says it was, simply the understanding in the  
14 market inside McLelland as to Tesco's likely behaviour.

15 Then back at 242(c), this document is another  
16 document that demonstrates the various levers that were  
17 available to both suppliers and retailers to improve  
18 their margin recovery, and that the OFT's picture that  
19 it paints, that it's simply a question of cost prices  
20 and retail prices, is oversimplistic.

21 If you go over the page, you will see an example of  
22 such a proposition:

23 "We have already suggested paying [REDACTED] retro on  
24 Seriously Strong at the end of this year provided we  
25 meet a target of [REDACTED] tonnes. This is worth [REDACTED] per

1           tonne which we can invest in the [REDACTED]  
2           [REDACTED]. At current level of business, we are  
3           already tracking to hit [REDACTED] tonnes."

4           What that means is that the proposition would be  
5           that if Tesco sold at least [REDACTED] tonnes of  
6           Seriously Strong cheese, then retrospectively they would  
7           be repaid [REDACTED] of the cost price by McLelland as  
8           a reward for hitting that target. The effect of that is  
9           that if Tesco hits a particular sales volume, the cost  
10          price comes down. We see that that is said to be worth  
11          [REDACTED] a tonne, so that's only a little less than half the  
12          cost price increase that was being contemplated in 2002  
13          and 2003.

14          You will recall I showed you at an earlier stage  
15          other emails that show the various negotiations,  
16          changing the pack pricing, other promotional activity  
17          that could -- that Tesco could use to claw back its  
18          margin if it had to accept the cost price increase.  
19          Here is another good example, the use of a retro bonus.

20          So it is simply wrong for the OFT to imply that  
21          Tesco cannot take a cost price increase without being  
22          sure everyone else will increase their retail prices  
23          and, therefore, being confident it can do the same  
24          because of the hit on its margins. That's just an  
25          oversimplification of the way that Tesco and these

1 suppliers do business.

2           Going back to my note, this is (d), there is no  
3 suggestion in the email that McLelland's difficulties  
4 with Tesco could be resolved by coordinating retail  
5 prices by acting as a conduit for the exchange of future  
6 retail pricing between Tesco and Asda. If you read the  
7 whole of this email, it is only consistent with a market  
8 in which McLelland is the supplier to two big powerful  
9 retailers who are fiercely competitive with each other  
10 and are seeking to work out, in that context of its  
11 separate bilateral negotiations with each, how it can  
12 persuade Tesco to accept a cost price increase and not  
13 to reduce the distribution of Seriously Strong. It is  
14 only consistent with that. Otherwise, all of the  
15 problems that are discussed in this email simply  
16 wouldn't have been problems for McLelland because they  
17 could have been sorted out by a few back channel  
18 conversations, which is the OFT's case.

19           So we say this email is wholly inconsistent with the  
20 OFT's case here.

21           So then, on 24 September 2003, Mr Meikle sent an  
22 email to Lisa, essentially nagging her. You see that at  
23 document 104 [Magnum]:

24           "Hi Lisa,

25           "In anticipation of our cost increase of £200 per

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1           tonne I have attached a file detailing our new ... costs  
2           [line] by lines."

3           So as she said, he was bombarding her at this time  
4           to try to persuade her to agree.

5           The same day he sent her another email attaching an  
6           article from the Dairy Industry Newsletter commenting  
7           that retailers would be increasing retail prices on  
8           cheese. That's the following document, 105 [Magnum].  
9           So you can see how he is constantly hassling her at this  
10          time to agree the cost price increase. Again,  
11          inconsistent with what he said in document 112, that he  
12          thought this was already sorted out.

13          Then on 26 September 2003, which is a Friday, I'm  
14          now at paragraph 245, Lisa Oldershaw had a telephone  
15          conversation with Mr Meikle and he, again, tried to  
16          persuade her to accept and implement the cost price  
17          increase proposal by telling her that Asda would be  
18          increasing its retail prices on the following Monday.  
19          Again, that's the next working day. She says that she  
20          ignored that comment which she considered to be typical  
21          of the negotiating tactics employed by her suppliers.  
22          There was no advantage to Tesco in committing to a cost  
23          or retail price increase on a Friday based on  
24          a supplier's view of what a competitor would do on the  
25          Monday, when Tesco could simply check the prices in

1 store on Monday. So it's just simply impossible to see  
2 what the point of this was. She also has said that she  
3 didn't trust what he said to her, and that's set out at  
4 246.

5 Most importantly her scepticism was well-founded,  
6 Asda did not increase its prices on the Monday. So this  
7 is yet another example, and the Tribunal has seen many,  
8 of a situation in which a supplier makes a claim about  
9 what it says another retailer is about to do which  
10 doesn't materialise. It's strange that Mr Morris spent  
11 so much time cross-examining Mr Ferguson and Mr Irvine  
12 and Mr Reeves and saying, "Oh, well, how could you ever  
13 give inaccurate information to the retailers since they  
14 would find out that it wasn't true?"

15 What you see in the documents is that information is  
16 constantly being given which is shown not to be true,  
17 sometimes the very next day and, on this occasion, the  
18 next working day the information is shown not to be  
19 true.

20 So then on the Tuesday, which is 30 September,  
21 Lisa Oldershaw and Mr Meikle spoke again and he said  
22 again that he believed Asda would move but, of course,  
23 his position was now even more lacking in credibility  
24 than it had been on the previous Friday when he had said  
25 that he thought Asda would move on the Monday, when that

1 had already been confirmed to be false.

2 She said that she still would not accept McLelland's  
3 proposal. She may have said that she would wait and see  
4 what competitors did in practice, which was her normal  
5 position, that she would wait to see what happened in  
6 the market, but made no commitment, whether conditional  
7 or otherwise, that she would be prepared to accept the  
8 cost price increase or raise the retail price.

9 What then happened was that Mr Meikle, on  
10 30 September, still trying to persuade Lisa Oldershaw to  
11 accept the cost price increase, which she is still  
12 resisting, on 30 September sent her copies of price  
13 labels for Safeway's Savers mild cheddar and Sainsbury's  
14 Isle of Bute cheese. That is document 110 [Magnum],  
15 30 September 2003:

16 "I have faxed copies of the Safeway and JS labels to  
17 you... Safeway Savers mild has increased in price by  
18 26p/kilo and JS Isle of Bute has increased by 20p/kilo."

19 So these are both presented to Lisa as retail price  
20 rises that are already live in the market, already on  
21 the shelf. But she was suspicious when she received the  
22 fax because the labels looked pristine, they did not  
23 look like labels that had been removed from packaging  
24 from an item bought in the shop, they looked like  
25 pristine labels that had just come off the production

1 run. As a result, she phoned Mr Meikle and told him  
2 that she did not wish to receive any similar material  
3 from him in the future.

4 The irony is that actually this was not future  
5 retail pricing information. The evidence shows that the  
6 Sainsbury's Isle of Bute price was in fact already in  
7 store. That's document 109 [Magnum], Calum Morrison, on  
8 30 September:

9 "Sainsbury's prices are effective from today on  
10 pre-pack and tomorrow on deli lines."

11 If you look at the attached spreadsheet, at the  
12 pre-pack, that includes the Isle of Bute. So the  
13 Isle of Bute was in store on 30 September when it was  
14 sent at 5.20 pm.

15 **LORD CARLILE:** How do we know it was in store?

16 **MISS ROSE:** Because he said it was "effective", and you have  
17 the evidence of Mr Irvine that "effective" meant on the  
18 shelf.

19 **LORD CARLILE:** As opposed to going into packing?

20 **MISS ROSE:** Yes.

21 There is no evidence from the OFT that this price  
22 wasn't in store. The only evidence as to whether the  
23 Sainsbury's price was actually in store is this email at  
24 109 which says it was effective on 30 September. Again,  
25 of course, the OFT could have obtained that information

1 from Sainsbury's but chose not to do so.

2 There is no evidence one way or the other --

3 **LORD CARLILE:** I'm sorry to interrupt you again. Can we  
4 just pause at document 110 for a moment [Magnum].

5 **MISS ROSE:** Yes.

6 **LORD CARLILE:** The evidence is that Lisa Oldershaw  
7 telephoned Mr Meikle in response to what truly or  
8 falsely appeared on the face of it to be the provision  
9 of not in-store pricing information relating to Safeway  
10 and Sainsbury's.

11 **MISS ROSE:** Yes.

12 **LORD CARLILE:** But there is no document showing that she  
13 reacted to this information by sending an on the record  
14 email saying, "We really ought not to be seeing this  
15 kind of information"?

16 **MISS ROSE:** That's correct, and there is no suggestion from  
17 her that she did.

18 **LORD CARLILE:** No.

19 **MISS ROSE:** Now, of course that is not very surprising  
20 because this is September 2003, it's before the decision  
21 in Toys & Kits, it's before retailers would be expected  
22 to understand that it's important to establish a paper  
23 trail. What Lisa is trying to do is not to defend  
24 herself against a later finding by the OFT of an  
25 infringement, but simply to stop her retailer sending

1 her inappropriate information -- sorry, her supplier  
2 sending her inappropriate information.

3 **LORD CARLILE:** But competition law issues were, as it were,  
4 meat and drink to people in this industry. They knew --  
5 the evidence is surely very clear that they knew all  
6 about competition law issues, they didn't need  
7 Toys & Kits, did they?

8 **MISS ROSE:** Remember that as at this date there is no case  
9 that suggests that, unless the retailer expressly  
10 rejects a communication, they will be taken to have  
11 decided they want to use it. There's no case that says  
12 that, until Toys & Kits. But what Lisa is doing,  
13 because her suspicions are aroused, is immediately  
14 pushing back and saying, "That is inappropriate".

15 **LORD CARLILE:** Yes.

16 **MISS ROSE:** The evidence that she did that, we submit, is  
17 overwhelming because it is her briefing document to  
18 Mr Scouler, prepared, it must have been, within a couple  
19 of days of this, because the meeting with Mr Irvine took  
20 place on 6 October.

21 **LORD CARLILE:** It says there's an urgent need for  
22 competition law training.

23 **MISS ROSE:** Yes, "Competition Commission training  
24 desperately needed". So that was written within  
25 a couple of days of her receipt of this email, to be

1 raised at the meeting.

2 **LORD CARLILE:** Yes. You see, forgive me just focusing on  
3 this for a moment, if she feels strongly -- let's assume  
4 that it is a single document created at a single time.

5 **MISS ROSE:** Well, there's no evidence that it's not.

6 **LORD CARLILE:** The hypothesis is that it's a single document  
7 at a single time.

8 **MISS ROSE:** Yes.

9 **LORD CARLILE:** She feels strongly enough about the desperate  
10 need for competition law training to put it to her own  
11 superiors but nobody puts it back to McLellands.

12 **MISS ROSE:** That's not correct, sir. They put it back to  
13 McLelland at the meeting on 6 October.

14 **LORD CARLILE:** But not in an email?

15 **MISS ROSE:** No, they don't write it down. But everybody who  
16 was at that meeting agrees that it was said at that  
17 meeting, that it was said specifically by Mr Scouler to  
18 Mr Irvine that Tesco was not interested in receiving any  
19 future retail pricing information. That is agreed by  
20 everybody who was at that meeting.

21 **LORD CARLILE:** All right. Thank you.

22 **MISS ROSE:** Now, I've already made the submission that, in  
23 relation to the Sainsbury's Isle of Bute, in fact the  
24 evidence is that this was not future retail pricing  
25 information. That's document 109 [Magnum].

1           So far as Safeway is concerned, there is no evidence  
2           either way as to whether this was present or future  
3           retail pricing information. Again, it could have been  
4           obtained by the OFT but was not. We simply don't know.  
5           There's no basis for a finding that this was future  
6           retail pricing information.

7           What we say is significant about this email is that  
8           what causes Lisa to react to the email is that it is  
9           different from all of the usual commercial positioning  
10          and puff that she gets because it looks like hard  
11          evidence of a price increase that's in the packing  
12          process but that hasn't yet reached the shelf, and  
13          that's why she reacts to it. It's of a different order  
14          to suppliers simply saying, "Oh, everyone will go up,  
15          everyone will match this, everyone is on board", which  
16          is what they always say and what she discounts. It  
17          looks like they've jumped the gun and she pushes back.

18          Indeed, of course, Safeway were not found to have  
19          participated in any infringement in 2003, so there's  
20          another inconsistency in the OFT's approach, but I'll  
21          come back to that when I come to deal with the strands.

22          Then on the following day, 1 October, Mr Meikle sent  
23          yet another email to Lisa Oldershaw telling her that  
24          Sainsbury's had increased its prices on Seriously Strong  
25          and Taste the Difference Mull of Kintyre. That's

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1 document 111 [Magnum]. Then he sends her another  
2 piecemeal email with further price increases that are in  
3 store on 2 October, and that's 113 [Magnum]. These are  
4 both clearly current retail prices, so he's still just  
5 trying to persuade her to increase her price by showing  
6 her what's in store. That is the reason why she asks  
7 him to send her a consolidated spreadsheet, because she  
8 is fed up with him continually bombarding her with  
9 emails telling her what prices are in store. So she  
10 says that she wants him to send a single matrix of all  
11 the McLelland lines and the current retail prices for  
12 all retailers who stock those lines, and that's 114  
13 [Magnum], 2 October:

14 "Stuart

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

18 So there is a specific request from Lisa for what  
19 information she wants from Stuart Meikle, and it is  
20 completely inconsistent with any suggestion that what  
21 she wants from him or what she is seeking from him is  
22 future retail pricing information. She is very clear  
23 that what she wants is current prices.

24 He responds on the same day with the matrix that's  
25 at document 115 [Magnum] which shows old retail and some

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1 new retail, and much of the matrix is blank. Again,  
2 there is no evidence that any of the new retail prices  
3 on this matrix are not in store. All of the evidence is  
4 consistent with them being precisely what Lisa Oldershaw  
5 asked for, which was the current retail prices.

6 On 5 October, Tesco increased its retail prices on  
7 a range of branded cheese and, on the following day, the  
8 meeting took place on 6 October between Lisa Oldershaw,  
9 John Scouler, Alastair Irvine and Jim McGregor. At  
10 paragraph 256 and onwards, we give our account of what  
11 happened at that meeting, and it's apparent, and I don't  
12 believe the OFT now disputes this, that at the meeting  
13 Alastair Irvine made some observations about retail  
14 pricing in the wider market and Tesco objected on  
15 competition grounds. The OFT initially rejected that  
16 account, and I showed you the passage in the decision  
17 where they rejected it on the basis that it wasn't  
18 supported by contemporaneous documents, but they did not  
19 suggest to any of the witnesses that this Tribunal has  
20 heard that that didn't occur.

21 Now, that is, of course, corroborated by the  
22 briefing note at 110A [Magnum]. You already have my  
23 submission on the fact that there is simply no evidence  
24 to suggest that this document is anything other than  
25 what both she and John Scouler say it is, namely the

1 briefing that she prepared for John Scouler before the  
2 meeting, and that the reference to "Competition  
3 Commission training desperately needed" is a reference  
4 to the behaviour of Stuart Meikle on 30 September.

5 Otherwise, it's very difficult to know what this is,  
6 and one has to ask the question, if you accept that  
7 that's right, there is no significance at all in the  
8 fact that her response to Stuart Meikle is oral,  
9 initially on the telephone and, secondly, at the more  
10 senior meeting with McLelland senior management on  
11 6 October. There is no principle that says that you  
12 have to push back in writing. The only issue is the  
13 credibility of the evidence that there was push-back,  
14 but this document makes it absolutely apparent that  
15 there was push-back, that the information was not  
16 welcome, that it was rejected and that it was considered  
17 by Tesco to be wholly inappropriate. There's just no  
18 other way it can be interpreted.

19 We've set out at 257 a particular part of  
20 Mr Irvine's witness evidence to the Tribunal, because  
21 it's clear that, and the Tribunal may recall the way  
22 Mr Irvine gave his evidence, he was taken aback by the  
23 sharpness of the reaction of Mr Scouler at the meeting.  
24 Because Mr Irvine made a pretty anodyne comment,  
25 a general comment about future retail pricing, and what

1 he said was:

2 "It was a little bit of sort of like -- it was  
3 a very cordial meeting and then suddenly bang, and  
4 I went 'Oh', and then we just moved on."

5 It was obvious that Mr Scouler had jumped in much  
6 more sharply than Mr Irvine felt was warranted by the  
7 very general comment he had just made. Again, I submit  
8 that is highly significant because that is significant  
9 with the fact that Mr Scouler had been prebriefed by  
10 Lisa that there was a problem with McLelland's  
11 competition law compliance and that it needed to be  
12 raised at the meeting, and that he jumped in early in  
13 the meeting when he got the opportunity to do that. So,  
14 again, we say that that evidence from Mr Irvine, which  
15 is completely independent, strongly corroborates this  
16 document and the account that has been given by  
17 Lisa Oldershaw of her reaction to Stuart Meikle.

18 At paragraph 258 we set out the history of this  
19 document, which I don't need to repeat.

20 At 259 we deal with the suggestion that has been  
21 made by the OFT that the document may not be one that  
22 was created all at one time. That's a suggestion made  
23 for the first time by the OFT during cross-examination  
24 without any evidential foundation whatsoever. It's not  
25 clear to me whether the OFT is alleging that this

1 document is in some way a concoction or whether it's  
2 simply saying it's a document that was created after the  
3 meeting. If it's the former, it's an allegation that  
4 shouldn't have been made because there was no proper  
5 basis for making it, so I assume that the allegation is  
6 the latter, simply being said it's a document created  
7 after the meeting.

8 So far as the former allegation is concerned, the  
9 inherent implausibility of it is obvious because, in  
10 order for that to be right --

11 **MR MORRIS:** Can I cut Miss Rose short. I don't think I've  
12 ever suggested that the document was a concoction.  
13 I put to the witnesses that it was possible it was  
14 created after either as a whole, or that it was in two  
15 parts and the second bit was --

16 **LORD CARLILE:** You were not making an allegation of fraud,  
17 otherwise you would have pleaded it.

18 **MR MORRIS:** I would.

19 **LORD CARLILE:** In the proper way.

20 **MISS ROSE:** I didn't think that was the position.

21 **LORD CARLILE:** I had assumed that.

22 **MISS ROSE:** I had assumed that too, sir.

23 **MR MORRIS:** It's just when I hear those words it makes --

24 **MISS ROSE:** No, no. I am very grateful for that  
25 clarification.

1       **LORD CARLILE:** A very proper reaction.

2       **MISS ROSE:** Sir, it's obvious that this is a document  
3       created before the meeting because it's setting out  
4       points to be discussed at the meeting. As Mr Scouler  
5       said, what on earth would be the point of creating  
6       a briefing document for a meeting after the meeting? It  
7       doesn't make any sense.

8               We also have evidence from both Ms Oldershaw and  
9       Mr Scouler that this was the normal format for the  
10      briefing documents that she prepared for Mr Scouler.

11      **LORD CARLILE:** If it helps you, speaking for myself, I think  
12      I'd struggle to justify the conclusion that this was  
13      a later document made in two parts.

14      **MISS ROSE:** Sir, I'm grateful.

15              My submission is that, once you accept that fact,  
16      the OFT's case on intent against Tesco really does  
17      collapse because what is said at paragraph 7 [Magnum] is  
18      completely inconsistent with that case. Because the  
19      OFT's case is that both Lisa Oldershaw and John Scouler  
20      were deliberately involved in back channel sharing of  
21      information about future retail prices with their  
22      competitors. If that is so, why on earth would she have  
23      said that to him? It just doesn't make any sense on the  
24      OFT's case, for 2002 as well as 2003.

25              At 260, we've set out what was discussed at that

1 meeting. Then the following day, on 7 October, if you  
2 turn over to document 117 [Magnum], there's another  
3 email from Mr Meikle updating Lisa on Asda's current  
4 retail prices. We say that when you look at all of  
5 these emails from Stuart Meikle, they are all of a piece  
6 with her original request to him that she wanted current  
7 retail prices. What he then does is he keeps sending  
8 her current retail prices as they come on to the  
9 shelves.

10 This one expressly says:

11 "... I can fax you the receipts as confirmation."

12 Then the same day, 118 [Magnum], the updated  
13 spreadsheet:

14 "... new retail prices that Asda will run on  
15 McLelland random weight branded lines."

16 The OFT's case is that this is future, not current  
17 Asda pricing information. We submit that is just  
18 plainly wrong. It is based only on the word "will" in  
19 this email.

20 **LORD CARLILE:** Are you saying it's an unreasonable inference  
21 to draw?

22 **MISS ROSE:** It's an unreasonable inference to draw just from  
23 this email because this is part of a string of emails in  
24 which Mr Meikle is responding to Lisa's original request  
25 for the prices that they currently are at.

1           We now know that not only was it an unreasonable  
2           inference to draw, it's factually incorrect, because the  
3           Tribunal now has the benefit of the documents at 116A to  
4           C [Magnum], and you'll recall, sir, the very lengthy  
5           cross-examination on these documents, which show that on  
6           3 October Asda instructed McLelland to pack at the new  
7           prices and said:

8           "Products priced at these levels should be sent into  
9           our depots from Monday 6 October ..."

10          In other words, the day before this email was sent.

11          You will recall the lengthy cross-examination of  
12          Mr Ferguson as to whether it was possible for them to  
13          pack the products over the weekend, and the very clear  
14          evidence of Mr Ferguson that it was, so that these  
15          products were in Asda's depot on the 6th and, therefore,  
16          on the shelf by the 7th.

17          Again, there is no evidence to support the OFT's  
18          contention that these were future prices. The only  
19          evidence demonstrates that they were current prices  
20          which is how Lisa understood them.

21          **LORD CARLILE:** Of course, these are not Lisa Rowbottom's  
22          emails, but if one looks at 117 [Magnum] and then 118  
23          [Magnum], they're on the same date and they're separated  
24          in time by less than two hours.

25          **MISS ROSE:** Yes.

1       **LORD CARLILE:** But the language is rather different. 117  
2           plainly refers to "in store", and 118, less than two  
3           hours later, is for whatever reason stated in the future  
4           tense.

5       **MISS ROSE:** But it includes some of the prices that are at  
6           117. They're not separate. If you look at the matrix  
7           that is provided with 118 [Magnum], it includes on it  
8           the prices that are at 117.

9           117 also says:

10           "We will buy some product from store this morning."

11           So he tells her at 8.55 that he's about to visit an  
12           Asda store. Then two hours later, he gives her the  
13           updated info on Asda.

14           So what the OFT's case on this hangs on is, first of  
15           all, the Tribunal rejecting the evidence of Mr Ferguson  
16           that these prices were in store by this date, for which  
17           there was no basis, and, secondly, rejecting the obvious  
18           inference that these are both updating her on the  
19           current retail prices when Mr Meikle sees them in store,  
20           and, thirdly, hanging an inference that these are not in  
21           store solely on the use of the words "will run".

22       **LORD CARLILE:** And you would add: the mysterious Mr Meikle  
23           has not been called to give evidence, presumably?

24       **MISS ROSE:** The mysterious Mr Meikle has not been called to  
25           give evidence, but more fundamentally of course, this is

1 an email, as I said in opening, this is an email, not  
2 a statute, and you can't safely draw any inference at  
3 all from the tense that's used in any email. Apart from  
4 anything else, "will run" may mean will run from today.

5 It's an ambiguous statement even on its own terms,  
6 but you have the benefit of the background evidence at  
7 116A to C [Magnum] which powerfully corroborates Lisa's  
8 own understanding of this at the time, which is that it  
9 was what she'd asked for, current retail prices.

10 Also remember that, by this date, she'd already told  
11 Stuart Meikle not to send her future retail prices. If  
12 you accept that 110A is a genuine document, she can only  
13 have written that, "Competition Commission training  
14 desperately needed", because of what he had said to her  
15 before. That strongly corroborates her evidence that  
16 she had raised it with him, so the OFT's case involves  
17 the assumption that he's flouting her wishes.

18 In my submission, it just doesn't get off the  
19 ground, only because of the use of the future tense and  
20 in the absence of Mr Meikle.

21 We set out at 264 the course of events at 116A to C.  
22 Then document 123, the following day, so this is now --  
23 sorry, yes, it's 121 [Magnum]. On 8 October, Mr Meikle  
24 said:

25 "Following our conversation I have updated the

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1 attached spreadsheet..."

2 So these are the new retail prices for packing the  
3 McLelland random weight retail lines which have now been  
4 agreed by Tesco. She changes some of those, and the  
5 following day, 9 October, this is document 123 [Magnum]:

6 "I have amended some of the suggested RSP's -- for  
7 ease I have highlighted them in red. Please pack these  
8 RSPs asap."

9 So, again, a completely routine commercial  
10 communication from Lisa Oldershaw instructing McLelland  
11 what prices to pack the cheese at.

12 So that's what we say is what happens in 2003.

13 Then coming to the OFT's case on 2003, the OFT  
14 accepts, as it does for 2002, that the retail price  
15 increases were consequential on cost price increase at  
16 the same time but insists that the retail price  
17 increases were achieved by unlawful coordination. We  
18 identify at the outset two striking features of the  
19 alleged 2003 infringement. The first is that the  
20 allegedly coordinated retail price increases are only  
21 said to involve a small part of the market, because it's  
22 only said to be McLelland that's involved, though they  
23 have less than 10 per cent of the UK cheese market. The  
24 evidence shows that the other cheese suppliers were also  
25 raising their cost prices at around the same time, we've

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1 given you various references, and yet the OFT does not  
2 allege that they were involved in this so-called  
3 initiative.

4 The second striking thing about it is the only  
5 motivation attributed to Tesco for engaging in  
6 anticompetitive conduct is to facilitate McLelland  
7 improving its margins. It's quite difficult to see why  
8 Tesco would want to do that.

9 So then the OFT's case on 2003 is as follows. First  
10 of all, they say that at the meeting on 4 September  
11 Lisa Oldershaw agreed, the first meeting that she agreed  
12 that Tesco would agree its cost and retail prices if  
13 McLelland were to ensure that other retailers did the  
14 same. We say that's factually just incorrect.  
15 Secondly, they say that despite having already agreed to  
16 increase cost and retail prices she then requested that  
17 McLelland should justify the cost price increase in the  
18 email of 12 September.

19 Then they say that on 26 September, Stuart Meikle  
20 told Lisa Oldershaw that Asda would increase its prices  
21 on the Monday and, on that basis, she agreed she would  
22 enter her new case costs on 29 or 30 September to take  
23 effect from 5 October. Then on 30 October (sic) he told  
24 her Asda hadn't increased its prices, and she said she  
25 wouldn't increase her cost or retail prices until she

1 had evidence that Asda had moved.

2 So on the OFT's case, on the Friday she was prepared  
3 to increase her cost prices on an assurance that Asda  
4 would move, but by the following Tuesday she wasn't, and  
5 was only prepared to increase her costs and retails once  
6 she had evidence that Asda's prices had moved in store.

7 But then, the OFT says, between 30 September and  
8 7 October Stuart Meikle provided Lisa Oldershaw with  
9 future retail pricing intentions from Sainsbury's and  
10 Asda. Then on 9 October she agreed to increase cost and  
11 retail prices even though she didn't have evidence that  
12 Asda had increased its retail prices on random weight  
13 cheese.

14 So the OFT's case is, on 26 September she's prepared  
15 to put up her prices on an assurance of Asda's future  
16 pricing behaviour; on 30 September she's not, she wants  
17 evidence of what's in store; but on 9 October she is  
18 again. Again, we say that is simply incoherent.

19 We make that point at paragraph 270, and then at 271  
20 we identify Lisa's evidence that she decided what to do  
21 about cost prices based, first, on the strength and  
22 justification given by McLelland and, second, the  
23 evidence of what competing retailers have done in store.

24 **MS POTTER:** Can I just check what is being said about the  
25 Tesco motivation for accepting a cost price increase,

1 given that you've made the point that it seems  
2 inherently unlikely that they do it just to assist the  
3 margin of one of the suppliers. What changed the  
4 thinking on that issue?

5 **MISS ROSE:** Well, what Mr Scouler said was that he was  
6 persuaded at the meeting on 6 October that McLelland  
7 really were in the difficulties that they said they were  
8 in.

9 **MS POTTER:** So that's in the transcript.

10 **MISS ROSE:** Yes.

11 **MS POTTER:** Is that footnoted?

12 **MISS ROSE:** I think he said the plea was made more  
13 passionately at the meeting, that it had been said  
14 before but that he really believed it when it was told  
15 to him at the meeting. We can find the reference.

16 But it was Mr Scouler who took that decision during  
17 the meeting of 6 October.

18 **MS POTTER:** And then instructed Lisa.

19 **MISS ROSE:** And then instructed Lisa to accept it. Again,  
20 of course, that decision taken without any reference to  
21 future retail pricing; it's taken on Tesco considering  
22 the justification that's being put forward by the  
23 supplier, explaining why they need to put the price up.

24 Can I now come to the individual 2003 strands. The  
25 first strand is alleged to be Asda to McLelland to Tesco

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1 in late September 2003. This is an allegation that in  
2 late September Asda communicated to Tesco, via  
3 McLelland, that Asda intended to increase its retail  
4 prices for certain McLelland cheeses on  
5 29 September 2003. This allegation is exclusively based  
6 on the Stuart Meikle Tesco briefing document, 112  
7 [Magnum].

8 We have identified, starting at paragraph 273 and  
9 going on, why we say that this evidence does not support  
10 the OFT's case. Mr Scouler's evidence, just for the  
11 note, as to the reasons why the cost price increase was  
12 accepted, first of all, it's his witness statement,  
13 volume 2A, tab H, paragraph 91 [Magnum]. Secondly, it's  
14 the transcript of Day 12, page 75, line 24 to page 76,  
15 line 21.

16 So we make the point at 276 that there is no  
17 presentation from McLelland to Sainsbury's, which is  
18 equivalent to the presentation that Calum Morrison made  
19 to -- sorry, there's no presentation from McLelland to  
20 Tesco equivalent to the presentation that Calum Morrison  
21 made to Sainsbury's at his meeting with the Sainsbury's  
22 buyer and, in particular, the references to the across  
23 the market move, all suppliers, all retailers, are  
24 completely missing from the presentation that, as you've  
25 seen, was made to Tesco. That, again, consistent with

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1 Lisa Oldershaw's evidence about what was said to her  
2 before that document had been identified, so again we  
3 say strongly corroborating her oral evidence.

4 She is very clear that she was not aware of any plan  
5 to coordinate cost or retail prices via McLelland and  
6 that she made no commitment to increase Tesco's cost or  
7 retail prices in this meeting.

8 At (b), we make the point that it is impossible for  
9 this Tribunal to make any finding as to whether or not  
10 McLelland had received any information from Asda about  
11 its future retail prices before this meeting which it  
12 was passing on to Tesco. There's simply no evidence  
13 about that, and no evidence has been called either from  
14 Mr Meikle to say where he got any information from or  
15 from Asda as to whether they were the source of any  
16 information. In that situation, it is impossible for  
17 the Tribunal to find that any information emanating from  
18 Asda was provided to Tesco at this meeting. Similarly,  
19 no basis for the conclusion that Asda would have  
20 intended information to be passed on because there is no  
21 evidence from anyone from Asda about that document.

22 We also make the point that it's plain from the  
23 document itself, I'm now at (e), that Lisa Oldershaw had  
24 no intention of making use of any information that she  
25 may have received at this meeting because, even at face

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1 value, what she's saying is that she'll move her cost  
2 prices after she has seen that Asda has moved.

3 So that's strand 1, which we say simply doesn't get  
4 off first base again, because the OFT has not shown that  
5 any information was passed to Lisa Oldershaw that  
6 emanated from Asda, or that it was passed with Asda's  
7 consent or intent, or that it was understood by Tesco as  
8 having come from Asda with such intention.

9 Strand 2, this allegation is that in late  
10 September 2003 Sainsbury's communicated to Tesco via  
11 McLelland that Sainsbury's was in the process of  
12 increasing the retail price for the Isle of Bute cheese.  
13 This is the email of 30 September with the fax of the  
14 price labels, document 110 [Magnum].

15 Again, it's worth just pointing out the inherent  
16 implausibility of the allegation that Sainsbury's was  
17 intending this information to be passed to Tesco for the  
18 purpose of affecting competition. Isle of Bute is  
19 a minor Scottish cheese with a pretty small sale, it is  
20 hardly an economically significant cheese. The quantity  
21 of Isle of Bute cheddar that's consumed is not very  
22 significant. So it's a very oddly-chosen piece of  
23 information if you're a retailer and, on this  
24 hypothesis, it has to be said that Sainsbury's is the  
25 retailer that wants Tesco to know that it's raising its

1 price on this particular cheese. Why on earth would  
2 Sainsbury's want Tesco to have that advance information?  
3 It just doesn't really make any sense.

4 You already have my submission that, actually, the  
5 only evidence before this Tribunal is that that was an  
6 in-store price, it wasn't a future price; even though it  
7 was understood by Lisa as potentially a future price, it  
8 actually was not.

9 The OFT's only case for saying that this was  
10 a future price is an email from Stuart Meikle confirming  
11 that retail prices of some of Sainsbury's own label  
12 products, including Isle of Bute, were in store on  
13 2 October. That's document 113 [Magnum]:

14 "Sainsbury's have moved retail prices across more of  
15 their own label products, details as below."

16 Their case in their defence was they said this  
17 showed that Sainsbury's had only moved the Isle of Bute  
18 on 2 October and, therefore, it was future information  
19 on 30 September. Now, of course, that doesn't follow.  
20 The fact that it's in store on 2 October doesn't mean  
21 that it wasn't in store on 30 September. What the  
22 Tribunal has is document 109 [Magnum] saying that the  
23 price was effective from 30 September on Isle of Bute.

24 The OFT's case on this document now appears to be  
25 different, because it was put for the first time in

1 cross-examination that these are not in-store prices  
2 either. But there has still been no application from  
3 the OFT for permission to amend its defence to run that  
4 contradictory argument, and there is no evidence at all  
5 that these were not in store by this date, none  
6 whatsoever.

7 Overall, what the Tribunal has in relation to these  
8 prices, and you'll see the same thing in relation to  
9 Sainsbury's and Asda in 2003, is that the OFT simply  
10 does not know what is the date when these prices were in  
11 store. It's clear that they were all being implemented  
12 at around this time. If the OFT was going to make the  
13 submission that it was critical to its case on  
14 infringement whether the prices were in store yesterday  
15 or tomorrow, then it needed to get proper clear evidence  
16 about the date when the prices came in store. Yet it  
17 never took any steps at all to obtain that evidence, and  
18 now, simply, with the burden of proof being upon it,  
19 makes the assertion that these are future prices without  
20 evidence which could easily have been gathered to  
21 demonstrate whether that was or was not true, and we say  
22 that's not good enough.

23 There's no evidence at all to support the  
24 proposition that Sainsbury's intended -- this is  
25 assuming that the Isle of Bute information was future,

1           which we say it wasn't -- there is no evidence at all to  
2           support the proposition that Sainsbury's intended that  
3           information to be passed to Tesco, because no witness  
4           has been called from Sainsbury's, and there is of course  
5           no information that -- no evidence that Tesco believed  
6           that Sainsbury's intended it to have that information.

7           You've had repeated and very clear evidence from  
8           both Ms Oldershaw and Mr Scouler that they would have  
9           been extremely surprised if their competitors had wanted  
10          them to have their retail price information, they would  
11          have been very surprised indeed. And indeed, of course,  
12          Lisa rejected this information and said she did not want  
13          it. So there is no case that this was information that  
14          Tesco was seeking to use, so it fails all the limbs of  
15          the A-B-C test yet again.

16          The OFT's conclusion that Sainsbury's had requisite  
17          intention is based on the factors that we identify at  
18          paragraph 282. Sorry, I beg your pardon, it's 281.  
19          They say, first of all, Sainsbury's had received an  
20          email from McLelland on 5 September with a presentation  
21          indicating that it was proposing a total market move.  
22          Second, they rely on Sainsbury's conduct in 2002 and,  
23          thirdly, they rely on Sainsbury's corporate admission.

24          That's the totality of their case in relation to  
25          Sainsbury's intent, and we say it's manifestly

1 inadequate. You've already had my submission on why no  
2 weight at all can be placed on the corporate admission.  
3 Conduct in 2002 we say is of no relevance given the very  
4 different circumstances in 2003. So the only piece of  
5 evidence is the wording of the presentation made by  
6 McLelland to Sainsbury's which, of course, is not  
7 evidence of Sainsbury's intent. How could it be? At  
8 the most it's evidence of what was said to Sainsbury's  
9 by McLelland.

10 We identify some further flaws in this reasoning at  
11 282 and 283, I invite you to read those. I think I've  
12 covered the remainder of the points, it goes down to  
13 286. So that's strand 2.

14 Strand 3, if I can just deal with this one before  
15 lunch. Just to let you know where I'm at. If I can get  
16 to the end of strand 3 before lunch, I would expect to  
17 be finished within about 40 minutes after lunch.

18 **LORD CARLILE:** Right.

19 **MISS ROSE:** So the OFT alleges at strand 3 that, in early  
20 October 2003, Sainsbury's disclosed to Tesco via  
21 McLelland the retail prices it was proposing to run for  
22 a number of pre-pack cheeses. This is the email from  
23 Stuart Meikle to Lisa Oldershaw on 2 October 2003  
24 attaching a spreadsheet. That's document 114 -- sorry,  
25 115 [Magnum]. The spreadsheet at 115 includes various

1 new retail prices for Sainsbury's, and the OFT's claim  
2 is that some of these new retail prices were not yet in  
3 store and that, therefore, this is future retail pricing  
4 information.

5 However, again, there is no evidence that this is  
6 future retail pricing information. There's no evidence  
7 from the OFT that these are not in store prices. It's  
8 inconsistent with the whole exchange because Lisa was  
9 asking for current prices.

10 Now, what the OFT says is that, when it submitted  
11 its statement identifying inaccuracies in the statement  
12 of objections, Sainsbury's identified that two of the  
13 prices on this list were already in store, and the  
14 argument of the OFT is that it must therefore follow  
15 that the rest of the prices were not in store. But  
16 that, of course, is a false inference because it could  
17 equally well be that Sainsbury's had not checked or did  
18 not have the documentation to demonstrate whether the  
19 other prices were or were not in store. In fact, the  
20 likelihood is that if Sainsbury's was moving its prices  
21 on the cheeses it was supplied by McLelland, it would  
22 have moved them all on the same day. So if Sainsbury's  
23 had evidence that two of them were in store, it's likely  
24 that the others were as well.

25 Now, the OFT seeks to rely on the wording of the

1 covering email from Stuart Meikle. He says:

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

8 Now, they suggest that when he says "as changes  
9 become visible", he means "as I get secret market  
10 intelligence of future pricing information". We say  
11 that's a very unlikely interpretation and that the  
12 obvious interpretation is that he's going to fill in the  
13 matrix as the prices come in store, and that's precisely  
14 what he then does. As the price changes work through  
15 the system and come in store, he sends her iterations of  
16 the matrix with the new prices in. Indeed, the evidence  
17 of Mr Irvine was that visible meant visible on the  
18 shelf. Again, Mr Meikle of course not called by the OFT  
19 to give evidence. So we say there is no evidence that  
20 this is future retail pricing information at all.

21 There is also no evidence of the required state of  
22 mind, that's paragraph 290. This will all be familiar  
23 ground to the Tribunal by now, the same points apply  
24 again and again, and we simply invite the Tribunal to  
25 read that over.

1                   That concludes strand 3.

2           **LORD CARLILE:** Thank you very much. We'll adjourn until  
3                   2 o'clock then.

4           (1.00 pm)

5                                   (The short adjournment)

6           (2.00 pm)

7           **MISS ROSE:** Sir, just on the issue of the complaint made by  
8                   Lisa, you asked me why didn't she make a written  
9                   complaint? The first point to make is in legal terms,  
10                  there was no significance as to whether her complaint  
11                  was written or oral. The only distinction is whether  
12                  it's credible that she made a complaint, and whether the  
13                  lack of a written record affects the credibility of her  
14                  evidence that she made a complaint.

15                  In the circumstances of this case, it doesn't affect  
16                  the credibility of her evidence that she made  
17                  a complaint, firstly, because of the corroboration from  
18                  document 110A [Magnum] that we've just been looking at,  
19                  secondly, the account of the meeting on 6 October given  
20                  by everybody who attended that meeting and, thirdly, the  
21                  lack of any evidence to contradict her, because the OFT  
22                  could of course have called Stuart Meikle. If they'd  
23                  wanted to run a positive case that she didn't make  
24                  a complaint to Stuart Meikle, they could have called  
25                  Stuart Meikle to say that. But they didn't, so there is

1 no evidence that she didn't make the complaint. Her  
2 evidence that she did is uncontradicted.

3 **LORD CARLILE:** Let's see what Mr Morris says about that. It  
4 seems to be an issue on the merits and I'm sure he'll  
5 address it.

6 **MISS ROSE:** Strand 4, this is paragraph 291. The OFT  
7 alleges that in early October 2003 Asda disclosed to  
8 Tesco, via McLelland, that it intended to increase  
9 prices on a number of pre-pack and deli cheeses. This  
10 is the email from Stuart Meikle to Lisa Oldershaw on  
11 7 October 2003 attaching an update to the 2 October 2003  
12 spreadsheet. This is the email we have just been  
13 looking at, which says the prices that Asda "will run".

14 It's at tab 118 [Magnum], we looked at it earlier.  
15 I have dealt with most of the points under this one, we  
16 were looking at this email before. If we go to  
17 paragraph 293, the first point is that these were not  
18 future prices. Tom Ferguson confirmed in his witness  
19 summary and in extensive cross-examination that the  
20 correspondence between McLelland and Asda on 2 and  
21 3 October demonstrated that the new prices were in store  
22 before Stuart Meikle sent his email on 7 October.

23 The 7 October spreadsheet was an update to the  
24 2 October spreadsheet which only contained the in store  
25 retail prices which, of course, were the only prices

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1           that had been requested. He had told Lisa Oldershaw  
2           less than two hours earlier on that day that he would be  
3           visiting Asda stores to check the prices and buy some  
4           product from store. She'd only requested in-store  
5           prices, believed he was giving her in-store prices, and  
6           of the new Asda prices recorded in the spreadsheet  
7           there's contemporaneous documentary evidence that at  
8           least some of them were already on the Asda website on  
9           that day, which are those that were mentioned in the  
10          earlier email.

11                 So 294, the OFT points out that Tesco increased the  
12          price of Seriously Strong white cheese on 8 October to  
13          match the Asda price, but we say that was nothing other  
14          than a response to the in-store Asda price and was  
15          perfectly legitimate.

16                 Then at 295, even if we're wrong about everything  
17          we've said so far, again, we say simply no evidence of  
18          Asda's intent, or indeed Tesco's intent.

19                 Strand 5, this is document 123, the allegation that  
20          Tesco disclosed to Asda via McLelland that Tesco's  
21          retail prices for cheddar would be increasing by an  
22          average of 35p per kilo. The OFT bases this on two  
23          documents. First of all, the Tesco document in which --  
24          this is document 123 [Magnum] -- in which Lisa Oldershaw  
25          informed Stuart Meikle of her new proposed retail prices

1 for packing purposes, which we say is an entirely  
2 legitimate commercial communication.

3 Then an internal Asda email of 10 October 2003 which  
4 is at tab 124 [Magnum], so this is 10 October,  
5 Jonathan Betts of Asda to Peter Pritchard also of Asda:

6 "Peter

7 "Further update below

8 "Tesco have now moved to increase retails on [own  
9 label] Value and territorials have moved between 23p and  
10 29p per kg and I have line detail. Cheddar has moved on  
11 average 35p per kg though I have no visibility on exact  
12 prices. These packs should be in store in [around] 10  
13 days time."

14 So the allegation is that information about Tesco's  
15 future pricing intentions on cheddar was passed by  
16 McLelland to Asda with the requisite intent on the part  
17 of Tesco.

18 Now, we submit that the documents don't support that  
19 at all. If you go to paragraph 298, the first point is  
20 that there is no evidence that this information that  
21 Asda reports internally here comes from McLelland. The  
22 email does not refer to McLelland cheeses, it refers to  
23 cheddar entirely generically, and to changes across the  
24 cheese category. So Asda appear to be referring to  
25 Tesco's cheddar prices generally, and McLelland supplied

1           only around 7 per cent of Tesco's cheddar. So the  
2           information that Lisa Oldershaw gave to McLelland could  
3           not have been the source of the information that's  
4           reported in this email.

5           Secondly, the information reported here, "Cheddar  
6           has moved on average 35p per kilo", is inconsistent with  
7           the information that Lisa provided to Stuart Meikle on  
8           9 October, because if you look at the average retail  
9           price rises for cheddar cheeses in the spreadsheet that  
10          she sent to Mr Meikle, it is not an average price rise  
11          of 35p per kilo, it is a price rise of -- an average  
12          price rise of approximately 28p per kilo. So it is  
13          significantly lower than that which is reported in the  
14          Asda email, which again is a strong indication that the  
15          source of Asda's information, whatever it is, is not  
16          McLelland and, therefore, is not Lisa Oldershaw's  
17          communication with McLelland.

18          Even if Asda did obtain this information from  
19          McLelland, as to which there is no evidence, there is no  
20          basis for the OFT's finding that Asda would have  
21          appreciated the information came from Tesco, or came  
22          from Tesco with its consent. On this point, we rely on  
23          document 125 [Magnum].

24          **LORD CARLILE:** This is another Asda ...

25          **MISS ROSE:** This is another internal Asda email, 22 October,

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1           so this is a couple of weeks later.

2           "Further update and recap below."

3           Then on "Retailers":

4           "Tesco have now moved with increased retailers through  
5           their entire range of British cheeses. Price increases  
6           vary from 23p per kg on Value to 39p per kg on [own  
7           label]. These packs are now filtering through to  
8           stores. As before, they have generally sought to  
9           maintain % across the cheese category. This is now  
10          being reviewed now they have had sight of our price  
11          increases in-store, eg all branded prices -- where they  
12          had moved [around] 30p per kg -- have now been realigned  
13          back to match our 20p increase. So, at least for a few  
14          weeks we've managed a small gap!"

15          Now, Asda are there congratulating themselves on the  
16          fact that they have priced themselves below Tesco for  
17          a few weeks. That is wholly inconsistent with the OFT's  
18          case that Asda and Tesco are seeking to coordinate their  
19          price rises. What this demonstrates is the extent to  
20          which Asda and Tesco are jockeying to charge less than  
21          each other, and that Asda have managed to charge less  
22          than Tesco who have now pulled their prices back down to  
23          match.

24          Again, we say the significance of this email goes  
25          beyond this strand because it is highly revealing about

1 the attitude that Asda has towards Tesco, which makes it  
2 extremely unlikely that Asda would be intending its  
3 confidential pricing information to be passed to Tesco.

4 Going back to our note at (d), the OFT accepts that  
5 in respect of own label, value and territorial lines the  
6 information might have been in the public domain, but  
7 states the information on cheddar retail prices, in  
8 respect of which Asda did not yet have line detail, must  
9 have related to Tesco's future retail pricing  
10 intentions. But the OFT never asked anybody at Asda  
11 where the information in the internal Asda email came  
12 from. It is simply inferred that it must have come from  
13 McLelland even though there was no witness evidence  
14 either from McLelland or Asda to support that inference.

15 We make the point that the OFT did not question any  
16 Asda witnesses, including Jonathan Betts who wrote the  
17 email, or the recipient of the email, Peter Pritchard,  
18 on what the source of the information was in this  
19 exchange. We make the point that there was in fact an  
20 interview of Jonathan Betts by Asda's solicitors which  
21 is inconsistent with the OFT's case, but it never sought  
22 to interview him or ask him further questions. We deal  
23 with that at (d) and (e).

24 We also make the point at (f) that the Tribunal  
25 knows the detailed information that McLelland had about

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1 Tesco's future retail prices because, on 9 October, Lisa  
2 had sent the complete spreadsheet of her new retail  
3 prices to McLelland so that it could pack her cheese.  
4 But there is no evidence at all that that detailed  
5 information was disclosed to Asda, and indeed the Asda  
6 email is inconsistent with that information having been  
7 disclosed to Asda, because the information in the Asda  
8 email is inconsistent with the spreadsheet.

9 On the OFT's case, why would Asda be giving -- why  
10 would McLelland be giving Asda a false picture of the  
11 extent of Tesco's price rise and not giving it the full  
12 extent of the information it had? It just doesn't make  
13 any sense, yet again.

14 Then at 299, we say there's also no basis for the  
15 conclusion that Lisa Oldershaw intended or foresaw that  
16 the information in her spreadsheet would be shared with  
17 Tesco's competitors. The first point the OFT makes is  
18 it says, by this date, Lisa Oldershaw had received  
19 future retail pricing information from McLelland on four  
20 separate occasions and, therefore, should have been  
21 alert to the risk that they would forward her  
22 information.

23 But on analysis that is untrue; there is actually no  
24 occasion in 2003 where the OFT is able to demonstrate  
25 that future retail pricing information had been

1 disclosed to Tesco. Each of the occasions it refers to,  
2 the OFT is unable to show its future retail pricing and,  
3 indeed, in every case the surrounding contemporaneous  
4 evidence strongly suggests that it was current retail  
5 pricing information. There was one occasion on which  
6 Lisa suspected that the information was future, she was  
7 wrong about that, but she complained in any event.  
8 Having made that complaint, there was no reason why she  
9 should consider that, notwithstanding that complaint,  
10 her confidence would be breached.

11 The second point the OFT makes is that they say that  
12 the information she supplied in the spreadsheet went  
13 beyond the information that McLelland needed for  
14 labelling. That is simply untrue. The original  
15 allegation was that she had provided retail pricing on  
16 deli lines. You have seen the exhibit to her witness  
17 statement. The deli lines are all blank with the  
18 exception of one where the original suggested retail  
19 price from McLelland was left in but with the words "on  
20 hold". She did not send any deli retail prices to  
21 McLelland.

22 That is the end of the strands on 2003.

23 Can I just, as for 2002, sum up looking at a whole  
24 what the evidence about the alleged 2003 infringement  
25 shows. First, what disclosures by Tesco are alleged by

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1 the OFT and what have been shown to have occurred? The  
2 OFT only alleges one disclosure by Tesco in 2003 and it  
3 is strand 5, the email of 9 October 2003 at document 123  
4 [Magnum]. We submit that that is, self-evidently,  
5 a normal commercial disclosure to the supplier who has  
6 to pack the cheese telling them what the retail prices  
7 of the cheese they're going to pack will have to be.

8 So, secondly, what are the disclosures to Tesco of  
9 future retail pricing information that are alleged by  
10 the OFT, and which of those have been proved? There are  
11 four that are alleged and we say none of them have been  
12 proved by the OFT. The first, strand 1, is the alleged  
13 disclosure from Asda in late September 2003, entirely  
14 based on the Stuart Meikle internal note, document 112  
15 [Magnum], which we say carries no evidential weight.

16 Strand 2 is the Sainsbury's Isle of Bute label on  
17 30 September, and you have my submission that that is  
18 not in fact a future retail price, already in store, and  
19 anyway Lisa complained about it.

20 Strand 3 is the further information about  
21 Sainsbury's on 2 October 2003, that's document 114  
22 [Magnum]; there is no evidence that these were future  
23 retail prices or that Tesco knew or believed that they  
24 were. They were supplied in response to a specific  
25 request for current retail prices.

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1 Strand 4 is the Asda email, 7 October 2003, which  
2 has now been shown by the evidence of Mr Ferguson and  
3 documents 116A to C [Magnum] to be current retail  
4 prices, not future, again supplied in response to  
5 a question for current retail prices.

6 So, in fact, strand 1 is based entirely on the  
7 questionable Meikle evidence. The other strands are all  
8 information that Mr Meikle supplied to Lisa Oldershaw in  
9 response to her request for current retail prices. We  
10 say that there is simply no basis, first of all, for  
11 inferring that they weren't what she asked for and,  
12 secondly, for inferring that she knew that they weren't  
13 what she asked for but were in fact future retail  
14 prices. If the OFT wanted to rebut the obvious  
15 inference that they were current, and that she believed  
16 they were current, at the very least it would have had  
17 to prove to this Tribunal that those were future retail  
18 prices and it has failed to do so in every case.

19 So far as the question of awareness of a plan by  
20 Tesco in 2003 is concerned, Tesco's only awareness in  
21 2003 was that McLelland, its supplier, was seeking  
22 a cost price increase, and there is no evidence that  
23 Tesco was aware of anything beyond that. So, in  
24 summary, the only disclosure by Tesco in both 2002 and  
25 2003, the only disclosure by Tesco of its pricing

1 information that has been shown by the OFT to have  
2 occurred, was when Tesco was informing its suppliers  
3 either of a cost price increase, the timings of a cost  
4 price increase or of its future retail prices for  
5 packing purposes. Nothing else has been shown.

6 In fact, there was no disclosure at all of any  
7 future retail pricing information in 2003, and the only  
8 occasion on which that occurred in 2002, where it wasn't  
9 public domain information, was the technicality in  
10 relation to Sainsbury's at 5.00 pm saying that the price  
11 would go up the following day. That is the only  
12 instance shown in this case of a disclosure of any  
13 future retail pricing information to Tesco.

14 We submit that, on that basis, for all the reasons  
15 that I've given, for all the reasons in the notice of  
16 appeal and for all those that you have heard developed  
17 during this hearing, this appeal should be allowed.

18 **LORD CARLILE:** Thank you very much indeed, Miss Rose.

19 Do you want to start straightaway or do you want ten  
20 minutes?

21 **MR MORRIS:** Can I ask for ten minutes, just for the passing  
22 over of the --

23 **LORD CARLILE:** The ceremonial passing over of the core  
24 podium, of course.

25 **MR MORRIS:** And I may need to rearrange some of my papers.



1 divided into the following parts. First, I wish to make  
2 some general and overriding submissions on the case as  
3 a whole; secondly, I will address the substantive  
4 principles of law which fall to be applied by the  
5 Tribunal in reaching its determination of the issues;  
6 thirdly, I will address the various evidential matters  
7 that arise covering a range of topics, including the  
8 calling of witnesses, the weight to be given to the  
9 various types of evidence you have before you and some  
10 observations on the oral evidence that you have heard;  
11 fourthly, I propose dealing with some of the factual  
12 issues of general application which have arisen in the  
13 course of the case; fifthly, I will deal with the events  
14 of autumn 2002; finally, I will turn to the events of  
15 autumn 2003.

16 Sir, the OFT will be providing written closing  
17 submissions and we propose providing these to you  
18 tomorrow. I will, for this afternoon, be making fully  
19 oral submissions.

20 May I therefore turn to the first part, some general  
21 overriding observations on the case. The Tribunal is by  
22 now more than familiar with the issues and the facts,  
23 and we are all aware that we have all been over the  
24 ground in some detail. There is now before the Tribunal  
25 a wealth of material. There is a very substantial

1 volume of contemporaneous documents, there are also  
2 numerous and, in some cases, lengthy witness statements  
3 from witnesses called by Tesco, and you have now heard  
4 seven days of oral evidence. We submit that, on the  
5 basis of all the materials and everything that has been  
6 heard, the only proper conclusion that the Tribunal can  
7 reach in this case is that Tesco participated both in  
8 the 2002 cheese initiative and in the 2003 cheese  
9 initiative.

10 The evidence to support that conclusion is not only  
11 cogent, but we would submit that when you step back and  
12 you look at this in the cold light of day you will see  
13 that that evidence is, in fact, overwhelming.

14 Throughout this process, by which I mean all the  
15 stages of the OFT investigation and this appeal, and  
16 despite everything that has been raised by Tesco, one  
17 always comes back to looking at a number of key  
18 documents, key documents which are contemporaneous  
19 evidence of the central events. Those documents and  
20 events were the documents and events which the OFT  
21 relied upon right at the outset, by which I mean at the  
22 stage where it provisionally concluded that there was an  
23 infringement, at the stage of the issue of the statement  
24 of objections.

25 These were also the key documents and events which

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1           were the foundation of the OFT's final conclusion that  
2           it reached in the decision. These remain the same key  
3           documents and events which have formed the foundation of  
4           the OFT's case before this Tribunal. They are the key  
5           documents to which Tesco has been unable to provide over  
6           time a consistent response and to which Tesco is now  
7           unable to provide you with a cogent response.

8           Contrary to my learned friend's suggestion in  
9           closing, these are the important documents and each of  
10          these are documents which were sent, received or seen by  
11          Tesco at the time or, at the very least, evidence  
12          information sent or received by Tesco at the time.

13          Let me identify at this stage some of those key  
14          documents to which I'm referring, there are others but  
15          let me just look at a few. For 2002, at the very core  
16          of the Office of Fair Trading's case are documents 47  
17          [Magnum] and 52 [Magnum], and 63 [Magnum] and [67]  
18          [Magnum]. I will take you to them in a moment, but I'm  
19          just giving you the numbers. So that's 47 and 52, and  
20          63 and [67], together with the Dairy Crest briefing  
21          document which you will find in a number of places but,  
22          for present purposes, document 25 [Magnum].

23          The first four documents I've just identified, 47,  
24          52, 63 and [67], evidence direct transmissions of  
25          relevant information from retailer to processor and

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1 further on to competitor retailer, and they show that  
2 happening both where Tesco is the recipient and where  
3 Tesco is the sender.

4 We will come back to them in detail and you are very  
5 familiar with them. But we say that those four  
6 documents, combined with the Dairy Crest briefing  
7 document, establish the following. The Dairy Crest  
8 briefing document establishes clearly that Dairy Crest  
9 had made a proposal to all retailers for a uniform cost  
10 and retail price increase on all cheese lines and to  
11 happen at the same time. That proposal was made to  
12 Tesco, and the evidence before the Tribunal also shows  
13 that Tesco was aware of the content of that proposal,  
14 firstly, and it was also aware that that same proposal  
15 had been made to all its main competitors at that time.  
16 It is our submission that in all these respects it was  
17 a highly unusual proposal.

18 Documents 47 and 52 establish clearly that, on  
19 16 October 2002, Sainsbury's passed its future pricing  
20 intentions to McLelland and, on 21 October 2002,  
21 McLelland passed on to Tesco Sainsbury's future pricing  
22 intentions.

23 If we could just go to those two documents, you've  
24 seen them many times, but they are in our submission  
25 clear and stark.

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1 Document 47 [Magnum] is the email from Tom Ferguson  
2 to Jim McGregor, internal, recording that  
3 Sarah Mackenzie has confirmed that the position moving  
4 forward will be as follows:

5 "Seriously Strong pre-pack will move on costs and  
6 retails from the 21st of October."

7 Pausing there for a moment, that's branded fixed  
8 weight, the Seriously Strong brand, and its cost and its  
9 retail, and it's going to happen on 21 October. That is  
10 future retail pricing intentions of Sainsbury's.

11 Secondly:

12 "Sainsbury own label and pre-pack brands..."

13 Just for your note, that we say is random weight as  
14 opposed to fixed weight brands.

15 "... will move on the 4th... allowing for the proper  
16 market conditions ..."

17 And thirdly:

18 "Deli and Taste the Difference will move on the  
19 11th..."

20 Whatever Mr Ferguson may have said in evidence about  
21 the meaning of that email, in our submission, there can  
22 be no doubt that that is the passing of future --  
23 evidences the passing of future pricing information by  
24 Sainsbury's to McLelland on 16 October. Put it this  
25 way, that is the first limb of the A-B-C.

1       **MS POTTER:** Sorry, in terms of intention here, what is the  
2           evidence for Sainsbury's intention?

3       **MR MORRIS:** I'll come back to that, if I may, and  
4           I understand that. But can I say this, we would suggest  
5           that the evidence of what is going on beforehand,  
6           evidence of what Sainsbury's thinking was, in the  
7           documents, and I'm thinking offhand possibly of 41 but  
8           I'll come back to it, shows that Sainsbury's were very  
9           concerned about only moving if other people moved. Of  
10          course, we would also say this, and now I would like to  
11          answer your question as I can, that of course there's no  
12          labelling reason to be passing information about fixed  
13          weight, item 1, or deli, item 3.

14       **MS POTTER:** Unless it's actually costs that are moving on  
15          these dates.

16       **MR MORRIS:** Yes, but it says costs and retail.

17       **MS POTTER:** On the first one, and the second two it doesn't  
18          say anything, yes.

19       **MR MORRIS:** It doesn't, but we would submit they're passing  
20          general information about movements. But nevertheless  
21          on pre-pack, and of course, this is in advance at this  
22          stage.

23                We then go to document 52 [Magnum], which is the  
24                email from Tom Ferguson to Lisa Rowbottom on the 21st.  
25                Of course we have the first part of the email which

1 deals with the spreadsheet, and then we have the three  
2 items of information from the words:

3 "As we discussed last week other parties are  
4 confirming..."

5 We point out the following. First of all, there had  
6 been a discussion between Ferguson and Rowbottom in the  
7 previous week, and it is our case that information was  
8 disclosed in that, certainly the cash and margin  
9 information was disclosed. But looking at this document  
10 in its terms, there are three items of information which  
11 Lisa Rowbottom receives. First, she receives the  
12 information that others are going to go by cash rather  
13 than percentage, and I don't need to remind you that the  
14 evidence in the case is that cash margin was highly  
15 unusual. That was information that plainly related and  
16 tied in with the Dairy Crest briefing document.

17 We then have the middle bit of information, which is  
18 contested, the 4 and 11 November bit of information.  
19 Our submission is that that is not a reference to  
20 Tesco's proposed dates; it is a reference to and matches  
21 very closely the wording of -- going back to 47, because  
22 you have pre-pack on the 4th and deli on the 11th.

23 The point that was not made, or perhaps not made in  
24 the way that it was put to Lisa -- Lisa Oldershaw's  
25 evidence on that was that it was her own proposal, but

1           you will recall that it was put to her that there is no  
2           evidence anywhere that at any time, by this point in  
3           time, Tesco had thought of moving deli on the 11th.  
4           It's not about what they did ultimately with deli; the  
5           point here is that there is no evidence to suggest in  
6           any document that Tesco ever contemplated moving deli on  
7           11 November as opposed to a later date. For that reason  
8           it was put to her in cross-examination, we submit, that  
9           it makes no sense that -- this is talking about Tesco,  
10          but in fact it is much more obviously a reflection of  
11          the information about Sainsbury's on the 4th and 11th.

12                 Then we have a third piece of information:

13                 "Sainsbury's are confirming that the new retails on  
14                 branded pre-pack will be in place Tuesday this week."

15                 That is, of course, slightly odd wording because it  
16                 is in fact "tomorrow", "Tuesday this week", and one  
17                 wonders why that was -- I'm only speculating now and,  
18                 obviously, that's not something... but the point is that  
19                 it is future pricing information about a product,  
20                 a fixed weight product. Regardless of the fact that it  
21                 might have been in store the next morning, the question  
22                 arises, why was it being sent before it was in store?

23                 In our submission, those documents show quite  
24                 clearly the receipt by Tesco of future retail pricing  
25                 information, both of Sainsbury's and, in fact, of other

1 retailers because of the sentence:

2 "As we discussed last week other parties are  
3 confirming..."

4 Our submission is that when you look back at  
5 document 51A [Magnum], again this is familiar, and it is  
6 perhaps just worth turning back to it, that the  
7 information about maintaining cash margin recorded in  
8 51A supports and is consistent with the reference in the  
9 email to "other parties are confirming". Because what  
10 we have is we have that document recording two parties,  
11 Safeway and Sainsbury's, clearly intending to maintain  
12 cash margin; they are "other parties". There is "Asda  
13 will probably" but that is not clear. It's not all  
14 other parties are confirming, it says "other parties are  
15 confirming". And we have Tesco at that stage who were  
16 saying that they wanted to maintain percentage margin.

17 If I might, just whilst I'm on the document, on the  
18 issue of whether or not the reference to 4 and  
19 11 November in document 52 is a reference to Tesco's  
20 position or proposal, I ask you to note that what is  
21 recorded in document 51A at Tesco makes no reference to  
22 the 11th. It just says:

23 "... will probably commence moves from [the] [REDACTED] ...  
24 staggered across..."

25 We would suggest that if the reference to the 4th

1           and the 11th in the email at 52 was a reference to Tesco  
2           then the position would have been different in 51A.

3           So that is the first set of -- the first two  
4           documents which we say remain at the core of the Office  
5           of Fair Trading's case and are compelling evidence of  
6           a transmission of future retail pricing information and  
7           receipt by Tesco.

8           Now let's have a look at documents 63 and [67].  
9           Before I take you to them, we say that these documents  
10          establish clearly that, on 30 October, Tesco passed its  
11          future pricing intentions to Dairy Crest and, as you  
12          know, we say that they clearly showed that those are  
13          future retail pricing intentions, and that, on  
14          31 October, Dairy Crest passed those future retail  
15          pricing intentions on to Sainsbury's.

16          Document 63 [Magnum] is Mr Arthey's email, and I  
17          take it you will have seen it many times before. It  
18          records a conversation with Lisa Oldershaw that  
19          afternoon on the 30th. It is accepted by Lisa Oldershaw  
20          in evidence that this is an accurate record of what she  
21          said and, in our submission, and I will be giving you  
22          perhaps half a dozen, at least, more points on this  
23          document in due course. But, in our submission, it is  
24          clear that that document records a conversation where  
25          Lisa Oldershaw informed Neil Arthey that Tesco were

1 going to move on retail prices, not cost prices, and all  
2 those movements in that email, in our submission, are  
3 retail prices.

4 The specific reason for the reference to the  
5 WeightWatchers specific price is because that was the  
6 only one that actually imminently needed to be packed.  
7 There we have a clear recording of the passing of future  
8 retail pricing intentions by Tesco, by Lisa Oldershaw to  
9 Neil Arthey and, in our submission, as I will develop,  
10 there was no reason, no legitimate labelling reason for  
11 that information to be passed on for most, if not all,  
12 of the categories of cheese in that document.

13 Then you go, just to complete the picture, you go to  
14 66 and you see -- it's not 66, I apologise, I've got my  
15 reference wrong, it is 67 [Magnum]. So every reference  
16 I've made to 66 so far in my closing should be  
17 a reference to 67.

18 This is the passing on by Paul Feery, who is the  
19 Sainsbury's person at Dairy Crest, of the information  
20 that Neil Arthey has received from Lisa Oldershaw and,  
21 as you will see, that is verbatim the same except for  
22 the omission of the sentence about mild and -- it might  
23 be farmhouse, I can't remember which ones they were, but  
24 there's one sentence of the email. The one-week delay  
25 on mild and medium is not referred to but, otherwise,

1 paragraphs 1 to 5 are either verbatim or practically  
2 verbatim. Of course, what is being said at the top is:  
3 "... latest information from Tesco on their price  
4 increases."

5 That must be, in our submission, a reference to  
6 their retail price increases.

7 Now, document 63 [Magnum] evidences a clear  
8 disclosure. Miss Rose says, "Well, this is the only  
9 one". We say, and I'm understating this, it's a pretty  
10 significant only one, and it's significant not only  
11 because actually it is sufficient for the OFT, if we are  
12 right on it, it is sufficient to establish the OFT's  
13 case, but it is significant for two other reasons, and  
14 I'll develop this in a moment. It is significant  
15 because it comes at the very point in time where the  
16 evidence shows that Tesco had taken the decision to move  
17 in waves and to tell all the processors at the same  
18 time, so it's the key event. And it's also significant,  
19 we say, because it sets the whole context for what  
20 happens afterwards and what follows from it.

21 Now, I've been talking so far about documents that  
22 have always been there, they've been there right from  
23 the outset. We accept, however, that there is one key  
24 document which is new to this appeal and which was not  
25 before the Office of Fair Trading when it took its

1 decision. This is a Tesco document, it is a document  
2 which was provided by Tesco for the first time in the  
3 course of this appeal. It is a document of which the  
4 Office of Fair Trading was not aware and had no reason  
5 to be aware at any time during the investigation. I'm  
6 referring to document 64 [Magnum], if you would like to  
7 turn the page.

8 This is Lisa Oldershaw's -- if you go to the second  
9 page -- internal cheese £200 per tonne plan, and it  
10 evidences, in her own words, her or Tesco's cost and  
11 retail moves. Now, in its skeleton argument of 6 March  
12 of this year for a case management conference, Tesco  
13 described document 64 as being "innocuous". The  
14 reference is to paragraph 16 of that skeleton [Magnum],  
15 just for the note.

16 Far from being innocuous, we would suggest that  
17 document 64 is, to put it at its very lowest, highly  
18 material evidence in this case. It provides a key link  
19 in the story of what actually was going on at the time,  
20 and it brings -- if I put it this way, it brings the  
21 story alive a bit. It is a detailed and comprehensive  
22 insight into what Lisa Oldershaw was doing at the key  
23 period of the events of 2002, that key period being the  
24 latter half of October 2002 and, more specifically, at  
25 the very point in time when Tesco decided to go ahead

1 with and to tell the processors of its detailed  
2 participation in the £200 per tonne initiative. It is  
3 the document which Lisa Oldershaw had in front of her  
4 when she made her telephone calls to six processors on  
5 30 October, and a copy of it or different versions of  
6 the same document were provided to John Scouler and  
7 Rob Hirst at the time.

8 We have looked at this document in detail in the  
9 course of this appeal, and its close examination has  
10 provided clarification on a number of issues, not least  
11 it has provided clarification about which supplier  
12 supplied what cheese to Tesco at that time. That is an  
13 issue of central significance when we come to consider  
14 document 63 [Magnum], and to the "labelling issue" more  
15 generally.

16 No explanation has ever been provided as to why no  
17 reference was made to this document by Tesco before the  
18 commencement of this appeal. We have been told that it  
19 was in the hands of Tesco and its legal advisers at the  
20 time of the OFT's investigation, and we have also been  
21 told that, however, it was not thrown up at the time of  
22 the computer searches. Just for the record, I'm  
23 referring to paragraphs 22 and 23 of that same skeleton  
24 argument [Magnum].

25 Even if those at Tesco dealing with the

1 investigation at the time of the investigation, and  
2 Tesco's legal advisers, were not conscious of its  
3 existence at the time, it is clear that it or a version  
4 of it was known to exist by each of Lisa Oldershaw,  
5 John Scouler and Rob Hirst, both at the time of the  
6 investigation and also at the relevant time in October.  
7 Yet there is no mention of this at all in Tesco's  
8 response to the statement of objections, nor in its  
9 response to the supplemental statement of objections.

10 **LORD CARLILE:** I'm not sure what inference you're asking us  
11 to draw from the fact that it was not raised at an  
12 earlier stage.

13 **MR MORRIS:** I've explained the explanation that has been  
14 given by Tesco, and I'm in no way asking you to draw any  
15 inference other than that is what the explanation is,  
16 that it was there amongst the box --

17 **LORD CARLILE:** But its genuineness has not been challenged.

18 **MR MORRIS:** The genuineness of the explanation?

19 **LORD CARLILE:** Of the document.

20 **MR MORRIS:** The document has not been challenged.

21 **LORD CARLILE:** No.

22 **MR MORRIS:** The document is genuine. But what I am stating  
23 is that it is a very odd omission at the administrative  
24 stage that this part of what was going on was never  
25 mentioned at all, and it only came to light -- this is

1 a missing bit that has only come to light at the appeal  
2 stage.

3 **LORD CARLILE:** Where does that get us? I mean, the document  
4 may get us a long way, but where does the fact that, for  
5 reasons which we certainly can't explain, it wasn't used  
6 at an earlier stage?

7 **MR MORRIS:** Well, perhaps it goes this far, that it goes to  
8 this point of changing explanations and the accounts  
9 that have been given at different stages about, for  
10 example, document 63 [Magnum]. And we have the  
11 situation, I will come to it in due course, where right  
12 from the start document 63 has obviously been a key  
13 document in the case.

14 What I'm going to suggest to the Tribunal is that  
15 Tesco's case has been ever-shifting, about document 63  
16 in particular, and that actually the fact that it has  
17 been ever-shifting indicates that it really has no  
18 answer to document 63 at all, and that the account that  
19 has now been told, of course document 64 was there, but  
20 it is an oddity that when Tesco were giving its first  
21 account, after consulting Lisa Oldershaw, she verified  
22 the detail of the response to the statement of  
23 objections, that it wasn't mentioned at all. And now,  
24 gradually, little bits of more information come out, and  
25 the picture becomes a little bit more complete and we

1 have another change of story.

2 It goes to the changing stories and the fact that  
3 Tesco have not actually come clean -- they've not  
4 actually -- the first time round they didn't provide  
5 a proper explanation for document 63 and, in our  
6 submission, the fact that this explanation now is  
7 different is an indication of shifting stories, and it  
8 goes to the credibility of the accounts that have been  
9 given over time about document 63. And, my learned  
10 junior... it goes to the balance, when you look at these  
11 things, of weighing documents against witnesses. When  
12 you're looking at this document and what it tells you on  
13 its face, and then you're looking at what the witnesses  
14 have said about it, the document has been there all  
15 along, the accounts have varied.

16 What I'm inviting you to do is to go back to the  
17 document and look at it, and what it says there is plain  
18 to see, and that the accounts trying to explain it away  
19 are ultimately not reliable.

20 Now, if -- I made one other point a moment ago about  
21 why these documents and exchanges are so crucial. The  
22 reason those two sets of exchanges on 16 October and  
23 30 October are so crucial is that, once those exchanges  
24 of information are established, and we say they are,  
25 they provide the crucial context for the remaining

1 events in 2002 and the further key documents in the  
2 remaining strands.

3 Now, I am conscious that when one takes some of  
4 those later documents in isolation and you say "This  
5 will be matched by Tesco", or you have half a sentence,  
6 "other players will move", that in isolation one might  
7 say, "Crikey that's a hell of a leap of logic to get to  
8 the fact that this is a reference to Tesco and future  
9 prices and their intentions", and viewed in isolation,  
10 that may be a fair submission to make, but the critical  
11 point is that they can't be viewed in isolation, even  
12 where the references in those later documents are to  
13 a single sentence. And even if the particular retailer  
14 is not named, when you look at that material against the  
15 background of the Dairy Crest proposal, and the  
16 exchanges between 16 and 30 October, we submit that the  
17 Tribunal should find that those later documents do  
18 evidence further disclosures and receipts by and to --  
19 by Tesco as the OFT has suggested all along.

20 That is why the findings in relation to the events  
21 at the end of October, and we submit that you should be  
22 with us on that, that's why they're of critical  
23 importance for the later strands.

24 Can I just say something about 2003 documents. If  
25 you go to -- the two documents that are particularly key

1           are document 118 -- we say that documents 118 [Magnum]  
2           and 123 [Magnum] establish clearly that McLelland passed  
3           Asda's future intentions to Tesco and then, two days  
4           later, Tesco immediately passed its future pricing  
5           intentions back to McLelland, and Tesco accepted that  
6           that was the case when it first considered those  
7           documents.

8                        So the first document, 118, as you pointed out this  
9           morning is a document --

10                        "Please find attached an updated spreadsheet  
11           including the new retail prices that Asda will run on  
12           McLelland random weight branded lines."

13                        As you, sir, pointed out this morning, we do rely  
14           very heavily on the contrast with what's in 117, in an  
15           email sent less than two hours before, where those are  
16           clearly in-store prices.

17                        In our submission, for that reason and a whole  
18           variety of other reasons to which I will turn when we go  
19           to the detail of this, this document is evidence of  
20           Lisa Rowbottom receiving future retail pricing  
21           intentions of Asda. Then you find -- I would ask you to  
22           bear in mind also that at this stage, according to  
23           Tesco, the day before there has been a meeting where  
24           they said "Don't do this". But nevertheless, despite  
25           that, you get this email. Then two days later, at 123

1 [Magnum], you have Lisa Oldershaw sending back, on  
2 9 October, Tesco's future retail pricing intentions on  
3 a range of products.

4 Just in that context, I make this point. Now, of  
5 course, it is said by Tesco that all those future retail  
6 prices in document 123 are for products which require  
7 labelling. We have the point on deli, which I will deal  
8 with in detail, but I invite you to bear in mind this  
9 point, and it's an important point. This is the  
10 clearest instance in this case of what we term  
11 "disclosed, having received". They have, two days  
12 before, received future retail pricing intention  
13 information about Asda and they are sending it back,  
14 their own back, two days later. Even if there was also  
15 a labelling reason, in our submission, that does not  
16 negate the existence of the requisite state of mind in  
17 circumstances where, in our submission, it is plain that  
18 Lisa Oldershaw must have realised that McLelland were  
19 receiving future pricing information details from Asda.

20 Now, those documents, and indeed other key documents  
21 on the latest plans(?) in 2002, are the foundations of  
22 the Office of Fair Trading's case. In our submission,  
23 nothing which has happened in this trial has shaken that  
24 foundation. Ultimately, the question for the Tribunal  
25 is this, is it more likely than not that these sensitive

1 future retail pricing intentions were disclosed or  
2 received with the requisite intent, foresight or  
3 knowledge -- and I use the term compendiously --  
4 requisite state of mind on the part of Tesco?

5 We submit that when you take account of all the  
6 evidence and all the surrounding context, there is only  
7 one possible answer to that question. Of course Tesco  
8 knew and intended to participate in what was going on.

9 Now, that is some of the key evidence that the  
10 Tribunal does have before it. A very major part of  
11 Tesco's response to this is that it alleges that there  
12 has been a substantial failure on the part of the Office  
13 of Fair Trading to gather sufficient evidence, or indeed  
14 a failure to gather all the evidence. And it seems,  
15 Tesco says, that there are a number of consequences that  
16 arise from this failure.

17 First, they say that where there are, as they put  
18 it, gaps in the OFT's case, the Tribunal should not be  
19 able to fill such gaps by the drawing of inferences.  
20 Secondly, they say that lesser weight should be accorded  
21 to certain documents and that oral evidence should be  
22 preferred. Thirdly, they say that in some way this  
23 failure works and has worked unfairness upon Tesco,  
24 although with what further consequence is unclear.  
25 Fourthly, and most seriously, they submit that the

1 Tribunal should conclude that the OFT acted in the way  
2 it did because it believed that any further evidence it  
3 might obtain would be unfavourable to the Office of Fair  
4 Trading's case.

5 Let me say at this stage, and at the outset of what  
6 I'm about to say now, that the OFT will respond to each  
7 of these points in its closing and will do so in due  
8 course, I imagine in the course of tomorrow.

9 We overall submit that these points are not well  
10 made and that consequences contended for do not follow.  
11 But at this stage, may I make this submission. We do  
12 submit that these arguments by Tesco are essentially  
13 a smokescreen, intended to obscure from view the fact  
14 that Tesco has no adequate answer to the evidence which  
15 is before the Tribunal. We urge the Tribunal to look at  
16 the evidence which it has and not the evidence which it  
17 does not have. In any and every case, in whatever  
18 court, tried up and down the land, a court's knowledge  
19 is never complete. There may be ten witnesses to an  
20 accident of whom only five come to give evidence or two  
21 come to give evidence. There may be 100 documents  
22 before the court when in fact there are another 100 that  
23 existed.

24 There are always gaps in the evidence, and it is  
25 a necessary function of every court to consider the

1 weight of the evidence which it has and to consider  
2 whether it is proper to draw inferences, and that  
3 applies here.

4 The OFT stands by the evidence it has adduced. We  
5 submit that that evidence is cogent, that it has  
6 sufficient weight, and that any gaps which you may think  
7 arise can properly be completed by the drawing of  
8 appropriate inferences. It is a matter for the Tribunal  
9 to decide whether the OFT has proved its case on the  
10 basis of that evidence.

11 **LORD CARLILE:** It's not a question of gaps. We will, of  
12 course, assess the evidence before us and draw  
13 appropriate inferences. But I suspect it goes almost  
14 without saying that, had, for example, Mr Meikle been  
15 a witness here, then we might have derived greater  
16 advantage in assessing the case from his presence than  
17 from his absence. It's just common sense, isn't it?  
18 And a choice made by the OFT.

19 **MR MORRIS:** Well, if I may, I will develop that tomorrow,  
20 but there were decisions made by the Office of Fair  
21 Trading. We are very conscious that this issue is one  
22 which might be said most directly, in the light of the  
23 questions that have been raised by you, sir --

24 **LORD CARLILE:** The section 4 questions, yes.

25 **MR MORRIS:** Yes, and I picked up the references that it

1 quite often came up when we were thinking about  
2 Mr Meikle.

3 **LORD CARLILE:** Well, only because he's -- there are other  
4 examples, possibly, but he's quite a striking one.

5 **MR MORRIS:** I see that, but if I may go into the detail of  
6 it tomorrow. But we would say that it's not all one way  
7 here, and I'll develop that tomorrow. First of all, the  
8 Office of Fair Trading operates under certain particular  
9 rules and administrative procedures and the like, and  
10 the way the regime is set up and, secondly, there are --  
11 as I said, it's not just one way, there are  
12 considerations about why he wasn't called, full stop.  
13 But I will explain tomorrow what the OFT did and I will  
14 develop the submission.

15 I understand the Tribunal's concern about that, but  
16 what I would say is we are where we are and, if it is  
17 the case that, given where we are, and I don't want to  
18 say this, but you are not satisfied on the basis of the  
19 evidence you have, including document 112 [Magnum], and  
20 we can go to the weight of that in due course, and what  
21 Mr Meikle was saying and the fact that it's  
22 contemporaneous, then of course that will be your  
23 decision.

24 **LORD CARLILE:** The reason why I raised my concern about  
25 this, and please don't think that it's necessarily

1 a fatal or even hugely significant point, is that I do  
2 have a pretty clear recollection of the case management  
3 conference in which I was told that the OFT were --  
4 I forget the precise terms -- seriously considering at  
5 least calling three witnesses.

6 **MR MORRIS:** Yes.

7 **LORD CARLILE:** It was fairly obvious who they were given  
8 that there was a restricted cast list.

9 **MR MORRIS:** Yes. Well, as I say --

10 **LORD CARLILE:** I think Miss Davies is giving you one of her  
11 billet doux.

12 **MR MORRIS:** Yes.

13 Sir, this will be addressed comprehensively  
14 tomorrow.

15 **LORD CARLILE:** Thank you.

16 **MR MORRIS:** So I just wanted to -- really, the reason why  
17 I've raised it now is perhaps putting my head in the  
18 noose about it, because I'm going to explain tomorrow,  
19 but I wanted you to be conscious of our overriding  
20 submission on this.

21 We understand the questions and why they're being  
22 asked, but we do invite the Tribunal to look at the  
23 picture -- the bigger picture.

24 **LORD CARLILE:** We'll give the LiveNote team a five-minute  
25 break when you choose.



1 a good idea.

2 I took you through it, but it starts off,  
3 essentially, Tesco's position at this stage, presumably  
4 having spoken to Lisa Oldershaw -- not presumably,  
5 having spoken to her -- is that it's unclear whether the  
6 comments relate to cost or retail, and there's a whole  
7 explanation about products being on promotion and about  
8 things -- whatever happened, in any event, they moved on  
9 different dates, that's (e), and then (g) there's  
10 a recognition that regional, Finest and stilton were not  
11 supplied.

12 Then 5.28:

13 "Even if the OFT's interpretation as referring to  
14 retail price moves would be correct, which Tesco  
15 refutes, an analysis shows that..."

16 That was the point (inaudible). It's a bit of  
17 a: how can you put that to the witness, because it's a  
18 sort of alternative plea?

19 The point I make about this, and I would invite you  
20 to read it again, I don't propose to read it out to you  
21 now, is that at that stage Tesco and Lisa Oldershaw  
22 recognised that the price moves referred to in document  
23 63 were or could well be retail prices. The explanation  
24 given is far from clear, it is legalistic, it is a --  
25 if -- which is denied, "I did it, I didn't mean to do

1           it", it's an alternative plea.

2           But what is quite clear, we would say, is that it  
3           was not suggested there that the price moves referred to  
4           in document 63 were cost price moves and cost price  
5           moves alone. That, however, is the case that  
6           Lisa Oldershaw and Tesco, on the back of that, presented  
7           to this Tribunal on this appeal. So for the first time,  
8           it's now -- the story is, "I only mentioned cost". That  
9           is a complete and highly significant change of case.

10          When asked about this in 2007, Lisa Oldershaw must  
11          have had a view about it one way or the other. If her  
12          recollection truly now -- or if her recollection now  
13          that it was cost price is accurate, you would have  
14          expected her to give the same explanation.

15          Now, finally, in relation to that, Tesco says in  
16          closing -- and I'll come to this again -- that in any  
17          event, the distinction between cost and retail is,  
18          I think to quote my learned friend's words, an "arid  
19          distinction". So it appears to be that now it's saying  
20          it's a distinction without a difference, and I will come  
21          back to that later. But the point I'm making here is  
22          that, on this key document, there are ever-shifting  
23          sands.

24          One other example is document 118 [Magnum], which is  
25          the document -- the cheese 2003 future pricing document.

1           This is 7 October. I went to it before the adjournment.  
2           That document, at the time of Tesco's first response,  
3           was, Tesco accepted, an inappropriate communication. In  
4           other words, recognising that the information about Asda  
5           prices were future prices and not in store. Then, by  
6           the time we get to the appeal, it is argued that after  
7           all this information was not future pricing information  
8           but it was information that was already in store.

9           A third instance of a shift, either in case or in  
10          emphasis, is this: Tesco's evidence from Mr Scouler and  
11          Ms Oldershaw in their witness statement was that the  
12          Tesco briefing document was a proposal for an increase  
13          in cost prices only, and there was a marked refusal to  
14          accept the proposition that it was a proposal for cost  
15          and retail price increases. Yet in closing, and my  
16          learned friend asserts quite boldly, that that document  
17          was after all a proposal for an increase in cost and  
18          retail prices.

19          Those shifts, we say, are pointers to you in  
20          deciding which account to accept, that the changes in  
21          the case are an indication of a lack of credibility in  
22          the accounts given by Tesco.

23          What is more, and this is a slightly different  
24          point, Tesco's explanations for various events vary  
25          according to what suits its case best. So sometimes it

1           says that all that was disclosed were future cost prices  
2           and not future retail prices, that's document 63. Then  
3           it says, "Well, in any event, that disclosure was  
4           inadvertent". On other occasions, it says that it did  
5           in fact disclose future retail prices but it did so only  
6           for legitimate labelling purposes. On other occasions,  
7           it says that future retail -- the retail prices it  
8           received were not future but they were in store. On  
9           other occasions it says that the information it received  
10          was future retail pricing intentions but they didn't use  
11          the -- it wasn't any use to them, it came too late.  
12          That's document 52 [Magnum]. On other occasions, Tesco  
13          says that, whilst the information it received was in  
14          fact future retail pricing intention information, it,  
15          Tesco, wholly ignored that information because it was  
16          pure speculation.

17                 We say both the changes in case over time, and the  
18                 giving of the different explanations for the differing  
19                 exchanges, demonstrate that Tesco is unable to provide  
20                 a consistent or cogent explanation for its conduct.

21                 On the issue of receipt of future pricing  
22                 information, what you would have expected is a clear and  
23                 consistent line, a written rejection of the information  
24                 as being inappropriate. On the issue of disclosure,  
25                 where it did send future pricing information,

1 specifically document 63 [Magnum] and document 123  
2 [Magnum], what you would have expected is a clear  
3 statement that the information was confidential and not  
4 to be passed on. But there is no evidence of either of  
5 those things happening, certainly not in 2002 and not  
6 even in 2003, on 7 and 9 October, at a time when, on  
7 Tesco's own evidence, they were alive to that issue.

8 Can I move on to I think the last two of my opening  
9 observations. The first is this, in their skeleton and  
10 in their closing submissions, Tesco persists in  
11 contending, first, that what was going on was just part  
12 of normal commercial discussions between supplier and  
13 retailer and, secondly, in a related way, that the  
14 Tribunal, when considering the relevant legal principles  
15 to be applied, should be astute not to curtail such  
16 normal commercial discussions. We submit that that is  
17 simply not the position and the Tribunal should not  
18 accept that it is normal or usual to discuss your own  
19 future retail pricing intentions as a general  
20 proposition and, secondly, it is certainly not usual or  
21 normal to receive the future retail pricing intentions  
22 of others.

23 What we are talking about, when there's a reference  
24 to normal commercial discussions, what we're talking  
25 about here is the discussion of future retail pricing

1 intentions, not any topic of conversation, not questions  
2 about cost prices or discounts or quality or anything,  
3 we're talking about future retail pricing intentions,  
4 and any discussion by a retailer of its own future  
5 retail pricing intentions necessarily carries the risk  
6 that this information might be used to distort  
7 competition.

8 Now, my learned friend may not recognise that that's  
9 the position, but in the real commercial world Tesco  
10 certainly does recognise it and certainly did at the  
11 time. They told the OFT that this is the case, that the  
12 discussion of retail prices should be -- should only be  
13 allowed in very limited circumstances, that is bundle 4,  
14 tab T, page 39, paragraph 3.17 [Magnum]. This is to do  
15 with compliance. What Tesco say there:

16 "At all times, it has been made clear to all buying  
17 teams that they should not in any circumstances discuss  
18 pricing intentions directly or indirectly with  
19 competitors and only in very limited circumstances could  
20 they have these types of discussion with suppliers."

21 So that's the first point. Tesco were fully aware  
22 at the time, and remain so, that discussions of future  
23 retail price intentions carry serious risks.

24 Then if you go to bundle 6, you see actually what  
25 they had told their employees. If you go to tab 6 of

1 volume 6, the first sub-tab is A [Magnum], and that is  
2 the first compliance programme which is in 2000. Even  
3 at this point, if you go to page -- well, it's about six  
4 pages in. Actually, before that, could I go to slide 2  
5 if I may, while we're here. This is training at the  
6 time of the coming into force of the Competition Act  
7 itself. I'm asking you to note, on slide 2, you'll see  
8 that in fact there are two topics. One is the  
9 Competition Act coming into force in 2000. If you're  
10 with me, it's the fourth page, "Key messages", there is  
11 a legal purpose. One is the Competition Act, and the  
12 other is the Competition Inquiry, which is the grocery  
13 inquiry, which culminated in the report of 2000 which in  
14 turn led to the code of practice. For whatever reason,  
15 at that time it's plain that it would have been known to  
16 employees that they were being told about that inquiry  
17 as well as about the 1998 act.

18 If you then go another three pages to slide, you'll  
19 see the "So, why have we got to change?" slide:

20 "Phase 1 is the key black issue.

21 "Retail selling price."

22 Then two more pages in:

23 "Retail selling price.

24 "Easy. Can't talk about it if it's your intent to  
25 [a]ffect the market."

1           Then you go forward actually to slide 6, and then  
2           you get:

3           "Let's now move on to [what] the Competition Inquiry  
4           ... means."

5           That is the grocery inquiry.

6           That was the training in 2000. We then get to tabs  
7           B and C, and you will recall that there was, at one  
8           stage, a certain amount of dispute as to what B and C  
9           were, and when I sought to ask Lisa Oldershaw about C,  
10          which we said and we maintain represents largely the  
11          2003 training, Miss Rose indicated at that point that,  
12          no, that was wrong and that actually C is the 2007  
13          training and B is the 2003 training.

14          Now, we have written a letter on that which you can  
15          look at in due course, I don't intend to take you to  
16          that letter, but we maintain our position on the basis  
17          of what Tesco has told this Tribunal, that item B is  
18          training for the trainers and that item C represents,  
19          not wholly, because it's an updated version, but  
20          represents the likely training that Lisa Oldershaw  
21          received in I think it was March 2003, but certainly in  
22          2003. We have written to the Tribunal about that and  
23          why we say that, and we say it on the basis of what  
24          Tesco have said.

25          So when you get to C [Magnum], this is the training,

1 the more detailed training that Lisa Oldershaw and other  
2 buyers received in 2003.

3 Then you get to slide 3:

4 "Do not discuss RSP's where it is your intention or  
5 the effect is to fix prices."

6 That was the first message. The next message:

7 "Risk area - price discussions with suppliers."

8 So it's not just there, it's any price discussions  
9 are a risk area.

10 Then at slide 5, you have the Competition Act and  
11 the Enterprise Act.

12 **LORD CARLILE:** So this is plainly after the Enterprise Act  
13 has been enacted.

14 **MR MORRIS:** Yes, and the point there is that I think it's  
15 fair to say, and I think this comes out of Tesco's  
16 explanation, that further training was put in place  
17 because what the Enterprise Act did was it made -- it  
18 gave rise to personal criminal liability, and that was  
19 obviously something that was a very serious matter for  
20 the individuals. For that reason, there was additional  
21 training.

22 You then see the supplier code of practice entirely  
23 separate. You then have a reference in slide 6 to  
24 Toys & Kits. Now, this is where we say slide 6 is  
25 likely to be the update in 2007 because, by that time --

1 I can't actually work out whether that is the decision  
2 or post-Tribunal judgment. I think it might be  
3 post-Tribunal judgment because I think 6.7 million --

4 **LORD CARLILE:** I can see the senior referendaire agreeing  
5 with you.

6 **MR MORRIS:** Yes, I think it was reduced from 8 something,  
7 8 million to 6 or something. So this is post the  
8 judgment of the --

9 **MS POTTER:** What was the date of the OFT decision in Kits  
10 and Hasbro, can anyone remember?

11 **MR MORRIS:** Someone will give me the answer to that in  
12 a moment.

13 2003.

14 Then you have criminal penalties at 7. Then 8:

15 "Contact Bal Dhillon/Martin Field."

16 And I think there's an indication in a later  
17 document about -- Bal Dhillon and Martin Field are  
18 members of the company secretariat.

19 Then you have 9, 10. And then 11, the "Do's and  
20 Don'ts", and this is important:

21 "Do always concentrate on cost price when  
22 negotiating with suppliers..."

23 Then at the bottom -- and this goes to the question  
24 that you, sir, asked this morning about what happened in  
25 relation to the Sainsbury's labels. Now, obviously, she

1           may have forgotten, there's a whole set of reasons, but  
2           I'm just -- what Tesco would have been aware of at the  
3           time:

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

5           Then over the page:

6           "Remind your suppliers of the Competition Act if  
7           they persist in inappropriate discussion of retail  
8           price. Stop the meeting if necessary.

9           "Escalate any concerns ... through line management  
10          within categor[ies] or direct to Bal Dhillon..."

11          The next one is important:

12          "Reply to unsolicited information on RSP's by  
13          stating you are not interested (and keep a copy of your  
14          reply) eg 'I want to make it clear that this non public  
15          domain information was not requested. I do not want to  
16          receive this type of information again. I want to  
17          remind you that it is Tesco policy not to discuss future  
18          retail prices with any supplier'."

19          Just pausing there for a moment, what this shows --

20         **MS POTTER:** But bearing in mind that we don't know the date  
21          of this, and it looks as though it's an update following  
22          Toys & Kits.

23         **MR MORRIS:** I may need to go to the letter that we wrote,  
24          because what we would suggest is the whole document --  
25          it has been updated. But if you go -- can I just -- if

1           you go to tab D [Magnum], and keep your finger on that  
2           page that I was looking at, it is not in issue that tab  
3           D is a 2003 document.

4           **MS POTTER:** Right.

5           **MR MORRIS:** Tab D is, we are told, a summary of what is in  
6           the training that was given, the slides that were given  
7           in 2003, and you will see that the dos and don'ts  
8           closely match in summary form the dos and don'ts on  
9           pages 11 and 12. They include the two dos:

10                   "Keep records of when suppliers have tried to  
11                   discuss."

12                   So that is equivalent to "do" number four on  
13                   page 11.

14                   And:

15                   "Do reply to unsolicited information on RSPs to  
16                   state you are not interested and keep a copy of your  
17                   reply."

18                   That is so close in the wording to "do" number three  
19                   on page 12 that we would suggest -- I mean, I rely on  
20                   document D in any event. We would suggest that these  
21                   match each other.

22           **MS POTTER:** Again, the date of this must be post-June 20,  
23                   2003, presumably, because the Enterprise Act came into  
24                   force in 2003?

25           **MR MORRIS:** Is it clear from the document that it has come

1           into force?

2           **MS POTTER:** Yes, because it's writing after 20 June.

3                   I'm just thinking that, given that the decision, I'm  
4           told by the referendaire, came in August 2003, it does  
5           look like a document that could easily have been  
6           produced in the light of the decision in Toys & Kits.

7           **MR MORRIS:** Yes, it could.

8                   Toys wasn't until November, I'm told, the decision.

9           **MS POTTER:** Okay.

10          **LORD CARLILE:** What about document E, where does that come  
11          from?

12          **MR MORRIS:** Document E, we are told, and I would have to  
13          take you to Tesco's pleading on this. Document E I  
14          think is the dos and don't from 2007, but somebody will  
15          correct me. It's the summary.

16                   It is I think in the pleadings file. If we go,  
17          whilst we're on it, to probably tab 8 or 9 -- no,  
18          tab 10. Certainly 10 to start with. Can I just take  
19          you first of all to tab 10 of the pleadings bundle. I'm  
20          at page 7 of tab 10, and it's paragraph 37(b) [Magnum].  
21          That says:

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

1 the presentation slides used for this training..."

2 I'll pause there for a moment, let's not look at  
3 the...

4 "... (updated in 2007) is attached to annex 6C,  
5 copies of the post-training summary sent to the  
6 attendees of the training in [first] 2003 [that's  
7 annex 6D] and in 2007 [that's annex 6E]."

8 Now, there is further material in another reply from  
9 Tesco, and I'm slightly -- it's in the letter that we  
10 wrote which indicates that the document at 6C -- 6B,  
11 which my learned friend in the course of  
12 cross-examination had said, "No, no, no, 6C is 2007 and  
13 6B is 2003", that is document -- the 6B document is not  
14 any training that was given to the buyer but is  
15 a pretraining training document used in connection  
16 with -- yes, if you go to tab 9 of the same pleading  
17 bundle.

18 **LORD CARLILE:** Yes.

19 **MR MORRIS:** Page 6, paragraph 6.1 [Magnum]. That's probably  
20 a clearer explanation actually.

21 6A is 2000, B is a copy of the presentation material  
22 used in connection with the Enterprise Act training in  
23 2003, no dispute that it was used in connection with --  
24 but when you look at its terms, it's for the trainers.  
25 And C, a copy of the presentation material prepared for

1 the Enterprise Act training which has been subsequently  
2 updated is at 6C. The 2007 version of that document is  
3 annex 6C.

4 So I can't do any more than -- it remains our  
5 submission, even based on 6D, that there was at the very  
6 least in 2003 a warning -- and I'll go back to 6D --  
7 about if you reply to unsolicited information on RSPs.  
8 If I take even that sentence in 6D -- can I just --

9 **LORD CARLILE:** My recollection is that Lisa Oldershaw  
10 accepted that she'd had Competition Act training in 1998  
11 and in 2000. That's right, isn't it?

12 **MISS ROSE:** No, 2000 and 2003.

13 **MR MORRIS:** No, 2000 about the 1998 act. I'll have to check  
14 the transcript. I think she accepted -- well, I put to  
15 her that she had training in 2003, not least because  
16 that is what is said in Tesco's pleading at paragraph --

17 **LORD CARLILE:** Around 2000, sorry, yes.

18 **MR MORRIS:** But we would also say she didn't -- we would  
19 submit that, on the basis of the material before the  
20 Tribunal, she had some Competition Act training also in  
21 2003 because Tesco positively assert that in their  
22 pleading.

23 **LORD CARLILE:** Supposing we can't be satisfied that the  
24 sentence that you've been focusing upon, that you should  
25 reply to inappropriate material, was not specifically

1 part of the training prior to the alleged 2002  
2 infringement. Where does that leave us? Do you say  
3 that she would have known it anyway, or what?

4 **MR MORRIS:** Well, I would have said that she would have  
5 known generally from the 2000 training that you don't  
6 discuss retail prices. I can't say, and I don't say,  
7 that in relation to 2002 she had had a specific  
8 instruction, "You must document things". I'm not saying  
9 that.

10 **LORD CARLILE:** I'm really asking you whether it's your  
11 submission that you need such a specific instruction or  
12 not?

13 **MR MORRIS:** No, it isn't my submission.

14 **LORD CARLILE:** You're the chief cheese buyer.

15 **MR MORRIS:** No, it is not my submission you need such  
16 a specific instruction. The specific instruction is  
17 over and above what was going on. We would say that she  
18 was -- from her training in 2000, she was aware that  
19 discussing -- and I wasn't making this point, actually,  
20 specifically directed to what she did and didn't do at  
21 the time. I was making the more general point, which is  
22 that -- I was pushing back on the proposition that  
23 discussions about retail prices of this nature were  
24 normal and to be expected, and that anything that --  
25 generally there would be no concern about them, number

1           one. And two, that you as a Tribunal, when considering  
2           questions of law, should be wary not to curtail the  
3           activities -- the reasonable commercial activities and  
4           the reasonable carrying on of business.

5           I was making it in that general sense, I wasn't  
6           making the proposition in relation to what she did and  
7           didn't know at the time. I can make that submission in  
8           due course.

9           The reason I'm referring to that specific sentence  
10          was this. You might say that, absent that sentence,  
11          a buyer would know that they shouldn't be talking about  
12          their retail price -- Tesco's retail prices generally,  
13          and you ought to be careful. But what that sentence  
14          shows certainly by 2003, because that sentence, in my  
15          submission, refers to incoming information about other  
16          people's retail selling prices, and what we say is that  
17          that -- by that time, it is absolutely plain that not  
18          only was there danger in talking about your own retail  
19          prices, but plainly it was known amongst buyers that, if  
20          you start hearing things about other people's retail  
21          prices, the alarm bells really should be ringing.

22          That was the point about taking you to that sentence  
23          because it indicates that it was apparent that there  
24          could be no possible reason for receiving retail pricing  
25          intentions of other retailers. That was the purpose of

1           that submission.

2                   Now, I got buried in the detail. We would invite  
3           you, and if the Tribunal doesn't have the -- if the  
4           Tribunal doesn't have the letter to hand we can provide  
5           you with further copies, but the detail of the minutia  
6           of who was trained when and where is set out in that  
7           letter, and that is our understanding of what Tesco have  
8           put in their pleaded case.

9       **LORD CARLILE:** I can't absolutely put my hand on that letter  
10           without being told where it is.

11       **MR MORRIS:** Somebody will --

12       **LORD CARLILE:** Perhaps you would tell us at some point.

13       **MR MORRIS:** I'll hand you another copy up now. We have  
14           several copies here.

15                   (Handed)

16                   So unless...

17       **LORD CARLILE:** Just give us a moment to read it.

18       **MR MORRIS:** Yes.

19                   (Pause)

20       **LORD CARLILE:** I think I'd emphasise the word "quite" in  
21           "quite clear" at the bottom of the second page.

22       **MR MORRIS:** Obviously it's a matter that Miss Rose may wish  
23           to deal with in reply, but we wrote this letter now  
24           nearly a week ago and there has been no response from  
25           Tesco. Obviously everybody has been terribly busy with

1           lots and lots of things, and I'm not going to seek to  
2           say there's an implied admission from the failure to  
3           reply.

4                     But that is our understanding of what Tesco has  
5           said, and obviously if --

6           **MISS ROSE:** Can I make it clear, we're not going to reply in  
7           correspondence. I'll reply on my feet.

8           **MR MORRIS:** The only observation I would make is that it  
9           would have been helpful, if that wasn't the correct  
10          position, for it to have been responded to before now.

11                    There we are. The detail of it is as it is. Our  
12          submission is that they had been told generally not to  
13          be discussing future retail prices except in very  
14          specific limited cases. And in answer to the question,  
15          were they or weren't they told to keep a record, we  
16          would suggest that, in any event, in the light of  
17          whatever training they'd had, they'd plainly been told  
18          that they shouldn't do it except in limited  
19          circumstances, it is perhaps a matter of submission, one  
20          might think it is common sense in those circumstances  
21          for a buyer to keep a record of any issue of concern  
22          that arose in any discussions.

23                    Can I move on to make two final points in relation  
24          to the events of 2002. Whilst the position of the  
25          farmers at that time might well be a cause for feelings

1 of sympathy on the part of anybody and everybody at the  
2 time, and whilst it might be said that what was being  
3 done at that time was merely to alleviate their position  
4 and to increase the price they received, the Tribunal  
5 will be conscious that nevertheless there was  
6 a countervailing victim here; "victim" is too strong  
7 a word, but a countervailing person or persons to whom  
8 this operated to their disadvantage.

9 **LORD CARLILE:** You mean me buying my litre of milk?

10 **MR MORRIS:** Yes, or your cheese.

11 The effect of the initiative to raise cost and  
12 retail prices was that, ultimately, the consumer paid,  
13 and paid for the 2p per litre increase for the farmers,  
14 and did so, if I can put it this way, without being  
15 consulted, by which I mean if there had been some form  
16 of other intervention by perhaps government, then you  
17 might say that the consumer had been in some way part of  
18 the process, but there wasn't.

19 The second point I make is this, that there was  
20 substantial benefit to Tesco in participating in this  
21 initiative and passing on the 2p per litre increases it  
22 had to pay on to its customers, because by acting in  
23 that way there was no cost to Tesco and it avoided the  
24 very substantial financial cost that it would otherwise  
25 have suffered as a result of the continuation of the

1 farmers' blockades, you've seen the evidence about  
2 actually how much that was costing, and it avoided the  
3 reputational damage of being seen to resist the farmers.  
4 We would submit that it was for that reason that the  
5 senior management of Tesco took the decision, which they  
6 took so publicly, to support the farmers.

7 Now, instead, what Tesco could have done in that  
8 situation, out of whatever support it felt that it  
9 wished to show to the farmers, was to support them  
10 themselves financially out of the margin that they were  
11 earning on their retail cheese sales at the time. In  
12 other words, accept the cost price increase that the  
13 processors were asking them to pay and not at the same  
14 time seek to recoup that increase -- cost price increase  
15 from its -- an increase in its retail price.

16 Tesco chose not to adopt that course and, instead,  
17 it chose to ensure that its profits were not affected.  
18 It is our case that it did so by unlawful means.

19 Now, sir, those are my opening -- the first section,  
20 and I would like to move on to some substantive law. We  
21 have to date in this case concentrated on the evidence  
22 and the facts and, ultimately, the Tribunal will be most  
23 concerned with finding what in fact happened in this  
24 case. Nevertheless, we would suggest that a precise  
25 analysis and statement of the substantive principles of

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1 law forms an important part of what is before the  
2 Tribunal. Now, there is much common ground between the  
3 parties. There are, nevertheless, important points of  
4 difference, and there are aspects which are important in  
5 the context of the general state of the law in this  
6 area.

7 For that reason, and partly because I haven't done  
8 so yet, I would like, with your permission, to take  
9 a little bit of time to look at the law. What I'm going  
10 to do is I'm going to deal with it under five broad  
11 heads. You will be receiving written submissions on  
12 this as well, but I would like to develop it orally, and  
13 the extent to which I develop it orally just depends on  
14 timing generally and where I am.

15 The five broad areas are these, first, the nature of  
16 a concerted practice; secondly, the specific case of the  
17 disclosure of information through intermediaries, the  
18 indirect disclosure; thirdly, to look in a little bit  
19 more detail on the issues of the requisite state of  
20 mind; then fourthly, and it may be that these will be  
21 dealt with in writing only, but they will be there in  
22 writing, it depends on timing, the question of  
23 attribution that you have raised; and finally, I wish to  
24 make some submissions on the concept of a single overall  
25 infringement, and that's a point which links in.

1           Now, as to the nature of a concerted practice,  
2           I don't propose to take you to section 2 of the act or  
3           Article 101, but we know that, under those provisions,  
4           there are effectively three things that are covered.  
5           There are agreements between undertakings, there are  
6           concerted practices and there are decisions of  
7           association of undertakings. Here we are in the field  
8           of concerted practices.

9           The one observation I make about the governing  
10          provisions, of course, and this comes back to the  
11          attribution issue, is who and what are caught by the  
12          prohibition is undertakings, not companies, and that is  
13          relevant to the question of, in particular, the  
14          attribution question.

15          Now, what we have in issue here is a concerted  
16          practice and, in considering the relevant principles of  
17          law, the starting point and indeed the touchstone for  
18          all analysis are the principles long-established and  
19          oft-repeated and indeed established by cases which are  
20          respectively 37 and 40 years old. Those two cases are  
21          Dyestuffs, that's ICI, and Suiker Unie in 1975. What  
22          I would like to do is take you to those two cases  
23          briefly. Dyestuffs is found in authorities bundle 2B,  
24          at tab 22.

25          **LORD CARLILE:** Authorities bundle 2B? I don't have an

1 authorities bundle --

2 **MR MORRIS:** No, mine has been split. Try authorities  
3 bundle 2. Go back to where you were, sir. Mine has  
4 been split into A and B because it was a bit large, and  
5 I think you'll find it's at 22.

6 **MS POTTER:** Yes, they're quite full.

7 **MR MORRIS:** Now, this is 1972, the judgment.

8 **LORD CARLILE:** Sorry, tab?

9 **MR MORRIS:** 22. Part of the problem in presentation of the  
10 legal argument in cases such as this is that all these  
11 authorities are all multiple-y cited as you go down the  
12 cases through the years, and you never quite know where  
13 you're going to take it from, but actually sometimes  
14 it's quite good to go to the actual authority.

15 I just draw your attention very briefly to the third  
16 page, page 622 [Magnum], where there's a very brief  
17 summary of the facts:

18 "... the Commission found three uniform price  
19 increases had taken place."

20 An increase in 1964, extended in 1965. I don't know  
21 if you're following; I'm at the left-hand column at the  
22 bottom of 622.

23 Then:

24 "On that same day almost all producers introduced,  
25 in Germany and the other countries already affected by

---

1 the increase of 1964, a uniform increase of 10% on dyes  
2 and pigments not covered by the first increase.  
3 Finally, on 16 October 1967 an increase of 8% on all  
4 dyes was introduced by almost all producers in Germany,  
5 the Netherlands, Belgium and Luxembourg. In France this  
6 increase amounted to 12%; in Italy no such increase was  
7 introduced at all."

8 Then if you go to paragraphs 64 and 65 of the  
9 judgment, which you will find at page 655 [Magnum],  
10 these are the well-known paragraphs stating the concept.  
11 Paragraphs 64 and 65 I think are the ones that are  
12 generally cited; 64 is the distinction between concerted  
13 practice and agreements:

14 "... the object is to bring within the prohibition  
15 of that article a form of coordination between  
16 undertakings which, without having reached the stage  
17 where an agreement properly so-called has been  
18 concluded, knowingly substitutes practical cooperation  
19 between them for the risks of competition."

20 Now, pausing there, that last sentence, that's what  
21 I say is one of the two key elements -- and I don't  
22 think there's any dispute here, Miss Rose took you to  
23 certainly that paragraph in her skeleton.

24 But that's the first -- the first key element is  
25 knowing substitution of cooperation for the risks of

1 competition.

2 Then 65:

3 "By its very nature, then, a concerted practice does  
4 not have all the elements of a contract but may ...  
5 arise out of coordination which becomes apparent from  
6 the behaviour of the participants."

7 I just ask you to note and mark the words  
8 "coordination which becomes apparent from the  
9 behaviour".

10 Then:

11 "Although parallel behaviour may not by itself be  
12 identified with a concerted practice, it may however  
13 amount to strong evidence of such a practice if it leads  
14 to conditions of competition which do not correspond to  
15 the normal conditions of the market, having regard to  
16 the nature of the products, the size and number of the  
17 undertakings, and the volume of the said market."

18 Now, that may ring a bell of my cross-examination of  
19 Mr Scouler when I was asking what normal conditions of  
20 the market would have dictated at the time. I put to  
21 him that they would have dictated certainly not a price  
22 increase.

23 "This is especially the case if the parallel conduct  
24 is such as to enable those concerned to attempt to  
25 stabilise prices at a level different from that to which

1 competition would have led, and to consolidate  
2 established positions to the detriment of effective  
3 freedom of movement of the products in the Common Market  
4 and of the freedom of consumers to choose their  
5 suppliers.

6 "Therefore the question whether there was  
7 a concerted action in this case can only be correctly  
8 determined if the evidence upon which the contested  
9 decision is based is considered, not in isolation, but  
10 as a whole, account being taken of the specific features  
11 of the market in the products in question."

12 **LORD CARLILE:** Am I to take it that "coordination" and  
13 "concerted" are roughly synonyms in this context? There  
14 has to be coordination?

15 **MR MORRIS:** Yes, but we would say that coordination is the  
16 end result. Coordination -- I'll come back to it in  
17 a moment when I summarise. If you look at the  
18 sentence --

19 **LORD CARLILE:** Coordination is a transitive concept, isn't  
20 there? There's "co" and there's "ordinating" involved  
21 in it.

22 **MR MORRIS:** Yes, but coordination is the outcome of the  
23 behaviour of the participants.

24 **LORD CARLILE:** I could see Miss Davies shrugging her  
25 shoulders and I think I understand exactly why, because

1           actually "concerted" is quite a good metaphor for this.  
2           If the instruments coordinate and are playing the same  
3           sonata, you get a concert.  If they're doing something  
4           completely different, you get something that is neither  
5           coordinated nor concerted, just disparate activities.  
6           This is rather like a criminal conspiracy, albeit  
7           without the criminal intent, isn't it?

8           **MR MORRIS:**  Yes.

9           **LORD CARLILE:**  Which rarely involves people sitting down,  
10          like Toys & Kits, and saying "Let's have a criminal  
11          conspiracy".  It usually involves people playing  
12          disparate parts which have coordinated to a shared  
13          aspiration.

14          **MR MORRIS:**  Yes, but it may -- I'm hesitating because we say  
15          that -- well, I'll come to it in a moment because there  
16          are other passages.  There does not need to be a plan  
17          for coordination at the outset, a plan for coordinated  
18          action.

19          **LORD CARLILE:**  Of course.

20          **MR MORRIS:**  The coordination becomes apparent from the  
21          conduct.

22          **LORD CARLILE:**  But there still has to be coordination.  
23          There may be a coordination which could be inferred from  
24          the conduct.

25          **MR MORRIS:**  From the conduct.

1       **LORD CARLILE:** But the court still has to be satisfied on  
2           the balance of probabilities that there was the  
3           requisite intent.

4       **MR MORRIS:** Yes, and we'll come to that. What we say in  
5           this case is that the coordination is the outcome -- is  
6           the exchanges of the pricing information. The reason  
7           that those exchanges of the pricing information are to  
8           be inferred as coordination is because of the awareness,  
9           amongst other things, awareness of the existence of  
10          a proposal for action across the market.

11       **LORD CARLILE:** I think what I'm trying to put to you very  
12          clumsily, and you'll have to forgive me --

13       **MR MORRIS:** I'm answering clumsily I think. Let's stop  
14          being nice to each other.

15       **LORD CARLILE:** Let's not be too self-deprecating. I think  
16          what I'm trying to put to you is something like this,  
17          that you could have the same result with coordination or  
18          without coordination. What the court has to decide,  
19          what the Tribunal has to decide is whether, on the  
20          balance of probabilities, coordination is demonstrated.

21       **MR MORRIS:** Yes. That is undoubtedly true as a proposition.

22       **LORD CARLILE:** Is that accurate?

23       **MR MORRIS:** It must be the case.

24       **LORD CARLILE:** I'm waiting for Miss Davies to shake her head  
25          again.

1       **MR MORRIS:** That is undoubtedly the case, sir, and this is  
2       the distinction. This is always the problem with this  
3       area of the law; is it pure parallelism or is there  
4       contact, coordination -- there is evidence which  
5       establishes the coordination and the conclusion that the  
6       events have happened because of coordination rather than  
7       pure parallel behaviour and anticipation and watching.  
8       That is at the core of every concerted practice and that  
9       is -- I mean, if you look at the grocery report which is  
10      actually quite illuminating on this, it's in your  
11      documents and we will be referring to it in our written  
12      submissions, where the distinction is drawn between  
13      collusion or coordination in this sense and tacit  
14      coordination where you can't show that there's an  
15      infringement of the Chapter I prohibition but there is  
16      parallel behaviour going on. But, of course, I accept  
17      that we have to demonstrate -- ultimately, you have to  
18      conclude that the outcome, the exchange of the pricing,  
19      amounted to coordination. I would accept that.

20             Now, if we then turn over just a few pages, after  
21      stating the general principle, what the court does is --  
22      I'm not going to read it. Paragraph 83 onwards  
23      [Magnum], it describes what happens on the facts.

24             Then at paragraph 118, it makes two other statements  
25      of general principle, 118 and 119 [Magnum]. These are

1 paragraphs to which I don't think you have been taken  
2 because they're not cited in Kit but they are  
3 effectively referred to, I think, in the decision. 118  
4 says:

5 "Although every producer is free to change his  
6 prices, taking into account in so doing the present or  
7 foreseeable conduct of his competitors, nevertheless it  
8 is contrary to the rules on competition contained in the  
9 Treaty for a producer to cooperate with his competitors,  
10 in any way whatsoever, in order to determine  
11 a coordinated course of action relating to a price  
12 increase and to ensure its success [and this is the  
13 second key concept] by prior elimination of all  
14 uncertainty as to each other's conduct regarding the  
15 essential elements of that action, such as the amount,  
16 subject matter, date and place of the increases."

17 That is the second aspect. It is there referred to  
18 as elimination of all uncertainty, but in subsequent  
19 case law, it is established that reduction of  
20 uncertainty is also sufficient.

21 Then it says at 119 [Magnum]:

22 "In these circumstances, and taking into account the  
23 nature of the market and the products in question, the  
24 conduct of the applicants in conjunction with the other  
25 undertakings against which proceedings have been taken

1 was designed to replace the risks of competition and the  
2 hazards of competitors' spontaneous reactions by  
3 cooperation constituting a concerted practice prohibited  
4 by [then] Article 85(1) of the treaty."

5 101 now.

6 What I would like to do, if I've got time, I would  
7 like to just take you to two more case references and  
8 then I would draw the propositions...

9 If you go to Suiker Unie, which I think this time is  
10 in volume 3 of the authorities at 23, and you go to --  
11 this isn't a short judgment, that's certainly the case.  
12 It's paragraphs 172 to 175, which are at page 1942 of  
13 the report [Magnum].

14 You've had read to you -- you've see 173 and 174  
15 before, but 172 is perhaps worth reading beforehand:

16 "SU [that's Suiker Unie] and CSM submit [they were  
17 the appellants] that since the concept of concerted  
18 practices [this is the plan point] presupposes a plan,  
19 and the aim of removing in advance any doubt as to the  
20 future conduct of competitors, the reciprocal knowledge  
21 which the parties concerned could have of the parallel  
22 or complementary nature of their respective decisions  
23 cannot in itself be sufficient to establish a concerted  
24 practice. Otherwise every attempt by an undertaking to  
25 react as intelligently as possible to the acts of its

1 competitors would be an offence. The criteria of  
2 coordination and cooperation laid down by the case law  
3 of the court, which in no way required the working out  
4 of an actual plan [that's the point I make about  
5 a plan], must be understood in the light of the concept  
6 inherent in the provisions of the treaty relating to  
7 competition that each economic operator must determine  
8 independently the policy which he intends to adopt on  
9 the common market, including the choice of the persons  
10 and undertakings to which he makes offers or sells.  
11 Although it is correct to say that this requirement of  
12 independence does not deprive economic operators of the  
13 right to adapt themselves intelligently to the existing  
14 and anticipated conduct of their competitors [this is  
15 the key link into Kits], it does however strictly  
16 preclude any direct or indirect contact between such  
17 operators, the object or effect whereof is either to  
18 influence the conduct on the market of an actual or  
19 potential competitor, or to disclose to such competitor  
20 the course of conduct which they may themselves have  
21 decided to adopt or contemplate adopting on the market.  
22 The documents quoted show that the applicants contacted  
23 each other and that they in fact pursued the aim of  
24 removing in advance any uncertainty as to the future  
25 conduct of their competitors."

1           Now, that paragraph 174 is the foundation for the  
2 indirect contact form of a concerted practice, which is  
3 at the heart of the Replica Kit case.

4           If I may take then take you to volume 1 of the  
5 authorities, and tab 6, this is the judgment of this  
6 Tribunal in Kit, and it was in October 2004, which was  
7 the liability judgment, and the penalty judgment I think  
8 was the following March. Is that -- I'm looking at the  
9 referendaire.

10           This is the liability judgment, that's  
11 1 October 2004. From recollection the penalty judgment  
12 was the following year, I may be wrong.

13           If you go to page 39 [Magnum], you will see that  
14 this is how the Tribunal built upon Dyestuffs and  
15 Suiker Unie at paragraph 151 and 152, although not  
16 citing all the paragraphs to which I've just taken you.  
17 Then I draw your attention to two further cases which  
18 I'll refer to in this analysis of the law. Those two  
19 cases are Cimenteries and Tate & Lyle.

20           Will you go to paragraph 158. At paragraph 158  
21 [Magnum] the Tribunal cites Cimenteries:

22           "... the Court of First Instance considered numerous  
23 allegations of infringement made against European cement  
24 producers. The court considered a submission by Buzzi  
25 to the effect that merely letting Lafarge, a competitor,

1 know of its intentions, could not have amounted to  
2 a concerted practice."

3 So this goes to the one-way passing of information.

4 "In that connection, the court points out the  
5 concept of concerted practice does in fact imply the  
6 existence of reciprocal contact [referring to Woodpulp].  
7 That condition is met where one competitor discloses its  
8 future intentions or conduct on the market to another  
9 when the latter requests it, or at the very least  
10 accepts it. In order to prove there has been  
11 a concerted practice it is not therefore necessary to  
12 show the competitor in question has formally undertaken  
13 to adopt a particular course of conduct."

14 Then over the page:

15 "It is sufficient that, by its statement of  
16 intention, the competitor should have eliminated [and  
17 then we have the words] or at the very least  
18 substantially reduced uncertainty as to the conduct."

19 That is where you get the gloss when you get to  
20 reduction of uncertainty, from elimination to  
21 substantial reduction.

22 What Cimenteries shows is that a one-way passing of  
23 information -- now, I accept of course that these were  
24 direct passing of information on the facts, but the  
25 Tribunal builds that in with Suiker Unie, which says

1 indirect, to conclude that a one-way passing of  
2 information from A through B to C may be sufficient to  
3 establish a concerted practice.

4 Then the Tribunal refers to Tate & Lyle, and I don't  
5 wish to read the whole extract, but paragraph 59  
6 [Magnum] across the page. As it says:

7 "The case concerned a series of meetings between  
8 British Sugar, Tate & Lyle and sugar merchants ...

9 "British Sugar and Napier Brown maintain that the  
10 price information envisaged by British Sugar was known  
11 by the latter's customer before it was notified to the  
12 participants at the disputed meetings and that,  
13 therefore, British Sugar did not reveal to its  
14 competitors during those meetings information which they  
15 could not already gather on the market.

16 "That fact, even if established, has no relevance in  
17 the circumstances of this case. First, even if British  
18 Sugar did first notify its customers, individually and  
19 on a regular basis, of the prices which it intended to  
20 charge, that fact does not imply that, at that time,  
21 those prices constituted objective market data that were  
22 readily accessible. Moreover, it is undisputed that the  
23 meetings in question preceded the release onto the  
24 market of the information that was notified at those  
25 meetings."

1           You might just pause there. So we would say that's  
2 relevant for document 52 [Magnum], disclosure of  
3 information prior to its release onto the market.

4           "Second, the organisation of the disputed meetings  
5 allowed the participants to become aware of that  
6 information more simply, rapidly and directly than they  
7 would via the market. Third, as the Commission held in  
8 recital 72 in the ... decision, the systematic  
9 participation of the applicant undertakings in the  
10 meetings in question allowed them to create a climate of  
11 mutual certainty as to their future pricing policies."

12           So those are the authorities I wish to take you to  
13 on this first heading about what is a concerted practice  
14 about. If I could just wrap up now, and I think we are  
15 stopping at 4.30 today, is that right?

16 **LORD CARLILE:** Yes.

17 **MR MORRIS:** I probably won't -- well, I'll summarise them.

18           I wish to make five main points and I may need to  
19 develop them a little bit tomorrow.

20           First, there are two concepts at the heart of  
21 a concerted practice, the knowing substitution of  
22 practical cooperation for the risks of competition,  
23 first concept. Second concept, the elimination or  
24 reduction of uncertainty in the mind of each competitor  
25 as to the conduct on the market of the other competitor

1 or competitors.

2 The second proposition is that that practical  
3 cooperation can come about through direct contact or  
4 indirect contact.

5 The third proposition, and I'm now summarising them,  
6 is that the coordination in question may become apparent  
7 or arise from the behaviour of the parties. There does  
8 not have to be a plan to coordinate at the outset.

9 Fourthly, what is in issue is the reduction of  
10 uncertainty.

11 Fifthly, the substitution of cooperation for  
12 competition has to be knowing.

13 Those are the five points, and I would want to spend  
14 a few minutes just tracking back and going through each  
15 of those. The first one I don't need to expand upon  
16 because they're the two aspects. The second one, that  
17 the practical cooperation can come about through direct  
18 or indirect contact, as I've said, that's the founding  
19 basis for the cases where the cooperation comes through  
20 not by direct contact between competitors but by  
21 indirect means, and is the foundation of the Court of  
22 Appeal's analysis in Kits & Toys.

23 I should add there, sir, it's worth noting that  
24 there is, and I think Miss Rose put it in the way that  
25 there's no European authority for the A-B-C. That is

1 strictly correct insofar as the A-B-C is a case of A  
2 passing information to B passing information to C. But  
3 if and insofar as it also includes cases where A puts  
4 pressure on B to do something about C, then there is  
5 European authority to that extent. That arises most  
6 notably where you have one distributor or retailer  
7 putting pressure on the middle man to prevent another  
8 distributor discounting.

9 The European authority for that proposition, where  
10 contact is made through a middle man, is the Pioneer  
11 case, Musique Diffusion, and Hasselblad. Both of those  
12 cases were decided and argued at great length in the  
13 course of Kit, in particular in the Tribunal's judgment  
14 in Kit at paragraphs 161 and 162. I can also tell you  
15 that they were the subject of extensive argument and  
16 discussion in the Court of Appeal as well.

17 So we would say that there is authority for this  
18 indirect means, indirect concerted practice, in  
19 subsequent community cases.

20 The third point I made was that the coordination may  
21 be apparent or, as I think you would put it, sir,  
22 inferred from the behaviour of the parties. As I've  
23 said, there doesn't have to be a plan to coordinate.  
24 Put it another way, the parties don't need to have  
25 signed up to a plan to coordinate prior to the behaviour

1 which evidences the unlawful coordination.

2 In this case, we say that there was a prior proposal  
3 or plan, and I will obviously take you to that in more  
4 detail, but we do not say that that proposal or plan  
5 constitutes the infringement. The infringement, the  
6 unlawful coordination, when that word "coordination" is  
7 used in the legal sense, was the disclosure of the  
8 future pricing information to and fro.

9 Now, my last two points of the five I just made, I'm  
10 going to be a few moments over and I think I would  
11 prefer, if I may, particularly the fourth point about  
12 what is meant by reduction of uncertainty, to develop  
13 that first thing tomorrow.

14 **LORD CARLILE:** What time do you want to start tomorrow?

15 **MR MORRIS:** Can I just take instructions. I want to start  
16 at 10.30 but I may be...

17 Yes, 10.30, if that's all right.

18 **MISS ROSE:** Can I just reiterate I will need half a day to  
19 reply, if that affects Mr Morris' view.

20 **MR MORRIS:** That comes as no surprise to me.

21 **LORD CARLILE:** We'll start at 10.30 tomorrow on the  
22 confident acceptance by counsel that we finish on  
23 Thursday, we actually have to finish on Thursday, and  
24 we're not sitting on Wednesday.

25 **MR MORRIS:** I'm aware of that. I hear fully that Miss Rose

1           wants half a day and I will calibrate accordingly.

2           **LORD CARLILE:** Because I won't even be in the country on  
3           Friday.

4           MR MORRIS: No.

5           (4.30 pm)

6                               (The hearing adjourned until  
7                               Tuesday, 29 May 2012 at 10.30 am)

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