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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13 July 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 17)

APPEARANCES

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

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

1 Friday, 13 July 2012

2 (10.15 am)

3 **LORD CARLILE:** Good morning.

4 Yes, Miss Rose.

5 **MISS ROSE:** How nice it is to see everybody again after an
6 interval.

7 **LORD CARLILE:** We are delighted to see everybody. We are
8 slightly at a loss as to what we said on the last
9 occasion was not clear about the length of reply.

10 (Small portion of text missing due to technical fault)

11 **MISS ROSE:** The point I'm making about schedule 1 was that
12 it became obvious to us when we had the opportunity to
13 read and examine the written closing submissions of the
14 OFT that there were a number of points included in that
15 document which had not been pleaded and had not been put
16 to any of the witnesses.

17 Our submission is that the OFT is not entitled to
18 maintain its case in relation to those points. So in
19 order to make that submission, we have to set out the
20 points in relation to which we make that submission and
21 the shortest way that that can be done is by way of
22 a table of the type that you have at schedule 1. So if
23 we just go to schedule 1, you can see what we've done
24 there. You simply have individual boxes which identify
25 the paragraph in the OFT's closing submission, the

1 argument that the OFT are making and then we identify
2 whether it's in the decision, whether it's pleaded in
3 the amended defence, whether it was in their opening
4 skeleton argument and whether it was put to any
5 witnesses. We do that for each of the instances that we
6 say are illegitimate.

7 Now, there isn't any way that we could have
8 presented this information in a shorter format than this
9 schedule. In my submission, it's essential material for
10 us to be allowed to adduce in order to respond to the
11 closing submissions that were made by the OFT. I'm
12 going to come back in a moment and look at some of the
13 examples but at the moment I'm just making a general
14 submission. So that's schedule 1.

15 Schedule 2 is the result of further detailed
16 examination of the many hundreds of references,
17 particularly in footnotes to the OFT's closing
18 submissions, to the oral evidence. Now, this is by no
19 means exhaustive. What you have in this schedule is
20 simply examples of instances in which we submit that the
21 way in which the OFT has presented that evidence in its
22 closing submissions is inaccurate and therefore
23 potentially misleading, either because it's asserted
24 that witnesses made admissions or concessions that they
25 didn't make or because it's asserted that they gave

1 evidence which they didn't give or because evidence that
2 they gave is taken out of context and, we say,
3 misinterpreted.

4 Now, again, this is not a full list of all those
5 instances because they are legion. As we said in our
6 covering letter, we don't seek to criticise the OFT
7 because we appreciate that the closing submissions were
8 written under considerable time pressure but, again,
9 it's necessary for us to identify the complaints that we
10 have about these references.

11 Now, this schedule is in a longer format because we
12 hoped that that would be of assistance to the Tribunal
13 because what we have done, as you can see, is in the
14 left-hand column we've set out the allegation that's
15 made by the OFT and the footnote reference. Then in the
16 middle column, and this is what gives it the length, we
17 set out the relevant evidence that the OFT is referring
18 to by its footnote and then, in the right-hand column,
19 we've identified why we say the way that the OFT
20 characterises the evidence is inaccurate or misleading.

21 Now, obviously, if the Tribunal doesn't find this
22 format helpful, you don't need to look at it. But the
23 general submission that we make about the references
24 that the OFT has included in its closing submissions is
25 that they need to be treated with the greatest caution

1 and they all need to be checked back against the
2 original transcripts because we do not accept that the
3 footnote references of the OFT are accurate. That is
4 a general submission that I make by reference to the
5 OFT's closing submissions.

6 **LORD CARLILE:** The issue, Miss Rose, is not about the
7 helpfulness or otherwise of the content of schedule 1
8 and 2 which, of course, we will consider. It may delay
9 our judgment but, plainly, it's intended to be helpful
10 material. The issue is about how litigants deal with
11 this Tribunal. We gave clear directions on the last
12 occasion. A few days before this hearing, in the busy
13 lives of all three of us, we received not a document
14 running to 40 pages but documents running to well over
15 100. It is the unanimous view of the three members of
16 the Tribunal that it would have been helpful and
17 courteous if an application, which I take it you're
18 making today, had been made in writing with reasons for
19 lengthier documents to be submitted.

20 **MISS ROSE:** Sir, I take that point and I do apologise
21 unreservedly and I take full responsibility for that.

22 **LORD CARLILE:** Yes, I'm sure you do.

23 **MISS ROSE:** I had not appreciated that the schedules would
24 strike the Tribunal in that way because, of course, we
25 have provided a reply which is 40 pages and, I entirely

1 accept, I wrongly took the approach that the Tribunal
2 would understand that the schedules were supporting
3 material which we certainly were not expecting the
4 Tribunal to have read before today's hearing. I do
5 apologise for that and I take full responsibility for
6 it.

7 **LORD CARLILE:** Thank you.

8 I hope, and I'm sure with the support of other
9 chairs of this Tribunal, I hope that anyone appearing
10 before the Tribunal in any case will note that where
11 case management directions, or even something falling
12 slightly short of directions are given, they must be
13 taken seriously, otherwise this Tribunal finds it
14 difficult to manage its very complex affairs, albeit
15 it's probably the best managed Tribunal in the whole
16 country.

17 Do you want to say anything, Mr Morris? It's
18 probably better not, isn't it?

19 Okay, if we need to, we will give permission for
20 these documents to be referred to.

21 I take it from some correspondence I saw yesterday
22 that it is intended that we start now, on time, and we
23 finish by 4.30 today.

24 **MISS ROSE:** Yes, sir. Indeed I am hopeful we will finish by
25 lunchtime.

1 **LORD CARLILE:** I'll believe that when I see it. All right,
2 let's get on with it, you never know. Don't feel under
3 any time pressure.

4 Reply Submissions by MISS ROSE

5 **MISS ROSE:** I don't feel under any time pressure, we'll see
6 where we get to, but that is entirely my intention.

7 Can I, just before I move to the substance of the
8 reply, identify -- I'm not going to take you through all
9 of the schedules, obviously, but I just want to identify
10 some of the points that we make by reference to the
11 schedules.

12 Can I start with schedule 1, so this is points that
13 were not pleaded and that were not put. Now, the first
14 of these is a reference to the Dairy Crest proposal and,
15 sir, as you will recall the passage in the Dairy Crest
16 proposal talking about, "If we jointly change the
17 competitive set of British cheese". The submission
18 that's made by the OFT is that self-evidently "jointly
19 change" refers to:

20 "All the retailers and Dairy Crest acting together,
21 and possibly to all the retailers and all the processors
22 acting together and to all the retailers adopting the
23 same cost and retail price increases in the same way in
24 response to the Dairy Crest proposal."

25 Now, if we just go back to the Dairy Crest proposal

1 itself at tab 26 --

2 **LORD CARLILE:** Tab 25.

3 **MISS ROSE:** Well, tab 25 or tab 26 (Magnum). The paragraph
4 in question is:

5 "We are seeking to address an immediate problem in
6 farming today. If, however, we jointly change the
7 competitive set of British dairy products versus
8 imports, damage would be done to this initiative. We
9 ask that you bear this in mind when considering your
10 retail pricing decisions."

11 Now, obviously, I have a submission about the
12 substance of the meaning of that paragraph and my
13 submission is that it clearly and simply is referring to
14 jointly we, Dairy Crest, with you, the particular
15 retailer to whom this document is addressed. Because
16 the point that's being made in that paragraph is that,
17 if the cost price and the retail price, ie we acting
18 jointly, us raising the cost price, you raising the
19 retail price, change the competitive set of the British
20 cheese against the imported cheese, because both the
21 cost price and the retail price of British cheese has
22 gone up as against imports, that will have an adverse
23 affect. So the warning is being given, "Please think
24 about that carefully when you take your retail pricing
25 decision".

1 So the first point we make is there is nothing in
2 this paragraph that says anything about all retailers
3 acting together and, still less, all processors and all
4 retailers acting together. That's the substance of our
5 submission.

6 But the point we make in the schedule is a different
7 one which is, as the Tribunal will recall, it heard
8 evidence from Mr Reeves, who was one of the authors of
9 this document, but this interpretation of this paragraph
10 was never put to Mr Reeves. We can see what was put to
11 Mr Reeves if you go to Day 5, page 66. If you go first
12 of all to page 65 on Day 5, line 20:

13 "Question: Then you say under the heading 'UK
14 Sourced Dairy Products versus imports'..."

15 And Ms Smith quotes the relevant paragraph, and then
16 she says:

17 "So in effect you were asking the retailers here to
18 restrain their retail price increases?"

19 "Answer: Not necessarily, no. We were asking them
20 not to price British cheese uncompetitively."

21 So the only question that's being put is in relation
22 to the competitive set. There's no question being put
23 saying, "When you say 'jointly' here, do you mean all
24 the retailers acting together, do you mean all the
25 processors acting together?" But it goes even further

1 than that because Lisa was also questioned about this
2 and a different interpretation of this was actually put
3 to her by the OFT.

4 If you go to Day 8, page 94, line 6, again you see
5 the same quote, the same passage, and Mr Morris says:

6 "My first question is 'jointly' is referring to
7 Dairy Crest and Tesco, isn't it?"

8 "Answer: Yes."

9 So that was actually put to her by the OFT as its
10 case about what "jointly" meant, she accepted it, and we
11 say that was clearly correct.

12 **LORD CARLILE:** This relates to one paragraph of that
13 document.

14 **MISS ROSE:** Yes.

15 **LORD CARLILE:** Presumably you're not contesting the view
16 that the Tribunal is entitled to look at (a) the whole
17 of the document and what it means, not just one
18 paragraph, and (b) how the evidence such as it is that
19 that document provides is affected by other evidence
20 that we've heard in the case, because we can't consider
21 every piece of evidence in isolation. That would be
22 absurd, wouldn't it?

23 **MISS ROSE:** Absolutely, sir. But the point I make here is
24 a different one which is -- and this is actually quite
25 fundamental to the way the OFT puts its case, because

1 its case on intent is now quite heavily based on the
2 argument that the Dairy Crest briefing proposal is
3 a proposal for joint action, based on that paragraph.
4 But not only was that not put to the witnesses based on
5 that paragraph, it wasn't put to the witnesses at all
6 that the Dairy Crest proposal was a proposal for joint
7 action.

8 You'll recall that I addressed this point at some
9 length in my closing submissions, that the case that was
10 originally in the decision and in the amended defence,
11 and then clarified in the further and better
12 particulars, was a case that there was a plan for
13 coordinated retail price rises and that that was
14 a covert plan for coordinated retail price rises,
15 "coordinated" meaning acting otherwise that
16 independently, therefore necessarily acting unlawfully.

17 That was the principal basis on which the OFT in its
18 decision founded its conclusion that Tesco had the
19 requisite intent. That case wasn't put at all during
20 the hearing to any witness in any context.

21 So it's not just about this paragraph. This
22 paragraph is where -- the only source that the OFT now
23 relies on to try and resurrect it, so the point we make
24 in the schedule is they can't do that because they
25 certainly didn't put that interpretation. But I make

1 a much broader point as well which is that they didn't
2 put any case of a plan for coordinated retail prices.

3 So in answer to your general questions, sir, it
4 would not be open to this Tribunal to make a finding
5 based on the Dairy Crest proposal read as a whole,
6 either alone or with other evidence, that there was such
7 a plan, because the existence of such a plan was not put
8 to Mr Reeves, it was not put to Mr Ferguson, it was not
9 put to Ms Oldershaw, it was not put to Mr Scouler.

10 The OFT's original case was that that was a plan
11 amongst the processors of which the retailers were
12 aware. Of course, this Tribunal heard evidence from
13 both of the processors and it wasn't put to any of those
14 witnesses. So we do submit that would not be a possible
15 finding. That's the first point in schedule 1.

16 If we just go over the page, I'm just going to take
17 a selection of these. On page 2, paragraph 251, this
18 relates, the Tribunal will recall, to what Sainsbury's
19 did about the price of Seriously Strong on the day after
20 the 21 October email was sent. The Tribunal will
21 recall, document 52, the document of 21 October saying
22 that Sainsbury's would increase its prices the following
23 morning, and the reference in that email to parties
24 saying that they would apply cash margin only on this
25 occasion.

1 The following day, Sainsbury's puts up its prices of
2 Seriously Strong but not by cash margin. It puts up the
3 price of 250 grammes by £240 a tonne, not £200 a tonne.
4 That was a point that was made repeatedly during the
5 hearing, I think I made it at least three times during
6 the hearing.

7 The OFT never put to any witness the proposition
8 that's at paragraph 251, that in fact, when Sainsbury's
9 put up the price by £240 a tonne, that was effectively
10 cash margin maintenance rounded up to the nearest penny
11 for a more convenient price point. That was never put
12 to any witness. Of course, that proposition contains
13 within it the proposition that £1.85 is, for some
14 reason, a more convenient price point than £1.84.
15 There's no reason why that should be. Indeed you might
16 think that the normal strategy of a retailer is that you
17 want a price to be immediately below a round number
18 because psychologically that feels cheaper for the
19 consumer, so you go for £1.99 rather than £2, £1.89
20 rather than £1.90, £1.84 rather than £1.85. But in any
21 event, that's a question of evidence, it's a question of
22 fact, and it was never put to anybody.

23 **LORD CARLILE:** Of course document 52 has the status of
24 evidence too. Just looking at document 52, of which
25 I have a number of versions because it's so overlaid

1 with notes, what are you saying are the conclusions that
2 we are not permitted to draw from document 52 taken with
3 other documents in relation to the same strand?

4 **MISS ROSE:** Sir, I'm going to come back to strand 2 in more
5 detail. The point I'm making at the moment is not about
6 what information you should or shouldn't conclude is in
7 document 52. I have a number of submissions to make
8 about that and I'm going to make them. But one of the
9 points that I make is that, on its face, this document
10 says:

11 "As we discussed last week, other parties are
12 confirming they will protect cash margin on this
13 occasion but not percentage margin."

14 The point that I made on numerous occasions during
15 the hearing is that, the following day, what Sainsbury's
16 did was inconsistent with that statement because
17 Sainsbury's increased the price of Seriously Strong by
18 £240 per tonne which was higher than cash margin
19 maintenance.

20 **MR MORRIS:** Sir, if I may just seek clarification and make
21 one correction. Miss Rose has said now twice that she
22 made these points several times and persistently through
23 the hearing in relation to that specific price on that
24 specific document. Our understanding, and for your
25 reference it's paragraph 251 of our written closing, is

1 that was a point that was raised only in re-examination
2 of Ms Oldershaw, and that's the only time, and that was
3 the first time the point was raised. It wasn't a point
4 pleaded at any stage by Tesco. I stand to be corrected,
5 obviously, but that is our understanding.

6 **MISS ROSE:** Sir, I don't believe that is correct. My
7 recollection is that it was raised also with Mr Ferguson
8 but we'll come back to that.

9 **LORD CARLILE:** Well, that's what tribunals are for, isn't
10 it, to decide what was raised and what we accept and
11 don't?

12 **MR MORRIS:** It was raised also with Mr Ferguson in
13 re-examination.

14 **MISS ROSE:** Sir, that rather makes my point. That means it
15 was squarely on the table before Mr Morris
16 cross-examined Ms Oldershaw.

17 **LORD CARLILE:** Well, I have a note of the point being made.

18 **MISS ROSE:** The point was made, sir, I think it is now
19 conceded by the OFT, it was made twice, and it was made
20 in re-examination of Mr Ferguson before Mr Morris
21 cross-examined Ms Oldershaw. But he did not put to her
22 that the action of Sainsbury's on the day after was the
23 equivalent of cash margin maintenance, and we submit
24 that, in that situation, it is simply not open to the
25 OFT to make that submission now in its closing

1 submissions because it should have been put and it
2 wasn't.

3 The next point I want to draw attention to on
4 page 3 -- I stress we maintain all these points but I'm
5 simply drawing your attention to some of the most
6 important ones.

7 Strand 3, paragraph 265.11(d):

8 "In respect of healthy eating there were only two
9 Dairy Crest lines named in the spreadsheet, Heinz
10 WeightWatchers mature was already addressed specifically
11 in the email, otherwise Tesco healthy eating half fat
12 Red Leicester was the only example."

13 And it said:

14 "It is likely that by 'healthy eating' Ms Oldershaw
15 was principally referring to other processors' products
16 and not to this solitary Red Leicester line."

17 Again, that was simply never put to Ms Oldershaw in
18 cross-examination and we say cannot therefore be
19 maintained by the OFT.

20 On the same page, a similar point about the
21 availability to her of the spreadsheet. This is in
22 relation to her giving information to Dairy Crest, and
23 what they say is that:

24 "She had in front of her at the time of her
25 conversations with the processors on 5th October

1 a spreadsheet setting out cheese lines by supplier. She
2 could have read off the spreadsheet processor by
3 processor."

4 Again, not put to her that the spreadsheet was in
5 front of her at the time she was talking to the
6 processors.

7 Again, if we go on to page 9, there are two
8 important points to make about 2003. The first, at
9 paragraph 316.5(b) on page 9, and this is relating to
10 Lisa Oldershaw's memo for Mr Scouler, document 110A,
11 before the 6 October 2003 meeting, and the comment:

12 "Competition commission training desperately
13 needed."

14 They say:

15 "It shows at most Lisa Oldershaw's point to
16 Mr Scouler that Mr Meikle was unsubtle in his methods."

17 So what is being suggested is that, when
18 Lisa Oldershaw said to Mr Scouler, "Competition
19 commission training desperately needed", she was not
20 intending to suggest that McLelland needed to be firmly
21 told that Tesco did not wish to receive any information
22 about future pricing intentions, but rather that Tesco
23 did wish to receive such information but more subtly.

24 Sir, that is a very serious allegation of bad faith
25 and it was never put to Lisa Oldershaw that that was

1 what she meant.

2 **LORD CARLILE:** Can we just remind ourselves of what was put?

3 It's Day 10 I think. Is it 103, 104, somewhere along
4 there?

5 **MISS ROSE:** I think it's page 109, sir.

6 **LORD CARLILE:** Page 107 it starts?

7 **MISS ROSE:** Page 109. It's at 109 that the specific phrase,
8 "Competition commission training desperately needed" is
9 referred to, line 18:

10 "Question: Can I ask you about the 'Competition
11 commission training desperately needed', can I put two
12 points to you?

13 "Answer: Yes.

14 "Question: The first point is that I'm going to
15 suggest to you that that could equally be a reference to
16 issues arising out of the code of conduct ... [in] the
17 Competition Commission enquiry ... Nothing to do with
18 future pricing, it's to do with code of conduct?

19 "Answer: That's just a phrase I and other buyers
20 use for that kind of training, Competition Commission
21 training.

22 "Question: And I would secondly suggest that if, as
23 I suggest is possible, this document postdates the
24 meeting, what it does is it ... reflects John Scouler's
25 intervention at that meeting and not something that you

1 had thought of before the meeting?

2 "Answer: This was not written after that meeting.

3 This was a briefing document for that meeting."

4 So, sir, those were the two points that were put to
5 Lisa Oldershaw about what that phrase meant, either that
6 it referred to a different type of training or that it
7 had been inserted in the document after the meeting and
8 it reflected what Mr Scouler had said.

9 Do you have the reference?

10 **LORD CARLILE:** Yes, I do. Thank you.

11 **MISS ROSE:** It was never suggested to her that this was
12 meant to be a coded message to McLelland that they
13 should be a bit more careful in their infringing conduct
14 in the future. That, we say, is a very serious
15 allegation which had to be put.

16 A similar point in relation to Mr Scouler, this is
17 page 11 of the schedule, paragraph 327:

18 "The fact that John Scouler did shut down
19 Alastair Irvine's attempt to raise this sort of issue
20 with him does not lead to any conclusion that Tesco and
21 specifically Lisa Oldershaw were punctilious about
22 compliance with competition law. It may show only that
23 John Scouler did not want such issues to be discussed at
24 a meeting where he was present."

25 So, again, a similar point, sir, that a serious

1 allegation of bad faith against Mr Scouler, that he is
2 saying "Please do naughty things when I'm not in the
3 room", and again never put to Mr Scouler.

4 So those are just a few of the examples of points
5 that weren't put, and we do ask the Tribunal to read all
6 the points in that schedule. Our submission is that
7 none of the points that are in that schedule are points
8 that the OFT is entitled to maintain or findings that
9 this Tribunal is entitled to make because they were not
10 pleaded and they were not put to the witnesses.

11 Schedule 2, inaccurate references. I just want to
12 examine the first two as examples. We'll see some more
13 as we go through today, this is just an example of the
14 sort of thing we're talking about.

15 If you look at the first page of schedule 2, first
16 of all, on the left, here is the OFT's characterisation
17 of the evidence:

18 "Each retailer knew that the processors were and
19 would be talking to their competitors about market-wide
20 cost and retail moves and passing information in all
21 directions in order to maintain confidence between
22 retailers. The retailers also knew it was a small
23 market and information was likely to flow generally."

24 The footnote to that is to Mr Irvine's evidence on
25 Day 7, pages 65 to 66. What we have done is to set out

1 evidence given by Mr Irvine. First of all, there is his
2 evidence shortly before where he says:

3 "The last thing I would want would be for my
4 competitors to have good market knowledge ..."

5 He says:

6 "... it was either practically public knowledge
7 or -- I think the first one ..."

8 That it was obvious.

9 So that's the first point.

10 The second point is when you look at the actual
11 evidence on which the OFT rely, it is not talking at all
12 about information about future retail pricing
13 intentions. You can follow this through. This is
14 talking about the conversation that Mr Irvine had with
15 Mr Stump of Glanbia. What's put to Mr Irvine is that he
16 records that Mr Irvine told him that "Dairy Crest are
17 seeing Asda this afternoon".

18 He says:

19 "... you must have got that information either from
20 Dairy Crest or from Asda. That's right, isn't it?"

21 "Answer: Or from some random source. You know,
22 some quirk that we tried to make an appointment
23 ourselves and the buyer said, 'We've Dairy Crest in this
24 afternoon, you'll need to come tomorrow.'"

25 Then he's accused of making that up. It is said:

1 "Question: The most likely source ... must have
2 been Dairy Crest or Asda, who you were talking to at the
3 time, both of them?

4 "Answer: If that's what you say.

5 "Question: Well, I'm asking you.

6 "Answer: I've said what I thought. You know, if --
7 let's wind back to what I said or am reported to have
8 said about Asda going in to see Dairy Crest. It's
9 a small market. You're constantly picking up
10 information of who is going in to see who; you're
11 sitting in the same reception, the same few salesmen ...
12 information gets to you in all sorts of different ways."

13 He's not talking at all about retail pricing
14 information, he's simply talking about information about
15 which processor is seeing which retailer and saying that
16 you pick that up because you go to the same meetings and
17 you see the same buyers.

18 So we submit that it was quite wrong to use that
19 comment by him in that context and seek to say that
20 there was any sort of evidence or admission from him
21 that information about future retail pricing information
22 was flying around in a small market. So that's the
23 first point.

24 The second point, paragraph 184.6, which you see
25 starts at the bottom of page [2], and what we see here

1 is the statement:

2 "As Tesco knew the processors would not take the
3 risk of lying to Tesco in the context of the £200 per
4 tonne £200 per tonne cheese move. If Tesco accepted
5 a cost price increase across all lines and went up, then
6 had to come back down again because what they had been
7 was mere speculation, Tesco would have lost millions of
8 pounds."

9 So the assertion is that Tesco knew that processors
10 would not take the risk of lying to Tesco and that is
11 said to be supported by Ms Oldershaw's evidence on Day 8
12 at pages 174 to 177. But in fact, when you look at her
13 evidence, she says exactly the opposite. So the first
14 thing that Mr Morris puts to her is:

15 "... your evidence is what they were telling you was
16 unreliable because it was the usual speculation from
17 them ...

18 "It's just unreliable, this information?"

19 "Answer: Well, it probably was -- it might have
20 been reliable, it might have been unreliable, but I just
21 assumed everything was unreliable.

22 "Question: But as regards some of the information,
23 you would know that the processor would in fact be in
24 possession of future retail pricing information,
25 wouldn't you?"

1 "Answer: If they were packing other random weight
2 products for another retailer, yes, they would need to
3 know that information prior to --

4 "Question: Yes.

5 "Answer: Yes.

6 "Question: So certainly as regards that
7 information, and if you then -- if then McLelland or
8 Dairy Crest said 'X is going to go up on random weight
9 in a week's time', you couldn't be sure that that
10 information was necessarily speculation?

11 "Answer: Yes, possibly, it could be true, yes.

12 "Question: So you didn't assume that all the
13 information was speculative?

14 "Answer: I took everything as speculative.

15 "Question: Okay.

16 "Answer: So I just applied a blanket approach.
17 Because, you know, it's such a waste of time to try and
18 ascertain what was true, what wasn't, there was no way
19 of ever knowing."

20 Then he says he wants to explore the question of
21 whether it would be in the interests of the processors
22 to make it up. Then he goes through the point about
23 their bargaining relationship and a relationship of
24 trust, and then, if you go to page 5, the question is
25 asked:

1 "... in this hypothetical scenario, if you did act
2 on such information and it turned out to be wrong,
3 I would imagine that you might feel rather aggrieved
4 with Mr Ferguson and you might go back to him and
5 complain.

6 "Answer: Which is exactly why I never placed myself
7 in that position. We would have just waited another
8 week to see if it actualised in store."

9 What she's saying is, "Yes, you're right, the
10 implications of me relying on future retail pricing
11 information could be significant for Tesco financially,
12 and that's the reason why I didn't, because it's not
13 a risk that I was interested in taking".

14 **LORD CARLILE:** Where are we left -- to take an extreme
15 situation, and please don't think I'm saying this is our
16 view, but where are we left, if we completely disbelieve
17 everything she said, what are we to conclude then? If
18 we reject this evidence as being deliberately untrue,
19 for example?

20 **MISS ROSE:** Sir, if you conclude that she's deliberately
21 lying to you then you're going to have to ask yourself
22 the question why, and you would be entitled to draw
23 inferences from that conclusion.

24 **LORD CARLILE:** Yes.

25 **MISS ROSE:** Sir, the point I'm making here, I'm not here

1 addressing the substance of the OFT's case, the point
2 I'm making here is simply that the way that the OFT has
3 presented its case in the closing submissions does not
4 actually reflect the evidence that was given because
5 what the OFT says in its closing submissions, if you
6 just go back to page 2, bottom of page 2, is simply that
7 Tesco knew that the processors wouldn't take the risk of
8 lying to Tesco. That is not the evidence that was given
9 by Tesco. The evidence that was given by Tesco was that
10 you never knew whether they were telling you the truth
11 or not and, in those circumstances, the only safe
12 conclusion to draw was that you weren't going to rely on
13 anything they said until you saw that it had actually
14 arrived in store.

15 You can see, and we were just coming to the relevant
16 part, that what's put to her is "If you acted on
17 something Mr Ferguson told you and it didn't
18 materialise, you would be cross with him", and that's
19 when she says, "Absolutely, that's why I didn't act on
20 what he said to me because I couldn't be sure it was
21 right and because there would have been implications".
22 So that's the key point.

23 Then he still persists, he says:

24 "... I'm suggesting in this scenario that you would
25 be rightly very cross with, or it would undermine your

1 relationship of trust with Tom Ferguson if he gave you
2 false information and you acted on it?

3 "Answer: Yes, I suppose, in your scenario."

4 So what's being put to her is, "If you relied on his
5 information and it was false, you would have been
6 cross". But the point she's making is, "That's
7 precisely why I didn't rely on it, because I couldn't".

8 Then over the page she makes that clear. She says:

9 "There was often situations of that type, where
10 suppliers would spiel things in emails and then it
11 didn't actually [materialise] and that is why ...
12 I didn't ever get my fingers burnt, but that is why
13 I never took what they said as read."

14 So she was frequently told things that didn't
15 happen, there could be all sorts of reasons why they
16 didn't happen, and that's why she didn't rely on stuff
17 until she saw it in store.

18 Then she makes the point:

19 "But Tom did not control the retailers. The
20 retailers may have told him one thing and then changed
21 their minds at the last minute. It happens. So he may
22 not have intended to lie, but then retailers change
23 their mind and, in your scenario, what he had been told
24 didn't eventualise at the retailer."

25 So there's a whole range of situations. He might

1 be, for want of a better word, bullshitting her, he
2 might be sincerely expressing to her his opinion, he
3 might be telling her something he's been told. But in
4 any of those situations, it doesn't mean that the price
5 rise is going to materialise because, in any of those
6 situations, either the retailer may never have intended
7 to do what the supplier said or the retailer might
8 simply change their mind overnight.

9 So you can't rely on the information whether you
10 think it's accurately sourced or not, and sometimes it
11 may be and sometimes it may not be. That's the point
12 that she's making.

13 I'm going to come back to the substance of the
14 submission about her intent, but the point that we're
15 making in this schedule is simply that the way that
16 Tesco's evidence is presented by the OFT in its closing
17 submissions does not accurately reflect the evidence
18 that was actually given by the witnesses. Those are
19 just two of the examples, and I don't have time to go
20 through the many others, but the general submission
21 I make is that we do ask the Tribunal to look at the
22 sources and not at the secondary material. There is no
23 substitute for the transcript in this case.

24 Can I now turn to the substance of our reply
25 submissions. We appreciate the message that we have

1 received, which is that we understand the Tribunal has
2 read our written reply and urges us not to read it out
3 and I shan't do that. What I intend to do is to take
4 you to the important points in it and explain why we say
5 what we do. That being so, I need to stress at the
6 outset that, just because I don't say something orally
7 today, doesn't mean it's not important.

8 **LORD CARLILE:** Of course.

9 **MISS ROSE:** And of course everything that is said in our
10 previous oral and written closing submissions stands,
11 this is simply a response to the OFT's changed case. In
12 particular, you will note that we have focused on
13 strands 2 and 3 of 2002 and that we have dealt pretty
14 briefly with 2003. That is because it's our perception
15 that the focus of the OFT's case is now on those
16 strands. I'm going to come to that point in a moment
17 but, sir, all the submissions that we have made about
18 all the strands in our closing submissions stand.

19 So the first point that we make is about the OFT's
20 case as it now stands and there are three points where
21 we say that the OFT's case has changed which are of some
22 significance. The first point is that the OFT does
23 principally rest its case on strands 2 and 3 of 2002.
24 Now, we've set out at the first page of our reply what
25 was said by Mr Morris about this. He says:

1 "The reason those two sets of exchanges [which are
2 strands 2 and 3] are so crucial is that once those
3 exchanges of information are established, and we say
4 they are, they provide the crucial context for the
5 remaining events in 2002 and the further key documents
6 in the remaining strands. Now, I am conscious that when
7 one takes some of those later documents in isolation and
8 you say this will be matched by Tesco, or you have half
9 a sentence, 'other players will move', in isolation one
10 might say, crikey, that's a hell of a leap of logic to
11 get to the fact this is a reference to Tesco and future
12 prices and their intentions. Viewed in isolation, that
13 may be a fair submission to make."

14 Then he says:

15 "You can't do it in isolation, you have to look at
16 it in the context of strands 2 and 3."

17 So we're not suggesting they've abandoned the other
18 strands, we accept that they maintain their case on
19 those strands, but the way they're putting their case is
20 that they say that what gives the inference about the
21 source of the information and Tesco's intent in relation
22 to those later strands any legs is the findings that
23 they invite the Tribunal to make about strands 2 and 3.

24 They are, we submit, accepting what we say is
25 self-evident on the documents that on the face of those

1 exchanges they don't begin to establish even that the
2 source of the information was Tesco, still less what
3 Tesco's intent was. A phrase such as "all players will
4 move" or "this will be matched by Tesco", by somebody
5 else, it doesn't begin to establish that Tesco gave any
6 information, still less what Tesco's intent was.

7 We submit that Mr Morris' approach here is clearly
8 the right one.

9 The second change in the OFT's case is the change
10 that relates to the nature of the plan that is alleged.
11 We developed that point in considerable detail in our
12 closing submissions, both written and oral. In our
13 written closing submissions, it was paragraphs 130 to
14 153, and we spent quite a long time on it orally.

15 What is striking is that the OFT has not responded
16 at all to those points. There was no response in the
17 200 plus page closing submissions of the OFT and there
18 was no response orally to those submissions that I made.
19 They are therefore unchallenged, and this takes us back
20 to a question, sir, that you asked me at the outset, to
21 what extent you're free to interpret the Dairy Crest
22 proposal as a whole and in the context of other
23 documents.

24 Of course you have to interpret that document but we
25 submit that document can only, fairly and lawfully be

1 interpreted on the basis of the case that was put by the
2 OFT to the relevant witnesses. It was not put by the
3 OFT at any stage during the hearing that you could infer
4 from that document or from any of the surrounding
5 evidence read with that document that there was any plan
6 for the coordination of retail price rises. It was
7 never put.

8 Again, that allegation is a very serious allegation
9 because it is an allegation of a plan for
10 anticompetitive conduct. It has to be put to the
11 witnesses. It cannot simply be inferred from the
12 documents when the witnesses are there giving evidence
13 having denied it.

14 Now, the third change in case which relates
15 specifically to strand 2 is the question of what is the
16 nature of the information that was transmitted in
17 relation to strand 2? I'm going to come back to that in
18 more detail. I just want to consider for a moment the
19 implications of the OFT's abandonment of the case based
20 on a plan to coordinate retail price increases because
21 we do say that the failure by the OFT to put that case
22 to the witnesses has very significant implications for
23 its case.

24 We have enumerated them, starting at paragraph 5 of
25 this reply. The first is that this change of position

1 has a significant implication for the inference of
2 intent. This is a point that, again, I developed in
3 detail in our closing submissions and that the OFT has
4 not responded to. The OFT's position on intent now, we
5 submit, rests on a non sequitur and, sir, you can see
6 this in their closing submissions at paragraph 225 under
7 the heading "The Industry Initiative":

8 "Tesco and the other retailers therefore knew, going
9 forward, that they and their competitors were being
10 asked to participate in an uniform, joint [let's come
11 back to that word] industry initiative to raise cost and
12 retail prices on the basis of a Dairy Crest briefing
13 document. They did not seek to distance themselves in
14 any way from what was going on."

15 Now, you've just heard my submission in relation to
16 "joint". This goes back to the argument that "jointly
17 change the competitive set" is meant to refer to us with
18 all the retailers, or all the processors and all the
19 retailers. You have my submission that that is not
20 a position that is open to the OFT because not only did
21 they not put that to the author of the document,
22 Mr Reeves or Ms Oldershaw, they actively put a different
23 case to Ms Oldershaw which that is "jointly" means
24 Dairy Crest and Tesco.

25 And if "jointly" means Dairy Crest and Tesco, then

1 "joint" adds nothing to paragraph 225, and all that you
2 are left with is what is common ground in relation to
3 the Dairy Crest briefing proposal which is that it is
4 indeed a very public proposal that Dairy Crest should
5 increase the cost price of its British cheeses by £200
6 per tonne and that the retailers should respond by not
7 increasing their retail prices by any more than the cash
8 margin equivalent to avoid the accusation of
9 profiteering. That is what the Dairy Crest briefing
10 document is proposing.

11 What there is not anywhere in that document, and
12 what was never put to any witness, was that that
13 involved coordination between the retailers. That's the
14 crucial point. Why I say that then leads to
15 a non sequitur in relation to the intent is because if
16 you then look at 226, what the OFT says is:

17 "They would also have interpreted subsequent events
18 and information transfers in the light of this proposal.
19 At the time of those events, they would have known that
20 Dairy Crest and the other processors would be passing
21 information between the participants to make the
22 initiative work, and it would have always been in their
23 minds that such information was likely to be coming from
24 the other retailers with their implicit or express
25 assent for that same purpose."

1 Now, that is the proposition that was contained in
2 the decision and the defence on the basis of a plan to
3 coordinate retail price rises, and it's a legitimate
4 inference if such a plan has been established, because
5 if the plan is all the retailers will act together,
6 jointly, to coordinate their retail prices, then the
7 covert passage of information between them is an
8 essential part of that plan whether they pass the
9 information directly or indirectly through their
10 suppliers.

11 But the only plan that's now alleged is a plan for
12 an across-the-board increase in the cost price which is
13 likely to lead to a consequential retail price rise. So
14 all that the retailer knows is Dairy Crest is proposing
15 to me that I should increase the cost price of all my
16 cheese lines and that, when I do so, I should not go
17 higher than cash margin maintenance to avoid
18 profiteering. That's what Tesco knows.

19 Tesco also knows that Dairy Crest has made that same
20 proposal to its other customers, but it doesn't follow
21 from that that Tesco has any idea that there will be
22 information passing from other retailers to Tesco or
23 from Tesco to other retailers. That's simply
24 a non sequitur. Because the proposal that's being made
25 by Dairy Crest is no different from a normal cost price

1 proposal by any supplier. Whenever a supplier says to
2 a big retailer like Tesco, and you see this in 2003, "We
3 want to put up the price of our cheeses, let's say
4 because the price of oil has gone up, that means our
5 transport costs are increased so we want to put up the
6 price of British cheeses by £40 a tonne", Tesco will
7 obviously conclude that the same proposal is being made
8 to its competitors. Tesco would find it quite bizarre
9 if the supplier, who has the same costs in relation to
10 everyone they supply, is only making that proposal to
11 Tesco.

12 That's just a normal commercial situation, that's
13 normal business. So there is nothing suspect or unusual
14 or strange about Tesco's understanding that that
15 proposal is being made to all the retailers. Neither is
16 there anything unusual or strange about the
17 acknowledgement in that proposal that the consequence of
18 the cost price increase is very likely to be a retail
19 price increase because everybody in a competitive market
20 understands that that is likely to be so.

21 What's unusual in relation to the retail price and
22 the Dairy Crest proposal is not that they're saying
23 there should be a retail price rise but they're saying
24 there should not be a retail price rise higher than cash
25 margin maintenance because, if you maintain percentage

1 margin, there will be an accusation of profiteering.
2 And also, of course, adversely affect the competitive
3 set of British cheeses in relation to continental
4 cheeses.

5 So the irony is that the only recommendations that
6 are made in the Dairy Crest proposal about retail prices
7 are that retail price rises should be kept down, not
8 that they should go up.

9 Sir, you will recall the evidence of Mr Reeves that
10 there was an attempt by the OFT to suggest to Mr Reeves
11 that it was necessary, for this proposal to work, that
12 everybody should increase their retail prices by £200
13 per tonne so that the farmers could see that the
14 initiative was being implemented. Mr Reeves very
15 clearly rejected that proposition. He said, no, the
16 farmers don't care whether the retail price does or
17 doesn't go up. The farmers will know the initiative has
18 been implemented when they get their cheque for their
19 milk with an extra £200 per tonne. What's going to
20 upset the farmers is if they get a cheque for an extra
21 £200 per tonne and they see that Tesco has increased the
22 price of cheese by £260 a tonne because then they'll
23 think that Tesco are making an extra profit off the back
24 of the increase to the farmers.

25 So, in our submission, the case that the OFT seeks

1 to mount based on the Dairy Crest proposal doesn't work
2 at all in relation to intent as soon as you strip out of
3 it the allegation of a coordination of retail prices
4 which has never been put to the witnesses. It's really
5 critical to the inference of intent which the OFT seeks
6 to draw, and I know I've said it before, I'm going to
7 say it again because it's very important, I made these
8 submissions and they were not challenged.

9 So that's the first implication of the decision by
10 the OFT not to pursue the case based on coordination.

11 Coming back to our text, the second point is no
12 single overall infringement. The OFT's case is that, if
13 it establishes that Tesco participated in a single A-B-C
14 transmission, Tesco is liable for the whole overall
15 infringement for 2002. For that it relies on Anic, the
16 paragraph that we saw and have discussed at considerable
17 length, in particular it's paragraph 84 of Anic
18 (Magnum).

19 But we submit that that argument fails once the
20 OFT's allegation about the nature of the overall plan
21 changes, because the original allegation of the OFT was
22 that the overall plan was a plan for anticompetitive and
23 unlawful conduct. It was a plan for a coordinated
24 retail price rise. Once that's not maintained, all that
25 you have is a plan for an across-the-board cost price

1 increase. That's not a plan for unlawful conduct;
2 awareness of and participation in that plan has no
3 implications for involvement in a single overall
4 infringement.

5 We have included at paragraph 9 a reference to the
6 latest decision of the General Court on this topic,
7 which came out after our hearing, on 27 June. If I can
8 just refer you, this is behind annex 1 to our reply. If
9 you go to paragraph 141 (Magnum), you see the heading
10 "Findings of the Court", it says:

11 "It should first be recalled the concept of a single
12 infringement covers a situation in which a number of
13 undertakings have participated in an infringement
14 consisting in continuous conduct in pursuit of a single
15 economic aim designed to distort competition or in
16 individual infringements linked to one another by the
17 same object, all the elements showing the same purpose
18 and are subject to the same undertakings."

19 Then they point out it could be a series of acts or
20 continuous conduct.

21 "Where the various actions form part of an overall
22 plan because the identical object distorts competition,
23 the Commission is entitled to impute responsibility on
24 the basis of participation in the infringement
25 considered as a whole."

1 Then at 144:

2 "It must also be noted that the concept of a single
3 objective cannot be determined by a general reference to
4 the distortion of competition on the market concerned by
5 the infringement, since an impact on competition, as
6 object or effect, constitutes an essential element of
7 any conduct covered by Article 81.1. Such a definition
8 of the concept of a single objective would deprive the
9 concept of a single and continuous infringement of part
10 of its meaning, since it would mean that different
11 instances of conduct relating to a particular economic
12 sector ... would have to be systemically characterised
13 as constituent elements of a single infringement. Thus,
14 for the purposes of characterising various unlawful
15 actions as a single and continuous infringement, it is
16 necessary to establish whether they display a link of
17 complementarity in that each of them is intended to deal
18 with one or more consequences of the normal pattern of
19 competition and, through interaction, contribute to the
20 attainment of the set of anticompetitive effects desired
21 by those responsible, within the framework of a global
22 plan having a single objective."

23 So the point is that you have to have established
24 a global plan with a single anticompetitive objective in
25 order for this concept to have any application. That

1 was originally the OFT's case, it is no longer the OFT's
2 case, so we say this goes.

3 Item 3 is no strong and unusual context to make it
4 clear there was a horizontal element. So this is
5 a reference to paragraph 106 of Toys and Kits. Now,
6 I want to deal in some detail with Toys and Kits and
7 I suggest that I do it a little bit later and I'll pick
8 this point up when I do so.

9 The final point is no basis for drawing inferences
10 to fill gaps. That's the point that no covert plan was
11 put to any witness. It was not put to any witness that
12 there was a covert plan and, in that situation, we are
13 not within the Aalborg Portland line of authority, we
14 are squarely in the Tobacco situation where there's no
15 covert plan, there is an ERA, and therefore the evidence
16 has to be produced to demonstrate all the elements of
17 the infringement.

18 The next topic is the OFT's allegations that Tesco
19 has changed its case. I don't propose to deal with this
20 orally. What we note and invite the Tribunal to note is
21 that the OFT has only identified two instances and, in
22 both of those instances, what has happened is simply
23 that Tesco's understanding of particular documents has
24 developed as more information has become available that
25 puts those documents in context. That's all. We submit

1 that that's entirely what you would expect.

2 The next topic is the consequences of the OFT's
3 failure to call witnesses. Now, I have dealt with this
4 at very great length and I don't intend to trespass for
5 very long today on your patience on this topic, but I do
6 want to draw your attention to the submission that we
7 make at paragraph 27 because this is now a hard-edged
8 submission of law.

9 We submit that on the particular facts and
10 circumstances of this case, it would be procedurally
11 unfair, and therefore unlawful, for this Tribunal to
12 find that either Asda or Sainsbury's had the requisite
13 intent. We submit that finding is not open to this
14 Tribunal in the light of the circumstances that have
15 developed and the failure to call witnesses. The
16 essential reason that we say that is that the OFT is
17 inviting this Tribunal to draw an adverse inference of
18 intent in relation to those third parties, which is an
19 essential element -- this is common ground -- an
20 essential element of this case against Tesco, and an
21 element which the OFT has the burden of proving, in
22 circumstances in which the OFT had itself interviewed
23 the crucial individuals, respectively Sarah Mackenzie
24 and David Storey, and had interviewed them about
25 relevant matters, and in which they had given evidence

1 which the OFT admits went both ways, including evidence
2 that was supportive of Tesco's position, and that the
3 OFT had powers under the ERAs to require Asda and
4 Sainsbury's to cooperate in the provision of evidence
5 and took a considered decision on no fewer than four
6 occasions not to call those individuals to give
7 evidence, and did so in the knowledge of the Tribunal's
8 finding in the Tobacco judgment, in the knowledge of the
9 centrality of that evidence to the appeal.

10 We submit that, in that situation, the OFT's conduct
11 deprived Tesco of the opportunity to test the case made
12 against it on the intent of Asda and Sainsbury's and, in
13 particular, the OFT has placed heavy reliance on the
14 corporate admissions made by both Asda and Sainsbury's
15 to support its case on various elements of these cases,
16 not just intent but on, for example, whether Sainsbury's
17 was providing future pricing information in 2003.

18 By relying on those admissions, those bare
19 admissions, and not calling the witnesses, it has
20 deprived Tesco of the opportunity to test that evidence
21 and meet the case properly. We submit that it would not
22 be fair, in those circumstances, for the Tribunal to
23 conclude that the OFT has proved its case against Tesco
24 about the intent of those third parties. It was
25 incumbent on the OFT to call those witnesses or, at the

1 very least, to explain why they were unavailable to it.
2 It's in no position to say the witnesses were
3 unavailable because it concedes that it made a decision
4 not to try to contact them and didn't try to contact
5 them.

6 Let me just give one example of where the OFT's
7 failure to call these witnesses leads it, and there are
8 many examples in the OFT's closing submissions, but this
9 is just one example. This is in relation to Asda. It's
10 strand 1 of 2003. If you go to page 310 of the OFT's
11 closing submissions -- paragraph 310. The issue here
12 was Asda's intent in 2003 in supplying McLelland with
13 future retail pricing information. The point is that
14 there's an internal McLelland document which indicates
15 that that was supplied by Asda for the purposes of
16 labelling.

17 If you go to 311:

18 "In this regard, Tesco argues that the email shows
19 that the information was provided for labelling purposes
20 and so there was a legitimate explanation."

21 Let's just look at the email so you can see what
22 we're talking about. It's document 106 (Magnum) in
23 volume 2. This is Gerry Doyle who, you will recall, is
24 the logistics manager at McLelland who deals with things
25 like packing and labelling.

1 **LORD CARLILE:** Operations manager?

2 **MISS ROSE:** Operations manager, that's right.

3 "Further to my telephone conversation with Tom, who
4 confirmed that Asda would be moving to new retails
5 effective from Monday 29th, I urgently require the
6 following information before I can proceed with the
7 price change."

8 And he asks for all the details he needs for the
9 labelling.

10 So that's the basis of the submission that Asda has
11 given future retail pricing information to McLelland
12 with the intent that it should be passed to its
13 competitors, the fact that that information has been
14 given for the purposes of labelling.

15 Now, what do the OFT say about this? They say:

16 "However, a close reading of the email does not
17 demonstrate this. What is apparent is that Tom Ferguson
18 had informed Gerry Doyle that Asda would generally be
19 moving to new retails from Monday the 29th."

20 It doesn't say "generally", it simply says "would be
21 moving to new retails".

22 "Gerry Doyle, who was in charge of operations, then
23 asked various questions, which customers, what products,
24 to identify whether there were labelling issues
25 arising."

1 Then they say this:

2 "It appears therefore that Asda's information was
3 not necessarily confined, when provided, to products
4 requiring labelling by the processor. Although some
5 products supplied by McLelland to Asda required price
6 labelling by McLelland, others such as the deli lines
7 did not."

8 Sir, there's obviously no mention of deli lines
9 anywhere in this email. The thought process the OFT is
10 going through is this, it says, well, when Mr Doyle is
11 sending this email, he just refers to Asda moving to new
12 retails, he doesn't identify any particular products; we
13 invite the Tribunal to draw the inference from that that
14 we, the OFT, have established on the balance of
15 probabilities that Asda gave information about
16 categories that did not have to be packed by McLelland,
17 including deli, and that therefore it did so without
18 a legitimate motive, and that therefore it did so with
19 the intent that that information should be passed to
20 Tesco.

21 That's the chain of reasoning from the party that
22 has the burden of proof, from the party that could have
23 called David Storey. It never even asked David Storey
24 this question in interview.

25 Sir, this is just one example, and you will see

1 chains of reasoning like this peppered through the OFT's
2 closing submissions. It is a self-inflicted wound. It
3 is the result of the tactical decision that they made
4 that they were not going to call this evidence.

5 Sir, I now turn to the substantive legal issues.

6 **LORD CARLILE:** We'll have to have a break at some point for
7 the LiveNote team.

8 **MISS ROSE:** Yes, sir. This is probably a convenient moment
9 for us to do that.

10 **LORD CARLILE:** We'll have a ten-minute break.

11 (11.32 am)

12 (A short break)

13 (11.50 am)

14 **MISS ROSE:** Sir, I was coming to the substantive law and
15 there are just a couple of points that I want to pick up
16 from the OFT's closing submissions on this. First of
17 all, paragraph 23, this is where the OFT is dealing with
18 the Anic presumption, paragraph 23.3.

19 **LORD CARLILE:** Sorry, bear with me for a moment.

20 **MISS ROSE:** Page 10.

21 **LORD CARLILE:** There are a lot of subparagraphs in this
22 document.

23 **MISS ROSE:** There are, yes, sir.

24 **LORD CARLILE:** Right, page 23.

25 **MISS ROSE:** They are talking here about the Anic

1 presumption, the presumption of use. They say:

2 "The OFT does not suggest it's impossible for the
3 presumption to be rebutted, it might be a decision by C
4 to adopt a particular course of action that had been
5 worked out in its full particulars, formally, clearly
6 and irrevocably taken prior to receipt of A's
7 information. This decision could not conceivably have
8 been influenced by that information. However, the
9 circumstances in which such independent action could be
10 demonstrated to the necessary level of certainty are
11 likely to be extremely rare. Compelling and detailed
12 proof would be required."

13 Now, there is no authority cited for that
14 proposition. What they seem to be asserting is that the
15 Anic presumption somehow operates so as to place
16 a burden on the company somewhere close to beyond
17 reasonable doubt.

18 Now, we submit that's complete nonsense. The Anic
19 presumption is an ordinary evidential presumption. The
20 position is that you start from the proposition that if
21 it is shown that sensitive future retail pricing
22 information has been exchanged between parties with the
23 requisite intent, the requisite anticompetitive intent,
24 you presume they used it unless you can show they
25 didn't -- unless they can show they didn't. It's as

1 simple as that. There may be all sorts of circumstances
2 in which they can show they didn't, but they only have
3 to show that they didn't to a normal evidential
4 standard.

5 There's one excellent example of the circumstances
6 in which, if there was an Anic presumption in this case,
7 which we say there isn't for all sorts of reasons, it
8 would be rebutted, and that is relation to strand 2, the
9 fact that the prices were coming in at 9 o'clock the
10 next morning. If you're given future retail pricing
11 information at 5.00 pm, you cannot act upon it if it's
12 coming in at 9 o'clock the next morning when the shops
13 open. That rebuts the Anic presumption. There's no
14 need for the sort of extreme circumstances that the OFT
15 posits, and we submit that this submission by the OFT
16 here is wrong in law.

17 **LORD CARLILE:** Sorry, I'm struggling with your proposition.
18 There's another example given I think in a footnote
19 here, which is the insider dealing presumption, where
20 one director, one nonexecutive director is insider
21 dealing and another nonexecutive director picks up
22 a whiff of it and sells some shares. The Anic
23 presumption may or may not apply in those circumstances,
24 it's a matter of evidence.

25 In the situation here, accepting for the moment, as

1 appears to be supported by the evidence, that the change
2 was taking place anyway the following morning, how does
3 that really rebut the presumption, if we go for the
4 presumption, there may be other extraneous evidence too,
5 how does that rebut the presumption?

6 **MISS ROSE:** Because to the extent the information was
7 future, it was so imminently about to take effect that
8 the recipient of the information couldn't take advantage
9 of it.

10 Let me give you an example in relation to insider
11 dealing.

12 **LORD CARLILE:** Sorry, forgive me for stopping you again.

13 They may not be able to take advantage of it.

14 **MISS ROSE:** Yes.

15 **LORD CARLILE:** That may be a consequence of the fact that
16 there's going to be an increase in prices the following
17 morning in any event --

18 **MISS ROSE:** No, no, sorry, sir. It's not that Tesco is
19 increasing its prices.

20 **LORD CARLILE:** No, no, I understand.

21 **MISS ROSE:** It's that the information is that someone else
22 is going to increase.

23 **LORD CARLILE:** Yes.

24 **MISS ROSE:** That's the information.

25 **LORD CARLILE:** That's the information.

1 **MISS ROSE:** Yes.

2 **LORD CARLILE:** But nevertheless, isn't it equally possible,
3 or at least possible, that the fact that the prices are
4 being increased by somebody else the following day is
5 just coincidence, it's just happenstance, but
6 nevertheless there may still be the intent to act upon
7 such information?

8 **MISS ROSE:** Sir, I think we're at cross-purposes, sorry.

9 What I'm addressing here is the presumption of use.
10 The point is that, if it's established by the OFT that
11 sensitive future retail pricing information was
12 exchanged between two parties, and that they did so with
13 the requisite intent, in order to establish infringement
14 it's not enough that information is exchanged, it must
15 also have been used. The information must have been
16 used.

17 **LORD CARLILE:** The evidence may be relevant to another
18 infringement, may it not? If the information that is
19 given in relation to alleged infringement A turns out to
20 be true, then if similar information is given in
21 relation to alleged infringement C, D, E, the other
22 party may take it that it's likely to be true and act
23 thereon.

24 **MISS ROSE:** Sir, I accept that you might have a situation in
25 which the transmission of demonstrably reliable

1 information on one occasion might affect the inference
2 you drew about intent.

3 **LORD CARLILE:** That's what I meant.

4 **MISS ROSE:** An inference about intent. But, sir, that's not
5 the point I'm on. What I'm looking at is the question
6 of a presumption of use, use of the information.

7 The point is simply this, to take the insider
8 dealing analogy, if I tell you at midnight that
9 something is going to happen to a company at 6 o'clock
10 in the morning before the stock market opens, you've got
11 inside information and you may be desperate to use it
12 but you can't use it because the stock market hasn't
13 opened. By the time the stock market opens the
14 information is public so you can't use the information.

15 It's the same point.

16 **LORD CARLILE:** Okay, I understand.

17 **MISS ROSE:** That if by the time you could act on the
18 information it's public, then the Anic presumption of
19 use is rebutted. That's the only point I make.

20 But the submission I'm making here is that the legal
21 standard for rebutting the Anic presumption is a normal
22 standard of balance of probabilities, it's not the very
23 high standard of certainty that the OFT posits at
24 paragraph 23.3.

25 **LORD CARLILE:** Thank you.

1 **MISS ROSE:** The next key issue is in relation to the law on
2 state of mind. Now, there are, with respect, multiple
3 errors in the OFT's approach to this. The first is in
4 relation to a situation that's not this case,
5 a situation where there's a direct transfer of
6 information between retailer A and retailer C.

7 If you go to paragraph 20 of their submission, they
8 say:

9 "Where future pricing information or indications of
10 future market conduct are disclosed directly by one
11 competitor to another, ie from A to C, there is no need
12 to examine the parties' state of mind."

13 That's wrong as a matter of law. I made this
14 submission I believe in opening that, when you have
15 a direct transfer, in 99 out of 100 cases, or 999 out of
16 1,000, it will be obvious what the party's state of mind
17 is because, if I tell you something, you can assume
18 I intend to tell you something. That doesn't mean that
19 you don't need to examine my state of mind, it means
20 that the answer to that examination is usually obvious
21 and so the examination will be extremely brief.

22 But there may be circumstances, indeed there are
23 circumstances, in which there would not be the requisite
24 intent. An example is if somebody accidentally
25 overhears what somebody else says or if there's mistaken

1 identity. So I think I'm talking to the new office
2 junior about my retail pricing information and I'm
3 actually talking to a competitor from Asda.

4 So there are circumstances in which state of mind
5 would certainly -- it's always relevant, but in which it
6 would require detailed examination. So we say that is
7 wrong as a matter of law.

8 That is important because it shows that the OFT is
9 starting from the wrong place. They are failing to
10 understand what is necessary in order to show concerted
11 practice. A concerted practice is always about
12 consensus and the knowing substitution of cooperation
13 for the risks of competition, and that's so whether
14 you're talking about direct or indirect transmission.
15 What is different about those circumstances is that,
16 once you are talking about a case in which I have no
17 contact with my competitors at all, I only have contact
18 with my suppliers, and you, the OFT, are seeking to
19 prove that in fact I am communicating with my
20 competitors, the task for the OFT is much, much more
21 difficult because at that point the OFT has got to show
22 that, even though I'm talking to B, I'm actually
23 intending to communicate with C. That's why state of
24 mind is at the centre of this case when it wouldn't be
25 at the centre of a case about direct transmission, but

1 it's equally important in both cases.

2 Now, indirect transmission they deal with at
3 paragraphs 25 to 35. I've just made the submission
4 that, in such a situation, the requisite state of mind
5 becomes much more difficult to establish. It doesn't
6 follow from that, as the OFT seems to imply, that that
7 means they're excused from having to establish it
8 because it's hard to do.

9 The underlying theme of this part of the OFT's case,
10 with respect, seems to be that because it's hard to show
11 that a person who was communicating with B is actually
12 intending to communicate with C, it means that either
13 they shouldn't have to prove all this with evidence, it
14 could simply be inferred, or the standard has to be
15 lowered so that they don't have to show an intent on my
16 part to communicate with C, it's enough to show that
17 I was reckless as to whether my communication would be
18 passed to C, or whether I was even negligent, I didn't
19 realise that there was a risk, but it was an obvious
20 risk, that what I said would be passed to C.

21 That's the basis on which they are arguing for
22 a lower standard. We say that is completely the wrong
23 approach as a matter of principle because what the
24 Competition Act requires, and this is ultimately
25 a question of statutory construction, let us not forget,

1 what the Competition Act requires is the establishment
2 by the OFT of a concerted practice. And a concerted
3 practice means knowing substitution of cooperation and
4 consensus. It is analogous to agreement though it is
5 not as fixed or formal as agreement.

6 It is no surprise that that type of cooperation has
7 been established where there is only indirect
8 communication in only a tiny number of cases. In fact
9 we only know of two cases in which that has ever been
10 established, which are Toys and Kits, and never been
11 established in Europe. That's simply because it's very
12 difficult to show that it's happened. It doesn't mean
13 that it should be made easier.

14 So we do submit that what the OFT is now seeking to
15 do in these submissions is to extend the scope of the
16 hub and spoke infringement established in Toys and Kits
17 both legally and evidentially beyond the proper ambit of
18 the statute. They do that first, we say, on the basis
19 of a misreading of the decision of the Court of Appeal
20 in Toys and Kits. If we can take up the authorities,
21 it's volume 2, tab 9 (Magnum).

22 Mr Morris made the submission that it was possible
23 to derive from this decision of the Court of Appeal the
24 proposition that it was sufficient to establish an
25 infringement if party A appreciated that information

1 that they gave to their supplier might be passed to
2 their competitor. We submit that is not correct.

3 We need to start at paragraph 90. At paragraph 90,
4 the court analyses the findings of fact in the Kit case
5 and they say:

6 "The Tribunal referred to what Mr Whelan would have
7 realised. It is said JJB was making complaints and
8 using its bargaining power with a view to affecting the
9 discounting practice of a competitor. That is to say,
10 in order to see that Umbro did something to present
11 Sports Soccer from discounting or persuade it not to
12 discount."

13 So the starting point is a finding that the intent
14 of retailer A is to stop retailer C from discounting and
15 to pressure the supplier to get retailer C to do that.
16 So you start with that crucial anticompetitive intent in
17 relation to your competitor.

18 In the middle of the paragraph, the Tribunal said:

19 "Leading Umbro to consider ways of limiting
20 discounting was one of the principal purposes, or at
21 least the reasonably foreseeable effect of the
22 conversations in which JJB complained. That's reflected
23 in paragraph 596, those complaints were intended or had
24 the reasonably foreseeable effect of putting commercial
25 pressure on Umbro to do something about discounting."

1 Then they say this:

2 "Given the terms of the complaints and the strength
3 of Mr Whelan's views, not to mention his evident
4 commercial acumen and experience, we do not understand
5 the basis for the Tribunal's apparent hesitation in
6 including in these paragraphs that the complaints were
7 intended to have the result of forcing Umbro to tackle
8 the question of Sports Soccer discounting. It is
9 another question whether JJB did expect or should have
10 expected that Umbro would threaten to limit Sports
11 Soccer's supplies to persuade them to agree to raise the
12 prices, but all the evidence reviewed in the passage
13 from 400 onwards about the pressure JJB did bring to
14 bear seems to us to lead to the conclusion that it was
15 intended to make Umbro face up to the issue of Sports
16 Soccer's discounting rather than this was no more than
17 a reasonably foreseeable consequence which subjectively
18 they may not in fact have foreseen. Nothing the
19 Tribunal said about Whelan suggests he is someone who
20 would not realise the reasonably foreseeable
21 consequences of something said by him in this sort of
22 commercial context. Accordingly, it seems to us,
23 pressure applied should be seen as imposed with a view
24 to affecting the discounting activities of
25 a competitor."

1 So that's the crucial starting point, clear finding
2 by the Court of Appeal that there was anticompetitive
3 intent.

4 Then at 91:

5 "That being so [in other words, in the light of the
6 finding we have just made about intent], we do not need
7 to decide in the context of the football shirts appeal
8 whether Mr Lasok's criticism of paragraph 659 referred
9 to at paragraph 32 above is justified."

10 If you just flick back to paragraph 32, you will see
11 that the criticism made by Mr Lasok was the criticism of
12 the formula:

13 "... if one retailer A privately discloses ... its
14 future retail pricing intentions in circumstances where
15 it is reasonably foreseeable that B might make use of
16 that information ... "

17 So that was the formula.

18 They say given the finding they've made about intent
19 they don't need to make a finding about it.

20 "But it does seem to us the Tribunal may have gone
21 too far, in that paragraph, insofar as it suggests that
22 if one retailer A privately discloses to a supplier B
23 its future pricing intentions 'in circumstances where it
24 is reasonably foreseeable that B might make use of that
25 information to influence market conditions' and B then

1 passes [it] on to a competing retailer C then A, B and C
2 are all to be regarded as parties to a concerted
3 practice. The Tribunal may have gone too far if it
4 intended that suggestion to extend to cases in which A
5 did not, in fact, foresee that B would make use of the
6 pricing information ... or in which C did not, in fact,
7 appreciate that the information was being passed to him
8 with A's concurrence. This is not such a case on the
9 facts."

10 Now, that's the crucial passage where the Court of
11 Appeal sets the boundary between what they definitely
12 think is okay and what they think is likely not to be
13 okay. Although I accept they don't make a final finding
14 on, it because they say they didn't need to, they give
15 a pretty clear steer that anything going beyond a case
16 in which A in fact foresaw B would make use is going too
17 far. That's very clear, we submit, from paragraph 91.

18 What we then have is a detailed analysis starting at
19 paragraph 92 of the communications between JJB, Umbro
20 and Sports Soccer where they seek to discern the extent
21 to which this test is satisfied. I do invite you to
22 read the whole of this passage. If you go, for example,
23 to paragraph 94 --

24 **LORD CARLILE:** I have certainly read up to the end of
25 paragraph 101.

1 **MISS ROSE:** Yes. Well, this is the crucial passage. In my
2 submission, what you find in these paragraphs are
3 detailed findings by the Court of Appeal to substantiate
4 the point that JJB did envisage that the information
5 would be passed to Sports Soccer. If you look, for
6 example, at 96. If we look at 95 first, you see first
7 of all ample evidence that the purpose of the disclosure
8 was anticompetitive, and then:

9 "In those circumstances, it seems to us more than
10 somewhat artificial to suggest Sharpe did not envisage
11 the information would be passed on to Sports Soccer."

12 By the way, on 95, this seems to be the source of
13 the OFT's obsession with the establishment of legitimate
14 purpose, because what's said is:

15 "There was ample evidence, especially from the
16 pressure brought to bear by JJB on Umbro, that the
17 purpose of the disclosure was anticompetitive. Absent
18 any basis for a suggestion there was some different and
19 legitimate purpose to the disclosure, the OFT's burden
20 of proof had been discharged."

21 **MR MORRIS:** Sir, with respect, the legitimate purpose case
22 is a case positively proffered by Tesco in their
23 evidence.

24 **MISS ROSE:** Sir, Mr Morris has had his opportunity to make
25 his submissions --

1 **MR MORRIS:** I think I'm entitled to correct my opponent when
2 she says things which are not accurate and apt not to
3 represent the picture.

4 **MISS ROSE:** Sir, I don't accept that that's not accurate but
5 let's move on.

6 The point I make is that what the Court of Appeal
7 says at the end of paragraph 95 is said in the context
8 of the finding they've already made at paragraph 90 to
9 the effect that the intent was anticompetitive.

10 If you like, there is an underlying global plan
11 which is to distort competition. The plan was to put
12 pressure on Umbro to force Sports Direct (sic) to cut
13 their retail price -- sorry, not --

14 **LORD CARLILE:** Paragraph 102 seems to me to wrap up this
15 whole section, doesn't it? It is obviously a question
16 of evidence, but that's the conclusion --

17 **MISS ROSE:** I want to come to 102 in a minute but I just
18 want to establish this point.

19 The point that I make is that the reference to the
20 fact that the OFT has established the burden of proof in
21 the absence of a suggestion that there was a different
22 and legitimate purpose is in the context of the finding
23 that has already been made, that there was ample
24 evidence that there was an anticompetitive purpose. It
25 cannot be the source of a proposition that where

1 a retailer has normal commercial conversations with its
2 supplier, without the establishment of any overarching
3 anticompetitive plan, that there is any onus on the
4 retailer to establish that there was a legitimate
5 purpose for the passage of each piece of information.

6 You will see, obviously, the relevance of this
7 submission in relation to strand 3, which I'm going to
8 come back to later.

9 **LORD CARLILE:** What if the Tribunal were to conclude that
10 they were not normal commercial conversations?

11 **MISS ROSE:** Sir, the Tribunal has to make a positive finding
12 as to what has been proved to have been the intent of
13 Tesco in those conversations, the burden being on the
14 OFT. So we're not in a situation where there's any
15 overarching presumption applying that assists the OFT.
16 It's not a question of are they normal conversations or
17 not? Are they legitimate or not? What the OFT has to
18 prove is that there was an intent for the information to
19 be passed on.

20 **LORD CARLILE:** Let me tell you what's concerning me about
21 these submissions because I want you to have the
22 opportunity to respond.

23 A dogmatic assertion that it would be wrong in law
24 to make a presumption is probably right. But supposing
25 you have a situation in which Tesco is given some

1 information, in all innocence, but they acquire that
2 information, and then the Tribunal concludes,
3 hypothetically, that they've gone through a thought
4 process which says, "Ah, now we can get this sort of
5 information, and we're given it, we're going to make use
6 of it, and we are now going to become complicit in
7 a collusive agreement albeit that we were given the
8 first set of information in all innocence".

9 It's open to the Tribunal to conclude that they have
10 become complicit in the collusion, albeit that they
11 never intended initially to be involved in any form of
12 collusion, isn't it? That's just evidence.

13 **MISS ROSE:** Sir, you would need to unpick that because you,
14 first of all, would have to ask the question, how is the
15 information reaching them, and was it sent by somebody
16 who was intending that information to be passed to
17 Tesco? Because, if that information was passed to Tesco
18 because of a breach of confidence on the part of the
19 supplier, then there is no conceivable infringement
20 arising out of that transmission. Similarly, if the
21 information is received by Tesco, not appreciating that
22 it has been transmitted from a competitor with the
23 intent it should be passed to the supplier, there's no
24 infringement.

25 Now, I think you're asking me about what the

1 implication of that is for later conduct by Tesco, which
2 is what Mr Morris deals with under the heading of
3 "Disclosed having received", the situation where Tesco
4 passes on information having received it.

5 I'm going to come on and deal with that point when
6 we come to the question of state of mind, so can I
7 indicate to you that, yes, I appreciate it's of concern
8 and I will deal with it but I need to deal with it in
9 its proper place.

10 **LORD CARLILE:** All right.

11 **MISS ROSE:** To put the matter in summary, our position is
12 that we accept that, as a matter of principle, it would
13 be relevant if it were shown that Tesco had received
14 from a particular processor information which it
15 understood to be confidential future retail pricing
16 information, that if Tesco then transmitted without
17 a legitimate reason confidential information to the
18 supplier, when you were asking what Tesco's intent was
19 in that transmission, the previous receipt would be
20 relevant. I don't suggest it would be irrelevant, it
21 would be a relevant factor, but that depends on all the
22 facts and that's what we're going to come to.

23 **LORD CARLILE:** Right, thank you.

24 **MISS ROSE:** Now, just going back to the findings of fact
25 here, at 97, where there's more detailed findings of

1 fact, you see at the end of 97 the finding:

2 "He must have realised that what he told Mr Ronnie
3 about Sports Soccer's intentions would correspondingly
4 be passed back to the others including necessarily JJB".

5 So there again, another positive finding.

6 Then 102, they say:

7 "In these circumstances, it seems the Tribunal was
8 entitled to find that JJB provided confidential price
9 information to Umbro in the circumstances and that it
10 was obvious that it would or might be passed on in
11 support of Umbro's intent."

12 Now, Mr Morris relies on that to suggest that
13 suddenly the Court of Appeal is adopting a different
14 test from that which it endorsed at paragraph 91 and
15 it's saying it's sufficient as a matter of law if JJB
16 envisaged that it might be passed on. But all that the
17 Court of Appeal are doing here are summarising the
18 finding that the Tribunal make because, of course, the
19 Tribunal did make a finding in the alternative either
20 that they knew or that it was obvious that it would or
21 might be passed on. And all that the Court of Appeal
22 are saying is that, given the overwhelming evidence,
23 first that there was an anticompetitive intent and that
24 both parties knew that the information would be passed
25 on, the Tribunal were entitled to make this finding.

1 They're not seeking to set up a different test
2 though, and we see that at 104 where they say:

3 "It seems to us plain that 'knowingly' must in
4 context refer to the knowledge of JJB and Sports Soccer
5 respectively that their pricing intentions would be
6 passed on by Umbro to the other. For the reasons
7 already given, it seems to us this finding was
8 justified."

9 Now, of course, the different interpretation that
10 Mr Morris seeks to place on this passage we submit makes
11 no sense at all of the Court of Appeal's judgment,
12 because it certainly makes no sense of paragraph 91
13 which is directly inconsistent with that interpretation.

14 Can I now look at paragraph 106, which is over the
15 page. Paragraph 106, here the Court of Appeal are
16 dealing with the concern that this decision might impede
17 freedom of discussion between manufacturers and their
18 customers:

19 "... in relation to matters which both parties need
20 reasonably to be able to discuss, including actual
21 likely retail prices, profit margins and wholesale
22 prices or terms of sale."

23 They say:

24 "[This] ought not to be seen as casting any cloud of
25 illegality over such discussions, so long as they are

1 conducted on a bilateral basis and limited to
2 discussions of the nature described ... there is a risk
3 that discussions about possible prices, or about
4 historic prices, can tend towards discussion of future
5 prices, and agreement as to what they should be."

6 They say that you should be aware of that risk and
7 avoid it.

8 "But this case is not about such discussions at all.
9 Nor does it outlaw complaints by a wholesale customer to
10 its supplier in general, especially if they are directed
11 at getting better [business] terms ... In the present
12 case the complaints did not have that aim, and the
13 discussions between manufacturer and customer had
14 a strong and unusual context which makes it clear that
15 there was a horizontal element in the subject of
16 discussion."

17 Now, this was the subject of some debate between
18 you, sir, and Mr Morris about what was meant by the
19 "strong and unusual context which makes it clear there
20 was a horizontal element". My submission is that what
21 the Court of Appeal are talking about there is the
22 finding that they have made at paragraph 90 that the
23 purpose, the intent of these discussions was to place
24 pressure on Umbro to persuade Sports Direct not to
25 discount.

1 So it's the horizontal anticompetitive intent which
2 the Court of Appeal are referring to as the "strong and
3 unusual context" which has a horizontal element. What
4 is not, with respect, appropriate is the suggestion
5 advanced by Mr Morris that because the situation in 2002
6 was unusual commercially, therefore, these discussions
7 are suspect. That's why I place weight on the
8 characterisation of the plan, and the difference between
9 a plan for an across-the-board increase in cost prices
10 and a plan for the coordination of retail prices.
11 Because a plan for the coordination of retail prices is
12 an anticompetitive global plan which provides a strong
13 and unusual horizontal context, and a plan for an
14 across-the-board increase in cost prices is not such
15 a context. It's a completely normal, general context
16 whenever a cost price rise is raised.

17 Now, it is therefore important to analyse, what is
18 it that's unusual about the situation in 2002? What is
19 unusual in 2002 is that the reason for the proposal for
20 the cost price increase is not market forces or
21 increased costs in the supply chain, but is external
22 pressure being applied by the farmers in an industrial
23 and political context. That external pressure is having
24 commercial impacts on Tesco and the other retailers and,
25 of course, on the processors, because the farmers are

1 blockading depots and blockading supermarkets and
2 Christmas is just around the corner.

3 Now, that unusual context has certain implications
4 for the proposal that's made. The first and most
5 important implication it has is that the proposal that's
6 made is public. It has to be public because the aim is
7 to placate the farmers, so the farmers need to know that
8 their concerns are being addressed, and that's why there
9 are so many press releases.

10 The second point is that the proposal is being made
11 to everybody, but that is not unusual because any
12 proposal for a cost price increase is always going to be
13 made to all major customers. It is the publicity of the
14 proposal and the context in which it arises being
15 industrial rather than market forces that make the
16 situation unusual. Those circumstances are unusual but
17 they don't have horizontal implications.

18 So that's an important distinction, we submit,
19 between this case and Toys and Kits.

20 We say that where the OFT's case leads to is
21 a completely unsustainable view of the scope of the
22 Competition Act, which would indeed cast a cloud of
23 illegality over normal commercial discussions between
24 a manufacturer or supplier and a retailer.

25 We can see this very clearly if you go to the OFT's

1 closing submissions, it's paragraph 45. This is where
2 they address what they say is the relevant state of
3 mind. There are a number of errors in paragraph 45.
4 First of all, at paragraph 1 -- this is what they rely
5 on in support of their case that less than intent is
6 sufficient to satisfy the finding of a concerted
7 practice.

8 The first point they make is that:

9 "Competition law prohibits agreements and concerted
10 practices which have as their object the restriction of
11 competition."

12 And they say it's unnecessary for them to be of
13 actual effect, provided there is potential effect, and
14 so competition law guards against the risk of
15 restriction of competition.

16 We say that's completely irrelevant because the test
17 that they're seeking to establish here is not in order
18 to decide whether there's an object infringement or an
19 effect infringement, it's to decide whether or not
20 there's a concerted practice. The relevant part of the
21 statute is, is there a concerted practice? And
22 a concerted practice is not a risky or reckless
23 practice, it is an agreed for consensus practice.

24 At 4, they say that:

25 "It is logically necessary that the Chapter I

1 prohibition will be found to be infringed in any of the
2 following circumstances, (a) where A did know, (b) where
3 A suspected, (c) where A could have known, or (d) where
4 A ought to have known that D would or might pass on its
5 confidential future pricing intentions to a competitor
6 retailer."

7 So they're suggesting that in a situation where
8 a retailer didn't know but ought to have known that
9 their supplier might pass on their retail pricing
10 information, that is sufficient to establish liability.
11 They then go on to say, moreover, where there's no
12 compelling reason for A to have given this information
13 to B and/or where A did not ask B to keep this
14 information confidential, a finding of liability on any
15 of these states of mind is appropriate. So that's why
16 I said to Mr Morris, perhaps a little harshly, a minute
17 ago that he was quite wrong to suggest that it was we
18 who were setting up legitimate aim and not him, because
19 it is the OFT's case here that, unless the retailer is
20 able to establish a compelling reason for giving
21 commercial information to the supplier, the retailer
22 will be fixed with the state of mind sufficient to
23 establish liability. That's what their submission is
24 here.

25 They also say that, even if the retailer did have

1 a compelling reason to give the information to the
2 supplier, if the retailer didn't expressly ask the
3 supplier to keep the information confidential, the
4 retailer is liable. So you can have a situation in
5 which a retailer has a commercially necessary
6 conversation with their supplier, says nothing expressly
7 about confidentiality, doesn't realise that the supplier
8 may pass it on, but ought to have done so, the supplier
9 does pass it on, there was a risk of him doing so and
10 they do, and the retailer is said to be liable.

11 Now, we say the implications of the test as set out
12 at 45.4 are truly intimidating. They would make it, in
13 practical terms, impossible for normal commercial
14 business to be undertaken in the United Kingdom. It is
15 quite extraordinary that it is the regulator putting
16 forward such a bizarre, with respect, interpretation of
17 the Competition Act here.

18 They then, over the page, go on to draw analogies
19 with various torts and equitable wrongs which we say are
20 irrelevant. Those are all situations in which the
21 relief that is being sought is compensation, not
22 enormous penalties. Of course, they are not the
23 statutory scheme with which this Tribunal is concerned.
24 That's what I want to say about the substantive law.

25 I won't finish at lunchtime, I confess it, I admit

1 it, but I will certainly finish this afternoon.

2 **LORD CARLILE:** I realised that some time ago.

3 **MISS ROSE:** We are further on than you might anticipate but
4 we won't finish by 1.00.

5 **LORD CARLILE:** Don't worry.

6 **MISS ROSE:** Establishing a state of mind. This is
7 paragraph 46 of the OFT's closing submissions. The OFT
8 says:

9 "There are four specific aspects of primary fact
10 which lead unavoidably to the conclusion that Tesco
11 acted with the requisite state of mind."

12 And they list four. We submit that all of the four
13 listed here are flawed. So the first is that they say:

14 "Tesco was aware of a plan for an across-the-board
15 increase in retail prices for cheese."

16 Two points. First of all, that is not the plan in
17 the decision. It's the point I've made ad nauseam. Can
18 I just, very quickly, show the Tribunal how this point
19 was referred to in the OFT's defence. It's in the
20 pleadings bundle. It's tab 15 of the amended defence
21 and the four factors that are listed in the closing
22 submission at 46 are dealt with at the defence starting
23 at paragraph 79, and awareness of a plan is dealt with
24 at paragraph 81. You can see that what is said is that:

25 "At the relevant times, Tesco was aware of a plan

1 which involved coordinating across-the-board increases
2 in retail prices for cheese."

3 That's the key word that has gone. At paragraph 84:

4 "As regards cheese 2002, Tesco was aware of the plan
5 for farm gate price increase and, more importantly, for
6 that increase to be achieved by a plan for a price
7 increase for cheese that was at the retail level,
8 involved all the major retailers and was coordinated."

9 That was the basis for our request for
10 particulars -- I developed all this in my closing
11 submissions -- which received the answer that
12 coordination meant acting otherwise than independently
13 from the market. That's the allegation that was not
14 pursued at the hearing. So that's the first objection
15 to element one.

16 The second element is that this is described as
17 a plan for an across-the-board increase in retail prices
18 for cheese. The plan that is being referred to now is
19 simply the plan in the Dairy Crest proposal. Sir, if we
20 just take that up, again going back to tab 25 in
21 volume 1 (Magnum), the Dairy Crest proposal. We're
22 looking at it at 25 because we often have done but you
23 need to bear in mind that this is not the email that was
24 sent to Tesco. The email that was sent to Tesco --
25 sorry, I beg your pardon, this is the right one.

1 The point I want to make is that there are other
2 versions of this sent to other retailers with different
3 covering notes but they were not known to Tesco. So,
4 when looking at this document -- and I entirely accept,
5 sir, what you put to me earlier, that this document has
6 to be read as a whole and in its context, and its
7 context is: received by Tesco under cover of this email.
8 So:

9 "Following our conversation on Friday, we can
10 confirm that Dairy Crest are to increase prices on
11 cheese, packet butter and cream with effect from
12 ■ October. We are fully committed to passing on all
13 revenue gained from this increase to our supplying
14 farmers. The attached briefing document clarifies all
15 the issues."

16 So the first point is that in the covering email
17 Mr Hirst is told that this is a proposal for a cost
18 price increase in these sectors. Then when we look at
19 the document, we're told that the background is the
20 pressure from the farmers. Then the objective:

21 "Dairy Crest aim to build on the recent retailer
22 initiative on liquid milk pricing by requesting
23 significant increases in pricing for packet butter,
24 fresh cream and cheese. All prices recovered as
25 a result of this initiative will be passed back to

1 farmers effective from date given."

2 Then specifically in relation to cheese:

3 "We propose to increase all Dairy Crest supplied
4 cheeses by £200 per tonne. The reason for an immediate
5 move on all grades is that our objective is to pass the
6 revenue gained straight on to farmers immediately."

7 So the objective is, we are increasing our cost
8 price for cheese by £200 per tonne as soon as possible
9 to pass it back to the farmers.

10 Then we get the bullet headed "UK Sourced Dairy
11 Products versus imports". That is not a notification of
12 any joint initiative involving other retailers; it is
13 simply a warning to Tesco, to whom this document is
14 addressed, that they need to be very careful before they
15 put the retail price up because the effect could be to
16 adversely impact on the competitive set of British
17 cheese versus imports. So that's that paragraph.

18 Then:

19 "If we're successful in persuading the market to
20 move, the resultant revenue gained will enable us to
21 increase raw milk prices between 1 and 1.5p per litre."

22 Again, that is talking about cost prices because
23 they're talking about the money they receive which will
24 enable them to pass the money back to the farmers.

25 The next heading is "Transparency". It's another

1 warning, it's a warning against profiteering:

2 "It should be noted that in the current climate cash
3 margin maintenance should, in our view, be the rule.
4 Percentage margin maintenance will only create
5 accusations of profiteering."

6 We submit that, when you read that paragraph and the
7 "UK Sourced Dairy Products versus imports", you cannot
8 read this document as proposing any minimum retail price
9 increase. It is clearly proposing that retail price
10 increases should be kept down and that the maximum
11 should be cash margin maintenance to avoid accusations
12 of profiteering.

13 That is not how the OFT now interprets this
14 document. The OFT is now submitting that this document
15 is a proposal for a minimum of an increase of cash
16 margin maintenance. Sir, that's at various paragraphs
17 in their closing submissions but can I just show you
18 paragraph 220.

19 **MR MORRIS:** Sir, I hesitate to interrupt but this seems to
20 us to represent a change in position from Miss Rose's
21 position in her oral closing. Day 13, page 51, lines 1
22 to 9, where it is said that --

23 **LORD CARLILE:** Hold on. It's a different file.

24 **MR MORRIS:** Day 13, page 51, at the top of the page.

25 **LORD CARLILE:** Do we have another copy of the second volume

1 of the transcripts?

2 (Handed)

3 **MR MORRIS:** I don't know if you have it.

4 **LORD CARLILE:** Page 51, yes.

5 **MR MORRIS:** Page 51, on the actual page, top right-hand
6 corner of that page, Miss Rose:

7 "What they say is that this is evidence that
8 Dairy Crest was seeking an across the board increase in
9 the cost and retail price of cheese. We don't disagree
10 with that. That's exactly what Dairy Crest were doing.
11 What we say is there's absolutely nothing wrong with
12 Dairy Crest making that proposal."

13 I point that out because it seems to me now, from
14 what is being said, that that is not now Tesco's
15 position. Obviously we've made our submissions that it
16 was, we went up hill and down dale on it, but I do
17 invite, through the chair of the Tribunal, perhaps, for
18 Tesco to explain what their position is.

19 **MISS ROSE:** Sir, there is no inconsistency. Yet again the
20 OFT persists in taking one sentence out of context. If
21 you read the whole of my submission that was made, you
22 will see it is very clear. Indeed, if you stay on the
23 same page and look at page 55, you will see what we say
24 is:

25 "What's now alleged is that this was an

1 across-the-board market-wide rise in cost prices with
2 consequential increases in retail prices, and that's not
3 unusual."

4 The point I was making was that it was appreciated
5 by everybody in the market that, if you increase the
6 cost price of cheese, it is extremely likely that there
7 will be consequential retail price rises. All that this
8 document was doing was proposing that the consequential
9 retail price rises should be limited in order not to
10 upset the competitive set and in order to ensure
11 transparency. There is no inconsistency.

12 The point I'm now making is that what the OFT say in
13 their closing submissions is that this document should
14 be interpreted as setting a minimum for the retail price
15 rise.

16 Let's go to paragraph 220 of Mr Morris' closing
17 submissions, this is where they summarise their case on
18 the Dairy Crest document. They say:

19 "The Tribunal is asked to find that it was clear to
20 all the recipients of Dairy Crest's briefing document
21 that, one, the document was being sent to all the other
22 major retailers at the same time and Dairy Crest were
23 making the same set of proposals across the market."

24 We don't disagree with that.

25 "Two, that Dairy Crest was proposing a uniform joint

1 industry initiative to raise cheese cost prices by £200
2 per tonne and retail prices by at least £200 per tonne
3 and at the same time on all British cheese."

4 That is not, with respect, a possible interpretation
5 of the briefing document, and if you look at the OFT's
6 submission you will see that formula repeated on
7 a number of occasions. It is a basic error. This
8 document is proposing a maximum retail price increase,
9 not a minimum.

10 Sir, you will recall the evidence of Arthur Reeves
11 on this issue. I don't propose to go back to it but
12 I do invite you to read carefully the evidence that he
13 gave about the purpose of this document and its content.
14 In particular, he gave evidence that the farmers were
15 not concerned about the retail price, their concern was
16 that they got their cheque, that they got the £200 per
17 tonne, but that what the farmers would be concerned
18 about is if they saw that Tesco were profiteering or
19 making extra profit as a result of this initiative.

20 So it didn't matter if the retail price rise was
21 less than £200 per tonne but he thought it did matter if
22 the retail price was more than £200 per tonne, and
23 that's why it's expressed here as:

24 "Percentage margin maintenance will only create
25 accusations of profiteering."

1 Mr Reeves' evidence is Day 5, pages 65 to 66.

2 Sir, coming back to the OFT's closing submissions,
3 we're on paragraph 46, where they're seeking to
4 establish state of mind, we've dealt with the first
5 issue. Second is that they say:

6 "Tesco's willingness to raise its retail prices was
7 conditional upon its competitors also raising their
8 retail prices at or around the same time and Tesco had
9 disclosed this."

10 There are two factual propositions in that sentence,
11 both of them, we submit, are incorrect. The first is
12 the proposition that it was in fact the case that
13 Tesco's willingness to raise its retail prices was
14 conditional on its competitors also raising their retail
15 prices. That is absolutely wrong, and indeed is not
16 even the OFT's case, because the OFT now accepts and
17 indeed asserts that Mr Scouler instructed Lisa Oldershaw
18 to agree to the Dairy Crest proposal having been told
19 himself to do that by senior management and that the
20 motivation for that was first of all that Tesco had gone
21 public with its support for the farmers and, secondly,
22 that Tesco was very concerned about the commercial
23 implications for its business if its supermarkets or
24 depots were subject to blockades in the crucial trading
25 period before Christmas. The potential commercial

1 losses from that would dwarf the 6 million or 18 million
2 that might be at stake in relation to the price of
3 cheese. You're talking about serious disruption of
4 Tesco's business nationwide in the key pre-Christmas
5 trading period.

6 Those were the reasons why Mr Scouler instructed
7 Lisa Oldershaw to agree to the cost price increase.
8 That had nothing whatever to do with any understanding
9 on the part of Mr Scouler or those above him as to the
10 willingness of other retailers to agree to the
11 proposals. Not only is there no evidence that
12 Mr Scouler or anybody above him had any such knowledge,
13 it's not even alleged by the OFT that they did.

14 Now, if we see where the OFT deal with this point,
15 it's in their closing submissions, it's paragraph 265.2,
16 page 127:

17 "Although the dates are not entirely clear from the
18 documents, the OFT suggests that on around 16 October,
19 or by 29 October at the latest, John Scouler instructed
20 Lisa Oldershaw that she had to go ahead and implement
21 Tesco's participation in the £200 per tonne cheese
22 initiative without further delay."

23 So that's accepted or asserted by them at some point
24 between 16 and 29 October.

25 Then they say:

1 "She was also given confidence at that time by the
2 information she was receiving about other retailers'
3 intended waves."

4 Now, they then make what we submit are some wholly
5 unmeritorious points about what knowledge she had at
6 this time, based on the mere fact that she was talking
7 to her suppliers. There's an inference that they seek
8 to draw, even though there's no evidence, that she would
9 have received future pricing information. But that's
10 not relevant for my current purpose. My current point
11 is this, that it's not even suggested by the OFT that
12 Mr Scouler was given confidence in giving her that
13 instruction by any knowledge that he had about the
14 future retail pricing intentions of other retailers.
15 The fact is that Tesco decided to implement this
16 initiative and instructed Lisa Oldershaw to implement it
17 without delay for commercial reasons that had nothing at
18 all to do with the future retail pricing intentions of
19 other retailers.

20 That meant that Lisa had to accept a £200 per tonne
21 cost price increase and inevitably would have to put her
22 retail prices up.

23 The implications of that we have explored at length
24 but we know that she had two weeks under the basket
25 policy in which she could remain out of line. If people

1 followed her up, well and good. If they didn't follow
2 her up, she had a number of choices: she could remain
3 uncompetitive, above her competitors, or she could bring
4 her price down and seek to recoup her margin from
5 a variety of different sources. She has hundreds of
6 lines of cheese, only some of which are British cheeses.
7 The Value cheeses we know are not part of this
8 initiative, so she has other sources where she can
9 recoup her margin, and we explored the availability of
10 promotional discounting and other sources for her to
11 recover her margin.

12 So the position is that the future retail pricing
13 intentions are irrelevant to Tesco's decision to
14 implement the initiative on the OFT's own case.

15 The second proposition at 2 is that Tesco had
16 disclosed the fact that its willingness to raise its
17 retail prices was conditional on its competitors doing
18 the same. Now, that is a reference to what's
19 effectively strand 1 of the OFT's case where it is said
20 that Tesco gave such a conditional commitment either at
21 the Dairy Supply Group meeting or in conversations with
22 Dairy Crest that occurred somewhere around 25 September,
23 and they rely on the internal Glanbia notes to support
24 that proposition.

25 Now, I've made detailed submissions on those points

1 and you have my point that nothing in the Dairy Supply
2 Group meeting amounts to anything close to a conditional
3 commitment, and the suggestion that this occurred in
4 meetings between Tesco and Dairy Crest, of which there
5 is no evidence whatsoever, whether the meetings
6 occurred, still less what was said at them, we submit
7 doesn't get the OFT's case off first base. You will
8 recall that the situation was that the OFT actually
9 asked Dairy Crest about the attendees at these meetings,
10 it was told who they were, but did not ask the question,
11 what was discussed at the meetings with Dairy Crest many
12 years ago? We've explored all of that and I don't want
13 to go back to it now.

14 We submit that they have failed to establish that
15 Tesco ever said that it was willing to participate if
16 others did, and that actually the factual position is
17 that that was not the case. Tesco was going to
18 participate regardless of what others did because it had
19 much, much bigger commercial fish to fry.

20 Then 3:

21 "On several occasions, it is said, at the time when
22 Tesco disclosed its retail pricing intentions to Dairy
23 Crest and McLelland, it had already received from
24 a processor the retail pricing intentions of one of its
25 competitors."

1 That's the point, sir, that you were putting to me
2 a little earlier, that if Tesco has received sensitive
3 information that may be relevant to its intent if it
4 transmits information at a later date.

5 Now, we submit that that's a case that fails on the
6 facts of this case. First of all, the use of "several"
7 there, we say is somewhat optimistic. On analysis,
8 there are only shown to have been two occasions in this
9 case on which Tesco transmitted information about its
10 future retail pricing intentions. The first is on
11 30 October 2002 and the second is in October 2003.

12 Now, the first point to note is that both of those
13 occasions are the occasion on which Tesco is
14 communicating with its suppliers to tell them that it is
15 implementing cost price increases and, certainly in
16 2003, about the retail price increases that are
17 necessary for the supplier to know in order that it can
18 pack the cheese. There is no suggestion in 2003 that
19 Tesco communicated to McLelland any information that
20 McLelland didn't need to know in order to pack Tesco's
21 cheese.

22 So far as 2002 is concerned, at the time that Tesco
23 communicated the information about its future intentions
24 to Dairy Crest, even on the OFT's case it had not
25 received any communication of any other retailer's

1 future pricing intentions from Dairy Crest. No such
2 occasion is identified by the OFT, the only
3 communication that the OFT alleges was given to Tesco
4 before then is the 21 October email from McLelland. So
5 even on the OFT's case, there is no reason for Tesco to
6 assume or consider there's even any risk of Dairy Crest
7 passing on its information -- this is strand 3 -- when
8 it gives information about its intentions to Mr Arthey,
9 there's simply nothing.

10 In relation to McLelland, this is strand 6, where
11 Tesco gives information about its future intentions to
12 McLelland on 30 October, I'm going to return to that in
13 some detail because, in my submission, when you look at
14 what actually happens in relation to strand 6, it is
15 inconsistent that any suggestion that there was any
16 intention by Tesco that that should be passed on. I'm
17 going to come back to that.

18 In relation to 2003, we say the answer is very
19 simple. There was no occasion in 2003 when Tesco
20 received any future retail pricing information at all.
21 All of the information that Tesco received was in fact
22 current pricing and the OFT have not been able to show
23 otherwise.

24 So we say that 3 also fails on the facts, and I'm
25 going to come back in more detail to deal with strand 3

1 which is, we say, even the only potential instance for
2 this occurring, this strand 3, and which of course is
3 not actually an infringement. Sorry, not strand 3, it's
4 strand 6 is the only even potential instance of this
5 occurring and strand 6 is not an infringement.

6 The fourth is:

7 "It is said there was no legitimate reason for Tesco
8 to provide or receive future retail pricing intentions."

9 We don't suggest there was any legitimate reason for
10 Tesco to receive future retail pricing intentions, but
11 there were certainly good legitimate reasons for Tesco
12 to provide future retail pricing information which we've
13 been through at length.

14 So we say those four grounds that the OFT relies on
15 as the basis of its case against Tesco on intent all
16 fail. Not only that, we say that the OFT has in this
17 passage ignored a number of factors which are strong
18 contraindications of Tesco having the requisite intent.
19 So it's not simply that the factors the OFT relies on
20 cannot be demonstrated, it is also that there are other
21 factors that the OFT ignores which show, we say, the
22 opposite, that Tesco did not have this intent.

23 We say those factors are as follows. First, that it
24 was Tesco which raised with the OFT in the year 2000 the
25 potential anticompetitive implications of letters that

1 were being sent by other retailers at that date. The
2 OFT has not put forward any explanation of why, in 2000,
3 Tesco was anxious to avoid any possible infringement of
4 competition law but a mere two years later is an
5 intentional participant in such conduct.

6 Secondly, of course, the direct evidence of Lisa
7 Lisa Oldershaw and John Scouler that they did not have
8 any such intent.

9 Third, and this is a point I've already made, the
10 fact that the reasons why Tesco accepted the Dairy Crest
11 proposal were nothing to do with the conduct of other
12 retailers but were dictated by commercial pressures.
13 Tesco would have done so even if the other retailers had
14 declined.

15 Fourth, the absence of any documentary or oral
16 evidence which suggests that Tesco had any interest in
17 being tipped off about the future intentions of other
18 retailers, and that is in contrast to the very clear
19 evidence that you have that Tesco was extremely
20 interested in receiving information about the current
21 retail prices of its competitors and monitored them very
22 closely in store.

23 Now, if we just go to paragraph 172 of the OFT's
24 submission, there's a suggestion at paragraph 172.3 that
25 Mr Irvine accepted in cross-examination that to give

1 Lisa Oldershaw the necessary confidence to raise her
2 retail prices, and thus to enable her to agree a cost
3 increase, it was necessary to give her reassurance about
4 what was going to happen before other retailers' prices
5 were visible in store so she wouldn't delay putting up
6 her own prices.

7 The reference that's given to that by the OFT is
8 garbled in the footnote. The reference should be Day 7,
9 page 84, lines 13 and 14. If you look at that
10 transcript, you will see that there is no such admission
11 by Mr Irvine. We can turn it up.

12 At page 83, we see that Mr Irvine is explaining that
13 a good way of convincing -- this is at line 11:

14 "A good convincer in this situation would be to
15 demonstrate other people who had already risen in the
16 market, and so the ideal scenario is that the biggest
17 and the most aggressive usually go last, the smaller,
18 other ones go first, and as soon as there's visibility
19 of their prices in the market we fire it into them to
20 give them comfort that ... the market is on its way up
21 and it's safe for them to join too."

22 Sir, you ask:

23 "What do you mean by 'visibility of their prices in
24 the market'?"

25 "Answer: Sorry, so visibility of prices in the

1 market would be prices in store, if you like. So we
2 employed a guy called Eric Dixon(?), who we basically
3 sent out ... his full-time job was collecting prices
4 from stores."

5 Then he explains what Mr Dixon did to monitor prices
6 in stores.

7 Ms Smith said:

8 "Now, it wasn't just giving information about what
9 was happening in store but it was also giving
10 information about what people were going to be doing
11 because ... your concern here was about Lisa delaying.
12 If she was going to wait until people had moved their
13 prices ... she needed that reassurance earlier than that
14 so she wouldn't delay on putting up the prices?"

15 It's right that he says "Yes", but he doesn't seem
16 to be agreeing with the proposition, he's just
17 acknowledging the question because what he goes on to
18 say is:

19 "A couple of things, one is it doesn't take long to
20 get prices into store, that process is pretty quick.
21 I think the second thing is that Lisa delaying wasn't in
22 itself unexpected. ... Tesco, Asda ... very jittery ...
23 The basket of goods [was becoming] a stopping point. We
24 hadn't managed to get a price rise for five years ...
25 constantly running into problems with supermarkets."

1 So to take it from that that Mr Irvine was accepting
2 that future retail pricing information (inaudible) Tesco
3 we say is completely inappropriate. When you look at
4 his evidence as a whole, he consistently said that he
5 regarded such information as confidential, and clearly
6 what he is talking about is giving current in-store
7 pricing information.

8 The next point, we say --

9 **LORD CARLILE:** Choose your moment.

10 **MISS ROSE:** Yes, sir. If I can perhaps just finish this
11 point.

12 The next point is the lack of any substantial
13 advantage to Tesco in receiving any tip-off. Now, this
14 is one of the key obvious distinctions between this case
15 and the Toys and Kits cases because in Kits what you
16 have is one retailer furious that a competitor is
17 discounting their sportswear, putting pressure on the
18 supplier to stop them doing that, and then indirect
19 exchange of information, "All right, we won't discount
20 if you don't discount", everybody goes at RRP for the
21 crucial tournament.

22 Similarly, in the Toys case, it's about setting the
23 prices in the catalogue, it's going to be in the
24 catalogue for months ahead, and you need to have
25 confidence of what your competitor's prices are going to

1 be before you commit to your prices, because once the
2 catalogue has gone out that's the price and you can't
3 change it for a period of many weeks.

4 That's completely different from the cheese market.
5 What happens in the cheese market, you have hundreds of
6 lines of cheese and their prices are changing all the
7 time. If you're talking about fixed weight cheese, the
8 price of that cheese can go up literally overnight,
9 because the fixed weight cheese is not priced on the
10 packet, it's priced on the shelf, and the supermarket
11 can at any time decide whether to raise or lower the
12 price of that cheese.

13 If you're talking about a random weight cheese, the
14 evidence you have heard is that even in relation to the
15 random weight cheese the price could be changed within
16 a matter of three days if stocks had been run down, and
17 at the most, it could be changed within a week.

18 So the question is what is the point of the
19 retailers engaging in this kind of indirect collusion
20 simply to try to get a tip-off about how prices are
21 going to move in the future, because the prices are all
22 moving all the time anyway and there is no certainty
23 about the situation.

24 If you decide, as Tesco did, that you have to accept
25 a cost price increase, you're going to put your retail

1 price up. You will then see what your competitors do.
2 Either they'll follow you in whole or in part or they
3 wont and, if they don't, you will either bring your
4 price down in whole or in part or you'll seek to recover
5 your margin from elsewhere. But how would knowing or
6 being given a tip-off in advance make any difference to
7 those calculations? It just doesn't make any sense.

8 When you factor into that the inherent
9 uncertainties, the fact that the retailers may decide on
10 a Monday, "Okay we're going to put the price up next
11 Monday", but then decide on the Tuesday, "No, we're not
12 actually, we're going to put it up the following
13 Monday", or "Actually, we won't put it up at all", or
14 "Actually, we'll drop it", and we've seen that those
15 decisions are taken all the time, the OFT sought to
16 characterise this as a process of fixed waves, but what
17 you actually see is that the proposed dates for price
18 increases keep moving all the time and that parties
19 don't do what they say they're going to do.

20 That's the reason why Lisa says, you couldn't rely
21 on what people told you about future pricing
22 information, because they might be telling you a lie and
23 they might be telling you what they thought was a truth,
24 but it doesn't matter which it is because whichever it
25 is the retailers may change their mind tomorrow. So

1 this information simply doesn't have the retail that it
2 would have to have in order for a company of the size
3 and sophistication of Tesco to become involved in this
4 type of initiative. There just simply isn't any point.

5 The next point, if I can just make a couple of very
6 quick points and then I will stop because that would be
7 a logical moment. We will then be turning to the
8 strands so if I can just finish this.

9 In fact I've already made the next point, that the
10 only occasions on which Tesco actually disclosed its
11 future pricing intentions was the two occasions when it
12 was implementing price rises. There is no evidence of
13 Tesco communicating any future pricing intentions in any
14 other situation.

15 Now, the OFT has alleged it, and that's some of the
16 latest strands in 2002, where you get the vague
17 statement about stilton, or the statement "Tesco will
18 match Asda", and the OFT seeks to build a whole set of
19 inferences to say that that's not a statement of
20 opinion, it's a statement of information, that
21 information comes from Tesco, that information is
22 transmitted by Tesco with the requisite intent, without
23 there being any evidence to support any of those
24 propositions.

25 We submit none of those are established and all you

1 are left with is one occasion in 2002 and one occasion
2 in 2003 where Tesco transmits information when it has
3 a legitimate reason to do so.

4 The final point, which we say is the final factor
5 telling against Tesco having the intent the OFT ascribes
6 to it, is the complaints that were made by
7 Lisa Oldershaw and John Scouler to McLelland in 2003
8 when Lisa wrongly, as it turned out, believed that
9 McLelland had sent her accurate and verifiable future
10 pricing information, because it hadn't simply been puff,
11 it had been pristine labels, and that was the only
12 occasion where that was ever done and it sparked
13 a complaint.

14 We submit that the OFT has completely failed to
15 grapple with this point. They have not responded at all
16 to our submission that, if the Tribunal accepts that
17 document 110A (Magnum), the briefing note prepared for
18 the meeting on 6 October 2003, was prepared before that
19 meeting for the purpose that we say, then it fatally
20 undermines their case on intent. They simply have not
21 addressed that point and we say it's of very great
22 significance.

23 Sir, those are the contraindications on intent and
24 that would be a convenient moment.

25 **LORD CARLILE:** Right, we'll adjourn until 2.05.

1 (1.05 pm)

2 (The short adjournment)

3 (2.05 pm)

4 **MISS ROSE:** Sir, we'd reached the question of the strands in
5 2002. I just want to make a couple of very quick points
6 about strand 1 before turning to strand 2. You already
7 have my submissions on the strands that were developed
8 in our closing submissions, and you have the point about
9 strand 1, that we say no conditional commitment was ever
10 given or has been demonstrated.

11 I just want to draw your attention very quickly to
12 a couple of paragraphs in the OFT's closing submissions
13 on this. It's at paragraph 228.

14 **LORD CARLILE:** Can you give us the page number?

15 **MISS ROSE:** Yes, sir, it's page 101. 228.3 is the OFT's
16 case about what they say happened at the meeting on
17 25 September. You can just see in this paragraph how
18 the OFT build up inference on inference because, first
19 of all, they ask you to infer that the meeting is likely
20 to have happened, and then they ask you to infer that
21 Tesco at that meeting confirmed that it would
22 participate in the initiative, by which the OFT mean
23 raising its cost and retail prices across the board in
24 line with the market-wide proposal. They say that this
25 must be what occurred.

1 We submit there's just no evidential basis for any
2 of these submissions, they are based simply on thin air
3 in a situation in which the OFT had been in dialogue
4 with Dairy Crest about this very meeting and failed to
5 ask the relevant questions.

6 So that's a demonstration of the weakness of their
7 case on this.

8 You see, similarly, at paragraph 228.6, dealing with
9 the Glanbia internal note:

10 "On 25 September, Glanbia, who did not supply Tesco,
11 recorded farmers were seeking milk price increases from
12 a move in retail cheese prices. DFB called to say Tesco
13 would move if Asda moved."

14 "DFB" appears to refer to Dairy Farmers of Britain,
15 a farmers group.

16 "This information is likely to have come from Tesco
17 at the Dairy Supply Group meeting, which a Dairy Farmers
18 of Britain representative attended."

19 Again, there is nothing in any of the four notes of
20 the DSG meeting to support that bare assertion, and it
21 wasn't put to either of the witnesses who gave evidence
22 who attended that meeting.

23 Finally, 228.8 on page 103, this is on
24 27 September 2002, this is the Alastair Irvine
25 conversation with Colin Stump:

1 "In his written evidence, Mr Irvine suggested that
2 although he could not remember making statements he
3 could well have speculated. In cross-examination he
4 plumped for the option it was a statement of the
5 obvious. This is implausible. Mr Stump's note records
6 this as interesting information. Second, the
7 information is likely to have been given by Mr Irvine as
8 genuine news. If Dairy Crest was telling Asda that
9 Tesco were going to move all sectors, it is likely they
10 would also tell McLelland. Finally Mr Irvine accepted
11 in cross-examination that it was possible McLelland had
12 obtained this information from Tesco. It was therefore
13 not speculation".

14 We say, again, the chain of reasoning in that
15 paragraph is obviously unsustainable. So that's
16 strand 1.

17 Now we come to strand 2, and if we can now turn back
18 to our written reply, we deal with strand 2 in some
19 detail starting at page 16, paragraph 45. The first
20 point that we make here is that the OFT's case on the
21 nature of the information that was imparted to Tesco in
22 strand 2 has changed very significantly since the date
23 of the decision.

24 In the decision itself, the OFT asserted that two
25 pieces of information were given to Tesco in document 52

1 (Magnum). It might help, while we're dealing with this,
2 if we had document 52 open. In the decision, the OFT
3 identified two pieces of information as being given to
4 Tesco in this email which were, first:

5 "Other parties are confirming they will protect cash
6 margin on this occasion but not percentage margin."

7 And, second:

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

10 So those were the two pieces of information in the
11 decision, and the same position was taken by the OFT in
12 its defence.

13 The point that I want to make is it was not until
14 the OFT amended its defence in April of this year that,
15 for the first time, the OFT alleged that there was
16 a third piece of information imparted in this email
17 which was said to be that other retailers were
18 confirming that they would move their prices on
19 4 November for pre-pack and 11 November for deli. That
20 was a new allegation for the first time in the amended
21 defence.

22 Now, I don't object to it on that basis because
23 Tesco agreed not to take that point in return for the
24 OFT not taking a point as to whether or not Tesco had
25 put in issue the state of mind of the other retailers.

1 But the point that we make is that the OFT's case on
2 this appeal has been, throughout, that it did not need
3 to call any witnesses because the documents, it said,
4 were so clear and unambiguous on their face that they
5 established its case without the need for any
6 clarification or amplification.

7 You will recall that was paragraph 28 of the OFT's
8 defence.

9 Yet on this document, which is absolutely central to
10 the OFT's case, its interpretation of this document has
11 changed fundamentally, not only from the date of the
12 decision but actually from the date of the service of
13 its defence. We submit that that does cast considerable
14 doubt on the OFT's confidence in the clarity of the
15 material.

16 **LORD CARLILE:** But what matters is our interpretation.

17 **MISS ROSE:** Of course it does, sir. Of course it does.

18 So if we now go back to our written text, we tracked
19 through the various changes in the OFT's position, and
20 not only is there then the change as to whether or not
21 this also contains information about other retailers
22 moving on those dates, there is further shifting in the
23 OFT's position about whether that information was
24 imparted by this email or was imparted in conversations
25 that took place in the week preceding this email.

1 The only case that was put to Mr Ferguson, who is
2 the author of the email and who was one of the parties
3 to the conversations, is that the information about 4
4 and 11 November was put in this email, it was never put
5 to him that it was in prior conversations. That case
6 was put to Lisa Oldershaw. We submit that in that
7 situation the OFT is limited to the case that it put to
8 both witnesses which is that this email contains that
9 information.

10 Now, can I then turn to Tesco's case in respect of
11 each of the three pieces of information that are now
12 said to have been imparted by document 52. We start at
13 paragraph 52, page 18. So the first is the information:

14 "As we discussed last week, other parties are
15 confirming that they will protect cash margin on this
16 occasion but not percentage margin."

17 The points that we make here will be familiar to the
18 Tribunal from our closing submissions. The first point
19 is that there is no evidence that this is information
20 that was obtained by McLelland from the other retailers.
21 There is evidence that this was information that was in
22 the public domain at the time, and we've looked at the
23 various articles and press releases that indicated the
24 situation. There is no evidence that this came from
25 other retailers.

1 The second point is the information is not capable
2 of distorting competition, first, because it's not
3 individualised and, secondly, we make the point that in
4 its written closing submissions the OFT said that the
5 cash margin maintenance communication told Tesco other
6 retailers would be increasing their prices by at least
7 that much. This is related to their interpretation of
8 the Dairy Crest memo when they say that the reference
9 there to cash margin maintenance is meant to be
10 a minimum retail price rise. We say it's clear that
11 what's being said in this is that they won't go with
12 percentage margin but only cash margin.

13 So to the extent that any information is being
14 imparted at all that's not in the public domain, what's
15 being said is, "Your competitors are going to restrict
16 their retail price rises to a lower level than you might
17 otherwise have expected", and we submit again it's not
18 information capable of distorting competition.

19 The next point at page 20, paragraph (c), no
20 evidence of intent that that should have been passed on
21 to competitors, and it's difficult to see why it would
22 be advantageous to Sainsbury's or any other retailer for
23 its competitors to know that it wasn't going to raise
24 its retail prices by as much as they would otherwise
25 have believed.

1 Then Lisa Oldershaw didn't believe it came from
2 other retailers at all, let alone with their
3 concurrence.

4 Not capable of reducing uncertainty, and of course
5 we're only looking at information that can reduce
6 uncertainty. This could not, for two reasons. First,
7 she did not treat it as reliable, secondly, it was
8 already in the public domain.

9 And, finally, she did not take it into account when
10 making pricing decisions, and this information was shown
11 to be inaccurate on the following day when what
12 Sainsbury's did was to increase its prices but not to
13 maintain cash margin only. It increased its prices by
14 more than cash margin in relation to one of the two
15 cheeses, the Seriously Strong 250 grammes.

16 That, sir, is very important given the questions you
17 were asking me this morning about whether Tesco could
18 have developed intent having received information
19 innocently. Because this is the first occasion where
20 the OFT alleges that any information was received by
21 Tesco, future pricing information. It's not capable of
22 leading Tesco into believing that it's getting
23 a privileged hot line because the very next day it's
24 shown to be inaccurate. Sainsbury's do not maintain
25 cash margin only.

1 So if this information has any effect at all on
2 Lisa Oldershaw, its effect can only be to reinforce what
3 is already her mindset, which is, "I always treated this
4 sort of information as unreliable because you simply
5 couldn't tell when it was reliable and when it was
6 unreliable". Of course now the OFT are saying, "Oh,
7 well, the 6p rise is almost cash margin", but that was
8 never put to Lisa Oldershaw, and her evidence was that
9 that was not maintaining cash margin. Crucially, it's
10 not lower than cash margin, it's higher than cash
11 margin. So that's the first item of information.

12 Then the second item of information, branded
13 pre-pack retail prices, this is:

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

16 The first point is that there is no evidence that
17 Sainsbury's ever told McLelland that it was going to
18 increase its prices on branded pre-pack on 22 October.
19 All of the evidence is that McLelland's understanding,
20 apparently from Sainsbury's, was that they were going to
21 increase their price on branded pre-pack on 21 October,
22 and the two references to that are document 47 (Magnum)
23 and document 51A (Magnum).

24 Can we just turn back to them. So this is Ferguson
25 on 16 October:

1 "Sarah Mackenzie has now confirmed the position as
2 follows: Seriously Strong pre-pack will move on costs
3 and retails on 21 October."

4 And you see the same thing at the internal McLelland
5 document at 51A.

6 So there is no evidence that Sainsbury's told
7 McLelland that the price on Seriously Strong retail was
8 going to move on 22 October. Of course, there easily
9 could have been because the OFT could have called
10 Sarah Mackenzie from Sainsbury's and asked her about
11 that point but they chose not to do so.

12 **MR MORRIS:** Sir, just for the avoidance of doubt, Miss Rose
13 didn't actually take you to document 52 (Magnum) itself.
14 Obviously it's a matter for her argument, but the
15 assertion that there is no evidence, we suggest, is not
16 borne out by the document itself.

17 **LORD CARLILE:** Well, we will certainly be looking closely
18 at -- I can tell you that my notes in this connection
19 refer together to 47, 51A and 52.

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

21 **MISS ROSE:** Sir, the next point is that the OFT's
22 explanation of the difference between the 21 October
23 date and the date that's given in this email of
24 22 October, is they say Sarah Mackenzie must have
25 changed her mind about the date for the retail price

1 move between 16 and 21 October and must have told
2 Tom Ferguson about the change in an undocumented
3 conversation.

4 That was never put to her in interview and we say
5 can't be accepted in her absence.

6 There's another curiosity about the position that
7 the OFT adopts here, which is that the OFT is inviting
8 the Tribunal to accept, on the basis of the wording of
9 this email, and indeed Mr Morris has just renewed that
10 invitation, is inviting the Tribunal to accept that this
11 email is evidence that in an earlier undocumented
12 conversation different information was given by
13 Sarah Mackenzie from that that's recorded in the earlier
14 documents, a change of date.

15 **LORD CARLILE:** Can I just correct something I said because
16 I don't want to be inaccurate.

17 **MISS ROSE:** Yes, sir.

18 **LORD CARLILE:** In relation to strand 2, I have certainly
19 been looking together at 47, 51, 51A and 52. I omitted
20 51 a moment ago.

21 **MISS ROSE:** Yes.

22 Sir, just to recap the point I was making, the OFT
23 is asking the Tribunal to make a finding on the basis
24 that the wording of this email is evidence that there
25 must have been an undocumented conversation between

1 Mr Ferguson and Sarah Mackenzie in which she informed
2 him that Sainsbury's had changed its mind about the
3 date. They say the fact that that date is different
4 from the dates in the documents at 47 and 51A doesn't
5 matter because there must have been an undocumented
6 conversation.

7 Sir, contrast that with the way that they approach
8 the proposed dates for what we say are Tesco's price
9 rises, because we say that the dates -- this is going to
10 be the third piece of information. The dates of 4 and
11 11 November, 4th for pre-pack and 11 November for deli,
12 relate to proposed dates for Tesco's price move. The
13 OFT say that you should reject that on the basis that
14 there is no document that shows that Tesco was proposing
15 those dates. But we submit that the point is the same
16 both ways, what is sauce for the goose is sauce for the
17 gander.

18 If the OFT say, well, this document is evidence that
19 there must have been such a conversation where that date
20 was mentioned, even though it's not the same as the date
21 in the documents, the same applies to Tesco, that the
22 dates of the 4th and the 11th mentioned here are the
23 dates that were under discussion between Tesco and
24 McLelland. I'm going to come back in a bit more detail
25 to point 3, but I just make the point there about the

1 inconsistency between the approach that the OFT invites
2 you to adopt, the interpretation of this memo in
3 relation to the date of 22 October, and the approach it
4 invites you to adopt in relation to the dates of 4 and
5 11 November.

6 Coming back to our text, Lisa Oldershaw's evidence
7 is clear that she did not believe the information was
8 true or that it came from Sainsbury's with its
9 concurrence. Then the important point that it wasn't
10 provided until 5.00 pm on the Monday, and that the view
11 of McLelland was that by that time it was effectively
12 public information; because it wasn't capable of being
13 acted on before it was in the public domain there was no
14 possible competitive use to which it could be put.

15 Then no evidence of Sainsbury's intention that the
16 information should be communicated to Tesco, and then
17 Lisa Oldershaw didn't use the information, and indeed it
18 wasn't capable of being used. That's the submission
19 I've already made about the timing.

20 That then brings us to the third and most
21 contentious --

22 **MS POTTER:** Can I just be clear on one point. The question
23 of how quickly pricing on branded pre-pack could be
24 changed, I think I'm right in thinking that is
25 shelf-edge pricing and therefore could be changed

1 immediately --

2 **MISS ROSE:** Yes, could be changed immediately.

3 **MS POTTER:** -- and therefore in fact could have been changed
4 overnight, in theory?

5 **MISS ROSE:** It could have been, yes.

6 **MS POTTER:** Thank you.

7 **LORD CARLILE:** I think you may want to take instructions on
8 that.

9 (Pause)

10 **MISS ROSE:** I'm told it's about 12 noon is the cut-off
11 point, if it were Tesco. I don't know what the cut-off
12 point would be for Sainsbury's, but it couldn't be done
13 by Tesco at 5.00 pm to come in at 9 o'clock.

14 Now, coming to the most contentious piece of
15 information, the moves on the 4th and the 11th. In my
16 submission, we have to look at the text of the email
17 again to understand what's being said here, and you need
18 to read the whole of the text in one go:

19 "Hi Lisa, spreadsheet attached which will cover off
20 the current supply prices and the new position with the
21 proposed £200 per tonne recovery."

22 So the first point is he is sending her
23 a spreadsheet with new proposed prices applying the £200
24 per tonne cost price increase.

25 "I have provided the recommended retail going

1 forward plus the position to protect your own margin."

2 In other words, he's giving her two recommended
3 retail prices, one is cash margin and the other is
4 percentage margin.

5 That's the context in which he says:

6 "As we discussed last week, other parties are
7 confirming they'll protect cash margin on this occasion
8 but not percentage margin."

9 So he's nudging her to go for the lower of the two
10 alternative retail prices, not the higher one. That's
11 the point I've already made, that this information, if
12 anything, was to deter her from raising her retail
13 price.

14 Then:

15 "We will need to discuss this as time develops this
16 week and reach a conclusion."

17 In other words, reach a conclusion about whether you
18 want to go for cash margin or percentage margin. That's
19 what they need to reach a conclusion on, Sainsbury's
20 view in relation to the retail price.

21 Then:

22 "The timescales are as we proposed, ie 4 November
23 for pre-pack and 11 November for deli."

24 So that reference, "we proposed", ie me and you
25 proposed these dates in the context of discussing the

1 new prices that are contained in the spreadsheet. Now,
2 in my submission, there is simply no way that that
3 statement, "The timescales are as we proposed, ie
4 4 November for pre-pack and 11 November for deli", can
5 sensibly be read as referring to other retailers' dates
6 for price moves. It's clearly referring to a proposal
7 made as between Tesco and McLelland for the
8 implementation of the prices that are referred to in the
9 spreadsheet he's sending. It's the only sensible
10 interpretation.

11 I make exactly the point that Mr Morris just
12 helpfully made when he says, well, this email is
13 evidence that Sainsbury's were confirming 22 October
14 because it says they're confirming it. It's evidence
15 that Tesco and McLelland were proposing these dates for
16 Tesco's price move because that's what it says.

17 So that's the first point, the wording of the email
18 itself, and we set out that reasoning at paragraph 55.

19 The next point is that both the author of this email
20 and the recipient of it confirmed in their evidence that
21 that was their understanding of what it meant, and there
22 is no evidence to the contrary.

23 The next point is a point about the spreadsheet that
24 was attached to this email because there are two
25 versions of the spreadsheet. One contains "effective

1 from" dates and the other does not, but it appears to be
2 the case that the correct version of the spreadsheet
3 that was attached to this email is the version that
4 Tesco discovered on its records, which is the version
5 that was on Lisa Oldershaw's system, which does not
6 include "effective from" dates.

7 What appears to have happened, and we will see this
8 in a moment in the correspondence, is that McLelland
9 separately recovered from its systems and sent to the
10 OFT the email and the spreadsheet attachment, and the
11 spreadsheet attachment may be from a different date than
12 the email. This is not disputed by the OFT. We can see
13 it in the attached correspondence, which is at annex 3.

14 If you go to the letter from the OFT dated
15 25 April 2012, which is about halfway through annex 3
16 (Magnum), they say:

17 "We've been trying to ascertain precisely the
18 spreadsheet that was attached to the email of 21 October
19 and when it was sent. As a result of our recent
20 enquiries of Salans, we've been informed that they
21 cannot be sure beyond doubt that the spreadsheet that
22 Salans, on behalf of McLelland, originally disclosed to
23 the OFT was in fact the version that was attached to the
24 email. It would appear that during our electronic
25 searches in response to the OFT's Section 26 notice,

1 emails and attachments were produced separately and put
2 together subsequently."

3 Then Freshfields, on 4 May 2012, second page
4 (Magnum):

5 "We share your concern that the document attached to
6 the email supplied by McLelland does not appear to be
7 the version attached to the McLelland email as sent. In
8 particular, the 'effective from' column does not appear
9 on the version that Lisa Oldershaw received."

10 The next point, this is paragraph 56(b), is that the
11 submission that these dates of 4 and 11 November are the
12 proposed dates for Tesco's price moves is not undermined
13 by the fact that there are not other documents that give
14 those dates. Because what we have seen throughout this
15 period is that Tesco was regularly changing the dates at
16 which price moves were intended to happen, and there was
17 regular slippage of dates on a pretty much weekly basis
18 at this time. And it is, we submit, wholly plausible
19 that on around 16 October, the dates contemplated were 4
20 and 11 November, but that later in the process those
21 dates slipped to 4 and 17 November and, of course, as we
22 know, there was then further slippage later in the
23 process. We say that simply takes them nowhere.

24 The OFT, this is paragraph 57, relies on strand 2
25 not only as an infringement but also as an exchange that

1 put Lisa Oldershaw on notice that suppliers were
2 exchanging sensitive future retail pricing intentions.
3 We say that that argument is unsustainable for the
4 following reasons.

5 First, none of the information that's communicated
6 at document 52 (Magnum) is in fact commercially
7 sensitive. First, the information on maintaining cash
8 margin is already in the public domain and, at most, it
9 tells you that people will not be increasing their
10 retail prices by as much as might otherwise have been
11 imagined.

12 Second, the information about the random weight
13 pre-packs is in store the following morning and,
14 therefore, although not technically public domain,
15 virtually public domain.

16 And, thirdly, the information about 4 and
17 11 November is not information about anybody else's
18 pricing intentions, it's simply the proposal that was
19 being discussed between McLelland and Tesco as to the
20 dates on which Tesco should move its prices.

21 The next point, even if McLelland was seeking by
22 this document to communicate sensitive information to
23 Lisa Oldershaw, that's not how she understood it because
24 she certainly did not understand the references to
25 4 November and 11 November as referring to other

1 retailers, she thought that they were the dates she'd
2 been discussing with Mr Ferguson. And the other
3 information, as we already indicated, wasn't sensitive
4 anyway and she didn't perceive it as such.

5 The final point is that the information is not
6 accurate and is shown to be inaccurate the following
7 day, so the message it gives to Lisa is the message that
8 she's always had which is you cannot rely on what you're
9 told by your suppliers because it may be speculation,
10 they may believe it but it may simply not come to pass.

11 So, for those reasons, we submit that there is no
12 infringement in relation to strand 2 and that the events
13 of strand 2 are not events that establish that after
14 that date Lisa Oldershaw would have been on notice that
15 sensitive information was being passed to her by
16 McLelland.

17 That then brings me to strand 3, and this is the
18 events of 29 and 30 October where Lisa Oldershaw is
19 informing her suppliers that she is accepting the cost
20 price increases and sending them information about the
21 dates on which she is intending to move her cost prices.

22 We identify the critical questions at paragraph 58.
23 First, whether Lisa Oldershaw told Neil Arthey that
24 retail prices for the various categories would change on
25 the dates that she read out to him, or whether he

1 inferred that those were the dates for retail price
2 moves from the fact that she told him those were the
3 dates when the cost prices were going to move. Because
4 everybody was operating on the assumption, right from
5 the outset, that the almost automatic reaction to an
6 increase in cost prices was going to be a rise in retail
7 prices. So he could readily infer from her telling him
8 that those were the dates that the cost prices were
9 going to go up, that her retail prices were going to go
10 up at or about the same time.

11 But, of course, she had a completely legitimate
12 reason to give him cost price date information. He
13 needed that first of all to start running down stocks
14 that were priced at the old price; secondly, to get
15 ready for the increase in the cost price, he needed to
16 know the dates on which he could start to charge her the
17 higher cost prices. So, in our submission, the fact
18 that he could infer from that information that her
19 retails were going to go up at or about the same time,
20 there's nothing she could do about that. It's an
21 inevitable part of her normal commercial relationship
22 with her supplier and the way that this market operates.

23 The only retail price that she communicates to him,
24 and this is common ground, is the price for the
25 WeightWatchers, and for that there is a legitimate

1 reason which is that they had to start packing the
2 WeightWatchers at the new price.

3 One point that we make is that, if the OFT is right
4 and Lisa's intent in this conversation is to give
5 illegitimate information about future retail pricing,
6 why does she only give him one retail price and that in
7 relation to a product for which he needs the information
8 for packing? Why doesn't she tell him "I'm intending to
9 maintain percentage margin", or "On some lines I'm going
10 to go with percentage margin and on some lines I'm going
11 to go with cash margin"?

12 It's not even alleged that she gives him any of that
13 information. The only retail price that she gives him
14 is the one that she needs to give him.

15 The second crucial question is what Lisa Oldershaw's
16 state of mind was in relation to the information that
17 she gave to Neil Arthey and, in particular, whether she
18 intended him to pass it on and whether she knew that he
19 would pass it on, and we do say that that is the
20 standard that has to be met.

21 So we address the first of those questions at
22 paragraph 59. I don't intend to go through that orally
23 in detail now, we simply invite you to read those
24 points.

25 The second issue is Lisa Oldershaw's state of mind

1 which we deal with starting at paragraph 64. The OFT
2 argues, this is paragraph 65, that Lisa Oldershaw did
3 intend the material to be passed on or know it would be
4 passed on for two reasons. First, they say she had no
5 legitimate reason for providing the information to
6 Neil Arthey and, secondly, that she understood that
7 suppliers were sharing information between retailers, in
8 other words disclosed having received.

9 We say both of those contentions fail on the facts.
10 The first, no legitimate reason for providing the
11 information. We make an important point at
12 paragraph 66. The issue is not whether Lisa Oldershaw
13 has established that she had a legitimate business
14 reason to give all this information to Mr Arthey, the
15 issue is whether the OFT has established that she had an
16 illegitimate reason for doing it or an illegitimate
17 intent in doing it.

18 The point is an obvious one, that if in fact her
19 reason for doing it was not a legitimate business reason
20 but was a mistake, the OFT's case fails because the OFT
21 has positively to establish anticompetitive intent. We
22 submit that Lisa Oldershaw's evidence on this should be
23 accepted and it's entirely consistent with what she did.

24 The first point is, of course, the enormous pressure
25 under which she was operating as at this date, because

1 she had proposals for cost price increases from all of
2 her suppliers across the whole line of British
3 territorial cheeses, and we know that she had been given
4 a clear instruction by her line manager that she had to
5 accept those cost prices without any further delay
6 because of Tesco's broader commercial interests. So
7 she's working under enormous pressure to get everything
8 out.

9 We also know, and this is document 64 (Magnum), that
10 her method of working was to identify a list, what she
11 called her £2,000 per tonne plan, which is her list of
12 each of the categories where she's going to accept the
13 cost price and implement a retail price on the
14 particular dates. So she created that single list. In
15 that situation, we submit that it is hardly surprising
16 that when she sits down with one of her biggest cheese
17 suppliers, Dairy Crest, she reads the list out. It's
18 perhaps the obvious and natural thing to do in that
19 situation.

20 Now, what the OFT have said is, oh, well, she should
21 have done and could have done something different.
22 First of all, they say she could have taken them through
23 her spreadsheet, broken down by supplier, but there is
24 no evidence that she had that spreadsheet in front of
25 her when she was talking to Neil Arthey.

1 Secondly, they say, well, when she's talking about
2 each category, she shouldn't talk in general terms
3 about, for example, brands or standard regionals, she
4 should identify only the particular cheese lines that
5 are supplied to her by Dairy Crest. We submit that that
6 is just wholly unrealistic. It's not the way that she's
7 likely to be thinking. She's thinking, right, these are
8 the categories I'm moving on these dates, this person is
9 my supplier, I'm going to tell him which dates.

10 Now, it's absolutely correct that when she does that
11 she just reads out the whole list and, ultimately,
12 there's a question that the Tribunal has to decide,
13 which is whether she did that innocently and as part of
14 her normal business under pressure, or whether she did
15 it with an anticompetitive motive, intending that
16 information to be passed on. We submit that there's
17 just no basis for the adverse finding against her of the
18 latter and it is the OFT that must prove that.

19 You've already heard this morning my detailed
20 submissions on state of mind, as to why theirs don't
21 stack up and the contraindications. We say all of those
22 considerations are in play here, and we submit that the
23 conclusion is that on the balance of probabilities this
24 was exactly what she said it was, it was an error, and
25 that putting the OFT's case at the highest they have not

1 established on the balance of probabilities that it was
2 not an error but was a deliberate piece of
3 anticompetitive conduct.

4 Now, the second point the OFT makes to support its
5 case on intent is they say, ah, this is a supplied
6 having received. But they are, with respect, wrong
7 about that because this is information that
8 Lisa Oldershaw is giving to Neil Arthey of Dairy Crest.
9 The OFT does not even allege that at this date Tesco had
10 received any sensitive future pricing information from
11 Dairy Crest. Even on the OFT's case, Lisa Oldershaw had
12 no reason at all to believe that Neil Arthey could not
13 be trusted with her confidential information. He had
14 never sent her anybody's future retail pricing
15 information. Even on the OFT's case, the only person
16 who had done that was Mr Ferguson from McLelland.

17 That leads me to a final important point about the
18 interaction between this strand, strand 3, and strand 6.
19 Strand 6 is not an infringement but strand 6 is the
20 document -- it's document 70 (Magnum) if you want to
21 turn it up -- in which Stuart Meikle of McLelland
22 informs the Co-op about what he believes is happening
23 with retail prices, including the information that Tesco
24 are moving random weight McLelland retails on
25 11 November and all own label lines on 18 November.

1 The OFT's case is that Lisa Oldershaw gave the same
2 information to Mr Ferguson of McLelland that she'd given
3 to Neil Arthey, in other words, read through the whole
4 of her list, and that she did so, they say, with
5 anticompetitive intent in the knowledge that he had
6 previously passed sensitive information to her.

7 Now, we submit that in fact, when you look at
8 strand 6, it is entirely inconsistent with that case
9 theory. The first and most obvious thing to notice
10 about document 70 is that it does not contain anything
11 remotely approaching the information that's in document
12 64 (Magnum) about the different cheese categories. If
13 you just go back to document 64 and see all the various
14 different dates and the list of different categories of
15 cheeses.

16 What you have from McLelland to the Co-op is a very
17 small fraction of the information in document 64, and
18 the two pieces of information that you have from
19 McLelland to the Co-op both relate to cheeses that
20 McLelland supplied to Tesco. The first explicitly so,
21 "random weight McLelland retails", and the second, "all
22 own label lines", McLelland were supplying own label
23 cheese to Tesco.

24 Mr Morris takes the point, "Ah, it says 'all own
25 label lines', that would include own label lines that

1 McLelland does not supply to Tesco". I have already
2 made the point that it would be quite unrealistic to
3 suggest that when a retailer is discussing with their
4 supplier the date they're going to move their own label
5 lines, that she should say "We will be moving the own
6 label lines that you supply to us on that day", rather
7 than simply the obvious statement, which is, "We're
8 going to move our own label lines on that day".

9 Sir, we submit nothing turns on that.

10 But there are essentially two possibilities when you
11 look at the information at document 70 (Magnum) and
12 compare it with document 64 (Magnum). There are two
13 possibilities. The first possibility is that
14 Lisa Oldershaw did not give to Mr Ferguson all of the
15 information in document 64 but only gave him the
16 information about the lines that McLelland supplied
17 Tesco, which are the two lines referred to here.

18 The second possibility is that she did give him all
19 the information at document 64 but only these two pieces
20 of information were passed on. Either of those
21 scenarios is inconsistent with the OFT's case theory.
22 If it is the first, and Lisa Oldershaw only gave to
23 McLelland the information about the lines that they
24 supplied Tesco, then that is inconsistent with the OFT's
25 case that she was seeking, by the communication on

1 30 October, to transmit information to her competitors,
2 that this was an indirect communication from Lisa
3 Oldershaw to her competitors.

4 It's particularly significant because the only way
5 that the OFT's disclosed having received case works at
6 all in relation to 2002 is in relation to McLelland.
7 The only person on the OFT's case that Lisa Oldershaw
8 would have any reason to believe might pass her
9 information on is Mr Ferguson, so if she didn't give him
10 this information, that's obviously completely
11 inconsistent with the OFT's case.

12 The second possibility is that she did give him all
13 the information but he didn't pass it on. Again, that
14 is inconsistent with there being any plan or scheme
15 between these parties that McLelland was to act as
16 a conduit for sensitive future pricing information,
17 because if the idea was that everyone was tipping
18 everybody off and McLelland were the conduit, why don't
19 they pass it on?

20 So, in my submission, when you compare and contrast
21 strand 6 and strand 3, it strongly corroborates
22 Lisa Oldershaw's account that what she was doing was
23 a normal commercial interaction with her supplier --
24 with her two suppliers, Dairy Crest and McLelland, and
25 that she had no reason whatsoever to suspect that the

1 next act of Dairy Crest would be to disseminate that
2 detailed information.

3 So that is what we wanted to say in reply on
4 strand 3, obviously there are more submissions in our
5 closing submissions, but those are the points we wanted
6 to make in reply.

7 So far as the remaining strands of 2003 are
8 concerned, we rely principally on our closing
9 submissions. I'm not sure there's anything more I need
10 to say. Just bear with me for one moment. (Pause)

11 Just very briefly on strand 5, which is said to be
12 a disclosure from Asda to Dairy Crest to Tesco. This is
13 one of the instances where the lack of any evidence from
14 Asda is critical, we say, to the failure of the OFT's
15 case. There is simply no evidence that the information
16 came from Asda at all, still less that it came from Asda
17 with the requisite intent.

18 If we look at the way the OFT puts it at
19 paragraph 276, they argue that it can be inferred that
20 these pieces of information came from Asda, and that
21 Asda knew or suspected it would be passed on by
22 Dairy Crest. They rely for that on their
23 cross-examination of Mr Reeves, because Mr Reeves in
24 cross-examination said "This is inappropriate because we
25 shouldn't be sharing one retailer's intentions with

1 another, we knew that was anticompetitive".

2 They say that shows that so far as he knew the
3 information did come from Asda, and was information and
4 not mere speculation as to Asda's intentions, also shows
5 the information must have come from Asda with Asda's
6 consent, because the problem was not that it was
7 a breach of Asda's confidence but that the disclosure
8 was anticompetitive.

9 With all due respect to Mr Morris, we submit that
10 that is a completely unsustainable approach. Mr Reeves
11 was not the author of the email, he was not a party to
12 this communication at all. He was shown that email for
13 the first time in cross-examination with no surrounding
14 information of where the information came from and
15 asked, is this appropriate? And said, not surprisingly,
16 it's inappropriate. He was not in a position to know
17 whether the information came from Asda, still less what
18 Asda's intention was in giving that information, if they
19 did give it.

20 We submit that this shows desperation on the part of
21 the OFT in seeking to rely, to establish its case, on
22 cross-examination of a third party who had no
23 involvement in this course of events at all because of
24 their own failure to call a witness from Asda. That's
25 another example, and I gave you an example this morning

1 of 2003, but that's another example, we say, of the
2 unsustainable attempts by the OFT to establish intent of
3 third parties through tortuous means that simply don't
4 bear the inference when they could have established it
5 through straightforward direct evidence.

6 You will also note, just going on to page 145, at
7 the bottom, they make the assertion that:

8 "As the analysis of strand 7 below will confirm, by
9 the very next day Ms Oldershaw had acted on the
10 information indicating she believed it to be concrete."

11 Now, can I just invite the Tribunal, when you come
12 to look at this, to look at strand 7, because strand 7
13 does not establish that Lisa Oldershaw, on the next day
14 or any day, had acted on any information about Asda's
15 intention, because all that strand 7 is is
16 a communication from McLelland making the bare
17 statement, "Tesco will match Asda", not saying where
18 that information comes from, what the source is and when
19 it was received, if it was information that ever came to
20 Tesco of which there is no evidence whatsoever. We
21 don't know on what date Tesco (sic) decided to move its
22 Smart Price products or on what date they did so.
23 There's simply no evidence about that.

24 So this is another instance in which the OFT
25 establishes a dubious case by inference and then treats

1 that dubious inference as if it were an established fact
2 and seeks to use it to bolster another particularly
3 dubious inference.

4 That brings me then to 2003, and we submit that
5 there is very little more to be said about 2003.
6 Strand 1 of 2003 depends entirely on document 112
7 (Magnum), which is the disputed note from Mr Meikle who
8 was not called to give evidence. The OFT say he no
9 longer works for McLelland but, of course, it does not
10 follow from the fact that he no longer works for
11 McLelland that he is unavailable to give evidence, and
12 the OFT is in no position to submit that he even might
13 have been unavailable since they admit that they made no
14 attempt at all to call him to give evidence.

15 The evidence given by Lisa Oldershaw, which is the
16 only evidence the Tribunal has heard, was that Tesco had
17 not agreed to accept any cost price increase on 26 or
18 29 September on an unconditional or a conditional basis
19 and that, therefore, the whole of the premise on which
20 document 112 is based is inaccurate.

21 This strand also hinges on pure speculation about
22 the intentions of Asda which can't be resolved in the
23 OFT's favour, and I've already shown you that problem.

24 Strands 2 to 4 in 2003, we say it's very simple.
25 The OFT cannot prove that any future pricing information

1 was transferred to Tesco whatsoever for the simple
2 reason that they cannot show that any of the information
3 at strands 2 to 4 was not already in store, and we've
4 gone through in great detail the evidence in relation to
5 each of those strands. Again, a situation in which the
6 OFT could have very simply resolved this question. All
7 it needed to do was to ask Asda and Sainsbury's, at some
8 point during its investigation, what were the dates on
9 which you increased these retail prices, on what date
10 were they in store?

11 They never asked those questions. As a result, they
12 simply don't know on what date those prices were in
13 store, and they asked this Tribunal to infer that the
14 information was future information from such matters as
15 the use of the word "will" in an email. We submit that
16 that is wholly impermissible and they have failed to
17 prove the most basic facts on which their case must
18 depend.

19 Strand 5, the final strand of 2003, is the provision
20 of information by Lisa Oldershaw to Mr Meikle, all of it
21 necessary, legitimate pricing information that he
22 needed, and you have already our submissions on that.
23 The OFT's case on strand 5 is wholly dependent on their
24 disclosed having received argument, that she must have
25 known that this would be transmitted because he'd given

1 her future pricing information. But once one realises
2 that the premise fails because he had never given her
3 future pricing information, then so does the conclusion.

4 The final point about 2003 of course is that the
5 only occasion where she was worried that he had given
6 her future pricing information, although wrongly, she
7 protested, she complained, and it was dealt with at the
8 meeting on 6 October.

9 Unless I can be of any further assistance, those
10 are -- I beg your pardon, I'm being...

11 (Pause)

12 Yes, the question you asked me, madam, about whether
13 she could have acted on strand 2 information overnight.
14 There is information, it's Lisa Oldershaw's second
15 witness statement and it's paragraph 95 (Magnum). She
16 says:

17 "By this point, I could not have made any retail
18 price changes to take effect in Tesco stores the
19 following day."

20 And that evidence wasn't challenged.

21 There's also a correction. The reference we gave
22 you to Mr Reeves, we said it was page 65. I think it
23 was 81 to 82.

24 **LORD CARLILE:** Thank you very much. That's on the record.

25 **MISS ROSE:** Can I just check there's nothing else anyone

1 wants me to say?

2 (Pause)

3 **LORD CARLILE:** Of course.

4 **MISS ROSE:** Sir, no. Those are our submissions in reply.

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

6 We shall take time to consider our judgment.

7 You look as though you want to leap to your feet,

8 Mr Morris, do you?

9 **MR MORRIS:** Well, I would like to. I don't really, and

10 I know you don't want me to really, but I would like to

11 stand up. I'm conscious that --

12 **LORD CARLILE:** There is absolutely no time pressure this

13 afternoon, it's just a question of when we stop making

14 submissions.

15 **MR MORRIS:** I understand, and that's why I hesitate, but

16 I would like to make a couple of observations, if I may.

17 **MISS ROSE:** Sir, he has no right to do that.

18 **MR MORRIS:** I have no right, but I would invite you to allow

19 me to make a couple of observations, and no doubt

20 Miss Rose will have the last word.

21 **MISS ROSE:** Sir, I do object to this. He has had --

22 **LORD CARLILE:** Shall we have a couple of sentences of

23 observations, really a couple of sentences, and then

24 Miss Rose can re-re-observe or whatever the term is.

25

1 Reply Submissions by MR MORRIS

2 **MR MORRIS:** Of course, as she will undoubtedly do.

3 The first point is just to check that you received
4 our letter from yesterday?

5 **LORD CARLILE:** We did.

6 **MR MORRIS:** The second point is, without going into great
7 detail, to invite the Tribunal to be cautious about
8 accepting matters in reply which have been dealt with by
9 assertion and unsupported by evidence.

10 I will give you one example only, and that was an
11 assertion before lunchtime, given by Miss Rose at
12 [draft] pages 79 and 81 of the transcript, of the
13 reasons why Tesco's senior management above Mr Scouler
14 gave the instruction for the price rise to be accepted.

15 There is no evidence before this Tribunal as to
16 those reasons. That is one illustration of a number of
17 occasions where Miss Rose has made pure assertion based
18 on no evidence.

19 The point I'm wishing to get across, and I'm sure
20 the Tribunal will look at all the evidence with the
21 greatest of care.

22 **LORD CARLILE:** We will.

23 **MR MORRIS:** But that was the main point that I wished to get
24 across to the Tribunal.

25 The final point was to say that if there was any

1 matter upon which you required any further assistance,
2 we would obviously be willing to oblige.

3 **LORD CARLILE:** Thank you, Mr Morris.

4 Do you want to re-re-observe?

5 **MISS ROSE:** No, sir, I'm content to leave it there.

6 **LORD CARLILE:** Thank you.

7 Right, what I was about to say, first of all, we're
8 grateful to all the parties during the course of this
9 hearing.

10 Secondly, we will take time to consider our
11 judgment. We hope that our judgment will be ready
12 before the end of September but that involves quite
13 a lot of work.

14 Thank you all very much, I wish you a good weekend.

15 **MISS ROSE:** I'm so sorry, sir, there is one re-observation.
16 Never say never.

17 It's Mr Scouler's witness statement, which is appeal
18 bundle 2A, tab H, paragraph 80 (Magnum). He says:

19 "I recall a cost price increase was not agreed until
20 late October when I eventually told Lisa we could not
21 delay any further as, in doing so, we risked further
22 blockades of our depots by farmers in the critical
23 run-up to Christmas."

24 So, with respect, Mr Morris was wrong.

25 **LORD CARLILE:** Right, well, anyway. So we will give our

1 judgment by the end of September.

2 I feel constrained to say this, what I'm about to
3 say, not because of this case particularly but because
4 of others. Correspondence following the end of today's
5 hearing will be deeply unwelcome and could lead to
6 a hearing taking place at approximately 7.00 am on
7 a date during August requiring the attendance of leading
8 counsel. Not junior counsel, definitely not junior
9 counsel, only leading counsel.

10 Thank you.

11 (3.10 pm)

12 (The hearing concluded)

13 INDEX

14 Reply Submissions by MISS ROSE6

15 Reply Submissions by MR MORRIS133

16

17

18

19

20

21

22

23

24

25