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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1 May 2012

Before:

LORD CARLILE OF BERRIEW CBE QC
MARGOT DALY
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING (DAY 3)

APPEARANCES

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

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

1 Tuesday, 1 May 2012

2 (10.00 am)

3 Procedural discussion

4 **LORD CARLILE:** Mr Morris, Miss Rose, to quote the West Wing,
5 we have a situation and it's a very unfortunate
6 situation. We have obviously been discussing it and it
7 might be helpful if I give you our thoughts on the
8 situation provisionally.

9 We feel a real sense of concern for Ms Oldershaw.
10 She has had to rush back to New Zealand, her husband is
11 plainly very seriously ill. He's facing a major
12 operation on Monday, as we understand it, and she has
13 a small child. She is a key witness in this case, and
14 this is far from a criticism, Mr Morris, you will use
15 your usual skills in an attempt to undermine certain
16 aspects of her credibility, and that is going to be
17 a stressful experience for her. We as a Tribunal feel
18 that it would be quite wrong to place her under undue
19 pressure. She cannot be expected to give evidence until
20 she is ready to do so, hopefully sooner rather than
21 later, but there has to be an objective assessment made
22 of her situation and her ability to give evidence.

23 There's a practical issue about her giving evidence.
24 She's in New Zealand. I believe New Zealand is 11 hours
25 ahead of us. Now, if she-is to return to give evidence,

1 that's fine, we don't have a problem. If she's to give
2 evidence by video link, the simple part is that the
3 documents have to be placed beside her in exactly the
4 same form as we have them. That can be done very easily
5 either by courier or maybe using the cloud system which
6 is now available, or some other electronic means, but it
7 would not be sensible for her to give evidence without
8 the documents in front of her in the same form as they
9 are in front of the Tribunal and counsel.

10 There is a question of, if it's video link, when we
11 do it, the time. I suggested with some trepidation to
12 my colleagues and to the Tribunal that we could, for
13 example, sit what I will call Maxwell hours from, say,
14 7.00 in the morning until 1.30, but I am conscious of
15 the problems facing counsel and solicitors and we're not
16 going to ruin people's family lives by sitting at 7.00
17 in the morning, I wouldn't be very popular anyway, but
18 we'll do it if necessary.

19 But it occurred to me that probably the best time to
20 do it would be early in the morning until late
21 lunchtime. Evenings are extremely difficult for me, for
22 reasons which you'll readily understand, because I have
23 responsibilities elsewhere which arise in the afternoon
24 and evening.

25 If she is to give evidence by video link, there is

1 a question of where. The Tribunal is not paying for it,
2 it has no budget for this. It occurs to me that there
3 are two possibilities, one is court 38 in the RCJ. In
4 the Enron case, evidence was taken by video link to
5 Singapore and it worked fine from court 38.

6 The other immediate possibility that occurs to me,
7 and I have done this as counsel myself, is at the Bar
8 Council's facilities in Holborn where there is a very
9 adequate video link facility; I cross-examined
10 Mr Jonathan Caplan QC over that video link when he was
11 unsurprisingly gainfully employed in Hong Kong at the
12 time, and that worked fine, and the room will hold about
13 20 people. It is I think more in a boardroom type
14 setting but it works very well. So that is another
15 possibility.

16 **MR MORRIS:** We had thought of other possibilities.

17 **LORD CARLILE:** There must be loads of other possibilities.

18 **MISS ROSE:** Sir, can I first perhaps update everybody as to
19 what the current situation is. We have a written
20 communication from a doctor at the hospital which
21 I think we ought to hand up. We were asked by the OFT
22 to provide it and we have done so.

23 (Handed)

24 **LORD CARLILE:** So far as it takes us.

25 **MISS ROSE:** Yes, so far as it takes us.

1 As we understand it, the precise date of the
2 operation is slightly uncertain because the surgeon in
3 question has to fly in from America to do the
4 operation --

5 **LORD CARLILE:** No wonder it's so expensive.

6 **MISS ROSE:** -- in New Zealand. Yes, it's obviously a very
7 different situation from London. I understand he is
8 a New Zealand surgeon but that he practises partly in
9 the United States as well as in New Zealand. So that's
10 the situation.

11 So far as the timing of her evidence is concerned,
12 of course, everything depends on what happens next
13 Monday. If all goes well, Ms Oldershaw's current
14 position is that she considers that she would be able
15 and willing to give evidence between the 16th and 18th
16 of this month, which had been the dates that originally
17 had been set aside for Mr Scouler, so that was the basis
18 for swapping them round. Of course we can't say
19 100 per cent until the operation is completed, but if
20 all goes well, that seems to us to be the most efficient
21 way forward.

22 **LORD CARLILE:** Would her current intention be to come back?

23 **MISS ROSE:** We have been very careful in not increasing the
24 stress on her. I saw her yesterday and I'm sure you can
25 imagine the state that she's in with her very small

1 child and so on. We did not want to put any pressure on
2 her. She made it clear that she remains willing to give
3 evidence and that she will certainly give evidence by
4 video link.

5 I don't think it's appropriate to explore the
6 possibility of her coming back until after the
7 operation --

8 **LORD CARLILE:** I agree.

9 **MISS ROSE:** -- because I would have imagined that her views
10 on that are going to depend very much on the recovery
11 process and I would be very uncomfortable in even asking
12 that question.

13 **LORD CARLILE:** I think we have to assume that she's going to
14 give evidence by video.

15 **MISS ROSE:** I think that would be safe.

16 **LORD CARLILE:** It's the only safe assumption.

17 **MISS ROSE:** We thought you probably wouldn't have to start
18 quite as early as 7.00, that you could do 8.00 until
19 1.30. And we wouldn't need a full lunch hour in that
20 period, we could simply have short breaks; short breaks
21 obviously for the shorthand writers and perhaps one
22 slightly longer coffee break, but that would give you
23 a reasonable period of time every day without having an
24 insanelly early start.

25 She appreciates that it would mean that she would

1 have to stay up quite late and she's prepared to do
2 that.

3 **LORD CARLILE:** As a broad principle of how we deal with
4 this, I'm sure my colleagues would agree that that would
5 be a sensible way of approaching it.

6 **MISS ROSE:** We will obviously explore what is the best
7 option on venue. Some of it depends on what technology
8 is available because obviously we want to get the best
9 resolution that we can. It enhances everybody's ability
10 to see the witness.

11 **LORD CARLILE:** Yes.

12 **MISS ROSE:** The other issue that's separating us and the OFT
13 is the question of timetabling.

14 **LORD CARLILE:** Let me tell you what we're going to do about
15 tomorrow. Tomorrow, not at 9.00 but at 10.30, and we've
16 asked the OFT to disseminate this information to those
17 who are interested in confidentiality issues, we will
18 deal with confidentiality issues at 10.30 tomorrow and
19 any other housekeeping matters, otherwise we will
20 adjourn tomorrow. We will not sit beyond housekeeping
21 tomorrow.

22 We've read the correspondence that has been passing
23 hither and thither. Despite some strictures, Miss Rose,
24 I have some sympathy for the OFT's position in this
25 because, as I see it, much will have been predicated on

1 Mrs Oldershaw giving evidence first. So I think it's
2 perfectly reasonable to continue on Thursday morning.

3 **MISS ROSE:** So we will continue with Mr Scouler on Thursday?

4 **LORD CARLILE:** We've seen an indicative timetable which I
5 think has Mr -- I've left it in the room.

6 **MR MORRIS:** Sir, we've also provided one as well.

7 **LORD CARLILE:** No, there are two timetables, one had
8 Mr Scouler on Thursday. The OFT have provided
9 a timetable which has Mr Reeves, Mr Ferguson, Mr Irvine,
10 then Mr Scouler.

11 **MISS ROSE:** Yes, that timetable isn't going to work for
12 reasons I'll explain. Can I explain why it won't work?

13 The first reason it won't work is we've checked with
14 Mr Ferguson's solicitors and he is not available this
15 week, so he is only available on the dates that he was
16 originally intending to give evidence. So he can't come
17 this week. That would mean the only witness that can be
18 taken this week would be Mr Reeves. Now, sir, I'm sure
19 you've had a look at his witness statement and have seen
20 it is pretty short. It seems to me that his
21 cross-examination is unlikely to take more than an hour
22 or two. It always surprised me that the OFT thought it
23 would take a day.

24 **LORD CARLILE:** I'm sure Mr Morris could string it out if he
25 wanted to.

1 How long is it going to take, Mr Morris?

2 **MISS ROSE:** The problem is more profound than that. The
3 problem is what happens at the other end, because what
4 the OFT is suggesting is, because of the delay, that
5 Ms Oldershaw's evidence should then be taken on the 21st
6 and 22nd, which were supposed to be days set aside for
7 closing submissions, and then they propose that all the
8 closing submissions should be heard between 23 and
9 25 May.

10 We understand the Tribunal can't sit for more than
11 two hours on 25 May.

12 **LORD CARLILE:** Yes.

13 **MISS ROSE:** Which means there would effectively be only one
14 day each to close plus two hours for me to reply.

15 That is really not going to work for us. As you
16 know, we had originally intended a longer opening where
17 I would have developed the law in more detail. Because
18 of your unavoidable commitment, sir, we changed plans on
19 that and I simply indicated some of the legal issues,
20 without going into them in any detail, on the basis that
21 it was agreed I would have two days to close the case.

22 Because what I need to do in closing is, first of
23 all, to deal with the legal issues, which are not just
24 on the substance but also some quite complicated legal
25 questions on inferences to be drawn from admissions or

1 from the failure of a party to call evidence, which is
2 obviously central to the case. I will then need to take
3 the Tribunal through each of the strands and to consider
4 the evidential position in relation to each strand after
5 the Tribunal has heard the evidence, and there are 15
6 strands. So I simply can't do that in a day, and it is
7 of course my appeal.

8 There is another objection to the proposal that the
9 OFT makes which is that it means that my case has to be
10 undertaken without us calling any Tesco witness until
11 right at the end of the witnesses. It would mean
12 calling Mr Reeves, Mr Ferguson and Mr Irvine before
13 either of the Tesco witnesses.

14 Now, I have to say that we would consider that to be
15 highly unsatisfactory and prejudicial to our position
16 because it would prevent us essentially from putting
17 forward Tesco's position which is at the heart of this
18 appeal. Ultimately, of course, it is for the appellant
19 to present their case on the appeal and these are my
20 witnesses.

21 I understand what is said by the OFT, that they say
22 they weren't expecting Mr Scouler to come next week.
23 Sir, if I can just show you Mr Scouler's witness
24 statement, it's in bundle 2A of the appeal bundle. It's
25 at tab H {Magnum}.

1 The OFT have had this document since October of last
2 year when it was served with our notice of appeal. If
3 you look at it, you will see that the principal topics
4 it deals with are the Dairy Supply Group meeting and the
5 6 October 2003 meeting with some other pretty general
6 high level elements, so effectively those two incidents.

7 Of course, there are only two lever arch files of
8 documents in this case and the documents that deal with
9 those incidents are very few in number.

10 Now, what you've just proposed would mean that the
11 OFT, who of course have a large team and they're not all
12 here today, they have counsel back at base who are able
13 to prepare cross-examination all day today, and then
14 they have virtually the whole of tomorrow as well to
15 prepare cross-examination of Mr Scouler.

16 In my submission, that really ought to be enough,
17 given the length of time that they've had this material,
18 given the fact that there are only two files of
19 documents in this case and that this evidence deals with
20 relatively limited issues. One of the things that
21 happens at the Bar is unexpected events occur in the
22 middle of trials and things don't happen in the order
23 you expect, and barristers then have to inconvenience
24 themselves, they stay up late, they get up early in the
25 morning and they prepare their case.

1 Now, in my submission, it's not ideal but it's
2 preferable to what the OFT are suggesting, because what
3 the OFT are suggesting will result first of all in Tesco
4 having to present its appeal without being able to call
5 either of its witnesses until the very end of its appeal
6 and, secondly, and perhaps even more importantly, will
7 result in me having what, with respect, is an inadequate
8 time to close my case, and also means that we're going
9 to waste a lot of time this week because effectively --

10 **LORD CARLILE:** Forgive me for interrupting you, but is there
11 any possibility of two extremely experienced leaders,
12 together with extremely competent juniors, sitting down
13 together and sorting out this timetable without the
14 Tribunal having to adjudicate?

15 **MISS ROSE:** Sir, I wish that were possible and, as you will
16 have seen, we made great efforts to communicate with the
17 OFT over the weekend and yesterday. We sent them our
18 proposal, we invited their comment on it. The next we
19 heard was that they did not respond to --

20 **LORD CARLILE:** I was thinking of people sitting in the same
21 room for a few minutes.

22 **MISS ROSE:** Sir, I entirely agree, but unfortunately our
23 experience of this case in recent weeks has been that it
24 is extremely difficult to get any constructive dialogue
25 with the OFT --

1 **LORD CARLILE:** Mr Morris is going apoplectic.

2 **MR MORRIS:** I am.

3 **LORD CARLILE:** I think we'd better let him let off some
4 steam for a moment.

5 **MR MORRIS:** This really is a gross misrepresentation. This
6 really is.

7 We hear this news on Sunday at midday. We are
8 preparing cross-examination for Lisa Oldershaw flat out.
9 If you've read the correspondence and the OFT's
10 response, you will see that it was (a) sympathetic and
11 (b) constructive. We have been constructive throughout.

12 The suggestion that Mr Scouler should be called
13 first was not -- nobody rang us up and said, "How would
14 that work for you?" It was said, "We have made
15 arrangements, we are going to substitute". We were not
16 consulted on that. This is a misrepresentation. I am
17 more than happy to sit down with Miss Rose and anybody
18 else and try and thrash this out but I do say, and I do
19 say this very firmly, I am not ready to cross-examine
20 Mr Scouler and I will not be ready adequately to
21 cross-examine him this week.

22 We submit very, very firmly that this is a wholly
23 unnecessary measure to take. We say it's unnecessary
24 for this reason. At the moment, as you rightly pointed
25 out at the outset, sir, first and foremost we simply do

1 not know the position with Ms Oldershaw. The whole
2 basis of the proposition that Mr Scouler should be
3 substituted is based on the assumption that she will be
4 free to give evidence on the 16th to the 18th.

5 We had been told first of all that the operation was
6 going to be in the week of 7 May, we don't even know
7 what date the operation is going to be now. I would
8 respectfully suggest that at the moment it is -- I was
9 going to say far from certain, it is wholly unclear
10 whether she will be available on those dates, 16 to
11 18 May. If that is right, that it's unclear, then we
12 are being squeezed into a timetable, for Mr Scouler,
13 into a timetable which no one knows whether it's going
14 to happen at all.

15 Now, we came back with what we consider to be
16 reasonable and fair proposals. If I may point out, we
17 were prepared for cross-examination for Ms Oldershaw and
18 Mr Reeves this week, and then there was going to be
19 a nine-day break and then cross-examination of three
20 other witnesses. We have come forward with a proposal
21 which, in any event, inconveniences us because we have
22 offered to bring Mr Ferguson forward this week. We are
23 told that he is not available by his solicitors. No
24 reasons are given, and there are powers for this
25 Tribunal to make further enquiry to find out whether it

1 is possible for him to come this week.

2 The current position is I have not prepared any
3 cross-examination for Mr Scouler. The second point is
4 that Mr Scouler, his witness statement runs to
5 93 paragraphs. Yes, in terms of specific instances that
6 he addresses there are only two, but he is involved in
7 these events throughout, particularly in 2002, and it
8 certainly does not follow that our cross-examination
9 would be confined to the Tesco Dairy Supply Group
10 meeting and the 6 October meeting in 2003.

11 We would urge upon the Tribunal that this is
12 a situation of nobody's making, but it is a situation
13 where the solution that should be found should be one
14 which is first of convenience to the Tribunal and,
15 second, one which does not work any unfairness on either
16 of the parties. And in our submission, the proposition
17 that Mr Scouler could be called to give evidence this
18 week would work substantial unfairness on the Office of
19 Fair Trading.

20 **LORD CARLILE:** What I want to happen now, please, is we're
21 going to adjourn for half an hour. In that half hour
22 I would like counsel to get together, and we do have
23 keys with which we can lock you into a room if
24 necessary, but we would like counsel to get together and
25 discuss this. Before counsel discuss this, we need to

1 know the real reasons why Mr Ferguson says he cannot be
2 here this week. It may be inconvenient for him, but the
3 Tribunal has powers to make him attend this week if
4 necessary.

5 I am sure I and my colleagues will be very
6 disappointed if counsel cannot between them come up with
7 a solution to this timetabling issue, particularly when
8 you discuss it face to face.

9 **MISS ROSE:** Sir, can I point out that the attendance of
10 Mr Ferguson this week will not solve the problem that
11 I've identified about inadequate time for closing
12 submissions, and neither will it solve the problem --

13 **LORD CARLILE:** I was just going to add something, Miss Rose.
14 I was going to say that if there is inadequate time for
15 closing submissions then we will provide additional
16 hearing time on some occasion in the not too distant
17 future for closing submissions. We can add days.
18 I mean, they may not be consecutive days, and we will of
19 course seek to meet the convenience of counsel so far as
20 possible.

21 **MR MORRIS:** Sir, my other question was whether there was
22 a possibility of sitting beyond but you've answered
23 that, thank you.

24 **MISS ROSE:** Sir, I don't know what the availability of the
25 Tribunal is in the week following, and perhaps it would

1 be helpful to know what the various parties --

2 **LORD CARLILE:** Which week are we talking about now?

3 **MISS ROSE:** 28 May. It also doesn't meet the point that, in
4 my submission, it is unfair to Tesco to require Tesco to
5 open its appeal with the evidence of three witnesses who
6 are not and never have been Tesco employees. It is
7 effectively requiring us to open our (inaudible).

8 **LORD CARLILE:** The week of 28 May, I haven't consulted my
9 colleagues and they may well have engagements but, so
10 far as I am concerned, although it would involve
11 cancelling something extremely interesting, it's
12 possible to achieve that, from my point of view. My
13 colleagues will look at their diaries when we retire.

14 Let's have half an hour to take stock but sit again
15 at 11 o'clock. Hopefully we will have some clearer
16 indications. But there is time available if we need
17 extra days. We do completely understand what you're
18 saying about needing time for closing submissions.

19 **MR MORRIS:** We too feel that, and we're grateful for the
20 indication that the Tribunal has given that there may be
21 extra time.

22 **LORD CARLILE:** I understand that we have a group of students
23 visiting from the University of Newcastle. You're all
24 very welcome, but I'm afraid we're about to adjourn for
25 half an hour so it may be an early trip to Starbucks or

1 wherever you prefer to buy your coffee. We will sit
2 again at 11 o'clock and shortly thereafter Mr Morris
3 will continue with his opening. That's Mr Morris
4 standing up, the distinctive looking gentleman.

5 **MR MORRIS:** And distinguished.

6 **LORD CARLILE:** And distinguished, of course. Mr Morris will
7 continue his very interesting opening statement in this
8 case.

9 If it's of any help, Mr Hiendl, one of the
10 referendaires, I'm sure would give you a short briefing
11 about the case.

12 Right, okay, we'll adjourn for half an hour.

13 (10.28 am)

14 (A short break)

15 (11.15 am)

16 **MISS ROSE:** I'm happy to tell you peace has broken out.

17 Here is the proposal which both sides are content
18 with, subject to you also being content. Can I first of
19 all say how grateful we are to you offering us some
20 extra days which was critical in breaking the impasse.

21 First of all, the proposal is that after the OFT's
22 opening we have the housekeeping matters tomorrow, we
23 then adjourn until the 14th.

24 **LORD CARLILE:** So let me just write this down. Tomorrow
25 housekeeping, and then we adjourn until the 14th.

1 **MISS ROSE:** Monday the 14th.

2 **LORD CARLILE:** We weren't sitting next week anyway.

3 **MISS ROSE:** No, we weren't sitting next week anyway.

4 We would like to start at 10.00 am on that day and
5 that will be Mr Reeves. We're not sitting on the 15th,
6 so on the 16th, Mr Ferguson.

7 **LORD CARLILE:** 10 o'clock?

8 **MR MORRIS:** Yes, please.

9 **MISS ROSE:** On the 17th, Mr Irvine.

10 We then propose to have Mrs Oldershaw commence her
11 evidence on Friday, the 18th, she would continue on
12 Monday, the 21st.

13 **LORD CARLILE:** I am just looking at my diary as we go along
14 so I can just be sure there are no errors. Yes, the
15 21st?

16 **MISS ROSE:** And the 22nd, finishing at lunchtime that day.

17 We then start Mr Scouler on the afternoon of the
18 22nd.

19 **LORD CARLILE:** Ah, there may be a problem about the
20 afternoon of the 22nd. I will tell you what the problem
21 is. I am a member of the QC appointments board and
22 there is a meeting scheduled for the afternoon of the
23 22nd, it involves a lot of people. Let's just leave the
24 afternoon of the 22nd.

25 **MISS ROSE:** Okay. Then he can also be heard on Wednesday,

1 the 23rd. I would then make my closing submissions on
2 the 24th and 25th.

3 **LORD CARLILE:** Now, on the 25th, we will have to sit
4 a little late.

5 **MISS ROSE:** Yes, is it right that you're not available on
6 the morning of the 25th?

7 **LORD CARLILE:** That's right.

8 **MISS ROSE:** But we can sit late?

9 **LORD CARLILE:** I have a professional engagement which is
10 fixed on the 25th, a court engagement in the morning.
11 We sit at 9.00 at Southwark so I will be, even allowing
12 a margin of error, my junior is a silk, so I can be here
13 for 1.30.

14 **MISS ROSE:** Until about, what, 5 o'clock or 5.30? If we
15 could sit until 5.30, and on the assumption that
16 everybody had lunch -- if we did 1.30 to 5.30.

17 **LORD CARLILE:** Yes, subject to my colleagues' availability.
18 Yes.

19 **MISS ROSE:** Mr Morris' closing submissions on 28th and 29th.

20 **LORD CARLILE:** That's fine, yes.

21 **MISS ROSE:** And my reply on the 31st, because we understand
22 you can't sit on the Wednesday.

23 **LORD CARLILE:** Bear with me for a moment.

24 I think that in the light of our sitting on the
25 Tuesday, I could sit on the Wednesday --

1 **MS POTTER:** I can't I'm afraid.

2 **LORD CARLILE:** Ms Potter can't, and Ms Daly needs to check.

3 **MS DALY:** The 31st is a Thursday?

4 **MISS ROSE:** That's correct.

5 **LORD CARLILE:** Shall we just check on the 30th and -- the
6 31st doesn't present problems for either of my
7 colleagues?

8 **MS DALY:** No, I have to check.

9 **MS POTTER:** The 31st I can do.

10 **LORD CARLILE:** The 31st, we couldn't start until 10.30
11 because I have an eye screening examination that
12 morning.

13 **MISS ROSE:** That would be fine. I wouldn't expect it to be
14 more than a half day.

15 **LORD CARLILE:** Shall we just check on the 31st and sort that
16 out this afternoon?

17 **MISS ROSE:** Yes.

18 The final point -- yes, we'd like a 10 o'clock start
19 on the 24th for the beginning of our closing.

20 The final point is this, can we ask that the OFT
21 should be ready to take Mr Scouler before Mrs Oldershaw
22 if necessary because --

23 **LORD CARLILE:** They're nodding.

24 **MISS ROSE:** At the moment we're proposing that she should go
25 first, starting on Friday the 18th, but we would ask

1 them to be ready to cross-examine him on that date.

2 **LORD CARLILE:** Fine, yes. Is that it on the timetable?

3 **MISS ROSE:** The other issue is the start time and the
4 location for the video link. Can I ask that we shelve
5 that for the moment. We would like to talk to
6 Mrs Oldershaw about the timing that would suit her. We
7 appreciate very much you offering 7.00 am and we will
8 investigate with her what is the best timing. Our
9 previous experience of her is that she does get tired,
10 not surprisingly, late in the evening, so we will
11 investigate and come back with a proposal, and also in
12 relation to the venue.

13 **LORD CARLILE:** Yes. Obviously a venue near here would be an
14 advantage.

15 **MISS ROSE:** Yes, of course.

16 **LORD CARLILE:** There's plenty of them.

17 **MISS ROSE:** There are, yes. We're simply trying to find
18 which has the best technology in terms of the best
19 resolution. Apparently there's a system called
20 Telepresence which is very good and we're going to see
21 where we can locate that.

22 **LORD CARLILE:** So the expectation should be for evidence on
23 video link.

24 **MISS ROSE:** As I said before, we just haven't explored the
25 idea of her coming back because of the current

1 situation. If she can come back it's preferable for
2 everybody that she should, but we can't really press
3 that point at the moment.

4 **LORD CARLILE:** No. Okay.

5 **MS POTTER:** The only thing I'm conscious of is Wednesday,
6 the 23rd. Ideally I wouldn't do a 7.00 am start because
7 I have another engagement at 8.00 am, that would be if
8 we had to switch round. But having said that, if
9 necessary, we can see that nearer the time.

10 **MISS ROSE:** I'm sure we can accommodate all of these issues,
11 but that gives us at least a route map going forward.

12 **LORD CARLILE:** Just out of an abundance of caution,
13 I presume that steps are being taken to ensure that
14 a bundle or whatever of documents is sent to New Zealand
15 as soon as possible.

16 **MISS ROSE:** Yes.

17 **LORD CARLILE:** In common form to the form that we will be
18 given.

19 **MISS ROSE:** Yes.

20 **LORD CARLILE:** Thank you, I'm very grateful to both counsel.

21 **MR MORRIS:** We're grateful too, sir, to the Tribunal for its
22 suggestion and approach.

23 **LORD CARLILE:** So we're going to go back to where we were
24 now.

25 What's happening with those students, because if

1 they're going to come in I would rather they came in now
2 rather than in the middle of a piece of purple prose
3 falling from your lips, Mr Morris.

4 Whilst we're waiting, in relation to any
5 confidentiality issues that are raised tomorrow morning,
6 what we had in mind was having -- obviously with both
7 parties present -- the possibility of hearings in
8 chambers involving serially each of those who wishes to
9 make representations so that we can determine the
10 issues.

11 What I had in mind is we simply ask them to point to
12 what they would wish to have excluded. There may be
13 issues about finding that material.

14 **MISS ROSE:** Would those hearings include the Tesco legal
15 team?

16 **LORD CARLILE:** Yes, they'll have to. Certainly the Tesco
17 legal team, the confidentiality ring team, yes, of
18 course. Hopefully we can deal with them well within the
19 morning. Again, if leading counsel felt that they could
20 take anybody who turns up, and I believe leading counsel
21 may be involved with at least one party, into one of
22 those nice closed rooms and talk to them before we sit,
23 it might help to resolve the issues.

24 **MISS ROSE:** I have to say we don't know what the issues are.
25 We didn't know anyone was coming tomorrow.

1 **LORD CARLILE:** Maybe Mr Morris can help with the closed room
2 scenario, with all your distinction, seniority,
3 distinctiveness and authority, please, Mr Morris.

4 **MR MORRIS:** And purpleness.

5 **LORD CARLILE:** Yes, all of those rolled up.

6 Opening submissions by MR MORRIS (continued)

7 **LORD CARLILE:** Yes, Mr Morris.

8 **MR MORRIS:** Yes, thank you, sir.

9 When we left off on Friday, I was dealing with the
10 Tesco Dairy Supply Group meeting and I had taken you to
11 the detail of some of the notes and, in particular, the
12 passage in the Express note at tab 14 {Magnum} about
13 value and value lines.

14 What I would like you to do now, can I invite you to
15 take up paragraph 33 of our skeleton argument {Magnum}.
16 There we set out what we say the notes establish, and
17 they establish three things. First that increases in
18 retail prices for cheese were discussed as part of
19 a discussion of prices for cheese; secondly, that Tesco
20 disclosed to the array of gathered processors that it
21 was contemplating increasing its own retail prices for
22 cheese; and, thirdly, that Tesco also disclosed that it
23 would increase those prices on condition that other
24 competitor retailers also increased their cheese retail
25 prices. This is the first of Tesco's statements of

1 conditionality.

2 Just for your note, those series of propositions are
3 to be found perhaps in a slightly more expanded form at
4 paragraph 117 of our defence, which is now our amended
5 defence {Magnum}.

6 Of those three points, the first two points, namely
7 that retail prices were discussed and that Tesco
8 disclosed that it was contemplating increasing its own
9 prices, we say are established by the passages which
10 I took you to on Friday. I don't propose taking you
11 back to those. We also say that those propositions are
12 also established by other passages in the notes, most
13 particularly I would point to the reference to customers
14 having to pay. You will recall that there is reference
15 in the Arla note at tab 13 {Magnum}, you will see in the
16 second part of the Arla note:

17 "Ask the customers to pay for it."

18 I'm in document bundle 1, where I will be I suspect
19 for the rest of the morning. The three main notes, and
20 the fourth one, are 12, 13 and 14. The middle one is
21 Arla's note, which is the shortest note, and you will
22 see there, halfway down the second section of that note,
23 under "Discussion", the words:

24 "Ask the customers to pay for it."

25 That, we say, is supported by a further note, to

1 which there is dispute as to the writing, but I just ask
2 you to turn it up and note in your notebook. If you go
3 back to the Dairy Crest note, the manuscript, on the
4 first page {Magnum}, you will see in the section
5 three-quarters of the way down:

6 "Ultimately consumer ..."

7 Then we've got whether it's "pays" or "pref" or
8 whatever, but we say that that word, in the "Ultimately
9 consumer", matches the "Ask the consumers to pay" on
10 page (sic) 13 {Magnum}.

11 We would submit that if you match the wording, we
12 submit that the passage that is in the manuscript note
13 which starts "Mood to see prices going up" and the
14 "Ultimately consumer [ambiguous]" -- "pref", we say it's
15 obviously "pays" -- those words are Mr Hirst's words
16 because they match the notes back on the Express note on
17 the third page which we were looking at just before the
18 adjournment on Friday. You will see there the "mood to
19 move" words come in there, and we submit that those
20 words are Mr Hirst's words.

21 Now, as to the third point, which is Tesco
22 disclosing that any retail price made would be
23 conditional on other competitors increasing their retail
24 prices, we say that you can see that from two
25 references. First, going back to the Express note,

1 page 3 {Magnum}, Mr Hirst near the bottom, the passage
2 we've been through before, where he says:

3 "Very difficult to move out of line with other
4 competitors."

5 We say that is indicating that: we can move retail
6 forward, but the problem will be because we can't move
7 out of line with our competitors, but it nevertheless
8 senses there is a mood to move these prices forward.
9 That's the first passage upon which we rely to support
10 the proposition that the indication that was given was
11 that: will go up if others do.

12 Then on the next page, you see Mr Scouler's -- third
13 from the bottom, "J Scouler":

14 "At the end of the day -- "

15 I'm in the Express note now on page 4 {Magnum}, at
16 the bottom, "J Scouler":

17 "At the end of the day we must be competitive.
18 Highlighting that they are up against Walmart's view of
19 'lowering the cost of the living for the world', so how
20 to tackle other sectors."

21 We say that that is also confirming the problem or
22 the difficulty of going up, which is they'd have to
23 watch what Asda did. So that is where we say you get
24 the indication of the conditionality of the statement.

25 Two more points on Tesco Dairy Supply Group meeting

1 and I shall be ready to move on.

2 The first is we would ask you to note the references
3 in -- and I now -- yes, Express note, Mr Scouler, last
4 page {Magnum}, I would say two-thirds of the way down
5 rather than three quarters of the way down here,
6 probably in between:

7 "J Scouler - two routes --"

8 Last page of the Express note, two thirds of the way
9 down, just below the "[Mr] Hirst - ... 8p on a pack
10 ...", the next one:

11 "J Scouler - two routes; either market meltdown and
12 farmers go out or some form of market management."

13 That is in itself mirrored in the Arla -- I think
14 it's actually in the Dairy Crest note at --

15 **LORD CARLILE:** Manuscript?

16 **MR MORRIS:** Manuscript. On the second page {Magnum}, two
17 thirds of the way down:

18 "Need some form of market management."

19 We would suggest that would be Mr Scouler again.

20 Then there's the unclarity of the -- it looks as
21 though there's the word "competition" in there.

22 "Anticompetitive" possibly, "need government
23 intervention [and] support".

24 But the proposition is that, unless the market is
25 managed, there would be a melt down, they were

1 discussing some form of market management. In other
2 words, the market is not going to be left to operate in
3 its own way.

4 Then the final point to make is that each of the
5 notes records the fact that Tesco issued a challenge to
6 the processors, or the phrase "challenge to processors"
7 was used.

8 Express note, page 2 {Magnum}, it comes in two
9 places. This is Mr Hirst halfway down:

10 "Challenge to processors was that Tesco wanted to
11 see a better return to farmers..."

12 Then further down:

13 "The challenge to processors was to put 2ppl on all
14 milk but recognising that supermarket milk is only
15 25 per cent of total."

16 Then at the Arla note, tab 13 {Magnum}, you have
17 again under the heading "Tesco", and that's a very close
18 match it seems to us, halfway down the "Tesco" section,
19 13:

20 "Challenge to processors to return a better price to
21 farmers."

22 Then you will also see, whilst we're there:

23 "Tesco expects processors to report [on] how they
24 are going to achieve this."

25 Then finally in the Dairy Crest note, working my way

1 backwards, on the first page you'll see the word
2 "Challenge" actually as a heading. Manuscript. First
3 page of the Dairy Crest note, tab 12 {Magnum}:
4 "Challenge processors to put back at least 2p"
5 And then there's the bit looking at other sections.
6 But the point there, and the point I conclude on, is
7 there's the challenge that Tesco state for the
8 processors, and now what I'm going to do is I'm going to
9 take you to see what Dairy Crest do next in response to
10 that challenge, and they do it right at the beginning of
11 the very next week.
12 13 September was a Friday, and what we say the
13 documents will now show is that actually Dairy Crest
14 picked up the baton, and within days they had put
15 together a proposal.
16 We go first to a document to which you have not yet
17 been taken, which is an important document, document 16
18 {Magnum}. We're now at 17 September, which is
19 the Tuesday, I think. What we have here is a slide
20 presentation made by Asda -- made by Dairy Crest to Asda
21 on 17 September. And just so I don't have to go to it
22 again, if you turn to the next tab, 17 {Magnum}, you
23 will see a very similar document. The same presentation
24 was made by Dairy Crest to Marks & Spencer and that's
25 also dated the 17th.

1 But let's concentrate for a moment on the
2 presentation made by Dairy Crest to Asda on
3 17 September. On the first page, you will see that it's
4 made to Penny Coates and Harvey Bennett, and then over
5 the page -- so this is one of four I've got, or 1/4 --
6 the heading "Elements Leading to Current Situation".

7 You will see:

8 "Oversupplied market.

9 "Surpluses flowed into commodities.

10 "Demand for commodities internationally weak.

11 "Prices low.

12 "Despite all signals production remains high."

13 Then we have "Options", and the first option is:

14 "Do nothing.

15 "Result.

16 "Unrest/disruption."

17 Second option:

18 "Leave market increase on liquid [that is liquid
19 milk and we know that has already happened] as
20 a standalone solution.

21 "Result.

22 "Only half the market is moved."

23 Third option:

24 "Move the whole market forward.

25 "An increase between 1.5 and 2 [pence per litre]

1 "Does not address longer term issues."

2 And there you'll see that the third option is
3 getting up towards, moving towards the 2 pence per
4 litre.

5 You then have a series of graphs about currency
6 movement, wholesale milk production and the like. If
7 you turn over {Magnum}, you'll see a graph about the
8 cheese market, this is bulk cheddar, and you will see,
9 and I'm assuming these are wholesale prices, you will
10 see there's a graph showing the decline in the prices
11 from June 2001, and the summary:

12 "Current situation.

13 "Mild [that's mild cheese] prices stable, at low
14 level; mature prices edging down.

15 "Stocks very high."

16 Then if you go over some more pages you then get to
17 a heading "What does 2ppl on retails mean?" The heading
18 means what does 2ppl on retail liquid milk mean?

19 Income 2 pence per litre. Retail milk sales are
20 only 51 per cent of total liquid intake net of wastage,
21 therefore 1.2p. 75 per cent of direct supplies go to
22 liquid, therefore the increase means -- 2p per litre on
23 retail means 0.77p for the farmer.

24 "Any cash received up to 1st October will be paid as
25 a lump sum."

1 Then we go to the next slide {Magnum} which is
2 "Proposals". The first proposal is:
3 "Move cheese prices at retail up by £200 per tonne."
4 I obviously emphasise the word "retail", and we
5 submit that is one of a series of references that you
6 will see which indicate that Dairy Crest's proposal was
7 not just for a cost price increase but it was for
8 a retail price increase too.
9 Then you'll see they run down butter as well,
10 yoghurt and desert.
11 "Ensure that competitive set versus imports does not
12 change".
13 Then 7:
14 "Ask NFU/FFA in return for agreed cessation of
15 hostilities and commitment to dialogue before action."
16 Then we go to 17 {Magnum} which I've just told you
17 is the same presentation made to Marks & Spencer. Then
18 what happens -- it's two days later and I'll give you
19 the narrative and then we'll go to the document. Two
20 days later, we see the first appearance of the
21 Dairy Crest briefing document. That first appeared, as
22 far as we can see, is that Dairy Crest met with
23 Sainsbury's on the 19th and handed them a copy of the
24 Dairy Crest briefing document on that day. You can see
25 that from tab 24 {Magnum}, which is the letter which is

1 on the 23rd, which is the following -- no, it's the end
2 of the week, isn't it? Monday, the 23rd. This is
3 a letter from David Flower of Dairy Crest to John Arnold
4 of Sainsbury's:

5 "As discussed last week [so they had a meeting],
6 Dairy Crest intend to lead a manufactured dairy product
7 price increase..."

8 I think from my note this may be a document which
9 you haven't yet seen either. Then I won't read the rest
10 of the documents at the moment because there are similar
11 letters, but what you get from the penultimate paragraph
12 is:

13 "I attach a briefing document which we handed to
14 Finn [that's Finn Cottle of Sainsbury's] on Thursday,
15 which provides more information on our proposals."

16 So on the 19th we can see that the Dairy Crest
17 briefing document was handed to Sainsbury's. Then on
18 the next day, the 20th, the Friday, that document is
19 sent to Asda and to Safeway.

20 Can we just look at Asda first at document 118.
21 Sorry, it's the same -- it's document 18, I use it 1/18
22 and 2/18 because of my note. I'm in the same bundle.
23 So document 18 {Magnum}, I'm going back from 24 to 18.

24 Here you have an email from Dairy Crest, Kenton
25 Robbins, to Penny Coates and Harvey Bennett at Asda:

1 "Dear All

2 "Please find attached, further to the meeting on
3 Tuesday 17th September [and that's the meeting I've just
4 shown you at effectively tab 16] with Penny, Harvey and
5 Bill Haywood, details of the industry initiative that
6 Dairy Crest is proposing to lead."

7 What that attachment was was the Dairy Crest
8 briefing document -- before I take you to the document,
9 I'm taking you to who it was sent to when.

10 You will also see, attached in the same tab -- if
11 you go over the page {Magnum}, you will see that they
12 attach a series -- the email attachment is on the second
13 page, you'll see a briefing document and then you'll see
14 four letters referred to: increase letter to Storey,
15 Watson, Greenwood and Moore. In fact those letters,
16 which were sent to various different people at Asda,
17 were in the same form as the letter at tab 21 {Magnum}
18 to which I'm now going to take you.

19 This is the form of the letter which was sent to all
20 these people. This was also sent to Mr Moore at Asda
21 and we say this is a very important document. Now, this
22 is a document, from recollection, to which Ms Potter
23 drew attention on Friday. We say that it is clear from
24 this letter that the industry action that Dairy Crest
25 was proposing to everyone at the same time was an

1 increase in cost and in retail prices.

2 If you go to paragraph 1 of that letter, this is
3 a passage to which we haven't been before:

4 "As I'm sure you will now be aware Penny, Harvey and
5 Bill Haywood had a meeting on Tuesday [that's the 17th]
6 to discuss the proposed industry action that Dairy Crest
7 are intending to lead as a result of the intensive
8 action from the farmers and the industry. The current
9 raw milk market is unsustainable as it stands. As
10 discussed at the meeting, we are proposing an increase
11 of £200 per metric tonne on cheese and a 10% increase on
12 cream in cost prices [and the next words] and an
13 equivalent increase in retails based on cash margin
14 maintenance."

15 We say it is absolutely plain there that what this
16 proposal is is both an increase in cost and an increase
17 in retails, and an increase in retails based on cash
18 margin maintenance.

19 "As a result of these proposed increases Dairy Crest
20 will guarantee that any cost benefits will be passed
21 back to the Farmers supplying Dairy Crest in full; this
22 value will be shown as a market price supplement to our
23 monthly milk price."

24 Then we have the next paragraph which I believe we
25 did go to:

1 "We would ideally like the change in cost prices to
2 be effective for all deliveries... but various [own
3 label] cheese lines still have preprice printed labels
4 and the time lines would need to be reviewed to reflect
5 what's involved in having the prices removed."

6 We say of course that the reference to preprice
7 printed labels is a reference to the stock and the delay
8 issue.

9 "The rationale to move swiftly on all lines to have
10 an immediate positive effect on the farming industry and
11 we would in conjunction with this initiative like to
12 jointly agree on a PR campaign to effectively
13 communicate the benefits that this action will have on
14 British farming.

15 "I attach a briefing document to this letter giving
16 more information on our proposals."

17 And I say "our proposals" is obviously a reference
18 back to the summary of what the proposal is in the first
19 paragraph.

20 The Dairy Crest briefing document is also sent to
21 Safeway and I'll come back to that in a moment.

22 We then go to the Dairy Crest briefing document and
23 I'm slightly struggling in my notes to find which
24 version you were taken to at the time. It may have been
25 in 24 or 25.

1 It was 25 {Magnum}, but it appears in several
2 places.

3 Our submission is, in addition to the points I've
4 just made to you -- our submission is the proposal was
5 a proposal for an increase in cost and for retail, and
6 we also say it's apparent from the terms of the
7 document, and we say it for the following reasons.

8 First, there is the reference to "cash margin
9 maintenance" rather than percentage margin. However one
10 looks at that, and however you categorise it as
11 a recommendation, suggestion, however, it is plainly
12 a proposal for an increase in retail price. Cash margin
13 maintenance and percentage margin maintenance refer to
14 a retail price.

15 Secondly, the word "Transparency" -- the "cash
16 margin maintenance" point appears in the right-hand
17 side, the second page of the Dairy Crest briefing
18 document --

19 **MS DALY:** Are you in tab 24 or 25?

20 **MR MORRIS:** I'm in 25, I apologise. I'm probably going too
21 fast. I'm working off the version that I believe
22 Miss Rose took you to so that we're all marking up or
23 looking at the same version. She took you through it,
24 I wasn't proposing to read it all again, I was just
25 trying to pick out the really significant points, we

1 say.

2 The first point we say is that it refers to "cash
3 margin maintenance", that is on the second page under
4 the second heading. That is the subject matter of that
5 bullet point.

6 The second point is that the actual heading of that
7 bullet point, "Transparency", we say is highly
8 significant. The topic being discussed here is the
9 visibility of the price increase proposal, and we say
10 that the only way the increase can be visible is through
11 a retail price increase. And you will see that the
12 concern is that the supermarket should not be seen to be
13 profiting or profiteering -- I put it more neutrally but
14 it's expressed as profiteering -- by raising it more
15 than the farmers were getting.

16 Thirdly, we say that the two references in this
17 document to the concept of the market moving is also
18 a reference to retail prices. If you -- those two
19 references are to be found first at the top of the
20 second page:

21 "If we are successful in persuading the market to
22 move the resultant revenue gained will enable us to
23 increase raw milk prices in total between 1.0 and
24 1.5..."

25 Then if you go down to the heading "Timing" you will

1 see:

2 "We have promised to pay our farmers all revenue
3 recovered from the market from the date RSPs [retail
4 selling prices] and costs have moved."

5 So plainly, in the second of those references, the
6 market move is a reference to a move in retail and cost,
7 or cost and retail. We submit that, similarly, the
8 concept of the market moving, at the top of the page, is
9 also a reference to retail. There is no suggestion that
10 only costs would move but an assumption that both retail
11 and costs would move. And that concept of market
12 moving, it comes up throughout the story, and it is our
13 submission that that -- when they say that we're going
14 to move or the market is going to move -- includes
15 a reference, at least includes a reference to retail.

16 We know then that -- well, first of all, we know
17 that this proposal was made to all retailers in the same
18 terms at the same time. We also know that at least
19 Tesco was aware of the fact that it had been sent to
20 other retailers at the same time. We see in the same
21 tab, at the beginning of 25, we see that the Dairy Crest
22 document was, the briefing document was actually sent to
23 Tesco in a number of places. We see it at the beginning
24 of this tab, because that's 23 September when
25 Mr Beaumont sends it to Mr Hirst.

1 You will see also a reference at the beginning of
2 that email -- I'm now at the beginning of tab 25 -- to
3 the words "Following our conversation on Friday", Friday
4 was 20 September, and so from this document we can see
5 that Mr Hirst -- and as you'll recall, Mr Hirst is sort
6 of between Ms Oldershaw and Mr Scouler in the Tesco
7 hierarchy. There's a conversation where, at the least,
8 it appears that he informed -- Dairy Crest informed
9 Mr Hirst about the increase in prices, and then he sends
10 this document on the Monday, and then he says:

11 "I will contact you tomorrow (Tuesday) to discuss
12 any questions which you may have."

13 So a further conversation envisaged the next day, on
14 the 24th.

15 We also see at document 26 {Magnum} that this
16 document was sent to Mr Rigby and this time by
17 Mr Arthey. Mr Arthey is I think lower down in the
18 hierarchy at Dairy Crest and he is sending it to his
19 opposite number, Mr Rigby, who was concerned with
20 spreads principally, at Tesco on the 23rd. Again he
21 says in that covering letter, I'm at tab 26 now, he says
22 that:

23 "Following our earlier conversation about the recent
24 moves in liquid milk, I can confirm we are committed to
25 passing the increases received back to farmers."

1 Then you see:

2 "I have attached a supporting document."

3 And that's the Dairy Crest briefing document.

4 We are now at the 23rd, which I think is the Monday.

5 What then happens is that on the next day, Tuesday,
6 the 24th, there is an internal meeting at Dairy Crest
7 and that is to be found at document tab 28 {Magnum},
8 which Miss Rose took you to on Friday.

9 Now, this is a very important document in the case
10 because this is the document where the first mention of
11 a proposal for what we have termed "waves of increases"
12 over a number of weeks appears.

13 We say this document too plainly refers to a retail
14 price increase.

15 First of all, you see that from paragraph 3:

16 "Commercial directors to clear with their senior
17 contacts [that means their senior contacts at the
18 retailers] by no later than 4 October Dairy Crest's
19 intention of making a public statement to the effect
20 that farmers could expect to see retail prices for
21 cheese increasing from mid-October onwards.

22 "NB it would be helpful if some key individual
23 account such as Tesco, Sainsbury's, Asda, Morrison, or
24 Waitrose could endorse such a statement."

25 If I may just make this point, you will see in

1 a moment that -- you will see the action points,
2 particularly I think numbers 3, 4 and 5, or perhaps 2, 3
3 and 4, being carried out in subsequent documents. So
4 you can match certainly number 2 and number 3 to events
5 which happened afterwards.

6 **LORD CARLILE:** This is Dairy Crest?

7 **MR MORRIS:** This is a Dairy Crest internal meeting held at
8 4.00 pm on the afternoon of Tuesday 24th where it was
9 agreed that:

10 "It was agreed that we should set a cheese price
11 implementation date... of 20th..."

12 That's the start date.

13 "Each account team to persuade their respective
14 retailers to move a section."

15 Now, there is the word "move" again. We say
16 "retailers to move a section" of their cheese category,
17 in the whole context of everything else you will see,
18 means a retail move as well as a cost price move.

19 In fact I should have taken you to paragraph 2 first
20 because here you see the wave idea.

21 "... to move a section... on the 20th [a section of
22 the category]."

23 And we'll come in a moment to why there was waves
24 because of the complexity of cheese, and you will see as
25 we get there that the first wave or the first move is in

1 fixed weight, and that's because you don't have the
2 delay problem with labelling with fixed weight.

3 Then it says:

4 "... a section... on 20th October followed by
5 a three week programme during which the remainder of the
6 cheese category moves."

7 That is, we say, the first indication of this idea
8 of it being taken in waves. In fact, if you look at
9 that, it looks like there's four waves, and in fact when
10 you see what happens it does turn out to be four waves
11 because Sainsbury's moves around the 20th on the first
12 thing, which is actually on the 22nd. And then you have
13 broadly the waves, Monday the 4th, Monday the 11th and
14 Monday the 18th as the plan.

15 That's the first mention of waves.

16 Then you have, as I've read out already, the
17 contact:

18 "Please contact senior contacts.

19 "Commercial directors to clear with their senior
20 contacts..."

21 Then item 4 is:

22 "Each account manager to present a matrix showing
23 cheese price implementation plans effective
24 20th October. These matrices to be presented to cheese
25 price increase meeting number 3 held on Tuesday

1 4th October..."

2 So there was going to be a meeting, was that two
3 weeks -- does that work out? It doesn't really, does
4 it? Ten days. They can't both be Tuesdays, anyway. It
5 must in fact -- anyway, that's by the by, we'll work
6 that one out if there's any issue.

7 Then item 5 is the plan about how it's going to be
8 invoiced, and it's not going to be invoiced at this
9 point on individual lines but there's going to be
10 a monthly supplement on the total tonnage summary. So
11 at that stage the idea is not to move individual cost
12 prices on individual cheese lines but to have
13 a supplement.

14 You can see that these steps were communicated at
15 least to Safeway, see how they were communicated, if you
16 go back to document 19 {Magnum}.

17 Oddly I'm going back in time in a way because this
18 letter is 20 September, and this is the letter that
19 Dairy Crest sent to Safeway enclosing the Dairy Crest
20 briefing document. As you see, it's called in the
21 letter "dairy product price increase rationale".

22 Now, this document is a document that was produced
23 by Safeway during the course of the investigation and on
24 it you can see some manuscript notes which we submit
25 must have been made by Safeway. The interest in this is

1 that, if you look at those notes, they mirror the action
2 points 3, 4 and 5 that appear at tab 28 {Magnum}.

3 So the first you see, "DC Position", is Dairy Crest
4 position. The first one "4/10 statement", that is
5 action point 3 because that is the paragraph of the
6 action point at document 28 which refers to making
7 a public statement by no later -- well, for it to be
8 cleared by 4 October. Given that the commercial
9 director was to clear with the senior contacts, that
10 records that Dairy Crest has put that point to Safeway.

11 Then we have -- then you note, and I ask you to
12 note, "JS lead by segment", so there you see the notion
13 that Sainsbury's will lead. Then the next one "Matrix
14 next week", and that mirrors paragraph 4 of document 28
15 which refers to presenting a matrix. Then you'll see:

16 "Proposal - invoice save

17 "- Additional ..."

18 And I won't read out -- I don't know whether I can
19 or I can't, but I won't read out the words after that.
20 That reflects paragraph 5 of document 28 which talks
21 about the invoices for individual lines remaining the
22 same but that there would be an additional supplement
23 which you will have seen at point 5.

24 As I said, the additional element is the fact that
25 JS leads by segment. Sainsbury's are to go first and in

1 fact, as we shall see, that is what happens.

2 If I can take you back to document 28 finally --

3 **LORD CARLILE:** Just before we go back to document 28, there
4 is some manuscript at the top of that document which you
5 haven't just taken us to.

6 **MR MORRIS:** I haven't, no.

7 **LORD CARLILE:** I presume that the letters of the top are
8 FFA, for further action or something of that kind.

9 **MR MORRIS:** Farmers for Action.

10 **LORD CARLILE:** Oh, of course it is. We've just seen that
11 elsewhere.

12 **MR MORRIS:** Yes. I've looked at it, I didn't want to make
13 particular submissions on it. Is the handwriting the
14 same? What does it mean?

15 **LORD CARLILE:** It's just what it says, that's all.

16 **MR MORRIS:** Yes, it does say what it says, and it's not
17 clear at what point in time that note was made.

18 **LORD CARLILE:** Okay, so I'll ignore that for the time being.

19 **MR MORRIS:** For the time being, yes.

20 **LORD CARLILE:** At the bottom of the page, the last entry but
21 one, "Anti [something] for Tesco on RSP".

22 **MR MORRIS:** "Or RSP" maybe it's "on". I don't know.

23 **LORD CARLILE:** "Anti"?

24 **MR MORRIS:** It looks like "shaft".

25 **LORD CARLILE:** It looks like "shaft" to me as well. I just

1 wondered if we were to be addressed on that.

2 **MR MORRIS:** I had noticed it, marked it and didn't --

3 **LORD CARLILE:** It looks like:

4 "Antishaft for Tesco on RSP."

5 **MR MORRIS:** Yes, can I come back to you on that with such
6 thoughts as I have. One is obviously...

7 **LORD CARLILE:** I've got a better copy here. Just going to
8 the top of the page again, there appear to be two
9 entries:

10 "What are Tesco doing?"

11 "Tesco lead, we follow."

12 Which I had observed earlier.

13 **MR MORRIS:** Yes, so had I.

14 **LORD CARLILE:** At the bottom, it looks like:

15 "Antishaft for Tesco over RSP", or "on RSP."

16 Anyway I had observed those and thought I should
17 point them out. Thank you.

18 Are you going to take us back to 28?

19 **MR MORRIS:** Yes. Finally at 28, paragraph 6 {Magnum}:

20 "It was agreed that we would present to all major
21 accounts the idea of applying a red tractor logo to all
22 [own label] cheese. Colin Beaumont [that's of Dairy
23 Crest] to test this proposal with Tesco during a meeting
24 tomorrow Wednesday 25th September."

25 We rely on that passage to support our case that

1 there was a meeting between Tesco and Dairy Crest on
2 25 September.

3 Can I then go to the next two tabs which are 29 and
4 29A {Magnum}. Perhaps you could just have a quick look
5 at them so you can see what they are without me going
6 into the detail. They're two Powerpoint presentations,
7 and these are Dairy Crest Powerpoint presentations
8 prepared for an internal meeting on 24 September, so,
9 I presume it's the meeting we've just been looking at.

10 You were taken to document 29A in opening but not
11 document 29. Document 29 is a presentation by -- it is
12 difficult to read, I notice, and we've struggled. It
13 does actually help if you put some highlight over it, it
14 brings out the words. I'm going to go through it very
15 quickly anyway.

16 Document 29 is a presentation by Mr Reeves dealing
17 very specifically with the staggering issue as opposed
18 to waves and stages. This is what I call the staggering
19 issue. This is the point that retailers were saying
20 that the cost price increase for cheese shouldn't be
21 paid until the cheese had matured, effectively. This is
22 a presentation where Mr Reeves presents the arguments
23 against a cost -- staggered cost price increase, that
24 being to push back against the retailers who said there
25 should be. You can see actually, in the second slide,

1 on the first page of 29 {Magnum}, that the actual
2 periods are -- you see:

3 "The retailers agree a cost price increase in three
4 months for mild, six months for medium and 15 months for
5 extra mature."

6 So it takes these extended periods for each variety
7 of cheese. I imagine there will be a period somewhere
8 in between six and 15 months for ordinary mature rather
9 than extra mature, but that is what this document is
10 dealing with. And not surprisingly, Dairy Crest were
11 arguing that the cheese cost price increase should be
12 paid now, in other words at the same time as Dairy Crest
13 would be paying the farmers the extra 2p per litre.

14 In this document, Mr Reeves identifies the risks for
15 Dairy Crest if there was a staggered cost price
16 increase. And, if you go over the page, you will see
17 the first slide just says "Risk". The second slide at
18 the bottom of the left-hand side, "Margins". And then
19 "Summary":

20 "Price increase not justified by the market. It is
21 desirable and may be possible to buck market for six
22 months. Not possible or desirable for 15 months."

23 So he is concerned that you might be able to get
24 this price through for a six month period but not for
25 the 15 months that would account for the period for --

1 that would be the delayed payment by the retailers at
2 least in respect of extra mature.

3 Then at 29A {Magnum} you have a presentation of
4 a more general nature. And it is not clear on its face,
5 although I suspect Mr Reeves will be able to clarify
6 this, it is not clear on its face the date of this
7 presentation. But you've seen this before, I think
8 Miss Rose took you to the first slide. You will note
9 "Retailer Action", and then she took you to the second
10 one, "Need for Change", and I would just identify:

11 "Current market is unsustainable.

12 "Milk producers are making losses.

13 "Processors are making losses."

14 Over the page, and I'm trying to take this
15 relatively quickly, "Management of Change", first
16 bullet:

17 "Market driven change will not happen in the near
18 future due to high stocks. DC unable to break market
19 alone."

20 Then the third one, and this is back to the
21 reference to the Tesco Dairy Supply Group meeting and
22 the concept of active management:

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

25 Fourth:

1 "Retailer action is needed to break vicious circle."

2 Then the next slide:

3 "Accept cost price increase £200 per tonne for 6
4 months..."

5 You've seen the rest of that slide, and you've seen
6 the rest of the next one, "Modus Operandi":

7 "Retailers to pay DC a cost price increase.

8 "... market supplement..."

9 "Use ... movement to generate positive PR..."

10 And then:

11 "Transparent flow through of the premium."

12 And there you've come back to the concept of
13 transparency.

14 Then at the bottom "The Alternatives", and you will
15 see there that this works in the staggering point in the
16 third of the -- this middle one.

17 I would just draw your attention on the last slide
18 to the last two -- I don't think they're bullets,
19 I think they're dashes, aren't they? At the bottom in
20 the middle one:

21 "Processors cannot afford the cash flow hit.

22 "Retailers must not be seen to be profiteering.

23 "Do nothing.

24 "Current scrutiny on milk prices paid to producers
25 versus retail cheese prices will intensify."

1 So that's document 29A.

2 Document 30 {Magnum} is 25 September, so we're now,
3 I think, the next day, and this is Dairy Crest to
4 Sainsbury's and this is also, we submit, a very
5 important document. This is the day after the action
6 point meeting and this is Dairy Crest setting out its
7 proposal to Sainsbury's. Again, we will see the clear
8 and perhaps even clearer explanation of waves:

9 "Dear Finn,

10 "As previously discussed. [We are] seeking dairy
11 product price increases...

12 "The current raw milk market pressures are well
13 understood by both of us. Dairy Crest are proposing an
14 increase of £200 per tonne on cheese and butter and
15 a 10% increase on cream. As a result of these proposed
16 increases Dairy Crest will guarantee that all benefits
17 will be passed back...

18 "With regard to the UK sourced cheese category we
19 are proposing to move some prices, effective from
20 20 October 2002 [so the first wave]. Clearly we aim to
21 move as swiftly as possible in order to have an
22 immediate positive effect on the farming industry but
23 importantly this date gives us the opportunity to manage
24 current stock holdings and to maintain a consistent
25 supply of correctly priced products to Sainsbury's.

1 "Therefore the proposed lines to move from the
2 20th October 2002 are ... Cathedral City and own label
3 medium."

4 "It is Dairy Crest's intention to make a public
5 statement on the proposed increases and we would welcome
6 Sainsbury's endorsement of such a statement."

7 That there matches or mirrors point 3 of document
8 28.

9 In fact, the 20 October reference here of course
10 matches points 1 and 2:

11 "Following the medium and Cathedral City there will
12 be a three week programme during which the remainder of
13 the cheese category will move. The proposal for
14 Sainsbury's is as follows."

15 And then you'll see 27 October, 3 November, 10
16 November. Those are all Sundays rather than Mondays.
17 I won't run down the particular categories there but
18 you'll see different categories of cheese lines.

19 "With regard to the financial management of these
20 increases our recommendation is that Dairy Crest will
21 not move individual cost prices on cheese lines but
22 instead provide Sainsbury's on a [blank] basis a summary
23 of all British cheese [supplied]..."

24 That of course is going back and that again mirrors
25 pretty much verbatim point 5 of document 28. And

1 actually it looks as though very possibly, and I'm just
2 guessing here, that the writer of this letter may well
3 have used the action points as a sort of template.
4 That's speculation on my part, but it certainly matches
5 it.

6 Then the next paragraph:

7 "I would like to raise concern about the
8 differentials that could occur post retail price
9 increases, between UK sourced cheese and imports.
10 I have no doubt that you will give this issue careful
11 consideration."

12 Then you'll see:

13 "On a separate note... we believe that applying Red
14 Tractor [will help]."

15 That reflects item 6. That's Mr Feery, whose name
16 will crop up again, who is the interface between
17 Dairy Crest and Sainsbury's, writing to Finn Cottle.
18 And actually, I'm sure you've already got it, but the
19 two main contacts at Sainsbury's -- at Dairy Crest are
20 Finn Cottle -- well, the two main contacts --
21 Finn Cottle and Sarah Mackenzie are the two main people
22 at Sainsbury's, and Feery is the Dairy Crest interface
23 with Sainsbury's.

24 Then we move to document 31 {Magnum}, we have not
25 seen this document before. This is an internal document

1 made by Glanbia, and I think this is probably one of the
2 first or early occasions where Glanbia appear in the
3 story.

4 We submit that this document and other Glanbia
5 documents are extremely important for showing the full
6 picture of what is going on at the time and, most
7 significantly, that other processors, as well as
8 Dairy Crest, were getting involved at this stage. This
9 document I think is also dated 25 September. It's made
10 by Colin Stump, who I believe was the managing director
11 of Glanbia. And for your note, the document itself is
12 addressed in the decision at paragraphs 5.19 to 5.209
13 (sic) {Magnum}.

14 Before I take you to the document, let me just tell
15 you in summary what it shows. First, it shows clearly
16 that what is being discussed is retail cheese price
17 increases. Secondly, it shows that an array of
18 retailers had been contacting Glanbia to get them to
19 participate and that that contact was happening between
20 17 and 23 September, which is exactly the same timeframe
21 as the Dairy Crest proposal was being circulated to the
22 retailers. Thirdly, it records an understanding,
23 Glanbia's understanding, of Tesco's position.

24 Now, if I just take you to the document, you will
25 see first of all it says "Issue":

1 "Farmers are seeking milk price increases from
2 a move in retail cheese prices.

3 "Can this be achieved?

4 "Can we support it and manage it?"

5 So that's the first point, it's retail.

6 Then you see a heading "Developments", and you will
7 see the first three entries indicate that
8 Marks & Spencer, Sainsbury's and Asda, and in fact
9 Somerfield, the first four, have been seeking Glanbia's
10 views and you see the dates there.

11 You will be aware, of course, as I believe Miss Rose
12 pointed out, that of course Glanbia was not a supplier
13 to Tesco. Glanbia supplied to Sainsbury and to Asda and
14 to M&S but it didn't supply to Tesco. The information
15 that's recorded about Tesco there is:

16 "DFB" [that's Dairy Farmers for Britain] called to
17 say Tesco would move if Asda moved."

18 We would suggest that, whereas in the case of the
19 first four there's an indication of direct contact
20 between the retailer and Glanbia, there appears not to
21 have been direct contact between Tesco and Glanbia and,
22 as I say, that's because it wasn't a supplier.

23 Now, the OFT submits that the "[Tesco (sic)] called
24 to say Tesco would move if Asda moved" is the second of
25 the statements of conditionality. That is an indication

1 received by Glanbia: Tesco would move retails if Asda
2 moved. It is the OFT's case that that statement
3 originated from Tesco.

4 Before leaving this document, it is also instructive
5 to read Mr Stump's --

6 **MISS ROSE:** Can I just have some clarity on the OFT's case
7 on this point; whom is it alleged Tesco made that
8 statement to?

9 **MR MORRIS:** Can I come back on that? It's a matter that we
10 have got an answer for but I would like to consider
11 because it may be a matter that is something that we
12 would wish to -- it's a matter for cross-examination.

13 **LORD CARLILE:** I see a post-it note approaching you as well.

14 **MISS ROSE:** I think we're entitled to know what their case
15 is.

16 **MR MORRIS:** We say that it came from Dairy Farmers of
17 Britain as a first contact and Dairy Farmers of Britain
18 have received it from Tesco, either directly or
19 indirectly.

20 **MISS ROSE:** Are they saying that Tesco spoke to Dairy
21 Farmers of Britain or that Tesco spoke to someone else
22 who spoke --

23 **LORD CARLILE:** I think you're asking us at this stage to
24 draw an inference, aren't you?

25 **MR MORRIS:** Yes, and it's a matter that we will explore in

1 due course.

2 **LORD CARLILE:** It's a matter of evidence. I understand the
3 point. We will deal with it as the evidence unfolds.

4 **MR MORRIS:** As I say, it is instructive to read Mr Stump's
5 very careful pros and cons arguments, "Considerations",
6 "Positive" and "Negative". On the first one:

7 "Farmers receive higher milk price: likely to
8 continue in business."

9 Then there's a reference on the right-hand side:

10 "Our margins are depressed due to excessive industry
11 stock position: agreeing to a 100% 'pass through' of
12 a retail price increase locks this margin in."

13 No doubt he was thinking what was in issue was
14 a retail price increase.

15 Left-hand side:

16 "Enables us to move towards [Dairy Crest] milk price
17 already increased to reflect liquid movements now being
18 orchestrated."

19 So he's talking in terms of an orchestration of the
20 milk price movements.

21 Then the next one, "Positive PR potential" is a plus
22 and the negative is:

23 "Orchestrating a retail increase could be seen as
24 collaboration. Potential 'competition' law
25 infringement?"

1 Then further down, you will see -- and you will see
2 his concern about competition law crops up again. Of
3 course it's his concern but it's interesting to note.

4 Then you go down three more and you'll see:

5 "If only certain retailers increase there is the
6 issue appropriating the revenue back to the relevant
7 milk suppliers on each location (or do we must average
8 across the whole piece?)"

9 That's the pooling effect point, that he sees the
10 problem: unless everybody moves, you're not going to get
11 all the money back.

12 Then over the page, "So what are we going to do?" he
13 says, and the fourth option is:

14 "Active role in forcing increase."

15 The positive "as above"; the negative:

16 "Locks in low margin. Probably won't cover food
17 service/ingredient elements."

18 That, in fact, I think relates to a point Ms Potter
19 made last week about cheese going into things other than
20 supermarkets.

21 Ms Smith thinks it's a reference to milk going into
22 the food service; I'm not so sure, it may be cheese.
23 Anyway I'm probably getting ahead of myself and perhaps
24 trying to cover a point too cleverly.

25 Then you'll see the last reference there in four:

1 "Competition law precludes price fixing."

2 Then we go to document 33 {Magnum}, which is another
3 Glanbia note and we're now approaching 27 September
4 which is Friday. This is a further Glanbia note made by
5 Colin Stump and, again, we submit that this gives a good
6 overview of what was going on at Sainsbury's, McLelland,
7 Asda and Dairy Crest. It records again that Glanbia is
8 in discussion with both retailers and other processors,
9 normally their competitors. The first paragraph is
10 a conversation with Sarah Mackenzie at Sainsbury's on
11 the 27th where he says:

12 "I have spoken to Sarah Mackenzie ... and sought her
13 views regarding how long this initiative on raised
14 cheese prices with full remittal back to farmers is
15 likely to last. She gave a clear impression that JS had
16 not given this any thought ... I said this was a major
17 issue for the industry and at some stage we would need
18 to move back to normal market setting cheese prices in
19 relation to the usual influence of milk price and
20 butter/skim markets. I suggested that she might try and
21 canvass a few on the JS management team today and feed
22 back to me at the British cheese awards tonight. Any
23 response we get from her will come back into the system
24 from Mark Grahame."

25 Mark Grahame is a Glanbia person.

1 Then the second paragraph records a discussion with
2 Mr Irvine of McLelland:

3 "I had a further [so it looks as though there has
4 been a previous one] lengthy discussion with
5 Alistair Irvine on the same subject. He tells me that
6 Tesco will go if one other major player moves."

7 Pausing there for a moment, that is another
8 statement of conditionality upon which the OFT relies.
9 We say that that is evidence that Tesco has indicated
10 that it will go, ie up, if one other major player moves.
11 That is obviously a disputed matter upon which Mr Irvine
12 will give evidence. It is our submission that Mr Irvine
13 got that information from Tesco, either directly from
14 Tesco or indirectly but, nevertheless, we rely on it as
15 evidence of a Tesco statement of conditionality and it's
16 an issue which, obviously, will be explored further.

17 The next bit is -- and we rely on it to note that
18 this statement has been made by this time, this is
19 27 September.

20 The next bit is interesting in terms of the history
21 because it carries on:

22 "He also told me [Mr Irvine] that DC [Dairy Crest]
23 are seeing Asda this afternoon."

24 In a moment we will see that that's exactly what
25 happened. That's the afternoon of the 27th.

1 "I have asked MG [Mark Grahame] to call Harvey
2 Bennett [Asda] later this afternoon to elicit
3 information on what Asda may now [be doing] on cheese
4 pricing."

5 They are going to go to Asda to find out what Asda
6 are going to do.

7 "MG will feed this back into the system once we have
8 made contact."

9 Then he, Mr Irvine, tells Mr Stump the approach that
10 McLelland are going to take. This is the third
11 paragraph down, not the numbered "3" paragraph:

12 "Alistair Irvine believes that this will set the
13 milk price now until next April ... We discussed
14 whether this increase would be applicable in the food
15 service and ingredients sectors."

16 That's the same point. Then the next sentence:

17 "His approach was to issue a letter to all customers
18 in all sectors, indicating that there would be an
19 increase in order to resolve the farmers' current
20 problems and in his letter would hope that our customers
21 would support this initiative. His letter is to go out
22 next week [for your note, "next week" is the week
23 commencing 30 September] and will be followed up by
24 detailed one-to-one sessions with each customer in
25 turn."

1 So that is an indication of McLelland's, I'm going
2 to use the word "plan" because it's the one that jumps
3 to mind but it's McLelland's plan of action. You will
4 see in a moment, in fact over the next page at 1/34
5 {Magnum}, if you just turn over, that is precisely what
6 McLelland did on 1 October and that's the example to
7 Sainsbury's.

8 They wrote a letter indicating there would be an
9 increase:

10 "We intend to move the cost of all across the board.
11 We will action this during October and will work on
12 agreeing a date with you."

13 Then if you move down a bit, miss out 3 and go to 4,
14 what Mr Stump then does is he then indicates what
15 Glanbia are going to do:

16 "In summary I believe we should press ahead with
17 a letter to our customer base outlining the fact that we
18 are intending to increase cheese prices by £200 per
19 tonne with the sole objective of passing all the benefit
20 of that back to the farming community at 2ppl."

21 For your note, I have scribbled against that,
22 "a letter to our customer base". If you go to 1/38
23 {Magnum}, that is a Glanbia letter to one of its
24 customer base, namely Sarah Mackenzie at Sainsbury's.
25 I think we will come to that shortly but that just ties

1 in. He does carry out what he's envisaging there and he
2 does that on 3 October.

3 Then he carries on, this is back at document 33, in
4 the second paragraph of number 4 {Magnum}:

5 "We should also then allude to the fact that we will
6 then follow this letter up with the individual customer
7 concerned on a one-to-one basis, armed with their
8 specific detail by SKU ..."

9 Somebody is going to tell me exactly what SKU --
10 stock keeping unit. That's the individual number
11 I think of the individual cheese line. As we'll see the
12 case develop, there are over 200 cheese lines and by the
13 end of the case I suspect we'll all be familiar with
14 some of them, but that's what the reference to "specific
15 detail" is.

16 "This letter should be checked legally as discussed
17 already (Jim Cooney to deal with his competition law
18 contact at Pinsent Curtis) and the letter should be
19 shared with all members of the sales force for all
20 sectors before issue."

21 Then at the end:

22 "I would suggest the letter goes out towards the end
23 of next week [which would be the 4th] once individual
24 major retailer positions become clearer, but if
25 necessary could be delayed until my return to the

1 business on Monday 7 October."

2 So that sets out Glanbia's plan of action and we say
3 that is very -- we're going to see a lot about McLelland
4 and Dairy Crest but we see very clearly there, at the
5 very same time, Glanbia's plan of action as to how
6 they're going to take it forward.

7 Then we go back to document 32 {Magnum}, and this is
8 a record of the meeting to which Colin Stump has just
9 referred in the first paragraph of his notes. This is
10 the meeting between Dairy Crest and Asda on
11 27 September. This is a very important document and
12 this document contains key evidence in relation to
13 strand one, and I'll take you to that in a moment. This
14 is the afternoon of 27 September. Here again we see
15 Dairy Crest implementing the action plan or action
16 points of 24 September and doing so this time with Asda.
17 For your note, this document is addressed in the
18 decision at paragraphs 5.169 to 5.192 {Magnum}.

19 I shall take you through the point. You've seen
20 this document before, I want to point out one or two
21 items. "Industry Pricing - Proposed Action Plan" at the
22 top, "Industry Pricing", the attendees.

23 "Outline

24 "Recent retail price moves across milk of 2ppl.

25 "Multiple milk represents [I suspect "on" should be

1 "only"] 25% of Dairy Crest sales.

2 "This translates into a blanket increase of 0.77..."

3 We've seen that, it's a recurring theme.

4 "Action proposed

5 "Move manufactured product prices forward during

6 October."

7 It is our submission that that is and includes

8 retail prices. You will, sir, note the reference to

9 "move" again.

10 "Cheese/Butters - circa £200 per metric tonne

11 proposed by 20th October.

12 "Tesco value butter now at 54p (from 45p)."

13 It is my understanding, and I stand to be corrected,

14 that that is a retail price that's being referred to.

15 "Cream-10% increase proposed by 14th October.

16 "JS [Sainsbury's] happy to lead on cream."

17 Then:

18 "Mechanics..."

19 "It is proposed that the cheese sector moves [again

20 market move, we say retails] on the 20th October."

21 Indeed that, of course, is the date that takes one

22 back to document 1/28, item 1.

23 "Catch will be needed in the 'middle ground'

24 accounts and the management of labels [and] stocks will

25 need closely monitoring."

1 "Management of labels [and] stocks" can only be
2 referring to retail prices.

3 "Proposed that by early November all accounts would
4 have followed the market moves.

5 "Asda

6 "Tesco

7 "Sainsbury

8 "Safeway

9 "Waitrose/M&S"

10 Then we have the sentence which is specifically
11 relied on in relation to strand one:

12 "Latest position is that JS [Sainsbury's and] Tesco
13 have agreed to move all sectors."

14 We say that that sentence is clear and direct
15 evidence of the strand one transmission of information.
16 It evidences two separate things. First, it evidences
17 that Tesco has told Dairy Crest that it will move, that
18 Tesco has agreed. That's the A to B on this strand.
19 Secondly, of course it evidences, by the very fact of it
20 being communicated to Asda, that that information was
21 being passed on by Dairy Crest to Asda.

22 Then "Payments Mechanics/Thoughts":

23 "It is proposed that these increases would be
24 retrospective, by period, this cash is then paid
25 directly to the farming industry. This reduces the

1 workload/admin although retails still require some
2 work."

3 And a further reference to retail prices.

4 That's 27 September and then I think I then go to
5 document 34 {Magnum} which actually you have already
6 seen. We see this is the letter that -- actually you
7 haven't seen this before, from me anyway. I'm not
8 sure --

9 **LORD CARLILE:** We have seen it before.

10 **MR MORRIS:** No, because I took you to the -- this is
11 McLelland to Mackenzie, not Glanbia to Mackenzie. Yes.
12 That was my confusion -- that was my mistake I suspect.
13 Yes, we have seen it. I did take you to it when I was
14 looking at the Glanbia note because it indicated what
15 Mr Irvine was going to do. Thank you.

16 Here we see the first direct contact between
17 McLelland entering the picture, contacting Sainsbury's,
18 writing a letter of the sort indicated. It is obvious
19 from this letter that Mr Ferguson has already been in
20 touch with Ms Mackenzie or at least with Sainsbury's
21 because the initial -- the letter starts, "Following on
22 from our discussions ..."

23 The attached price increases on cheese include
24 proposed retail prices, as you can see if you turn over
25 and I'll do that in a moment. If you go to the version

1 of this document which is not blanked out, I have it in
2 pale green. I don't know if yours is still in pale
3 green.

4 **MS DALY:** In the same tab?

5 **MR MORRIS:** Same tab, there's a version of the spreadsheet
6 which is -- I have one with blanks in it.

7 **MISS ROSE:** I'm sorry, I only have one with blanks in it.

8 **MS POTTER:** We've only got it with blanks in it.

9 **LORD CARLILE:** Lots of blanks.

10 **MR MORRIS:** It's the unredacted version I want. I think you
11 have that actually.

12 **MS POTTER:** No, I don't think we have.

13 **MR MORRIS:** I think you have, I think it's just the colour.
14 Okay, all right.

15 I'm going to leave that. We'll have to see when we
16 get to confidentiality but I will want to come back to
17 it.

18 **MISS ROSE:** Sorry, I just want to clarify one thing. Is the
19 OFT in fact seeking to rely on blanked-out parts of this
20 as part of its case? I'm very troubled if that's what
21 Mr Morris is suggesting because we have asked the OFT
22 repeatedly to make sure that we had disclosed to us, if
23 necessary within a confidentiality ring, any material on
24 which the OFT was seeking to rely as part of its case,
25 for very obvious reasons. If it's now being suggested

1 by Mr Morris in opening that there may be material which
2 has not been disclosed to me, my instructing solicitors
3 or my clients, which the OFT wishes positively to rely
4 on as part of its case, that is a matter of very grave
5 concern at this stage of the proceedings.

6 **LORD CARLILE:** I've taken it that the summary is contained
7 in the letter, if you look at the whole of the letter:

8 "I have attached the price increases on cheese that
9 will result from the recent market movements on milk
10 pricing."

11 I presume that the blanking out, the redactions,
12 were for confidentiality reasons but simply illustrate
13 what is said in the letter.

14 **MR MORRIS:** I actually now notice that I can make the point
15 by looking even at the blanked-out version, so if I may.

16 The point I want to show is that the proposal
17 included currently retail and proposed retail. If you
18 go to the first page, if you go down halfway you will
19 see pre-packed lines and you'll see two entries for
20 Galloway, if you're with me. Then a whole series of
21 entries below. Galloway is a McLelland branded, and you
22 will see a figure for current retail. Then if you go
23 over the page, this is the spreadsheet continuing, you
24 will see a figure for proposed retail which matches
25 across and I can read this out.

1 The first Galloway entry is 6.59 per kilo and the
2 one over the page is 6.79 per kilo. What in fact has
3 been blanked out is the costs by the looks of it.

4 **LORD CARLILE:** I see, these two pages are a spreadsheet, as
5 it were.

6 **MR MORRIS:** Exactly. The next page is a single in landscape
7 which I don't go to. This is the first of a series of
8 documents that McLelland send with their matrix, their
9 proposals.

10 So the first point I get out of that is here is
11 a proposed by McLelland retail price increase, and the
12 second point you get of that is you can see that the
13 increase is 20p per kilo.

14 **LORD CARLILE:** We can follow this across with other cheeses
15 for which we have prices on --

16 **MR MORRIS:** Yes, they're all 20p per kilo, and as of course
17 we know by now 20p per kilo converts to £200 per tonne
18 and also gives you the figure of 2p per litre. So, in
19 fact, because I had got another version I had been
20 looking at, but that's why I wanted to take you to that
21 document.

22 Can I then take you to document 39 {Magnum}, which
23 is Mr Ferguson. This is two days later. He's sending
24 an email to Sarah Mackenzie and you've seen this
25 document before:

1 "Please find enclosed the details which will cover
2 off the proposed £200 per tonne movement... our target
3 date is the 20th... and we can work together to achieve
4 this. With regard to new retail levels I have left this
5 open for discussion and we can agree on this position as
6 time develops. A movement of £200 per tonne on retail
7 will protect your cash margin although % margin will
8 [obviously] drop..."

9 A number of points. It refers to 20 October being
10 the target date for Sainsbury's and, as you will see,
11 that is what happens. Secondly, we would suggest the
12 suggestion that they are going to agree on the position
13 on retail might be regarded as somewhat unusual.
14 Thirdly, he is suggesting cash margin increase and not
15 percentage margin increase. He says:

16 "We can discuss this at our meeting on Friday this
17 week."

18 It indicates that on Friday, 4 October, Mr Ferguson
19 met with Ms Mackenzie.

20 If I can then take you back to document 38 {Magnum},
21 which is a document you haven't seen before. Same day.
22 This is Glanbia writing to Sarah Mackenzie with their
23 proposal on the same day, all happening at the same
24 time. It shows us what's going on with Glanbia at the
25 same time. And in this document -- Glanbia just make no

1 bones about it, this is a retail price increase
2 proposal. 3 October, "Low Price Cheese Retails":

3 "Please find attached the new pricing details for
4 the agreed £200 per tonne increase in retails for the
5 low priced range.

6 "The packed and delivered costs have been increased
7 by £200 per tonne for all three mild variants and for
8 the two full flavour products as requested and the
9 retail has been increased by 20p per kilogram in line
10 with this increase.

11 "The new retail prices will be effective in store
12 from 4th November and we will manage stocks internally
13 to enable this change over."

14 So you've got the stock point and you've also got
15 the cash margin maintenance.

16 I'm just checking on the position of
17 confidentiality.

18 You'll then see a table and in the box there are
19 some figures. You will see, in the non-boxed, you will
20 see on the third column "New RSP", new retail price per
21 kilogram for each of the products. Then you will see if
22 you read it, and I'm not going to read aloud, but you
23 will see that, as a result of there being only a cash
24 margin increase, the new POR percentage is different
25 from the old POR percentage.

1 I won't say any more than that in case I breach
2 confidentiality, for the time being. But you will
3 see... and that is showing what happens to percentage
4 margin if you only increase by cash -- to maintain cash
5 margin.

6 Then we go to document 41 {Magnum}, again a document
7 to which I believe you haven't been taken before. For
8 your note, this document is dealt with in
9 paragraph 5.231 of the decision {Magnum}. This is
10 a letter from Finn Cottle at Sainsbury's to
11 David Handley at the FFA.

12 What it shows in the third paragraph:

13 "With regards to cheese we are still discussing the
14 implementation of cost price increases with all our
15 processors."

16 So that confirms what we've already seen in the
17 picture, that Sainsbury's have been and are in
18 discussion with all the processors. They've been
19 talking to Dairy Crest, McLelland and Glanbia at least.

20 "It is intended that we will pass on an increase in
21 our buying prices by £200 per tonne in approximately 3
22 weeks [so passing on the increase in their buying prices
23 means it is intended that we will crease our retail
24 prices], for all of our standard cheese range, provided
25 other retailers also accept this. I must stress that if

1 others do not generally support this initiative, I will
2 have to withdraw my support for cheese, if I find I am
3 uncompetitive in the wider market place."

4 Two points about this document. One, a plain
5 statement of what Sainsbury's are going to do about
6 retail prices, but, secondly, a statement by Sainsbury's
7 of its conditionality: we will go up provided others do
8 so.

9 And you will find an echo, and I'll put it no more
10 than that; the words "uncompetitive in the wider market
11 place" has an echo of the wording you saw right at the
12 beginning in the letters in 2000, right at the beginning
13 of my opening. Document I think 1A has -- it's not
14 verbatim the same, but it's the same concept of
15 finding -- yes, if you go back to 1A, this is the
16 Waitrose letter, ensuring -- raising prices as long
17 as -- it's worth looking, document 1A, Waitrose letter
18 to the FFA, end of the second paragraph {Magnum}:

19 "We would accept a price as long as we find we would
20 not be uncompetitive in the market place as a whole."

21 That's pretty close wording. It's the same concept
22 that, essentially, everybody -- they will go up if
23 others go up.

24 **MS DALY:** And this hand note from Ian is, we assume, Ian --

25 **MR MORRIS:** Yes.

1 "Finn, I am concerned about this wording."

2 Ian I presume is Ian Merton who is the CC at the
3 bottom. I don't know but somebody will tell me who Ian
4 Merton was.

5 Finn Cottle's immediate boss.

6 Just for your note, the OFT expressly relied upon
7 this document in the decision at paragraph 5.236
8 {Magnum}.

9 **MS POTTER:** Mr Morris, can I just check, you are saying this
10 talks specifically about retail prices and I just
11 wondered if you could take me to that.

12 **MR MORRIS:** The word isn't retail but I say it is what it is
13 talking about. It's the words:

14 "Implementation of cost price increases with all our
15 processors. It is intended that we will pass on an
16 increase in our buying prices by £200 per tonne in... 3
17 weeks..."

18 What I say is that the words "pass on"; we're going
19 to have an increase, and then it's the words, "increase
20 in our buying prices by £200 per tonne", that's the cost
21 price increase and they're going to pass on the increase
22 in three weeks.

23 **MS POTTER:** So pass it forward in terms of passing it on to
24 customers, rather than passing it back.

25 **MR MORRIS:** Pass on to the customer in the retail price.

1 First of all, that's the natural -- well, that's what
2 the words mean. Also it's the words "provided other
3 retailers also accept this" and the words "I can't do it
4 unless I'm competitive in the wider market place". That
5 must be a reference to the retail market.

6 **MS POTTER:** Thank you.

7 **MR MORRIS:** Okay, so we then go --

8 **LORD CARLILE:** It's rather emphasised by the manuscript note
9 on the left.

10 **MR MORRIS:** Indeed.

11 **LORD CARLILE:** Though I notice that wasn't referred to in
12 the decision.

13 **MR MORRIS:** The manuscript note?

14 **LORD CARLILE:** No.

15 **MR MORRIS:** I shall have a word with those behind me.

16 The next two documents are 42 and 44, and these are
17 letters, so now we're at 8 and 9 October, and this is
18 again McLelland activity rather than -- I think the last
19 activity before, it may have been McLelland as well.
20 Anyway this is McLelland activity, and this is McLelland
21 writing to Somerfield and to Asda in broadly similar
22 terms.

23 If you go to 44 {Magnum}, this is McLelland to Asda.

24 You have seen this before:

25 "Dear David,

1 "Current situation...

2 "I am writing in light of a press release issued
3 last week by the Scottish NFU... with regards to milk
4 and cheese pricing.

5 "At McLelland's we have been aware of the
6 difficulties many dairy farmers have been experiencing
7 and the potentially grim outlook if the situation on
8 milk pricing remained unchanged. We therefore welcome
9 the recent market moves that have occurred in an attempt
10 to address this."

11 And I would suggest they are the market moves in
12 terms of liquid milk.

13 "In order for us to be able to pay 2p per litre more
14 to farmers from October, we would need to get £200 per
15 tonne more for our cheese. Clearly, any cheese that we
16 do not get this rise for, we cannot pass back on milk
17 price.

18 "It would seem that the current market conditions
19 are that over the next few weeks there will be an across
20 the board increase on all cheddar (from mild to extra
21 mature). In light of this, I thought it appropriate to
22 outline our position with regard to the situation, and
23 we will keep you updated..."

24 I think he gives the same letter to Mr Hibberd at
25 Somerfield at tab 42 {Magnum}.

1 Then I believe we move forward about a week to
2 15 October. We're now getting to the stage where the
3 details of the proposal, of the waves, the precise
4 details, start to be worked out between the retailers
5 and the processors. In that week beginning 14 October
6 we will see contact between, at the very least,
7 Sainsbury's and Dairy Crest on the one hand and
8 McLelland on the other, and also contact between Tesco
9 and Dairy Crest and Tesco and McLelland.

10 So the first thing we go to is the exchanges between
11 Dairy Crest and Sainsbury's, and we next see that there
12 was a meeting between Dairy Crest and Sainsbury's on
13 15 October. You get that from document 45 {Magnum}, and
14 actually -- well, you see that from the date of the
15 Sainsbury's briefing document, "Raw Milk Pricing",
16 15 October, John Arnold. This is a presentation made by
17 Dairy Crest to Sainsbury's at that meeting on
18 15 October.

19 In fact if you go forward to document 1/48 {Magnum},
20 which I'll come to in a little bit more detail in
21 a moment but just ask you to note, in document 1/48, at
22 the first sentence after the addressees of that document
23 you will see:

24 "Following my meeting with Sainsbury's yesterday..."
25 This document is dated 16 October, that refers to

1 a meeting on the 15th and that confirms this meeting
2 that is -- at which the presentation at document 45
3 {Magnum} is made.

4 I don't propose to take you in detail through this
5 document because it is very similar, if not the same, to
6 the presentation made to Asda on 17 September at
7 document 1/16 {Magnum}.

8 **LORD CARLILE:** This is a Dairy Crest internal document?

9 **MR MORRIS:** Yes, but we believe it's more than an internal
10 document. It's a presentation made to Sainsbury's at
11 the meeting between Dairy Crest and Sainsbury's on
12 15 October. You get that from the first page of this
13 Powerpoint, left-hand side at the bottom, Jon Arnold who
14 is Sainsbury's, 15 October, and they've put Sainsbury's
15 on the bottom left. If you compare it with document 16,
16 for example, it is worth just a quick comparison, the
17 Powerpoint for document 16, you'll see that Dairy Crest
18 changes the heading or the bottoming or the footer, by
19 having Penny Coates on the 17th, Asda. They very
20 politely use each of the company's own sort of logos and
21 trademarks when they're referring to them.

22 That document is pretty much the same. If you go
23 right to the end of it, just to remind you, the last
24 slide of this document at tab 45 {Magnum}, "Proposals",
25 the first heading:

1 "Move Cheese Prices at retail up by £200 per tonne."

2 We'll see in a moment what happens at that meeting
3 on 15 October.

4 Before we do that, I'll just take you to document 46
5 {Magnum}, which is a document which you've seen before
6 and which Miss Rose took you to. This is an internal
7 Dairy Crest document about how a £200 per tonne cost
8 price increase will be treated internally within
9 Dairy Crest in accounting terms. You've seen it before.
10 We say that the fact that it deals with costs only does
11 not, in any way, indicate that the initiative was
12 concerned with cost prices only. Dairy Crest as
13 a processor would not at all be interested in any
14 accounting treatment of retail prices because they
15 weren't their prices. So this is just an internal
16 document which shows how they're going to deal with
17 the -- how they're going to invoice the £200 per tonne.

18 Then we go to document 48 {Magnum}, and I probably
19 use this phrase too often, but this is also a very
20 important document. This is a document which I think
21 Miss Rose did take you to but I'm not sure, I can't
22 recall the detail, but it does pay detailed attention.
23 It's an internal memo from David Flower to a variety of
24 people including Mark Allen, Arthur Reeves, David
25 Wagstaff, Kenton Robbins who is Asda, Colin Beaumont,

1 Neil Arthey who is Tesco, and it reads as follows --
2 Paul Feery also with Sainsbury's.

3 "Following my meeting with Sainsbury's yesterday
4 [15 October] and subsequent conversations this morning,
5 I can confirm [clear evidence of a clear communication
6 from Sainsbury's to Dairy Crest] that Sainsbury's will
7 move their cheese prices in 3 waves, as follows:

8 "Wave 1

9 "Branded ... Cathedral City/ Seriously Strong/
10 Pilgrims Choice ...

11 "Level - £200 per tonne ... 20p per kg. Timings ...
12 21 [October]."

13 I just ask you to note that those products are fixed
14 weight, branded.

15 "Wave 2

16 "Standard English lines - Economy/ Mild/ Medium/
17 Mature/ Extra Mature/ All Stilton Lines."

18 Those are Sainsbury's own label, week commencing
19 4 November.

20 "Wave 3

21 "Davidstow, All Territorials, Deli [worth noting
22 "Deli], Grated, All Other Lines."

23 11 November, again 20p per kilogram.

24 Over the page, I would invite you to read the boxes
25 under "Cash Versus Percentage Margin". Then:

1 "Implementation

2 "Prices will be reflected in our standard cost
3 prices and not as specific supplement."

4 There it appears that there's a change in the
5 invoicing, they're going to actually reflect it in the
6 cost prices.

7 "Other movements.

8 "As you are aware Sainsbury's moved their cream
9 price up last week. However, the current prices are now
10 above the competition and Sainsbury's are intending to
11 reduce this price back to their original levels from the
12 weekend."

13 So there you see Sainsbury's having led on cream but
14 people haven't followed so they've come back down again.

15 "Next steps

16 "In terms of saying the final yes to changing the
17 cheese RSP's [retail selling prices] I will issue
18 specific instruction.

19 "If you have any queries please contact myself or
20 Paul Feery."

21 Who was a Dairy Crest Sainsbury's man.

22 What we get from that document can be summarised as
23 follows. First, Sainsbury's have said and have told
24 Dairy Crest that they will move. Secondly, the
25 movements will be in three waves as far as they're

1 concerned. This wave idea matches document 1/28
2 {Magnum} which was the internal Dairy Crest meeting of
3 4 October and document 1/30 {Magnum}. Thirdly, we say
4 that you can see from that that it is plainly referring
5 to cost and retail, and you get that in particular from
6 the passages in the box.

7 **MS POTTER:** Just on that, because that was exactly, I'm
8 afraid, my normal subject, retail versus cost. The
9 wording in the first box versus the specific figures
10 listed under the waves does seem to suggest the waves is
11 talking about cost price.

12 **MR MORRIS:** Well, that may be the case but if you then --
13 that may be the case but the -- it's very difficult
14 without reading the --

15 **MS POTTER:** Of course, yes. So it's talking about -- the
16 letter covers both but just so one is clear, I think
17 that one would probably read it as saying there's
18 waves -- yes.

19 **MR MORRIS:** Possibly. I'm not sure I would necessarily
20 accept your interpretation because if you go back to
21 "will move their cheese prices", I would say it's cost
22 and retail and the waves refer to everything, because --

23 **MS POTTER:** Yes, that's true.

24 **MR MORRIS:** -- you then again have "will move their cheese
25 prices" and then you have in the box dot dot dot, and no

1 doubt in due course I may be able to say or put
2 something in writing on that.

3 **MS POTTER:** Yes.

4 **MR MORRIS:** We would say the boxes plainly support the
5 proposition that what is -- for the variety of reasons
6 that I've mentioned before, both on the cash margin
7 maintenance issue and on the labelling issue and the
8 stocks issue.

9 It also gives -- we say it gives the rationale for
10 moving branded lines first, because they're going fixed
11 weight first to test the market and the indication of
12 them having come back down on cream is an indication of
13 that.

14 The other point to note finally -- well, two more
15 points. Firstly, this is circulated widely throughout
16 Dairy Crest including Mr Arthey, who is the Tesco man at
17 Dairy Crest, and Kenton Robbins, who is the Asda man at
18 Dairy Crest. I would also point out to you this, there
19 is no packing justification on Sainsbury's part for
20 giving information about retail prices for fixed weight
21 or for deli.

22 **MS POTTER:** Although, as we've indicated, they may or may
23 not have given those prices.

24 **MR MORRIS:** Not the prices.

25 **MS POTTER:** But the intention to move.

1 more than an hour.

2 **LORD CARLILE:** Yes. Well, if we deal with the other matters
3 first and then you can carry on.

4 **MR MORRIS:** Obviously, we lost a little bit of time this
5 morning.

6 **LORD CARLILE:** Yes. Unfortunately we can't go on beyond --
7 well, we can go on to, say, 4.20, 4.25, but not beyond
8 that today.

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

10 **LORD CARLILE:** I'm sorry about that.

11 **MR MORRIS:** No, I don't mind either way.

12 **LORD CARLILE:** We all have things around the edges that we
13 have to fit in.

14 **MR MORRIS:** That's fine.

15 **LORD CARLILE:** We don't have the advantage of many full-time
16 judges in this Tribunal so we all have lives to lead.

17 **MR MORRIS:** Yes.

18 Can I go back to the documents. Just before the
19 adjournment, we'd been looking at what was happening as
20 between Sainsbury's and Dairy Crest around
21 15/16 October. Now I want to turn to what was happening
22 at the same time between Sainsbury's and McLelland. You
23 will see an internal McLelland email of the same date,
24 16 October, at document 47 {Magnum}. This document, in
25 our submission, establishes the A to B for strand two.

1 This document shows Sainsbury's passing future
2 retail pricing information to McLelland and is the
3 important first step in strand two. For your note,
4 we'll come to it in a moment, it matches the waves,
5 broadly, the waves that appear at document 1/48 {Magnum}
6 which we had just looked at. On 1/48 you see the three
7 waves and then, if you go back to 1/47 {Magnum}, you
8 will see this is Tom Ferguson writing internally to
9 Jim McGregor:

10 "Sarah Mackenzie has now confirmed that the position
11 moving forward will be as follows.

12 "Seriously Strong Pre-pack will move on costs and
13 Retails from the 21st of October.

14 "Sainsbury own label and pre-pack Brands will move
15 on the 4th of November, allowing for the proper market
16 conditions...

17 "Deli and Taste The Difference will move on the 11th
18 of November."

19 As I say, those waves broadly match -- more than
20 broadly match -- waves 1, 2 and 3 in the next document.

21 **LORD CARLILE:** We have an interesting illustration here of
22 how certain dates are the subject of confidentiality in
23 one document but not in another.

24 **MR MORRIS:** Yes.

25 **LORD CARLILE:** However, that's besides the point.

1 **MR MORRIS:** It depends on the claim for confidentiality.

2 This document is dealt with at paragraphs 5.243 to
3 5.250 of the decision {Magnum}. It carries on:

4 "Sainsbury would also like from us an official
5 statement of our intentions or actions to ensure that
6 this recovery on costs will be passed directly back
7 through the Milk price to the Farmer. Can you advise on
8 the content of such a statement."

9 You will note that this information includes
10 information in relation to fixed weight and to deli at
11 least, neither of which would relate to the issue of
12 price labelling. That, of course, proposition, along
13 with everything else, is relevant to the question of
14 Sainsbury's knowledge and state of mind and why they're
15 passing this information on.

16 We then go to document --

17 **MS POTTER:** Sorry, can I just -- Seriously Strong is
18 a McLelland brand?

19 **MR MORRIS:** Seriously Strong is a McLelland brand.

20 **MS POTTER:** So in fact in 48 {Magnum} the reference to
21 Seriously Strong, it's a Dairy Crest document, but it's
22 to all brands including McLelland brands? Yes.

23 **MR MORRIS:** Yes. For your information, Pilgrims Choice is
24 another brand of cheddar, and that's produced by
25 North Downs who you will see shortly is one of the other

1 processors that people were talking to at the time.
2 You're right that the information as far as -- McLelland
3 record the information on Seriously Strong only in their
4 email, but Dairy Crest in their document record not only
5 their own brand but other people's brands, branded.
6 Seriously Strong is McLelland, Pilgrims Choice is
7 North Downs.

8 Then we go to document 49 {Magnum} which is
9 a Glanbia internal file note. I should say that it's
10 possible that that may be slightly out of sequence
11 because this, we believe, is likely to be some time just
12 before 16 October, perhaps 15 October. It is a -- it
13 records the intentions and stated position of retailers,
14 this is Glanbia's understanding, including Tesco, and it
15 also includes what appears to be matters of dispute
16 going on between Tesco and Dairy Crest.

17 If I may just refer you to the relevant parts. I'm
18 not sure it's -- we don't know if it's a Colin Stump
19 document.

20 "File note, retailer cheese initiative update."

21 Then it records:

22 "Sainsbury's, Asda, Tesco, M&S and Somerfield.

23 First Sainsbury's:

24 "Moving brand pricing next week [next week being 21
25 October].

1 "Moving economy standard cheddars, including mild,
2 medium, mature plus stilton forward to November.

3 "Moving pukka tier (TTD [being Taste the
4 Difference]/Deli/Special Reserve) to 11 November."

5 So we submit that that is recording Glanbia's
6 understanding of Sainsbury's position which is
7 consistent with the waves we have just seen in relation
8 to both Dairy Crest -- that Dairy Crest know about and
9 that McLelland know about.

10 Then we have Asda:

11 "Formal advice on plan still unknown due to
12 unavailability of senior team... expect final view
13 Monday 21 October."

14 "Tesco.

15 "Apparently DC have argued strongly that all cheese
16 prices move simultaneously so they can repatriate
17 revenues direct to farmers on all cheeses."

18 That we say is a reference to the concern about the
19 difference -- about the staggering point.

20 Then it says:

21 "To be finally confirmed Wednesday 16 October and
22 communicated to CRS [I think that may be Colin Stump]
23 Thursday 17 October."

24 This document records Sainsbury's position matching
25 exactly what is in document 49 {Magnum}, and it is

1 reporting document 49 and -- yes, 49, which is
2 Dairy Crest -- and it is reporting a debate between
3 Dairy Crest and Tesco about staggering, and it refers to
4 the fact that the position is expected to be confirmed
5 by 16 October, which would indicate why we think this
6 document is before 16 October.

7 We would suggest and submit that that entry for
8 Tesco indicates that Dairy Crest had been reporting to
9 Glanbia what Tesco had been saying to them.

10 Then we go to document 50 {Magnum} which is
11 16 October. This is a document that you have not seen
12 before and this is Glanbia to Sainsbury's, also on the
13 16th. The 16th was a Wednesday. We say this is very
14 instructive:

15 "Louise Walters --"

16 "Dear Sarah [that's Sarah Mackenzie]

17 "Louise Walters [of Glanbia] has asked me to confirm
18 the details of your agreement to increase the retail
19 selling prices & buying cost prices for the stilton
20 range. The increases will be effective from
21 4th November 2002. Please find attached a letter of
22 confirmation that the RSP's will increase by 20p per
23 kilogram [pausing there for a moment, cash margin
24 maintenance] and the buying price by £200 per tonne."

25 So you will see that when you talk about retails,

1 they're talking about pence per kilogram, and when
2 you're talking about cost, by pounds per tonne.

3 "This benefit will then be passed back to our milk
4 supplying farmers. The details of this mechanism will
5 be confirmed by shortly."

6 Now, this is dealt with at paragraph 5.276 of the
7 decision {Magnum}, and this itself is found in the
8 decision to be part of an A-B-C infringement but one of
9 the infringements not involving Tesco. This is found by
10 the Office of Fair Trading to be a relevant concerted
11 practice between Sainsbury's, Glanbia and Safeway
12 because there's a pass-on in due course to Safeway.

13 The amount and the timing of the increases; the
14 amount, by which I mean the 20p per kilogram, not the
15 specific price, but the amount and the timing is wholly
16 consistent and -- consistent is the wrong word. It is
17 part of the overall scheme. Same date, cash margin
18 maintenance.

19 We then go to document 51A {Magnum} which is an
20 internal McLelland document dating from some time
21 between 16 and 21 October. It is headed "Price Move
22 Update". This is one of the additional documents for
23 which permission was granted to be adduced, and it is
24 a summary of where, from McLelland's point of view,
25 things had got to by that time in respect of the £200

1 per tonne price increase, and it records the position of
2 the main supermarkets.

3 What is recorded here is crucial background
4 generally and background -- crucial background to what
5 McLelland passes on to Tesco both in that week and on
6 21 October. If you go to the document, you will see
7 first Sainsbury's, and you will see that that wording
8 there matches practically completely the wording in
9 document 47 {Magnum}. I say practically because there
10 are two further pieces of information where, if you
11 compare -- the first is that this document records the
12 fact that Sainsbury's are going to move not just on
13 Seriously Strong but also Cathedral City and
14 Pilgrims Choice, which marries the point that was raised
15 a few moments ago, the discrepancy or difference between
16 the Dairy Crest and the McLelland document. The second
17 point, which is important, is that it records
18 Sainsbury's intention to maintain cash margin. That, in
19 turn, becomes important when we get to document 52 in
20 a moment.

21 We then have, recording McLelland's understanding of
22 what Tesco will do:

23 "Will probably commence moves from [a particular
24 date] staggered across Brand/Own label.

25 "Want to maintain percentage margin."

1 Then we get Asda:

2 "Moving across the board on 4th November (tbc). No
3 info on margin position, but will probably maintain cash
4 position."

5 Safeway:

6 "Commence 4th November.

7 "Moving across the board. [Again] Intention is to
8 maintain cash margin."

9 We would submit that the first section on
10 Sainsbury's corroborates very strongly or supports what
11 had been received from Sainsbury's, and the second
12 aspect, Tesco, is a strong indication that McLelland had
13 been speaking to Tesco and records McLelland's view that
14 Tesco would probably commence on the [REDACTED].

15 If you then go over the page, in a passage, the
16 second paragraph over the page:

17 "This move has been led by retailers and farmers.
18 If the farmers are to get this increase of 2ppl
19 immediately, we have no option but to pass on the
20 increase only when we get it. We do not have the margin
21 to borrow against a move further on in the year."

22 But it's the sentence, the reference to "led by
23 retailers and farmers". And the reference to not able
24 to borrow, that goes to the staggering point.

25 Also this document establishes that Asda will move,

1 to be confirmed, and Safeway are going to commence on
2 the 4th.

3 Next --

4 **MISS ROSE:** Before we leave this document, can I just flag
5 up that there is a passage redacted under the heading
6 "Stock Profit" and it would appear to be important to
7 see the whole of this document, so we would particularly
8 request that that should be unredacted.

9 **MR MORRIS:** We will check whose redaction it was and
10 we'll --

11 **LORD CARLILE:** Ms Smith is being very helpful and no doubt
12 we'll be told something later.

13 **MR MORRIS:** We don't know. We'll check whose redaction it
14 is.

15 Document 51 {Magnum}, going back slightly. As
16 I said a moment ago, I said that that document is
17 a strong indication that McLelland had been speaking to
18 Tesco. And at document 50 {Magnum}, we see evidence of
19 what was going on between Tesco and Dairy Crest during
20 that week. We have an email on 18 October which is the
21 Friday.

22 **MS DALY:** Sorry, are we on 51 or 50?

23 **MR MORRIS:** We're on 51. I was on 51A and I've gone back a
24 tab. And I was told over the adjournment I was not
25 necessarily being entirely clear which document I'm in

1 when I'm going through.

2 **LORD CARLILE:** I think that's quite an unfair criticism, if
3 I may say so. I've understood.

4 **MR MORRIS:** I'm very glad to hear it. But anyway, I'm
5 trying to keep everybody following as we go along.

6 At 51 {Magnum}, we're back now between what's going
7 on between Tesco and Dairy Crest. Neil Arthey,
8 18 October to Lisa -- I'm going to say Lisa Oldershaw
9 throughout just to make it easier for all of us:

10 "Lisa.

11 "I have put the attached spreadsheet together to
12 outline the [that zero is obviously used by people quite
13 a lot as a pound sign on emails, you see it quite a lot]
14 £200 per tonne cost price increase across our cheese
15 lines sold to you.

16 "I have calculated some possible rsp's based both on
17 20p per kilogram increases and the increase required to
18 maintain your current POR [that's percentage margin,
19 percentage on return -- no, percentage on retail I think
20 it means, POR]... some of the price points are not that
21 sexy and no doubt you may look at changing these.

22 "I will try and give you a call later/Monday."

23 Later being the Friday, the 18th, Monday being the
24 21st.

25 You will see what this shows is, as well as the

1 cost, he is showing suggested prices for retail, for
2 cash margin maintenance and percentage. If you look
3 over the page you will see a list, there are three
4 pages, and those are a list of Dairy Crest cheese
5 products supplied to Tesco. The first two pages show
6 the option with a cash margin maintenance and the third
7 page shows the option of a percentage margin
8 maintenance.

9 For example, you will see that the first line of the
10 first page, middle column, "RSP kilo", this is CF465,
11 which I think is a Welsh cheddar, Afon Clwyd Cheddar,
12 I presume extra mature. You will see "RSP kilo", £7.49,
13 and over the page you'll see "New RSP kilo", £7.69, so
14 that's your 20p per kilogram.

15 On the second page, next to that, you see £2.31,
16 which is the new per pack, based on 20p per kilo. And
17 then you'll see the new POR and the old POR, and you
18 will see the decline between 46.12 old POR in the
19 right-hand column of the first page at the top with
20 44.92 being the new POR which shows the POR declining if
21 you only go up by cash margin.

22 Then if you go over the page, you'll see the same
23 product and you'll see there that the new -- for that
24 first product, the new retail selling price per kilo,
25 which is in the third column in from the right, is 7.86

1 as opposed to 7.69 on the second page.

2 I don't know whether that was too fast or...

3 Then I follow this little chain of correspondence
4 through.

5 At tab 53 {Magnum}, on the Monday, Lisa Oldershaw
6 replies to Neil Arthey saying:

7 "Thank you and can I have deli as well, please."

8 Then if you go to 55 {Magnum}, again you've seen
9 these before, you then see him replying the next day,
10 the 22nd, which is the Tuesday, at about midday:

11 "Updated spreadsheet which includes deli lines.

12 "I will try and call you later [so this is the 22nd]
13 to discuss price increase in general."

14 We would ask you to note that it looks as though
15 there is a discussion that day on the phone between
16 Lisa Oldershaw and Neil Arthey about the price --

17 **LORD CARLILE:** Am I right that all the information in these
18 spreadsheets would have been known to the producer
19 anyway? They don't require to be given new information
20 by the supermarket?

21 **MR MORRIS:** This is information about the lines of cheese
22 that Dairy Crest, not anybody else, Dairy Crest supply
23 to Tesco. I would imagine that they know internally
24 what lines they're selling. And what they are doing,
25 what he is doing is he is giving -- he is making

1 suggestions to Lisa: this is going to be the cost price
2 with the £200 per tonne increase, and here are, for your
3 information, benefit, or whatever -- and the extent to
4 which that was usual or normal is something which we
5 might have to explore.

6 **LORD CARLILE:** So it's a bit of arithmetic really?

7 **MR MORRIS:** Yes. Whether that was something that was
8 normally done or not, I don't think we would necessarily
9 accept. But what he is doing is he is giving suggested
10 retail prices for Lisa to adopt, which were obviously
11 Tesco, and he's giving the two options of cash and POR,
12 and we would say the fact that he's giving her the
13 option of cash is indicative of the fact that he has got
14 the initiative, the overall Dairy Crest proposal in mind
15 because of the unusual circumstance, we say, of this
16 being -- of Tesco only going up by cash rather than
17 percentage. Because he knows Dairy Crest's proposal
18 internally is that we should keep it down to cash margin
19 only because of all the issues about profiteering and
20 transparency.

21 If you go over the page at 55 {Magnum}, just for
22 your information, you will see, and again it's probably
23 useful background, that he's added in at the top of the
24 spreadsheet a whole section of eight cheeses, going from
25 cheddar mature Wexford down to Tesco cheddar mature

1 organic. And those are deli prices, you can see that,
2 I think, from the sizes, because you've got four times
3 5 kilograms -- these are big lumps of cheese,
4 2.5 kilograms. So these are deli prices.

5 Would you just bear with me a moment. (Pause)

6 Then we go back a bit to see -- meanwhile back at
7 the ranch, sort of thing, we're now doing a split
8 screen. Let's see what's going on between Tesco and
9 McLelland at the same time, and we go to document 52
10 {Magnum}. Document 52 is the document which completes
11 or evidences the completion of strand two, document 47
12 {Magnum} is the first part. This is a document which
13 evidences McLelland passing on to Tesco the future
14 retail pricing intentions of Sainsbury's and indeed
15 other retailers. That is dealt with, for your note, at
16 paragraphs 5.251 to 5.266 of the decision {Magnum}.

17 I'll read it first, if I may, and then I will
18 summarise it. This is from Tom Ferguson to
19 Lisa Rowbottom, 21 October:

20 "Hi Lisa,

21 "Spreadsheet attached which will cover off the
22 current supply prices and the new position with the
23 proposed £200 per tonne recovery. I have provided the
24 recommended Retail going forward plus the position to
25 protect your own margin. As we discussed last week ..."

1 And I pause there for a moment. The OFT's case is
2 that that indicates that there was a discussion the
3 previous week between Lisa Oldershaw and Tom Ferguson
4 which we submit happened between 16 and 18 October.

5 "As we discussed last week, other parties are
6 confirming that they will protect Cash Margin on this
7 occasion but not % margin. We will need to discuss this
8 as time develops this week and reach a conclusion. The
9 time scales are as we proposed.

10 "Ie 4th of November for Pre-pack and the 11th
11 of November for Deli. Sainsbury's are confirming [again
12 the words "are confirming"] that the new retails on
13 Branded pre-pack will be in place Tuesday this week."

14 Now, a number of points arise on that document.
15 First of all we make this point, and as we will show in
16 a moment when we look back to what's been going on, this
17 is not speculation by Mr Ferguson. This is hard fact.
18 He knows this. It's absolutely plain as a pikestaff
19 that he knows it, because you look at document 47
20 {Magnum} and you look at document 51A {Magnum}. The
21 notion that this is sales hustle is, in our submission,
22 not credible.

23 There are five pieces of information passed on in
24 this email. The first is that it provides recommended
25 retail prices for Tesco for lines supplied by McLelland

1 and, as in the case of Mr Arthey, as we have seen at
2 document 51 {Magnum}, Mr Ferguson provides
3 Lisa Oldershaw with alternatives for cash margin
4 maintenance and percentage margin maintenance.

5 Secondly, as I've said, this document provides
6 information that there had been a discussion between
7 Mr Ferguson and Ms Oldershaw in the previous week.

8 Thirdly, it says that other parties, other retailers
9 are confirming that they will go with cash margin
10 maintenance and not percentage margin maintenance. That
11 point is confirmed by document 51A {Magnum}, which
12 I took you to a moment ago, which indicates that in two
13 cases, clearly, two have said that they intend to
14 maintain cash margin and one, Asda, will probably
15 maintain cash margin.

16 Miss Rose quite rightly pointed out that the Asda
17 bit was "will probably", we submit that in any event
18 there are two clear cases where McLelland know before
19 this that two, Sainsbury's and Safeway, have said that
20 they intend to maintain cash margin.

21 Fourthly, it says that Sainsbury's new retails on
22 branded pre-pack will be in place on the next day,
23 22 October. This is Sainsbury's first wave on fixed
24 weight as indicated in both documents 47 {Magnum} and
25 I think 48 {Magnum}.

1 Fifthly, we say that it shows that the further
2 waves, the time scales for the further waves will be
3 4 November for pre-pack and 11 November for deli. We
4 submit that those are dates for Sainsbury's and for
5 other retailers.

6 This information provided very closely matches the
7 information which we know Sainsbury's had given to
8 Tom Ferguson on the 16th, document 1/47 {Magnum}, and it
9 also ties in with document 1/51A {Magnum}, which is
10 McLelland's general state of the position. For those
11 reasons, the OFT's case is that these documents, 47
12 {Magnum} and 51A {Magnum} and 52 {Magnum}, and the
13 context of everything that is also going on with
14 Dairy Crest at the same time, establish a clear passing
15 on of future retail pricing information from Sainsbury's
16 and other retailers, principally Sainsbury's, but other
17 retailers as well, to McLelland and from McLelland to
18 Tesco.

19 Interestingly, and again -- document 54 {Magnum} is
20 the next document I would like to take you to. This is
21 a document I believe you haven't looked at before. What
22 in fact we find is that the information which Tom
23 McLelland (sic) has given Lisa Oldershaw on the previous
24 day turns out to be wholly accurate and Sainsbury's act
25 as he indicated they would act, because what this shows

1 is that Sainsbury's did move:

2 "Hi Sarah,

3 "I can confirm --"

4 Sorry, this is from Ferguson to Sainsbury's.

5 "I can confirm your retail movement on

6 Seriously Strong today after visiting the Darnley store
7 in Glasgow.

8 "250 grammes has moved... to £1.85... 500 grammes
9 pack has moved to £3.59... I will need the detail
10 confirming your new retails on Sainsbury's brand ASAP,
11 we will be packing product for supply week commencing
12 the 4th of November on Monday next week."

13 That has two important and wholly consistent pieces
14 of information. First, Sainsbury's do in fact move
15 Seriously Strong fixed weight on 22 October as they said
16 they would; and, secondly, it is asking Sainsbury's to
17 confirm retail prices for Sainsbury's own brand -- so
18 it's not branded, it's own brand -- for the next wave
19 which is due to happen on 4 November and, of course,
20 here we are 13 days away from that and, in respect of
21 that, that would be random weight and they need that
22 information to label so as to be able to move the next
23 wave in time.

24 That was on the 22nd, which was the Tuesday. On the
25 Wednesday, document 57 {Magnum}, this is Mr Meikle.

1 I should say that over the adjournment we were
2 having a debate about pronunciation of Mr Meikle but I'm
3 going to follow Miss Rose's example on the basis she
4 might know better than I do. I don't know whether it's
5 "Mykle" or "Meekle" but --

6 **LORD CARLILE:** It's a Scots name, isn't it?

7 **MR MORRIS:** I'm not sure. Maybe it is a Scots name.

8 **LORD CARLILE:** I can do the Welsh but not the Scots.

9 **MR MORRIS:** I will stick with "Meekle". If I revert to
10 "Mykle" it's only because that's my instinct.

11 Anyway, it's from Mr Meikle to Asda on the 23rd:

12 "David,

13 "The attached file lists our new supply prices to
14 Asda... current cost per case and per tonne, new cost
15 per case and per tonne.

16 "As discussed we will move prices for pre-pack
17 cheese and butter from 4th November 2002 and deli cheese
18 from 11th November 2002. Can you please send me
19 confirmation on these dates?"

20 What he attaches is suggested cost prices. First of
21 all, note in particular that the moves, the dates of the
22 moves are the same waves, pre-pack cheese on the 4th,
23 deli cheese on the 11th, again in line with the waves as
24 indicated at document 52 {Magnum}.

25 Then document 58 {Magnum}, which is a document of

1 the same date, and is also a document you have not seen
2 before. This is an internal Dairy Crest email from
3 David Wagstaff to various people within Dairy Crest with
4 an update on the cheese price increases. The heading is
5 "Cheese Price Increase Actions":

6 "Guys, actions as follows please.

7 "1. WWFH Asda Safeway JS/Tesco, all costs and rsp's
8 to move on the 11th November plus 20p [per] kilo.
9 Somerfield, Co-op. Propose that we stop deliveries of
10 old price stock on Friday the 8th and the new stock on
11 the 11th -- confirm this is okay please.

12 "Asda.

13 "Plain labels are in of Friday the 25th Nov.

14 "Packing from Sat the 26th.

15 "Need to confirm new retails & date we pack from
16 given that we have circa 2 weeks stock in system."

17 4:

18 "Agree invoice price changes as each customer
19 changes shelve edge [prices]."

20 7:

21 "Push branded increases through as JS have now gone
22 on C City - Safeway should go next, Matt can you talk to
23 Safeway."

24 We believe that "WWFH" is a reference to
25 WeightWatchers and we think the "FH" means Farm House.

1 That is a random weight product and it records an
2 indication that Sainsbury's, Safeway, Asda, Tesco are
3 all going to move costs and RSPs on the 11th. Again we
4 have the point about stock running through.

5 The plain labels point is an indication that in
6 certain circumstances they would pack in plain labels so
7 that the price can be then labelled; if it's random
8 weight, you pack in a plain label and -- I think this is
9 right, somebody will correct me -- that would be a means
10 of enabling it to be priced in the supermarket by the
11 retailer rather than having the price printed on it by
12 the processor.

13 The other point I would make, of course, is back on
14 58 {Magnum}. Item 7 is further confirmation that
15 Sainsbury's have done what they said they would do and
16 they have gone on Cathedral City fixed weight branded as
17 per the first Sainsbury's wave.

18 We then go to 60 {Magnum} which is a document you
19 have seen before. This is 24 October, a Dairy Crest
20 internal email from Richard Wilkinson. I'll read it to
21 you first and then I'll tell you what we say -- what you
22 get from it:

23 "After raising RSP's on [Cathedral] City,
24 Sainsbury's have now stated they want to wait to raise
25 the prices on the own label products ..."

1 Pausing there for a moment, we know that the own
2 label is supposed to come on 4 November.

3 "... until they have evidence that Asda and Tesco
4 are moving. Arthur Reeves is in [Sainsbury's] tomorrow
5 and will push for them to continue on track rather than
6 wait [and I put a line after "rather than wait"] based
7 on intelligence that he has on Tesco and Asda."

8 And we'll come back to that in a moment.

9 "We are now packing blank labels for Asda [that's
10 Dairy Crest] and packing the new priced packs for M&S so
11 the movements are in the pipeline. This needs to be
12 communicated so that the lag created by everyone waiting
13 for each other to move in store can be reduced."

14 This document shows the following. It is further
15 confirmation that Sainsbury's have gone up on Cathedral
16 City, as they said they would. But what it shows,
17 I think it's a point I made on Friday, is it shows that
18 Sainsbury's are concerned that others might not follow
19 and do as Sainsbury's believes they're going to do.
20 Remember Sainsbury's had gone first, so they're getting
21 cold feet about the next wave, and the next wave for
22 Sainsbury's is Sainsbury's own label.

23 It then shows that Dairy Crest are going to go back
24 to Sainsbury's to give Sainsbury's confidence that Tesco
25 and Asda will be moving or are moving. And the question

1 arises, well, how are they going to do this? They're
2 going to do this by virtue of the intelligence that
3 Mr Reeves already has.

4 So the important sentence in this email is -- or
5 part of a sentence, is the "based on intelligence that
6 he has on Tesco and Asda". That intelligence, we
7 submit, is intelligence as to their future conduct. It
8 again refers to the packing blank labels in relation to
9 Asda is indicative of a prompt move from Asda going
10 forward. And, finally, it indicates that there is going
11 to be a meeting between Mr Reeves at Sainsbury's the
12 next day which is 25 October.

13 **LORD CARLILE:** Just pause for a moment. "Based on
14 intelligence" is a slightly odd phrase. It doesn't say
15 based on an agreement.

16 **MR MORRIS:** It wouldn't be an agreement. At no stage are we
17 alleging it's an agreement. Based on information.

18 **LORD CARLILE:** It doesn't say based on an understanding.

19 **MR MORRIS:** No, it doesn't have to be an understanding
20 either. The case is not that agreements are being made.
21 The case is that information as to intention is being
22 communicated through the processors, and we would say
23 that this means based on information he has about what
24 Tesco and Asda are going to do.

25 Our case is not that each of these A-B-Cs, each

1 individual strand is an agreement. That is the essence
2 of the concerted practice and the essence of the A-B-C
3 test, which is you are passing information as to your
4 future pricing intentions, not your decisions
5 necessarily and not your -- what's already in store.
6 You're not necessarily agreeing with the processor that
7 you're doing it, you're passing the information, and
8 you're passing the information in such a way that it's
9 going to reach your competitor. That is the reduction
10 of uncertainty.

11 **LORD CARLILE:** I happened to notice the document which is at
12 tab 59 {Magnum}, and I just wondered if that was an
13 actual press release issued by Dairy Crest or a draft
14 press release not issued by Dairy Crest. Do we know?
15 Because the first sentence to that gives the flavour of
16 agreement.

17 **MR MORRIS:** Yes. I don't know the answer to that question.
18 I don't know whether it was published or not. Whether
19 they're saying -- well, have decided -- I mean, if, for
20 example, Sainsbury's -- well, we know Sainsbury's have
21 decided. We know from document -- I can't remember the
22 number now -- we know that they have decided, I'm
23 thinking of 48 {Magnum}:

24 "I can confirm that Sainsbury's will move."

25 They've taken a decision, but taking a decision to

1 move is not the same as agreeing with somebody. I mean
2 it may be that the processor goes to the retailer and
3 says, "We want a cost price increase and here's some
4 suggested retail prices for the future", the retailer
5 comes back and says, "We're going to move to those
6 prices", it's not the same necessarily as an agreement
7 between the two of them, it's just information that they
8 have decided.

9 The essence of -- the whole essence of the
10 distinction in a way between the concerted practice and
11 the agreement is that there is a passing of information
12 as to your future conduct in the market. The OFT's case
13 is that that is sufficient.

14 **LORD CARLILE:** I'm sorry, I didn't mean to interrupt you.
15 It's just that I was slightly struck by the language of
16 the first and the fifth paragraphs of that press
17 release, that's all:

18 "Dairy Crest welcomes the initiatives taken by
19 retailers..."

20 Anyway, there we are. If anything turns on that
21 we'll be told about it.

22 **MR MORRIS:** Yes.

23 **MS DALY:** May I ask you a question about tab 60 {Magnum}.

24 I know you were talking in waves and Tesco's has broken
25 it more into strands, but are we between strand two and

1 three?

2 **MR MORRIS:** No, it's not -- this is the difference between
3 a wave and a strand. They are different concepts. The
4 strands don't match the waves. The waves are times.
5 Let's assume there are four waves. The waves are
6 increases in prices, and I use that word neutrally at
7 the moment just so I can explain, they are increases in
8 prices, cheese prices, at different periods of time.

9 You have four waves starting on 20/21/22 October and
10 then you have 4th, 11th and the 18th. They are just the
11 stages of the increases and within each wave different
12 cheeses are being moved. The strands are merely the
13 short-hand devised by Tesco for the purposes of this
14 appeal in order to simplify the explanations of the
15 various transmissions, infringing transmissions, which
16 are found in the decision. The strands do not marry in
17 any way, or maybe they do, I may have to come back and
18 tell you, but they don't necessarily marry the waves.

19 So strand two, for example, we say involves
20 information about all three waves. Asda, strand three,
21 and we'll see that in a moment.

22 **MS DALY:** Thank you.

23 **MR MORRIS:** Could I ask you to actually quickly take up
24 document bundle 2, this is really to complete the
25 chronological picture.

1 If you go to tab 76 {Magnum}, tab 76 is an email
2 which starts as a email dated 7 November. You've been
3 to it before, but you'll see in fact it's a reverse
4 chain of emails. Right at the bottom, at the end of it,
5 you will see the first in the chain is 25 October, and
6 I just wanted you to note in terms of chronological
7 order that we have there, and this is the day after the
8 document at document 60 {Magnum}, we have Mr Ferguson
9 sending to Sarah Mackenzie at Sainsbury's his
10 spreadsheet of prices including retail prices for
11 products in one of the particular waves.

12 So that is continuing the picture of what's going on
13 on the 25th, which is in -- so we've previously been
14 looking at Dairy Crest, what Dairy Crest is doing on the
15 24th, and this is an indication of activity by
16 McLelland's with a spreadsheet.

17 I also just ask you to note that he's sending
18 a spreadsheet, and both Mr Ferguson and Mr Arthey are in
19 this period, which is the key period leading up -- the
20 period from about 14 October to the end of October is
21 the key period really in the cheese 2002 case, that they
22 are sending to their opposite numbers at the retailers
23 spreadsheets which have prices in them for all their
24 particular lines.

25 We then get to the week commencing 28 October and,

1 as I just indicated and as I indicate again, this week
2 is at the heart of the issues for the 2002 initiative
3 because this is the week in which Tesco decides, in
4 principle, to accept cost and retail price increases in
5 waves and, further, proceeds to tell its processors of
6 that fact.

7 Document 61 {Magnum}, which is at the beginning of
8 that week, on the Monday, is an email from Neil Arthey
9 at Dairy Crest to Lisa Oldershaw at Tesco which -- and
10 it's worth making a note here: see also 1/51 {Magnum},
11 1/53 {Magnum} and 1/55 {Magnum}. This is where he gives
12 a final polish to his spreadsheet for recommended Tesco
13 prices. The email reads, the bottom half of the
14 email -- the top half of the email is being forward to
15 Mr Guilpain, maybe Monsieur Guilpain, but to
16 Alain Guilpain. But the bottom three-quarters of the
17 email is:

18 "Lisa,

19 "I have added TPNB's to the spreadsheet, there are
20 a few gaps which we are still working on getting."

21 That document is very similar to the document at
22 1/55 {Magnum}, but if you go over the page at 1/61
23 {Magnum} and you look at the spreadsheet, you will see
24 down the left-hand column something called TPNB, which
25 is the Tesco product number which, I understand, is

1 Tesco's own internal product number for each particular
2 cheese line. I think, although I haven't checked, that
3 you will also see that he again, first two pages, cash
4 margin maintain, third page, percentage margin maintain.

5 On the next day, on the 29th, at the top of document
6 61, you see Lisa Rowbottom forwarding that on the 29th
7 to Alain Guilpain who I understand to have been a buyer
8 in the continental cheese department at Tesco. As
9 I understand the position, Tesco had a sort of main
10 cheese department, buying department, and then it had
11 a continental cheese department. I'm not sure, and
12 somebody will correct me, whether the continental meats
13 and cheese were together, or continental cheese was
14 separate from continental meats. But in any event, the
15 continental cheese department was separate from the main
16 cheese buying department which Lisa Oldershaw, by that
17 time, was the senior buyer for.

18 We then go to document 62A {Magnum}, and we're still
19 on the 28th, the Monday.

20 **LORD CARLILE:** The 28th is a Tuesday.

21 **MR MORRIS:** I think the 28th was a Monday of October. Yes.

22 **LORD CARLILE:** It is a Monday.

23 **MR MORRIS:** Sorry, the email -- 28 October -- if you look
24 at -- the email at 62 {Magnum} is dated the 29th, that's
25 the Tuesday, but the document is dated -- bears the date

1 28 October.

2 If you go over the page --

3 **LORD CARLILE:** I don't want to be pedantic but -- or perhaps
4 I do want to be pedantic, at document 60A {Magnum} there
5 is a Dairy Crest meeting headed "Monday 27th October",
6 so somebody has got a day wrong.

7 **MR MORRIS:** Yes, I've got the answer to that one. That
8 document is a 2003 document, it is one of the two or
9 three documents in this case which appear in the wrong
10 place in the bundle.

11 **LORD CARLILE:** Ah, thank you.

12 **MR MORRIS:** At one stage we were going to suggest that they
13 should be moved around but then we thought better of it
14 and we thought we would just tell you when we got to it.

15 **LORD CARLILE:** Thank you for that because I was puzzling
16 over that document on the basis that it occurred on
17 a Monday in October 2002.

18 **MR MORRIS:** I think there is at least one other example of
19 that happening. Documents 5 {Magnum} and 8 {Magnum} are
20 also 2003, I'm told.

21 So this document at 62A {Magnum} is a McLelland
22 document entitled "Price Move Matrix". The document
23 itself has the date 28 October on it, and it is
24 a McLelland internal summary of the position as at
25 28 October showing all the main and other retailers and

1 their positions on the various waves. And actually
2 having now looked at it, it seems to me to be the
3 clearest explanation of the waves, because each column
4 is a wave and under each column you see the different
5 types of cheese.

6 It shows three main waves, 4th, 11th and 18th,
7 running down vertically, but you notice that on the 21st
8 there is one wave out of line, which is the Sainsbury's
9 wave, and that is the Seriously Strong Cathedral City
10 wave which we've already heard about and which has
11 already happened and which we know, first, that
12 Sainsbury's informed McLelland and Dairy Crest was going
13 to happen and, second, did happen, and third, caused
14 a little bit of consternation between the two waves for
15 Sainsbury's because they were worried that other people
16 weren't going to go.

17 As for Tesco, we can see here three waves of 4, 11
18 and 18 November. We see Tesco, Sainsbury's, Asda,
19 Safeway, Somerfield, and then you see in fact other
20 smaller retailers being listed as well.

21 We then go to document 62 {Magnum} and this is also
22 a core document. This shows -- it's the second half of
23 this email which is the important one, and I'll read it
24 to you. From Lisa Rowbottom/Oldershaw, 29 October, 3.10
25 pm, to -- and then it identifies six different

1 processors. So this isn't just to Mr Arthey or
2 Mr Ferguson as we've seen so far. This is a round robin
3 circular email to six of Tesco's suppliers of cheese,
4 including Butlers, Heler, North Downs, which we
5 mentioned earlier which is Pilgrims Choice, Kerrygold
6 and McLelland and Dairy Crest.

7 "Subject: Cost Price Increases.

8 "Hi

9 "I will call you all tomorrow [that's the 30th] with
10 confirmation of cost price changes and retails where
11 relevant.

12 "At the moment the plan is for the following to be
13 changed from Sunday 3rd November (we have to change
14 costs on a Sunday, please note that you must change on
15 a Sunday also).

16 "3rd November.

17 "Brands.

18 "Regionals.

19 "Stilton.

20 "Speak tomorrow.

21 "Cheers Lisa."

22 This is where Lisa Oldershaw informs all her
23 processors at the same time that Tesco is accepting the
24 proposal, and at the very least, and I emphasise "at the
25 very least", accepting the cost price increase.

1 The OFT's case is that she is also effectively
2 telling them that Tesco will be raising its retail
3 prices. We say that it is clear that by this time,
4 internally, Tesco -- by this time at the latest, Tesco
5 had agreed to accept the cost price increase.

6 She says she's going to call them all the next day,
7 and in this email she gives them details of the first
8 Tesco wave and she tells them what products the first
9 Tesco wave will cover and they cover brands, regionals
10 and stilton. As you will see in a moment, those three
11 categories for the first wave mirror her own internal
12 document that she had herself in her possession at the
13 time.

14 **MS POTTER:** Sorry, Mr Morris, can I just be clear. So the
15 OFT case is that, as of the 29th, it is clear that Tesco
16 is accepting that it is moving cost prices and retail
17 prices.

18 **MR MORRIS:** We say it's absolutely clear that they made the
19 internal decision to do it, accept cost. We also say it
20 is clear that she is telling them that bit. We say that
21 when you put everything else together it is also
22 indicative -- they've plainly made the decision to
23 accept the retail as well, and that actually, when you
24 add it all together, she is also telling them here, and
25 she tells them the next day as well.

1 **MS POTTER:** Yes. Because we've had various dates, earlier
2 dates, where we've talked about intelligence from Tesco
3 which would seem to be suggesting that the OFT case is
4 that there were earlier communications whereas this
5 is --

6 **MR MORRIS:** Yes. There were certainly communications, I did
7 say -- maybe I should say "at the latest by". There is
8 evidence from Lisa Oldershaw on this which will be
9 explored in cross-examination. I don't particularly
10 want to go to the evidence in detail at the moment.

11 We would say, I think, that at the latest by this
12 date they have -- I mean there -- we certainly say there
13 were earlier indications saying "We're on board and
14 we're going to go with this and we have agreed in
15 general", but here what is clear is that by this time
16 they had accepted (a) the principle, and (b) the waves,
17 the categories of cheese at particular times. You'll
18 see that from the next document.

19 It might have been earlier but it's certainly by
20 this time at the latest. The suggestion, which I think
21 is made, is that they haven't decided anything until
22 later and they've waited to see what happened in store.
23 The OFT does not accept that suggestion, and whatever
24 happened afterwards, it may have been about particular
25 price points for particular lines but, in principle,

1 they had accepted that they were on board with the waves
2 and they informed the processors that.

3 If I can go to 64 {Magnum}, this is an internal
4 document produced by Lisa Oldershaw. It is her own
5 plan -- I will just summarise what we say. It is her
6 own plan for cost and retail price increases over the
7 three waves. It is a very important piece in the
8 jigsaw.

9 What you see is a covering email which she sent to
10 her husband's email address, and she explains that she
11 was effectively sending it to herself at home, which is
12 something -- I don't know, something perhaps we all do
13 from time to time. It is from Lisa to her husband,
14 "Just in case".

15 Then you will see on that first page of this
16 document that there are two attachments to it. There is
17 a Word attachment entitled "Cheese price changes", I'm
18 not looking at the documents, I'm just describing the
19 frontispiece of the email. Then there is "Cheese price
20 o200T", which I think is £200 per tonne, "xls", that's
21 a spreadsheet.

22 The first attachment {Magnum}, if you turn the page,
23 this is the Word attachment, and this describes in
24 summary Tesco's waves. What you have is it's entitled:
25 "Cheese £200 [per tonne] plan.

1 "Cost and retail moves."

2 Then you see the three dates of the waves, and here
3 you've got 3rd, 10th and 17th as opposed to 4th, 11th
4 and 18th because that's the Sunday and the Monday of the
5 change. We say actually you have to change the retail
6 on the Sunday. But what you see is different categories
7 of cheese, and the first wave is:

8 "Standard Regionals.

9 "Brands.

10 "Stilton."

11 The second wave:

12 "Cheese with Bits.

13 "All finest/Butlers Regionals.

14 "All British speciality.

15 "Cottage Cheese."

16 And then the third wave, the first one, two, three,
17 four, five are Tesco standard own label cheddars.

18 "H/E [healthy eating].

19 "Sliced and Grated.

20 "Organics.

21 "Deli."

22 If you for a moment turn back to 62 {Magnum}, you
23 will see that the information on the 3rd November wave,
24 the first wave, practically matches the information held
25 on her internal plan for cost and retails. When I say

1 practically, there's a distinction between there's
2 standard regionals as opposed to regionals. My
3 understanding is that the distinction is between
4 standard and Butlers Regionals, and Butlers Regionals
5 are actually within, or may well be within, the Finest
6 category.

7 **MISS ROSE:** Sorry, that's not correct, because you'll see
8 that deli is given as 4 November at document 62
9 {Magnum}, and 17 November on --

10 **MR MORRIS:** Sorry, I'm comparing 62 and 64 {Magnum} at the
11 moment. Is deli referred to in --

12 **MISS ROSE:** 62A {Magnum}.

13 **MR MORRIS:** Yes, 62A we were comparing.

14 We've moved on a bit, we're now at 29th/30th. It is
15 right that deli is given -- oh, I don't know even on
16 62A -- anyway, at the moment, if I may, I'm comparing,
17 and this is why I said when Ms Potter asked me the
18 question about the 29th, about cost and retail, you see
19 the very close match between the first wave -- I mean,
20 the 29th, she gives them the first wave, and you can see
21 that from document 64 {Magnum}. I was just explaining
22 what I understood to be the difference between regionals
23 and standard regionals. And we'll see, no doubt
24 Ms Oldershaw will explain why.

25 Then back at 64, the second part of 64 is a whole

1 series of spreadsheets of which there are lots of pages.
2 Can I just invite you to go to the first page of the
3 portrait spreadsheet {Magnum}. You've got some
4 landscape, you've got seven landscape pages and then you
5 have a portrait page. Essentially what you have there
6 is each Tesco cheese line for all the suppliers, not
7 just -- so now we don't have a spreadsheet which is just
8 Dairy Crest Tesco cheeses or McLelland Tesco cheeses, we
9 have her spreadsheet for all Tesco cheeses.

10 That lists the supplier and two alternative prices.
11 If you look at the top, the two alternative prices, £200
12 per tonne or percentage maintained. And then you see
13 a column "RSP", and we say that RSP column represents
14 the choice that she has made in relation to each of
15 those cheese lines, and that she's made that choice
16 by -- that's a retail price, and she'd made that choice
17 by the 30th at the latest.

18 **LORD CARLILE:** We'll give the LiveNote team a break in
19 a moment.

20 **MR MORRIS:** I can stop there.

21 **LORD CARLILE:** Okay. We'll break until just after quarter
22 past, just to give them a short break.

23 (3.08 pm)

24 (A short break)

25 (3.22 pm)

1 **MR MORRIS:** We're at 30 October, a very important date in
2 the case. What we see next happens, we've seen the
3 internal document, but on 30 October -- you remember on
4 the 29th, in the email at 62 {Magnum}, she tells the six
5 processors that she will call them all tomorrow and she
6 does that. She speaks to Neil Arthey at Dairy Crest and
7 she speaks to other processors.

8 Document 63 {Magnum}, which is between the two that
9 I've just taken you to, is Neil Arthey's report of her
10 conversation late in the afternoon of the 30th.

11 This document is the document which evidences the A
12 to B of strand three of cheese 2002. That sounds very
13 codified but I think you know what I mean. This
14 document evidences the passing by Tesco to Dairy Crest
15 of future retail pricing intentions of Tesco and that is
16 the first part of strand three in the cheese 2002 story.

17 Before I read it, it records the dates of the waves,
18 Tesco's waves for different categories of cheese. And
19 the OFT's case is that all the price moves here referred
20 to are retail price increases, not just the
21 WeightWatchers. We will see that in a moment.

22 If I can just read it through, this is an email from
23 Mr Arthey circulated very widely within Dairy Crest, and
24 I can't begin for the moment to tell you who all these
25 people are, but amongst them are relevant people in the

1 Dairy Crest teams for the different retailers. So
2 you'll see Kenton Robbins in the middle, he was Asda.
3 About two to three lines up, above the cc, you'll see
4 Paul Feery, Paul Feery was the Sainsbury's account
5 person at Dairy Crest. It is also cc-ed to more senior
6 people, Bill Haywood, Colin Beaumont, David Wagstaff,
7 Arthur Reeves. I'm sure somebody will tell me in some
8 detail about who some of the other people are.

9 It reads as follows:

10 "Following a conversation late this afternoon Tesco
11 have confirmed that all branded PrePack cheese will go
12 up as of Monday 4th November.

13 "The only exception is [Cathedral] City 400g due to
14 promotional activity -- this line will move on 15
15 [December]. Their regional cheeses and stilton are also
16 due to increase at this time."

17 "At this time" means 4 November. That is the first
18 wave.

19 "They have confirmed the price for WeightWatchers
20 [Mature] at £8.19 per kilo targeted to move on 11
21 [November]

22 "Finest, speciality lines and cottage cheese will
23 move on 11 [November].

24 "They have now informed me that they intend to move
25 all the other own label lines [that's Tesco own label]

1 on 18 [November] [so this is the third wave] ie mild,
2 medium, mature, extra [mature] and farm house, sliced
3 and grated and healthy eating.

4 "This is a 1 week delay on mild and medium.

5 "Deli lines are also due to move on 18 [November]

6 "Regards.

7 "Neil."

8 So in summary, what you have is as follows. Wave
9 one, 4 November, branded pre-pack, regional and stilton.
10 Wave two, 11 November, Finest, speciality, cottage and
11 WeightWatchers. Wave three, 18 November, all other
12 Tesco own label and deli.

13 I will explain in a moment the point about mild and
14 medium being put back by a week.

15 This matches page 2 of document 64 {Magnum} almost
16 precisely. I say almost, because there's references to
17 cheese with bits and the like. But that summary I have
18 just given you matches the three waves of the cost and
19 retail moves which Lisa describes on the Word document
20 at tab 64.

21 Now, the one-week delay on mild and medium arises in
22 the following circumstances. If you go back to document
23 62, you will see in that document -- I'm sorry, 62A
24 {Magnum}. In that document Tesco's middle wave,
25 11 November, has got mild and medium on 11 November, but

1 mature and extra mature -- both those are Tesco own
2 label -- is on the 18th. It appears that at some stage
3 between the receipt of the information in 62A and the
4 30th there was a moving back of the mild and medium into
5 wave three. So that if you go forward to 63 {Magnum},
6 you will see the words "This is a delay on mild and
7 medium", you can tell from the previous sentence that
8 mild and medium are included within the 18 November
9 wave.

10 This document, the OFT says, records retail price
11 moves, not just cost price moves, and it tells -- well,
12 it indicates that Lisa Oldershaw has told Neil Arthey of
13 the dates of the waves. It doesn't give the precise
14 prices for each line of cheese, apart from in relation
15 to WeightWatchers, which I can broadly explain as being
16 there because that was the only one that needed to be
17 packed in time for labelling purposes, but it gives the
18 dates, and it gives what lines are going to move on what
19 date, and that, in the OFT's submission, is the passing
20 of intention as to the future pricing behaviour of
21 Tesco, and it was key information that Dairy Crest was
22 wanting to know and that went to fit in to what had been
23 going on before to fit into the overall price move
24 matrix.

25 Now, document 67 {Magnum} is the completion of the

1 infringement, because document 67 {Magnum} is the B to
2 C. What then happens is the very next morning, this
3 email is at 6 o'clock in the evening, Mr Feery has
4 received it at 6.11 or whenever he opened his emails,
5 and at 8.55 the next morning Mr Feery passes this
6 information on to Miss or Mrs Mackenzie at Sainsbury's.
7 So here you have B, Dairy Crest, passing on to C,
8 Sarah Mackenzie, the future retail pricing intentions of
9 A, Tesco. It reads:

10 "Sarah.

11 "Please find below the latest information from Tesco
12 on their price increases."

13 Then I'm not going to read out 1 to 5 because they
14 are, again, practically verbatim, almost possibly a cut
15 and paste from the email at 63 {Magnum}, save that the
16 sentence:

17 "This is a 1 week delay on mild and medium."

18 Is not included.

19 At the end of the email Mr Feery says:

20 "I'll call you tomorrow when you're back in the
21 office to discuss further."

22 You will also note that the information is marked:

23 "Subject: Tesco Price Increases.

24 "Importance: High."

25 In our submission, this is plainly communicating

1 retail price increases. Sainsbury's would not be
2 interested in cost price increases alone.

3 Can you just give me one moment?

4 **LORD CARLILE:** Yes. (Pause)

5 **MR MORRIS:** Could you then -- I'm just following the
6 chronology. If you would pick up again volume 2. It is
7 slightly unfortunate, this document 76, which has
8 a series of emails in it.

9 I should say that it is our case that on the same
10 day, on the 30th, Lisa Oldershaw spoke to the other
11 processors, as she said she would in the email of the
12 29th. Here you have an email, this is now the document
13 at tab 76 {Magnum} on the -- I always put lines across
14 to divide emails up because I find reading them in
15 reverse counterintuitive and difficult. There's an
16 email there of 31 October which is from Tom Ferguson of
17 McLelland to Sainsbury's Sarah Mackenzie. So this is
18 now McLelland emailing Sainsbury's as well as Paul Feery
19 having emailed Sainsbury's.

20 Tom Ferguson writes:

21 "Details enclosed confirming the changes across the
22 Branded area..."

23 Then the next sentence:

24 "This will be in line with the rest of the Market.
25 With regard to your movement on Deli and own label..."

1 can you please confirm your [increases] by...

2 I currently have packed stock at the current retails..."

3 What I rely on is that this will be in line with the
4 rest of the market. He is indicating that he has heard
5 that others are going to go in the way suggested there.
6 We'll come back to the last bit of 76 in a moment.

7 **MISS ROSE:** Can I just raise a point on that document. It
8 says "Details enclosed" but we don't seem to have an
9 enclosure. Can we ask the OFT to disclose the enclosure
10 immediately, please.

11 **MS SMITH:** We have no enclosure. We've asked on a number of
12 occasions both of Tesco, they have no enclosure, and of
13 the other parties. We don't have an enclosure.

14 **MISS ROSE:** I don't see how Tesco could have it since this
15 is a communication between McLelland and Sainsbury's.

16 **MS SMITH:** We've asked the relevant parties and we don't
17 have that enclosure.

18 **MISS ROSE:** I don't understand whether it's now being
19 alleged that this is an additional strand because this
20 was not relied on in the OFT decision as a strand. But
21 from the submission that was just being made it sounded
22 as if it was being put that way. If it was then we
23 would ask for disclosure of that document.

24 **MR MORRIS:** No, we are not alleging it is a strand or a
25 fresh infringement. It is part of the evidential

1 picture that has been there and has been there all
2 along. We do say that as a matter of fact there were at
3 the same time communications between Mr Ferguson and
4 Lisa Oldershaw.

5 On document 66 {Magnum}, you then see the second
6 email in this case where Lisa Oldershaw is sending
7 a circular email to all her processors. This is on the
8 31st at 4 o'clock so this is, I think, now the Thursday.
9 I think it's the same people she sent the email at 62
10 {Magnum} but I haven't quite checked it's exactly the
11 same. I'm almost certain it will be. Brian Butlers
12 Cheeses, Rob Evans I'm not sure about. Kerrygold,
13 Heler, Dairy Crest, McLelland, Butlers. I'm not sure
14 that North Downs are included but anyway.

15 She's confirming to all of them at the same time
16 that the £200 per tonne increase is happening:

17 "As you can see from my hiding away and changing all
18 the figures this week, the £200 per tonne price increase
19 is happening. What I would like from you now is to
20 outline.

21 "(a) how you are proposing to get this money back to
22 the farmers...

23 "(b) how you/we address the issue of Tesco for x
24 number of months (depending on the cheese maturity)
25 paying a £200 per tonne inflated price for cheese made

1 with milk £200 per tonne cheaper than on the new cost
2 implementation date.

3 "I look forward to your outlines."

4 That's the staggering point. But it absolutely
5 confirms at the very least that Tesco has plainly made
6 its decision to accept the cost price increase, at the
7 very least.

8 Then 68 {Magnum}, 1 November, the next day, so
9 that's the end of the week. A Glanbia internal
10 memorandum, not looked at before, addressed in the
11 decision at paragraphs 5.322 to 5.331 {Magnum}. This
12 document is a status of the discussions going on from
13 Glanbia's point of view and summarises the position
14 between Glanbia and its retail customers.

15 On the first page you will see, left-hand side:

16 "Split of Glanbia UK Manufactured Cheese.

17 "Non 2p customers.

18 "Retail confirmed.

19 "Retail outstanding."

20 And it lists that Sainsbury, Asda and M&S confirmed.

21 If you go over the page, there's a calculation showing
22 how much would be going back to the milk, presumably,
23 the 0.9p.

24 Then over the page:

25 "2p per litre summary."

1 Then it lists the customer: Asda, JS, M&S,
2 Somerfield and the like. It does then also list Tesco
3 at the bottom.

4 What it says about Asda in the "Comment" column is:
5 "SP to move by 20p per kilogram. All FW being
6 produced with no RSP's on label currently."

7 I think SP is Smart Price. You've probably picked
8 this up by now, but the equivalent of Tesco Value
9 products for Asda is Asda Smart Price:

10 "Asda SP to move by 20p per kilogram. All fixed
11 weight being produced with no retail sale prices on
12 label currently.

13 "JS.

14 "Rolling change from 4/11, see separate sheet.

15 "Subject to other retailers following suit."

16 Safeway, all products 18 November.

17 Then Tesco:

18 "4/11... for brands. 11/11 farm house & mainstream
19 cheddar and territorials, 18/11 organic, sub-brand
20 cheddar, deli, sliced & grated."

21 I would point out there that the waves recorded for
22 Tesco there, the dates are the same but the particular
23 products allocated to the dates are slightly different
24 from what we see in the 30 October Arthey email. From
25 what we have seen, it is very likely that Glanbia are

1 not speaking directly to Tesco. This information may
2 have been -- it's obviously information they've received
3 from somewhere, we suggest they're not making it up. It
4 may be out of date. I've already explained to you that
5 on the 28th, McLelland were recording the waves slightly
6 differently.

7 That, again, is consistent with -- this is Glanbia
8 recording the waves.

9 So that takes us to the end of the week of
10 28 October and we then come to the week commencing
11 4 November. What we now see from here onwards, we have
12 got strands one, two and three. What we see from now
13 onwards is the wave plan being implemented, and we see
14 it clearly being implemented in some cases, and we see
15 that in other cases the waves get put back, there are
16 delays, people have cold feet. But in the end, although
17 ultimately the dates get moved back, the broad plan is
18 respected.

19 The first document we see is document 69. Document
20 69 you've been to before, this is 4 November, middle of
21 the day, from Neil Arthey to Lisa Oldershaw, copied to
22 Mr Rider and Mr Beaumont in Dairy Crest:

23 "Lisa.

24 "I have attached a spreadsheet which shows the
25 suggested rsp's of cheese lines that we supply Asda

1 following the price increase."

2 Then the next sentence is the very important
3 sentence:

4 "My understanding is ["my understanding is"] that
5 Asda will be applying £200 per tonne ie 20p per kilo to
6 rsps of Smart Price Mild & Mature."

7 So the first half, this is to do with Asda's retail
8 price. And in the second half he says:

9 "Please could you confirm the rsp's that you wish me
10 to pack Tesco lines with for deliveries targeted [week
11 commencing 10 November] following the cost price
12 increase in Tesco. (Not actually implemented until [the
13 17th] asap or to Chris if later in the week."

14 This document relates to strand five as far as the
15 infringement is concerned, so I've jumped a bit ahead,
16 and this document evidences a passing of information
17 from Asda as A to Dairy Crest as B and on to Tesco as C.

18 It is the OFT's case that the understanding, "my
19 understanding", is an understanding gained by Mr Arthey
20 from Asda, the fact that it is (a) the reference to "my
21 understanding", and, secondly, this is not speculation.
22 This is not saying, "I think Asda may be applying"; they
23 may be, they may not be. This is "will be", this is
24 a definitive statement of what Asda is going to do.

25 If we go then to document 70, this is

1 4 November 2002. You've been here before. There's bits
2 I would like to -- extra bits I would like to take you
3 to anyway. This is Mr Meikle of McLelland, so we're now
4 back at McLelland rather than Dairy Crest, and he's
5 writing to the Co-op, another retailer. He says:

6 "As per our conversation I have detailed below what
7 I believe is happening with retail prices over the next
8 2 weeks."

9 So the first sentence is about the future. The
10 second sentence:

11 "Seriously Strong retails have already moved in some
12 cases. We will be checking stores all this week and
13 I will keep you updated on anything that filters through
14 over the next few days.

15 "I would like to raise your costs... and have
16 attached a file detailing the new costs by line. We
17 will be raising the retail prices on the McLelland
18 random weight brands by 20p per kilo to allow for cash
19 margin to be maintained. Detail on these new retails
20 are also attached. Can you confirm that you are OK with
21 these retails or let me know if you want to use
22 different retails?"

23 The next passage is important as to what has
24 happened. This is existing -- the bit beginning
25 "Seriously Strong prices checked today", that is in

1 store. This isn't future, this is what has happened.

2 "Seriously Strong prices checked today..."

3 You remember Seriously Strong is a McLelland fixed
4 brand, fixed weight brand.

5 "Asda, Tesco and JS have all moved their retails on
6 [Seriously] Strong as of today; Asda..."

7 And then it gives all the prices. The significance
8 of that is that they have all moved today -- I should
9 point out this is the 4th, not the 5th. They have all
10 complied with the first wave as they had indicated they
11 were going to. The prediction of what was going to
12 happen has happened.

13 I think it's pointed out that their prices are all
14 different. That is, in our submission, completely
15 irrelevant. What is relevant is that they have all
16 moved on the same date, and what is also relevant is
17 that the planned wave has happened.

18 Then we have:

19 "... and indicates that Tesco itself has plainly
20 complied with what it had told all its processors on
21 29 October."

22 Because you see the fact that Tesco have moved on
23 Seriously Strong.

24 He then goes on to give a detailed picture of future
25 pricing intentions in relation to the second and third

1 waves for all the retailers. That you can see from the
2 passage beginning "What I believe will happen elsewhere
3 is", and he lists Asda and Tesco and Sainsbury's and
4 Morrisons and Safeways.

5 Now, I'll concentrate for a moment on the Tesco bit.
6 He indicates that Tesco will move on random weight
7 McLelland retails on 11 November. Now, random weight
8 McLelland retails are McLelland branded cheese but
9 random weight rather than fixed weight. So we're not
10 talking about Seriously Strong, we're talking about
11 other McLelland brands -- somebody will tell me, I think
12 Galloway is one example and there are others -- which
13 haven't been moved in the first wave but are going to
14 move in the second wave. Then 18 November, all own
15 label lines, and that is entirely consistent with the
16 waves which Lisa Oldershaw told Neil Arthey about on the
17 30th, it matches precisely.

18 This is referred to colloquially as strand six. It
19 is accepted that this does not evidence a complete
20 infringement because, I think this is right, there's B
21 to C tail to it. But it is important evidence for the
22 other strands about what is going on at the same time.

23 Can I just ask you to note that the paragraph -- the
24 sentence above, the Asda sentence, is relevant to strand
25 eight and relates to document 2/79 {Magnum} because that

1 indicates the passing of information from Asda to
2 McLelland on or before 4 November. When we come to
3 strand eight in a moment, to the later document, that is
4 the relevant passing of information from Asda to
5 McLelland.

6 I misdescribed the reason why this strand is not
7 a complete infringement. This is a B to C but I think
8 the answer is that there's no evidence, or the OFT had
9 no evidence of a relevant state of mind on the part of
10 Co-op and no case was brought against Co-op. That is
11 why the B to C is not complete. The A to B is Tesco to
12 McLelland, Asda to McLelland, or would have been, but
13 the B to C is not a complete B to C.

14 We then go to document -- I think we might be into
15 the next file. I think we are. 73, volume 2 {Magnum}.
16 I'm just trying to get the order right here, if I may.

17 If we go to tab 73, this is a internal email of
18 5 November, you've been to it before. This is an
19 internal Safeway email. It is evidence of strand four
20 and it is dealt with in the decision at paragraphs 5.383
21 to 5.395 {Magnum}. The email is addressed to Tim and
22 Matthew:

23 "Need your advice -- we are about to execute
24 a market wide [retail price] increase on the full range
25 of UK cheeses. This is linked to supporting Farmers to

1 the tune of 2p per litre...

2 "We will be having to make changes to the range on
3 the 11th and 18th of November of an average of 10p per
4 500g piece and 5p per 250g [that's another calculation
5 of the £200 per tonne in a different way], to show our
6 support."

7 So they're conscious of a need to show their support
8 for the farmers.

9 "Can you let me know what impacts this will have..."
10 And notice this is retail price increase.

11 Bottom paragraph:

12 "Our indices will remain the same, as all players
13 will be moving by the same amount on the same day but
14 prices will go up from current levels in Commando and
15 I don't want to be the 1st challenge."

16 The OFT submits that this indicates all players, in
17 our submission, includes Tesco. Of course, in many of
18 these subsequent emails, Miss Rose is going to say it's
19 a very general statement, how can you possibly infer
20 it's Tesco? This is the most general of statements,
21 it's a massive ask to build a whole case on a few
22 oblique references like that.

23 That point might have some force if you were looking
24 at this document in isolation, if you were looking at
25 one sentence in the decision. But that's not what we're

1 doing. We're now a day and a half into my opening and,
2 in our submission, it is perfectly plain what has been
3 going on. We have got the whole background of what's
4 been going on, the contacts between all the retailers
5 and the three main processors and, in those
6 circumstances, we say it is an obvious inference that
7 the "all players moving" includes Tesco. And in our
8 submission, and that is why in this case, it's not just
9 a matter of inference, this case, it's a matter of
10 context and circumstance. This is why, at the outset,
11 I urged upon you not to take too much of a strand
12 approach because you don't see the whole fabric.

13 We've now been through a lot of documents and we say
14 it is obvious that this is a reference to Tesco and that
15 Safeway have got this information. They have received
16 the pricing -- future pricing intentions information:

17 "... as all players will be moving by the same
18 amount..."

19 Not "have moved", "will be moving", and that "all
20 players" includes Tesco.

21 We then go to the next day -- no, it's the same day,
22 the 5th, and we're going back now to communications
23 between McLelland and Sainsbury's, 5 November, tab 71
24 {Magnum}. I don't think I gave you the tab actually.
25 This is strand seven and it is addressed in paragraphs

1 5.374 to 5.383 of the decision {Magnum}.

2 This, we say, evidences McLelland passing to
3 Sainsbury's Tesco's future pricing intentions about
4 Tesco Value products. The email reads:

5 "Hi Sarah,

6 "Completed details for [period] seven enclosed, we
7 have slipped against the plan... Our forward plan from
8 January onwards should still ensure that we hit the
9 annual targets.

10 "A quick update on the generic cheddar area, Asda
11 have moved [not future but "have"] all sizes of
12 Smart Price mild cheddar to £2.69 per kilo and
13 Smart Price mature cheddar to £3.69 per kilo. This will
14 be matched by Tesco."

15 A clear statement, not speculative, not sales
16 hustle, "This will be matched by Tesco". In our
17 submission, this is a statement by Mr Ferguson and, in
18 our submission, by this time he knows that that is the
19 case.

20 74 {Magnum}, 6 November, the next day. I'm just
21 going to make a passing comment on this. You were,
22 I think, taken to it by Miss Rose. Just to say that
23 this is Dairy Crest to Sainsbury's expressing a concern
24 not about the retailers participating but whether the
25 other processors were participating and the threat by

1 Dairy Crest to withdraw.

2 76 we've been to before, we come back to 76
3 {Magnum}. We've seen the three emails below but now we
4 see 76 in its proper place, 7 November. This is
5 McLelland to Sainsbury's, Ferguson to Mackenzie:

6 "Busy times. I have updated the spreadsheet with
7 the proposed new retails covering the straight £200 per
8 tonne movement. Can you please sign this off by
9 lunchtime today and I will complete the planning
10 process. With the timings you have submitted we would
11 plan to deliver at the new costs and retails in the
12 following way."

13 And there you see dates of 18 November for all
14 Sainsbury's own label and 25 November for deli. At this
15 point we see that in some instances the 18 November wave
16 has been complied with. We see that the later waves
17 start shifting back by a week, 18 November and
18 25 November.

19 Then at document 78 {Magnum}, I think -- is it the
20 same date? Yes, same date, same point about retails for
21 packing on the 17th, own label. This is the packing of
22 the own label -- Tesco own label brands for the wave of
23 the 17th:

24 "We need to confirm the new retails for packing on
25 Monday the 11th for supply from the 17th. Can you

1 please either send the information to Jim McGregor by
2 completing the initial spreadsheet..."

3 Then we go to 79 {Magnum}, and 79 records, and
4 you've been taken to this, the fact that Lisa Oldershaw
5 on the 8th -- this is, we say, the hesitation and the
6 lack of confidence:

7 "Lisa called to state Tesco will not commit to
8 moving Own Brand [that's own brand in the 17th] until
9 they see that Asda have moved and therefore will not
10 give us their rsps. While they are relatively confident
11 that everything is in place with Asda, they are taking a
12 'we won't believe it until we see it' stance."

13 The OFT's case, and this is why, if you remember,
14 I asked -- in document 1/71 {Magnum} I identified the A
15 to B. Document 1/71, in relation to Asda, indicates
16 that McLelland has got information by 4 November about
17 what Asda is going to do, and OFT's case, this is strand
18 eight, is that that information was passed on by
19 McLelland to Tesco in the course of that conversation:

20 "While they are relatively confident that everything
21 is in place with Asda..."

22 And that is the strand eight infringement.

23 She puts the brakes on it until she sees and, in our
24 submission, she's then told that Asda are going to move
25 and that that information was transmitted.

1 We then go to document, I think, 79A {Magnum}. This
2 is Mr Meikle to Asda, McLelland to Asda on the 8th,
3 confirming that Morrisons won't move on Seriously Strong
4 until they've finished promotion. Thereafter they will
5 implement a rise versus their current retail.

6 Then at 80 {Magnum}, this is again the -- this is
7 internal to McLelland:

8 "Dialogue is still continuing with Tesco regarding
9 the market movement... As of today, Tesco have not
10 confirmed any movement on retails and the likely outcome
11 of this is that we could have the confirmation by the
12 end of the week."

13 This is a dialogue. They are seeking to persuade
14 Tesco to go up, after Tesco has expressed its concerns
15 about Asda at document 79 {Magnum}.

16 I should point out, importantly, that it is not the
17 case that Tesco have not confirmed any movements on
18 retails because we know that, by this time, a week
19 earlier, they had already moved on the first wave. So
20 this is talking about hesitation or concerns that people
21 are not complying in respect of I think the third wave,
22 effectively, of the -- of whether Asda is going to move
23 or not. But one shouldn't be misled by this document to
24 see that, in fact, this is an indication that no
25 decision had been taken on retails, because a decision

1 had been taken in principle and it had been implemented
2 on the first wave at least by this date. And I believe,
3 although I'll have to come back on this, that there are
4 other movements that had happened.

5 Then we go to 81 {Magnum}, you see -- there you'll
6 see that's borne out by the price check made by
7 McLelland on the 13th:

8 "I've attached an updated price & promotion check
9 for [the main five] Asda, Morrisons, Tesco, JS and
10 Safeway ... All price changes and new lines that
11 I picked up have been highlighted in bold.

12 "Key points are

13 "Asda, Tesco, JS, Safeway all have new retails for
14 Seriously Strong on display.

15 "Tesco and Asda have new retails on Cathedral City."

16 Both of those wave one, branded fixed weight.

17 "No product on display in JS, Safeway price ...", et
18 cetera.

19 So that document confirms the proposition which I
20 just gave to you that that had already happened and this
21 hesitation was not a hesitation in respect of all the
22 waves.

23 Then if we go to 83 -- yes, actually, just bear with
24 me. 82 {Magnum} is also relevant because 82 actually
25 shows that not only have they moved on Seriously Strong

1 and Cathedral City, but they had also moved, by then, in
2 relation to McLelland random weight brands in Tesco,
3 Safeway and Sainsbury's. So showing not only that fixed
4 weight branded had gone up but random weight branded had
5 also gone up by then. 11th was the second wave, this is
6 the 13th.

7 Then 83 {Magnum} is the strand nine issue and this
8 is the issue with stilton which you get -- this is an
9 internal Asda audit of what is going on and reports
10 Asda's knowledge, we say, of what Tesco will do if Asda
11 does not go up on stilton. At the bottom of that
12 page -- again, you see the confirmation. This is the
13 13th. Before we get to the passage specifically
14 relevant to the strand, if I could invite your attention
15 to the Smart Price, Tesco have moved in line with Asda
16 on all packs, so by that time Tesco Value had gone up on
17 the 11th.

18 Then we go:

19 "On own label packs -- Tesco... have commenced
20 phasing in..."

21 Then at the bottom, stilton:

22 "Asda haven't yet moved. All have moved up except
23 Kwik Save..."

24 And I would submit that the words "all have moved
25 up" in the context of the rest of that email must

1 include Tesco since, if you look at the two previous
2 categories, Smart Price and own labels, they're looking
3 at Tesco, Asda, Morrisons, and then the next one, Tesco,
4 Sainsbury's, Safeway, Kwik Save, Morrisons. Then
5 stilton, you've got:

6 "Asda, no.

7 "Kwik Save, submit approval.

8 "All have moved up except ..."

9 That, in our submission, again -- I mean, as
10 a matter of language it includes Tesco given what is in
11 the rest of the email, but also as a matter of context.

12 You then go over the page:

13 "NB others have indicated will move back down unless
14 we follow due to moving 2 weeks ago."

15 We submit that that is an indication that Tesco is
16 indicating its future retail price intentions, ie they
17 will go down unless Asda move up.

18 Again, the same point arises on the wording here.
19 This is the last strand of cheese 2002 as far as the
20 infringements are concerned. It's a pretty general
21 statement on its own but, in our submission, it's not to
22 be read on its own. It's at the end of the story and,
23 in our submission, both in the context of this
24 particular email and in general, this is information
25 that Asda has received about Tesco. That's the first

1 point.

2 The second point is where have they got it from? We
3 say in the context of everything that has been going on
4 before, all the communications you see between the
5 retailers and the processors and McLelland and
6 Dairy Crest, that we submit it is a proper and fair
7 inference that it has come through McLelland or
8 Dairy Crest or both, given what has been going on.

9 That is document 83. I think there may be two or
10 three more documents I need to just run through and that
11 will be the end of cheese 2002 and it may be that I'll
12 stop there.

13 Document 84 {Magnum} you were taken to before. This
14 is an internal email, 14 November, concerning
15 a Somerfield press release, and they set out the press
16 release:

17 "Here is the gist of the Press Release issued by
18 Somerfields.

19 "Somerfield... have struck a deal to pay an extra
20 £200 [and the like].

21 "We can say, [this is we, McLelland can say] that
22 this deal concludes a series of negotiations between
23 McLellands and all the major supermarket groups,
24 including Asda, Safeway, Sainsbury and Tesco, to obtain
25 a price increase sufficient to allow us to pay an extra

1 2p per litre to the dairy farmers supplying our
2 creameries at ..."

3 McLelland had I think, as I understand it, five
4 creameries in Scotland, and in our submission this is
5 the final piece as far as they're concerned, Somerfield
6 are on board, and they are in a position to say that
7 we've now got everybody lined up.

8 Then 87 {Magnum}, there is an email in which -- it's
9 87 and 88 in which -- in fact, if you go to 88 {Magnum}
10 we see the two emails together I think. You first of
11 all see an email from Tom Ferguson, this time to
12 Rob Hirst, cc Lisa Oldershaw:

13 "Please find enclosed my completed control document
14 which will cover our complete range."

15 This is 88, middle of the page.

16 "... cover our complete range. I will therefore
17 plan to increase costs on the Tesco own label Range from
18 the 1st of December and also move the Deli range from
19 the same date."

20 Now, that is a shift back by two weeks in the final
21 wave but this is -- end of the story:

22 "As agreed I will start packing the Tesco named
23 creamery range at the new retails protecting your
24 existing margin and I would plan to deliver the new
25 retails from the 1st of December. On the Scottish mild

1 and medium pre-packs I have included suggested retails
2 on the control document, we can agree on your new retail
3 position on these lines by Wednesday next week and then
4 pack for delivery on the 1..."

5 Notice again the time lag needed to pack and to get
6 them --

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

10 "If you require any further information please do
11 not hesitate to contact me.

12 "Cheers Tom."

13 Finalising the position between McLelland and Tesco
14 after a period of reluctance on the part of Tesco in
15 relation to the own label strand, and Tom -- what then
16 happens is Tom writes to Lisa on the 27th, not really
17 forwarding but -- I suppose forwarding that email, the
18 email below:

19 "Good morning Lisa.

20 "I will contact you this morning to confirm the
21 retails on mild, medium and generic mature. I have
22 updated the control document with the named creamery
23 retails... we have started to pack at these retails in
24 preparation for delivery from the 1st of December.

25 "Cheese Tom (put your feet up now and relax)."

1 That, sir, is the run-through for cheese 2002.

2 **LORD CARLILE:** Shall we pause there?

3 **MR MORRIS:** I think so. Actually I'm probably further or as
4 far as I had hoped to be by now, and I would hope I can
5 do cheese 2003 relatively quickly tomorrow morning.
6 I am presently assuming that you will wish to do that
7 after we deal with the other matters.

8 **LORD CARLILE:** Yes.

9 **MISS ROSE:** Can I just ask, I'm not sure if we are fully
10 informed as to exactly who is coming tomorrow.

11 **LORD CARLILE:** That's why I asked Mr Bailey the very same
12 question now.

13 **MISS ROSE:** I see.

14 **LORD CARLILE:** As of the mid-afternoon break we knew of two
15 parties, or two nonparties, who had representations to
16 make. I believe that Mr Rhodri Thompson may be
17 appearing for one of them.

18 **MISS ROSE:** Do we know which?

19 **LORD CARLILE:** Why don't you hang on for a few moments and
20 the referendaires will give you the necessary
21 information.

22 **MISS ROSE:** Also I just want to alert the OFT to some points
23 that we may wish to explore tomorrow. The first is that
24 it's been a theme of the submissions that have been made
25 by Mr Morris that he says these are redactions that were

1 made by the parties, they're not the OFT's redactions.

2 **LORD CARLILE:** Is it necessary to do this through the
3 Tribunal?

4 **MISS ROSE:** Sir, I just want to raise it so everybody knows
5 where we're coming from.

6 The first point is that it's our understanding that,
7 in fact, parties made proposals to the OFT for
8 redactions that they wish on grounds of confidentiality,
9 and the OFT took a decision as to which of those it
10 considered to be justified on grounds of commercial
11 confidentiality or damage to the public interest.
12 I would just like confirmation of that.

13 The second is that I understand it would appear that
14 Mr Morris has a number of green pages, and we've seen
15 quite a lot of green pages in his files, which we don't
16 have access to. We would like urgent confirmation as to
17 whether the OFT is intending to rely on any material we
18 haven't seen and, if so, we would like that to be
19 immediately disclosed.

20 **LORD CARLILE:** Well, there you are, Mr Morris. The Tribunal
21 is merely acting as the satellite dish for Miss Rose's
22 messages. You will take them on board and no doubt
23 comment later but not now.

24 **MR MORRIS:** In this instance I'm on receive mode.

25 **LORD CARLILE:** Thank you.

1 Right, we'll adjourn until, we said 10.30 tomorrow
2 morning. Thank you all very much.

3 (4.15 pm)

4 (The hearing adjourned until
5 Wednesday, 2 May 2012 at 10.30 am)

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