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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

2 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

Transcribed by Opus 2 International
1 Bell Yard, London, WC2A 2JR
Tel: +44 (0)20 3008 5900
info@opus2international.com

HEARING (DAY 6)

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 Wednesday, 2 May 2012

2 (10.30 am)

3 **LORD CARLILE:** Good morning, everyone. Can I start with
4 a little piece of housekeeping. Can I just remind
5 everyone that this courtroom is going to be used for
6 another hearing in another case on 10 May, so it's
7 entirely up to you what you do with your bundles.
8 You're perfectly welcome to leave them at the side of
9 the court if you want to or remove them. It's an
10 entirely different case with different lawyers. There
11 may be issues about protection of documents, but
12 I simply want to point out that certainly the front two
13 rows are going to be needed, required for that hearing.

14 Right. Now, how many potential litigants, if I can
15 use that term, are represented here at the moment?

16 Thank you.

17 Discussion re Confidentiality

18 It might be helpful if I said one or two things
19 before we start. We think that it's going to be
20 difficult to produce a ruling which binds the future of
21 this hearing in relation to categories of documents or
22 individual documents. That view arises because we do
23 not know the context in the witness evidence in which
24 some of these documents at least are going to be
25 referred to. It seems to the Tribunal that the ultimate

1 test is whether disclosure is necessary for disposing
2 fairly of the appeal, and I would at least suggest,
3 subject to argument, that that simple ultimate test, as
4 I've described it, is consistent with the decision of
5 the Tribunal arising from the previous President's brief
6 judgment in the case of Umbro v OFT [2003] CAT 26 at
7 paragraphs 23 to 26.

8 Sir Christopher said at paragraph 23:

9 "Although the statutory provision [and that's
10 Enterprise Act 2002 schedule 4] deals only with what is
11 to be included in the Tribunal's judgment, the Tribunal
12 takes the view that for that provision to be effective
13 the Tribunal should protect, during the appeal
14 proceedings, information that it would be likely to
15 regard as confidential for the purposes of its judgment,
16 subject of course to the overriding requirement of
17 ensuring the fairness of the appeal proceedings."

18 It seems to us that there are three questions.
19 First, would disclosure cause significant harm to the
20 relevant interests of the company concerned? Secondly,
21 is the interest sought to be protected a legitimate
22 interest? Thirdly, is disclosure necessary for the
23 purpose of explaining the reasons for the Tribunal's
24 decision?

25 If I can get one set of representations out of the

1 way, we have a letter from the solicitors acting for
2 Asda, Slaughter and May, that letter is dated
3 1 May 2012. Our view at least at this stage is that
4 points taken by Asda are well taken on the grounds of
5 relevance. It seems to us that the items mentioned in
6 that commendably succinct letter do not have any real
7 relevance to the outcome of this appeal and that,
8 therefore, Asda can take it that unless some further
9 decision is reached during the appeal at a later stage,
10 we will accept their representations.

11 So far as others are concerned, we have of course
12 read the written arguments contained mostly in letter
13 form. If it is sought to increase or augment those
14 written arguments by oral argument, we will of course
15 listen as politely as we always do, although I do find
16 it difficult to see how much can be added to what is
17 said in writing by oral argument. But there's always
18 a surprise in store, particularly in this Tribunal.

19 We have formed the provisional view that it would be
20 very helpful, Mr Morris, if the OFT were, in stages
21 possibly, possibly by preparing clips of documents in
22 relation to which there is claimed confidentiality on
23 a witness by witness basis, segregating those documents
24 to be used so that we can examine them prior to
25 cross-examination of those witnesses taking place,

1 because it is all in relation to cross-examination.

2 What we are very concerned about is the possibility
3 of redacted documents being used without -- in most but
4 not all cases, because there is an exception, Tesco, and
5 I mean outside the confidentiality ring of lawyers --
6 seeing those documents.

7 One cannot exclude the possibility that there may be
8 material that is probably redacted, so we would have to
9 examine the documents and make our own decision as to
10 whether the redaction should stand or not, but the
11 normal principle is that the other party should see,
12 subject to the decision of the Tribunal, what is going
13 to be put, particularly to their own witnesses. So that
14 would be helpful.

15 Our provisional view is therefore this, that when we
16 know in relation to each witness what it is intended to
17 put to that witness, then we can decide on the basis of
18 our examination of the document whether confidentiality
19 falls within the ultimate test, as I put it earlier, and
20 within the three questions which I posed.

21 So that's our opening gambit, now over to the
22 parties.

23 What we had in mind, I should say, if it is thought
24 appropriate, we're prepared to hold separate hearings
25 now, mini hearings, hopefully even micro hearings, for

1 each party or company that wishes to make
2 representations but, of course, the OFT and Tesco would
3 have to be present for those hearings.

4 Ms Smith?

5 **MS SMITH:** Sir, I'm dealing with the confidentiality issues
6 for the OFT if that's acceptable.

7 **LORD CARLILE:** Of course.

8 **MS SMITH:** It might help if we start by obtaining some
9 clarification because I think having looked at all the
10 documents, the letters from the non-parties, if that's
11 the right way of describing them, that came last night,
12 there appears to be perhaps a little confusion about
13 what the meaning of redacted information is.

14 Hearing what you said this morning, sir, about
15 redacted information, I think it's worth clarifying
16 perhaps also the concerns that Tesco might have. By
17 this, I'm afraid we need to look perhaps a little at the
18 status of the various markings on the documents and the
19 different markings, the blue boxes, the red boxes and
20 the black boxes. It has to be stressed at the outset
21 that the blue boxes contain information that can be seen
22 by the OFT, by Tesco, by Miss Rose's clients, not just
23 the lawyers, but was disclosed by the third parties on
24 the basis that it doesn't -- it is not referred to in
25 public. So, for example, information disclosed by

1 Wiseman and Glanbia processors that they do not want
2 their competitor processors to see, but they are quite
3 relaxed about the OFT and Tesco -- clients, not just
4 lawyers -- seeing and also that information being put to
5 witnesses as long as it isn't on the public transcript.

6 There did appear to be some confusion on the part of
7 Tesco as to what could be done with the blue box
8 material and some complaints were made about the blue
9 box material but it's quite clear that that can be seen
10 by Miss Rose's clients.

11 Also, some of the letters that have come in to the
12 Tribunal last night, particularly from the cheese
13 company, Wiseman and Glanbia, also appear to be perhaps
14 a little confused about the request to waive
15 confidentiality. They say we have already waived
16 confidentiality, but when you look back at the
17 correspondence they had with the Tribunal in December
18 and January of this year, they waived confidentiality on
19 certain information on the basis that it would be used
20 for the purposes of the appeal only. And therefore,
21 blue box markings still apply.

22 So in the letters, for example, Wiseman says, "Oh
23 yes, we've already waived confidentiality on this", but
24 I understand that is what they meant when they said in
25 their letters "We have already waived confidentiality";

1 they provided it on the express understanding that it
2 would only be put to the parties to the appeal.

3 So those are the blue box markings, and we frankly
4 can't see what prejudice this causes, the blue box
5 markings cause to Tesco.

6 The red box markings, of which there are a much
7 smaller number, contain the information that the parties
8 have said they are -- non-parties have said they are
9 prepared to disclose into the confidentiality ring, the
10 confidentiality ring that has been agreed by Tesco and
11 that has been signed by all the external lawyers for
12 Tesco and was ordered by the Tribunal on 18 April. That
13 information, of course, can be seen by the external
14 lawyers for Tesco, but my understanding is that the
15 non-parties are not happy for it to be seen by
16 Miss Rose's clients. So those are the red boxes.

17 The black boxes, I think there are only in fact 12
18 black boxes in the two document bundles that will be
19 being put to the witnesses, contain fully redacted
20 information. So that is only those black boxes that are
21 fully redacted.

22 But I think it's important that we understand what
23 the situation is, have some clarity on that situation,
24 and one can judge any objections or concerns that might
25 arise against that.

1 I don't know, sir, if it would help just to outline
2 the background to what has happened so far in this case
3 and Tesco's involvement in requests for unredaction.
4 I can do that, sir.

5 There have been a number of rounds of correspondence
6 between the Tribunal, Tesco and the OFT. The first
7 round, essentially, after Tesco filed its notice of
8 appeal on 10 October, the notice of appeal was
9 accompanied by what are now appeal bundles 1 to 4 and
10 documents bundles 1 and 2. Those bundles predominantly
11 contained material that had been produced to Tesco
12 during the investigation stage, so contained redactions
13 that had been made by the OFT pursuant to its
14 obligations under part 9.

15 In November, Tesco wrote to the OFT asking for
16 unredactions of just 49 of those documents in the
17 bundles -- 47, I'm sorry, 47. Those were the only
18 documents that Tesco requested should be unredacted at
19 that stage. Tesco proposed at that stage that
20 disclosure should be into a confidentiality ring, and
21 essentially that request was dealt with by the Tribunal.
22 The OFT got in touch with the relevant parties to ask
23 for their representations on those 47 documents and
24 that, for example, is the letter of 16 December that you
25 see attached to Dairy Crest's letter to the Tribunal

1 today.

2 The third parties were asked to inform the Tribunal
3 as to their position on confidentiality and to tell the
4 Tribunal to give any reasons if they objected to
5 disclosure. So the unredaction exercise was carried out
6 by the Tribunal and Tesco was kept informed of what was
7 happening. It was on 17 January, and if you don't have
8 those letters to hand I do think it's helpful perhaps if
9 I hand up the Tribunal's letter of 17 January. (Handed)

10 So having considered the representations from the
11 parties, it was the Tribunal who made a decision on the
12 claims of confidentiality on 17 January. And you'll
13 see, sir, on the basis of that letter, this is the
14 letter to Tesco containing the Tribunal's decision.

15 On the last page of that letter, you see the
16 situation set out for Glanbia, Sainsbury's, The Cheese
17 Company and Robert Wiseman. If you look, for example,
18 at the ruling for Robert Wiseman at number 9:

19 "Robert Wiseman has indicated it has no objection to
20 the disclosure of document 153, which is a specific
21 document asked for by Tesco to the appellant, Tesco, and
22 to the Tribunal for the purposes of this appeal provided
23 it remains confidential as between the OFT, the
24 appellant and the Tribunal."

25 So that, sir, is what has now become the blue box

1 material, and similar disclosure was given on that basis
2 by Glanbia, Sainsbury's and The Cheese Company.

3 Sir, the position taken by McLelland, Arla and Asda
4 is set out in the Tribunal's letter, but if you look,
5 for example, at Asda they consented to some documents
6 being disclosed, they make the point that they want
7 other documents disclosed into a confidentiality ring,
8 second paragraph. Then in the third paragraph -- and
9 that is what is now the red box material. In the third
10 paragraph the Tribunal has considered Asda's submissions
11 and concluded:

12 "There is a prima facie and good argument for
13 maintaining the redactions in relation to document 279.
14 If, having considered the version of the Asda documents
15 that it receives as a result of this disclosure
16 exercise, the appellant Tesco maintains that the
17 redacted documents should be disclosed, then it should
18 make a reasoned application to the Tribunal for
19 disclosure."

20 No applications were made by Tesco subsequent to
21 this ruling of the Tribunal in January.

22 So that was the first round of the unredaction
23 disclosure exercise.

24 The second round happened as follows. On
25 13 February this year, Tesco asked for disclosure of

1 what it described as unused material, that is documents
2 on the OFT's file that postdate the supplementary
3 statement of objections. Of course it had had access to
4 the file of all the documents pre-SSO.

5 On 1 March, the OFT identified there were 11
6 categories of documents within its post-SSO material and
7 indicated that one category of those may be relevant to
8 the appeal, and indicated that it would enter into
9 correspondence with the third parties in relation to
10 those documents, because no redactions had been made to
11 those documents, they had not been disclosed to any
12 parties at that stage.

13 That is what you see behind Dairy Crest's letter to
14 the Tribunal of yesterday, the letter of 21 March from
15 the OFT. That is the letter from the OFT letting
16 Eversheds for Dairy Crest know that:

17 "Tesco has requested disclosure of documents placed
18 on the OFT's case file following the issue of the ...
19 supplementary statement of objections."

20 We say we don't rely on those documents or consider
21 they're relevant to the appeal, but subject -- at
22 Tesco's request we are considering providing them with
23 these documents and we ask for your representations on
24 those documents.

25 So having obtained representation on those

1 documents, the OFT disclosed those documents to Tesco on
2 13 April, subject to blue box and red box markings.
3 Now, Tesco hasn't subsequently put any of those
4 documents in the appeal bundles so one assumes they're
5 not going to be relying on them for the purposes of this
6 appeal, but that's the second stage.

7 The third round of this process, as part of our
8 preparations for the hearing, on 17 April the OFT sent
9 letters to all the third parties asking them to
10 reconsider the redactions that they had made at the
11 investigation stage to enable documents to be referred
12 to during the hearings, to enable documents to be put to
13 witnesses and to be referred to in submissions. That
14 was done for all the documents in the appeal bundles and
15 the document bundles. That is the letter to Dairy Crest
16 that's attached to their letter of 17 April. That is
17 the request that was made then.

18 So, sir, on the OFT's initiative, further
19 unredactions were therefore made to the material and
20 some of it went into blue boxes, some of it went into
21 red boxes, some of it was completely unredacted. Those
22 documents were disclosed to Tesco shortly before the
23 hearing started, and those further redactions are in the
24 appeal bundles.

25 Finally, as part of its preparations for the

1 hearing, on 23 April, so three days before we kick off,
2 Tesco asked the OFT for unredactions of two further
3 documents from its investigations bundle. You may be
4 aware the OFT didn't agree to the introduction of the
5 investigations bundle, but nevertheless we sought
6 consent from the third parties for those two requested
7 unredactions from Tesco, and we obtained that, and the
8 unredacted documents were disclosed to Tesco on
9 25 April.

10 Those were the two documents, the letter from
11 WilmerHale relating to Morrisons and the interview with
12 Frank Robinson Arla, that Miss Rose referred to in
13 opening. So the request for the unredaction of those
14 two documents had been made on the 23rd and the
15 documents were produced on 25 April.

16 Sir, that's the position where we are now.

17 I should clarify that in the last two rounds that
18 I've referred to, certain third parties, particularly
19 Glanbia, have indicated that they want certain
20 information to remain in red boxes. In order for that
21 information to be seen by Tesco's external lawyers an
22 extension to the confidentiality ring order is required,
23 because the confidentiality ring order only relates to
24 particular documents. That has been covered in
25 correspondence between the parties but that is necessary

1 for Tesco to see those documents, Tesco's lawyers to see
2 those documents.

3 So that's where we are. We have about 12 black
4 boxes remaining in the documents bundle, a number of
5 other black boxes remaining in the appeal bundle, but we
6 have unredactions in blue boxes and red boxes.

7 I've clarified, I hope, the status of the blue box
8 information and the status of the red box information
9 and that might, I hope, clear up a little of the
10 confusion and misunderstanding that appeared to be
11 present when we were hearing opening submissions.

12 The point is, of course, that applications to the
13 Tribunal have always been open to Tesco, certain
14 applications were made but none have been made since the
15 Tribunal's letter of 17 January, and no application or
16 complaints, as far as we are aware, have been made until
17 those complaints were made in oral opening.

18 Sir, now of course we're in the situation where you
19 have requested submissions from the third parties, and
20 of course it is now a matter for the Tribunal applying
21 a different test to that applied by the OFT as to
22 whether or not further redactions should be maintained.
23 But I think it's important to understand what the status
24 particularly of the blue box information is.

25 **LORD CARLILE:** That's very helpful, Ms Smith.

1 Just so everybody hears it, you will understand
2 because you've been here, that the concern of the
3 Tribunal is we're dealing with historic material.
4 I think every document that we have had our attention
5 drawn to that is redacted is at least nine years old,
6 most of it is ten years old, or getting on for ten years
7 old, and it seemed to us that it's counterintuitive that
8 documents that are ten years old should contain any
9 material that is still confidential.

10 We have since received correspondence from various
11 companies making claims of confidentiality, apparently
12 on the basis that nothing changes in the cheese market
13 over a period of ten years, to put it simply and
14 crudely. We will have to consider that, but it's
15 a matter for us in the end, isn't it?

16 **MS SMITH:** Sir, of course it is, and the OFT absolutely
17 accepts that, but I thought given the various
18 submissions which have been made, which appear to have
19 been made on a relatively confused basis, we needed to
20 clarify the situation.

21 **LORD CARLILE:** We have two issues, don't we? We have the
22 fairness of the trial issue about which, as you've
23 gathered, we have a degree of sympathy for Tesco so that
24 they may know as fully as is just the case they have to
25 meet. Then we have a much broader issue which is about

1 whether certain information contained in documents is
2 confidential or needs to be treated as not confidential
3 so that we can achieve a fair outcome of this hearing.

4 **MS SMITH:** Sir, we absolutely accept that and it is
5 primarily for the third parties to make submissions on
6 this. But if I may, there are two points that the OFT
7 would like to make, and first of all that is that we
8 note that what the parties say in their submissions now
9 and what they've previously said is that the Tribunal
10 should be mindful of the nature of what information is
11 sought.

12 Here we're looking really at red boxes and black
13 boxes because I cannot on any basis see any prejudice
14 caused to Tesco by the blue boxes. That information
15 that remains in red boxes and black boxes is not just
16 about old prices, it's about commercial strategy and
17 it's about relationships with individuals. The
18 commercial strategy, as I understand it, and this will
19 no doubt be developed by the third parties, commercial
20 strategy remains an issue and in a number of cases the
21 individuals with whom one is negotiating are still the
22 same individuals about which comments were made ten
23 years ago.

24 So particularly as regards commercial strategy, we
25 say that one needs to be careful about facilitating

1 collusion between what are competitors and continuing to
2 be competitors, but we'd also make the second general
3 point that the Tribunal, under schedule 4,
4 paragraph 1.2(a), has to take into account as one of the
5 factors that disclosure shouldn't be contrary to the
6 public interest. And the OFT is very alive to the fact
7 that if parties perceive that there's a risk that
8 material which they consider to be of commercial
9 sensitivity, which they consider to be of commercial
10 sensitivity, is not to be treated as confidential if
11 there is an appeal of the OFT's decision, then that
12 could deter parties from providing full cooperation with
13 the OFT during the decision process.

14 That is the second point that the OFT would ask
15 that, sir, you and your colleagues bear in mind when
16 considering the confidentiality request.

17 **LORD CARLILE:** Thank you, Ms Smith.

18 Just bear with me for a moment.

19 Yes, where do we go from there. Miss Rose?

20 **MISS ROSE:** Sir, I would just like to flag up what Tesco's
21 concern is and also just to correct one aspect of the
22 history that you've been given by the OFT. It was
23 suggested by Ms Smith just now that we had not made any
24 complaint about unredaction after January and that we
25 had only asked for the two specific documents on

1 23 April. In fact the position is that on 27 March we
2 wrote to the OFT. If I can just ask for a small clip of
3 correspondence to be handed up, I assure you it is very
4 small. (Handed)

5 You have here three letters, one is a letter from
6 Freshfields dated 27 March, the second is a reply from
7 the OFT of 13 April and the third is another letter from
8 the OFT of 25 April.

9 **MS SMITH:** Before Miss Rose makes her submissions, it would
10 help if we had a copy.

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

12 **LORD CARLILE:** Unredacted copies.

13 **MISS ROSE:** The first letter is a letter that we wrote on
14 27 March and, as you can see from the second paragraph,
15 we drew the OFT's attention to its duties as a public
16 authority and as a regulator fulfilling a role analogous
17 to that of a prosecutor. We made the point that the OFT
18 is under a continuing duty of candour, obliging it to
19 conduct these proceedings with its cards face up on the
20 table, to disclose all unused material, potentially
21 exculpatory. We said you've now had an opportunity to
22 see our skeleton argument and our notice of appeal from
23 which the facts and issues are clear.

24 We requested the OFT, in accordance with that duty,
25 to confirm for the purposes of the forthcoming hearing

1 that none of the documents or parts thereof on its file
2 that had not so far been disclosed to Tesco were capable
3 of undermining the OFT's case or advancing or supporting
4 Tesco's case on any of the facts or issues relevant to
5 the appeal.

6 **LORD CARLILE:** A standard disclosure request.

7 **MISS ROSE:** A standard disclosure request but in the public
8 law context. We then referred specifically, as you can
9 see, to two categories of material, the first was unused
10 material, that is the post-SSO material, and the second
11 was confidential information that continues to be
12 redacted against Tesco.

13 We asked the OFT to review the material and provide
14 confirmation requested above, namely that nothing that
15 was potentially exculpatory hadn't been disclosed. You
16 can understand why we made a general request since, of
17 course, the nature of redacted material is that we don't
18 know what it says, so we were asking them as a public
19 authority to review the material that it had redacted on
20 its files and to respond.

21 They replied on 13 April and you can see the third
22 paragraph. They said:

23 "The OFT is aware of its disclosure obligations as
24 set out in the extensive case law of the Tribunal and
25 can confirm that it has acted in accordance with those

1 obligations throughout the administrative phase of this
2 investigation and this appeal."

3 We then, when we saw their skeleton argument, saw
4 points that they were taking in their skeleton argument,
5 and in the light of those points asked for specific
6 redactions, which were provided very late in the day,
7 and you've heard my submissions on those documents and
8 on the fact that they are in fact exculpatory. And the
9 OFT, on 25 April said this:

10 "We refer to your letter dated 23 April in which you
11 assert that in your letter of 27 March you requested
12 confirmation from the OFT that all information contained
13 in the documents in the OFT's file that was at that
14 stage redacted against Tesco but relevant to this
15 appeal, had been or would be unredacted for the purpose
16 of the appeal. That is not the case. Your letter of
17 27 March requested a confirmation of the OFT limited to
18 documents on the OFT's file that have not so far been
19 disclosed to Tesco, ie post-SSO documents, and referred
20 only to the unused material."

21 You've just seen our letter of 27 March and it's
22 clear that there are two categories there. The first is
23 unused material and the second is confidential
24 information that continues to be redacted against Tesco.
25 It's simply wrong for the OFT to say that our earlier

1 request was limited to unused material.

2 Then they say over the page:

3 "We have not reviewed all materials contained in the
4 OFT's files that have been redacted against Tesco and
5 you have not before now asked us to do this."

6 Sir, I simply draw your attention to that and to say
7 that the history you've just been given by the OFT is
8 not quite correct.

9 Now, having said all that, our concern now is what
10 one might call the Rumsfeldian known unknowns. So far
11 as we are concerned with material that has now been
12 disclosed in a blue box, that can be dealt with. So far
13 as we are concerned with material that has now been
14 disclosed in a red box, at least that can be dealt with
15 within the ring and we are very attracted to your
16 suggestion, sir, that any documents that they wish to
17 rely on for cross-examination should be identified in
18 advance so there can be consideration of material that
19 remains in the red boxes. We would respectfully agree
20 that's a sensible way of dealing with it.

21 What concerns me is what has just been said by the
22 OFT that there are some documents that I haven't seen on
23 which the OFT is proposing to rely in this appeal, or
24 some parts of documents.

25 **MS SMITH:** No, I'm sorry, I did not say that.

1 The position is clear. The documents that the OFT
2 relies on, or the documents that are before the Tribunal
3 in this appeal, are in the bundles. The OFT does rely
4 upon material that is in the blue boxes, the OFT does
5 rely, subject to the confidentiality ring, on material
6 that is in red boxes. The OFT does not rely, and that
7 material is not in front of the Tribunal, on anything
8 that is in black boxes. The position is quite clear.

9 **LORD CARLILE:** So Miss Rose has seen or is able to see
10 everything?

11 **MS SMITH:** Miss Rose has seen everything.

12 **MISS ROSE:** Sir, can I explain why I'm concerned, because
13 what was just said by Ms Smith was that there remained
14 some material that they wanted to put in red boxes but
15 that they didn't yet have the consent of the third
16 parties, so that that had not yet been disclosed to us.
17 If I'm wrong about that, I'm very grateful to be
18 corrected.

19 **LORD CARLILE:** I'm not sure what the Tribunal can do.
20 I understand your point, I think. I'm not sure what the
21 Tribunal can do about it because we have to assume,
22 given that there has been extensive and recent
23 correspondence, that the OFT has complied with its
24 disclosure obligations. They understand perfectly well
25 what their disclosure obligations are. They've set it

1 out in writing as recently as last week, as far as I can
2 see, so we have to assume that advised by an array of
3 formidable counsel, if I can be forgiven for putting it
4 that way, they have complied with their disclosure
5 obligations.

6 Now, if during the course of the hearing, for some
7 reason, the OFT decide they want to rely on a document
8 of which you and the confidentiality ring have not seen
9 a full copy, then the Tribunal may have to make an
10 adjudication. But we're told they're not going to do
11 that.

12 **MISS ROSE:** Can I just be clear that -- I may have
13 misunderstood Ms Smith, then, it's not being suggested
14 that there remain any redactions which they're still
15 trying to agree with third parties that haven't yet been
16 disclosed to the confidentiality ring, is that correct?
17 I just want to be absolutely clear about that.

18 **MS SMITH:** I think that Miss Rose should perhaps speak to
19 her solicitors about this. This is absolutely clear and
20 has been canvassed in correspondence.

21 As I said before, as regards certain material that
22 we requested Glanbia to reconsider the redactions, they
23 said we would be prepared to disclose this material into
24 a confidentiality ring.

25 **LORD CARLILE:** I think you're about to get something helpful

1 from near left.

2 **MS SMITH:** That material can go into the confidentiality
3 ring once the order has been amended, and that has been
4 the subject of correspondence between solicitors.

5 I have made my position clear, however Miss Rose
6 wishes to reformulate my position.

7 **MISS ROSE:** I'm sorry --

8 **MS SMITH:** Perhaps I can be allowed to finish.

9 **LORD CARLILE:** One at a time, please.

10 **MS SMITH:** I have made the position clear: there is blue box
11 material, there is red box material. Some of that red
12 box material, pursuant to submissions made,
13 representations made to the OFT by Glanbia, has not yet
14 been disclosed into the confidentiality ring but can be
15 disclosed into the confidentiality ring as soon as the
16 order has been made and amended.

17 That is a position that has been clear to
18 Miss Rose's instructing solicitors since 25/26 April, I
19 don't know the exact date. That is the only outstanding
20 issue, and that material will, as soon as the order has
21 been amended, that material will be available to the
22 members of the confidentiality ring.

23 **LORD CARLILE:** So this is disclosable material that has not
24 yet been disclosed into the confidentiality ring?

25 **MS SMITH:** It is red boxed material that, as soon as the

1 order has been amended, as soon as the order has been
2 updated, will be disclosed into the confidentiality
3 ring.

4 I really don't see what further, with great respect,
5 what further time should be wasted on this in front of
6 the Tribunal. It's not a matter that the Tribunal can
7 deal with.

8 The Tribunal -- the order can be amended and sent to
9 the Tribunal, and as soon as it is agreed with Tesco,
10 the order can be made by the Tribunal, the amended
11 confidentiality order.

12 I understand on that point, I'm not sure, but
13 Glanbia may wish to be involved in --

14 **LORD CARLILE:** As far as amending the order is concerned,
15 it's a matter of the parties to inform the Tribunal as
16 to what amendment to the order is required.

17 **MS SMITH:** My Lord, yes, and that has been the subject of
18 discussions between solicitors which is why I'm saying,
19 with the greatest of respect, we really don't need to
20 waste time on this issue.

21 **LORD CARLILE:** We can't, by the use of our imagination,
22 imagine what might be required out of thin air.

23 Miss Rose?

24 **MISS ROSE:** Sir, as I understand it, it is now being said
25 that there are documents that we haven't seen that the

1 OFT wishes to rely on.

2 **LORD CARLILE:** But that you're aware of the fact that there
3 are such documents.

4 **MISS ROSE:** Sir, that's what I understood to be the position
5 which is why I was surprised to hear Ms Smith then deny
6 it.

7 My concern is that this must be -- this position
8 must be finalised. At the moment I just don't know what
9 is in this material, and I've already opened my --

10 **LORD CARLILE:** Forgive me, there seems to me to be a lot of
11 metaphorical chuntering going on about this particular
12 issue. This is not something the Tribunal can do
13 proactively.

14 If there is an amendment to be made to any order
15 that the Tribunal has made then the parties had better
16 sit down, agree what amendment needs to be made to the
17 order, and the Tribunal will make, subject to our
18 discretion of course, we will make the amended order.

19 So what I suggest is that immediately after this
20 hearing, whoever is responsible for this, from both
21 sides, sit down in that room with a key, which we
22 mentioned yesterday, and produce the amended order by,
23 say, 4.30 this afternoon.

24 **MS SMITH:** Sir, no witnesses are going to be before the
25 Tribunal until 14 May. We will, of course, act as

1 quickly as possible but there is no conceivable
2 prejudice to Tesco. The confidentiality ring can be
3 agreed very quickly.

4 **LORD CARLILE:** Ms Smith, my concern is that if we let you
5 out, and I mean you as a group, of this building, then
6 there will be a further destruction of a forest in
7 correspondence which will lead us absolutely nowhere,
8 and therefore I would rather that this was dealt with in
9 this building today.

10 So I think we're about to order, with the agreement
11 of my colleagues, that this be resolved by the
12 production of an agreed amended order by 4.30 this
13 afternoon.

14 **MISS ROSE:** Sir, I'm grateful. And then to be followed by
15 the production of the documents by tomorrow, because
16 there is indeed prejudice to Tesco.

17 **LORD CARLILE:** You're pushing at an ajar door, Miss Rose,
18 but I think if the agreed order is made then the
19 production of whatever documents will follow in a timely
20 way.

21 **MISS ROSE:** Sir, I hope that's right. But can I just say
22 that there is indeed prejudice to Tesco because I'm in
23 a position now where I have actually opened my appeal
24 without having been able to see the full extent of the
25 evidence on which the OFT relies.

1 **LORD CARLILE:** That's certainly theoretically so. I can't
2 imagine that there's very great prejudice.

3 **MISS ROSE:** Sir, one simply doesn't know, but I just make
4 the point, and we do -- it is absolutely essential that
5 we have this material as soon as possible. And also
6 that we have confirmation from the OFT that that is it,
7 that there is no more to come.

8 **LORD CARLILE:** Miss Rose, if there's prejudice then I'm
9 absolutely certain you'll draw it to our attention at
10 the first possible opportunity. And I should emphasise
11 that bail is refused to those who are going to sit down
12 and sort out this situation.

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

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

15 **MISS ROSE:** The final point I wanted to make was that you
16 will have seen the lack of clarity in the OFT's position
17 as it adopted on 25 April as to whether or not it had
18 searched for exculpatory material or whether it had only
19 looked in post-SSO material. The OFT will have heard
20 what you have said about their awareness of their
21 disclosure obligations and I don't think I need to say
22 any more about it.

23 **LORD CARLILE:** I think not.

24 **MS SMITH:** Sir, simply on that point, if criticism is to be
25 made of the OFT, I'll be very brief, I promise. The

1 letter of 27 March from Freshfields is, to put it, far
2 from clear. The request was limited to unused material
3 not so far disclosed to Tesco, and it was in response to
4 a letter dealing with the post-SSO material.

5 No application was made to the Competition Appeal
6 Tribunal and no application has been made to the
7 Competition Appeal Tribunal if Tesco were concerned
8 about what the OFT was doing.

9 **LORD CARLILE:** That was my point, about people sitting down
10 and telling us what they want together. We can't do
11 this out of thin air.

12 **MS SMITH:** Sir, the other point Miss Rose made was she said
13 that "Once we'd seen the OFT's skeleton we then asked
14 for two further unredactions". The OFT's skeleton was
15 produced on 4 April, the request for redactions was made
16 on 23 April.

17 Sir, those are the only points I need to make.

18 **LORD CARLILE:** Well, I'm confident that this will be
19 resolved by 4.30 this afternoon.

20 Thank you, who is next?

21 Do you want a separate hearing?

22 **MR THOMPSON:** It rather depends. Sorry, I appear for
23 Dairy Crest and we've put in a letter which has been --

24 **LORD CARLILE:** Which we've seen.

25 **MR THOMPSON:** I can make some general remarks now, just

1 because it would be efficient to do so.

2 **LORD CARLILE:** Yes, Mr Thompson, that would be helpful.

3 **MR THOMPSON:** If there's going to be an adjudication on what
4 is I think eight documents and various boxes in those
5 documents, then unfortunately I think that will need to
6 be done with a smaller group. I'm not sure that's
7 actually necessary.

8 **LORD CARLILE:** I don't think it's necessary, Mr Thompson.
9 The point I was seeking to make earlier on was that we
10 can't, as a Tribunal, make an adjudication now as to
11 something that may arise in an unforeseen context
12 somewhere later during this hearing. The best we can
13 do, I think, at the moment, is to hear or read or both
14 your submissions, and then we will bear those
15 submissions closely in mind as we proceed through the
16 case. We haven't heard any evidence yet.

17 **MR THOMPSON:** Absolutely. I think we're all here and a good
18 deal of effort has been put in, certainly by my client
19 and my solicitors, because we understood that there was
20 a possibility that there was going to be a general
21 lifting of all claims to confidentiality in the redacted
22 information. That caused us a good deal of concern
23 because, as I think Ms Smith has already said, at least
24 as far as the red boxes that Dairy Crest has still
25 defended as such, they're very far from historical data.

1 They are remarks about the market which were very
2 largely made either in correspondence through my
3 solicitors to the OFT, or more generally in notes of
4 interviews with Dairy Crest employees which were taken
5 as part of Eversheds due diligence investigation, the
6 allegations in the statement of objections at the end of
7 2007, and those notes, which have been now I think
8 disclosed in full to the confidentiality ring, not
9 perhaps surprisingly contain a number of rather
10 unguarded remarks about the market generally and
11 individual buyers and sellers which Dairy Crest is quite
12 sensitive about being disclosed in open court.

13 It's really that type of material which we think is
14 very far from just historic data and which we would
15 think that the Competition Commission, if it had looked
16 at this matter, or the Competition Appeal Tribunal,
17 would be astute to defend as genuinely confidential. So
18 it's that type of material that we are mostly concerned
19 about. We obviously want to debate individual sentences
20 and paragraphs and what exactly they mean and who the
21 individuals were, but that would take quite a long time
22 if we were to do it and it may not be a useful use of
23 the Tribunal's time.

24 **LORD CARLILE:** I doubt if it would. Obviously, the Tribunal
25 has no desire to gratuitously place in its judgment

1 tittle tattle that would be of huge interest, albeit to
2 a mercifully small number of people in the particular
3 market. On the other hand, the Tribunal must be left in
4 a position, which it occupies in law anyway, to be able
5 to refer to relevant material in its judgment and during
6 the evidence. Now, once we've heard the representations
7 or read the representations as to why what is factually
8 historic material remains confidential, then that will
9 form part of our judgment as to whether the redaction
10 should remain in place.

11 **MR THOMPSON:** Yes.

12 **LORD CARLILE:** Nobody can bind us at this stage.

13 **MR THOMPSON:** Can I just make the general observations I was
14 going to make about our position. I was really going to
15 just touch on first of all Tesco's position, then
16 Dairy Crest's position and the legal issue, although
17 I think I can take that very shortly given the
18 preliminary indication from the Tribunal.

19 As far as Tesco's position, it's obvious, and I'm
20 sure the Tribunal is acutely aware of it, but it's the
21 most powerful retailer in the United Kingdom and
22 competently represented by counsel of its choice and by
23 Freshfields. So far as we understand it, it has been
24 fully aware of the issue throughout, at least as far as
25 Dairy Crest is concerned. I don't understand it to have

1 made any pre-trial applications against Dairy Crest or
2 indeed to make any application now against Dairy Crest
3 and indeed, as far as I understand it, Tesco's legal
4 representatives have seen all the documents at issue in
5 the case, whether in a blue or a red box, and I don't
6 understand the issue that was exercising Ms Smith and
7 Miss Rose to relate to Dairy Crest.

8 Turning to our position, we are, inevitably, in
9 a somewhat invidious position given that Tesco is our
10 largest potential customer in a perishable product and
11 the OFT is a central regulator with whom we have an ERA
12 agreement in place. We have no knowledge of the
13 submissions or of the transcript that have been put
14 forward, but we are concerned to uphold our procedural
15 rights which we had understood to be agreed in
16 correspondence under the aegis of both the OFT and the
17 Tribunal itself. More generally, we're concerned that
18 the scope of this hearing shouldn't extend beyond the
19 scope of the decision and, if any evidence or findings
20 were to be made in relation to Dairy Crest that went
21 outside the scope of the decision, that would obviously
22 be a matter of acute concern to us where we feel, at the
23 moment, our procedural position is quite vulnerable. We
24 don't know from day to day what is being said unless
25 I and Eversheds come along and sit and assiduously take

1 down shorthand notes of everything that's said. So
2 that's an area of concern.

3 So far as this particular issue is concerned, we
4 haven't seen the letter of January 2012 that Ms Smith
5 read from, or I'm not aware that we've seen it, but we
6 have responded three times to specific requests from the
7 OFT which we understood was being managed by the
8 Tribunal and, as I've said before, the reason why we're
9 here is that we understood from a letter we received on
10 Friday night that there was at least a possibility that
11 all our claims for confidentiality were going to be
12 rejected on a wholesale basis. That's obviously
13 a matter of acute concern to us.

14 So far as the legal position is concerned, we would
15 say it was relatively well-trodden ground, not only in
16 the Tribunal but also in the Competition Commission.
17 Commercial issues of this kind are sensitive, given the
18 broad powers of the OFT to obtain documents and the
19 nature of its leniency regime. This is an important
20 balancing issue for the Tribunal but we would say that
21 it requires careful consideration, if it's going to lift
22 individual claims of confidentiality, of the individual
23 claims and the context of individual documents. So if
24 we were going to go down that route, that's why I say we
25 would, I think inevitably, have to have a more narrowly

1 focused hearing and have to look at the individual
2 documents. But we would hope that that's not really
3 necessary, both because of the nature of the claims that
4 are being made, the lack of application by Tesco to have
5 its witnesses see the documents and the nature of the
6 basis on which the claims are being made. That's the
7 general shape of our submissions and I don't know
8 whether it's necessary to go any further for the purpose
9 of the present hearing. I'm not really sure whether
10 there's actually any issue likely to arise.

11 **LORD CARLILE:** No. Just relating to one comment you made,
12 Mr Thompson, the Tribunal did express concern, and this
13 was the concern that all three of us felt, about the
14 possibility of all the redacted material remaining
15 redacted throughout. We were not postulating the
16 wholesale redaction, to use your term, of all the
17 redacted material. What we were postulating was the
18 possibility (a) that some of it was not properly
19 redacted or (b) that it would have to be referred to in
20 order to meet the test of whether disclosure is
21 necessary for disposing fairly of the appeal.

22 **MR THOMPSON:** Yes.

23 **LORD CARLILE:** We have received not only your cogent general
24 submissions this morning but we've received written
25 submissions too in correspondence and we will now bear

1 that closely in mind. But we will have to decide as we
2 go along, when these issues arise, hopefully with the
3 assistance I suggested from the OFT, on a witness by
4 witness basis.

5 **MR THOMPSON:** I'm grateful for that indication.

6 Perhaps I could just say two very short other
7 points. The first is of course that, since Friday, we
8 have effectively conducted this exercise in a way for
9 a fourth time. We have been back over everything and we
10 have waived confidentiality in both the first two
11 categories of correspondence altogether.

12 **LORD CARLILE:** Yes, very helpful.

13 **MR THOMPSON:** And in relation to the third we have been back
14 over it and we've reclassified some of the documents so
15 they've been downgraded, as it were, from either blue to
16 green or red to blue, and so there's now a relatively
17 small number of red items which are of the character
18 that I've described, though no doubt if it really
19 mattered, individual sentences could be debated about
20 whether Mr X was in fact still in the industry or
21 whether what was said about Mr Y was still sensitive or
22 retailer Z or W. So there's that issue.

23 The other point is, I think, in opening the Tribunal
24 made a remark about some observations made on behalf of
25 Asda which I think related to relevance. We haven't

1 gone into the issue of relevance at this stage but
2 I think it might very well be that, when you look at the
3 red boxes, it will be quite difficult to see any
4 conceivable relevance of at least the majority of the
5 matters of confidentiality in those boxes. So we
6 certainly wouldn't abandon the issue of relevance.

7 **LORD CARLILE:** We'll certainly bear that in mind and we are
8 grateful for the reclassification of documents. I read
9 that correspondence this morning in fact.

10 **MR THOMPSON:** You can imagine, it's a tricky job and we've
11 done our best in the time available.

12 **LORD CARLILE:** Thank you, Mr Thompson.

13 **MR THOMPSON:** I think that's probably enough from me.

14 **LORD CARLILE:** Probably.

15 I think Ms Watson is here too. Ms Watson, how can
16 you help us?

17 **MS WATSON:** Yes. McLelland is somewhat comforted by what
18 we've heard here this morning. Our position has been
19 set out in two letters to the Tribunal, one of 25 April
20 to the OFT, should I say, and our letter of 1 May to the
21 Tribunal.

22 **LORD CARLILE:** Just bear with me for a moment.

23 **MISS ROSE:** I'm not sure we have the letter of 25 April to
24 the OFT, I don't think we've seen that.

25 **LORD CARLILE:** Well, Miss Rose is certainly entitled to see

1 copies of any correspondence that we're considering.

2 **MS WATSON:** The letter of 1 May is a slightly expanded
3 version of the points that were put forward to the
4 OFT --

5 **LORD CARLILE:** Have you got the letter of 1 May? Let's try
6 to work from that one at the moment.

7 **MS WATSON:** Yes. So our position now, briefly, is that we
8 understand that any of the information in black boxes
9 will not be relied upon at all and that is the
10 information about which we are most concerned and,
11 therefore, our concern would seem to be removed now.
12 With respect to the information in blue boxes, it
13 depends really on how that information is going to be
14 used. Is it going to be disclosed in open court? Is it
15 going to be disclosed in a hearing in camera? If in
16 camera, we have no great objections.

17 **LORD CARLILE:** We're not going to have any hearings in
18 camera.

19 **MS WATSON:** Right. So if it's an open court we would like
20 the possibility of seeing what documents in the blue
21 boxes are going to be relied upon in open court, in
22 cross-examination or otherwise. With respect to the
23 information in red boxes, we would also like the
24 possibility of reviewing those documents if they are to
25 be disclosed beyond the confidentiality ring.

1 **LORD CARLILE:** Hasn't this been dealt with at an earlier
2 stage? Ms Smith, hasn't the problem raised by Ms Watson
3 been dealt with at an earlier stage?

4 **MS SMITH:** I'm sorry, I didn't hear the precise problem that
5 was raised.

6 **LORD CARLILE:** Ms Watson was asking for the opportunity to
7 review the documents that are in the blue boxes and the
8 red boxes which are likely to be referred to in open
9 court.

10 **MS SMITH:** Well, we haven't referred to any blue box
11 material in open court and we don't propose to refer to
12 any blue box material in open court. If we do propose
13 to do so, in light of what we've said to the third
14 parties, we'll make them aware of that.

15 **LORD CARLILE:** So that's a yes. Thank you, Ms Smith, very
16 helpful.

17 Forgive me, Ms Watson, you can't see what's going on
18 stage left. (Pause)

19 **MS SMITH:** Sir, the position on witnesses is as we always
20 have ... The OFT has not sought --

21 **LORD CARLILE:** Can you speak up?

22 **MS SMITH:** I'm sorry. The OFT has not sought so far to
23 refer to any blue box material in open court, and we do
24 not propose to do so. We do not propose to refer to any
25 blue box material in open court, to read it out, when

1 cross-examining witnesses. We may need to draw the
2 attention of witnesses to blue box material but we can
3 do that without reading it out in court, and it's
4 generally done in this Tribunal and we don't see any
5 problem with that.

6 We cannot, on the terms of the confidentiality ring
7 as they presently are, put any red boxed material to any
8 witness. If, and I stress "if" because we don't at the
9 moment see that that is necessary, but if it does become
10 necessary, we want to put a particular piece of red
11 boxed information to a witness, then of course we will
12 have to apply to extend the confidentiality ring and we
13 will do so in a timely manner, but that is our position
14 on that material.

15 **LORD CARLILE:** Thank you, that is clear.

16 Ms Watson, this whole problem arises because of the
17 concern of the Tribunal as to whether the
18 confidentiality ring is going to create difficulties for
19 us in the eventual preparation of our judgment, because
20 we are entitled as a matter of law, beyond any doubt
21 whatsoever and I'm sure you're not going to contradict
22 this, to refer to any matter in our judgment which we
23 regard as being necessary for the purposes of giving
24 a proper and informative judgment. My words, not the
25 statutory words.

1 I've provoked Miss Rose again, I'm sorry.

2 **MISS ROSE:** Not provoked, just concerned. One point made by
3 Ms Smith about cross-examining witnesses in relation to
4 blue box material; of course, she may not read that
5 material out but the witness, when responding to the
6 question, may need to do so by reference to the material
7 that is in the blue box.

8 **LORD CARLILE:** But that's a bit of case management.

9 **MISS ROSE:** It is a bit of case management. I just raise
10 that point.

11 The second point is that we may well wish to make
12 submissions on blue box material and I just flag that
13 up, so that will have to be dealt with.

14 **LORD CARLILE:** We will just have to deal with that as it
15 arises.

16 **MISS ROSE:** The third point which is specific to McLelland,
17 which you will recall I raised yesterday, relates to
18 document 51A {Magnum} where there is a black box in
19 relation to a McLelland document which we have indicated
20 to the OFT yesterday we consider may be relevant and we
21 do seek disclosure of that. So that's a matter --

22 **LORD CARLILE:** That's a matter for the OFT to examine,
23 exercising their disclosure obligations properly,
24 isn't it?

25 **MISS ROSE:** It is, sir, but we haven't had a response from

1 them and it may also be a matter that ought to be
2 resolved today while all the parties are in the
3 building. 51A.

4 **MS SMITH:** Sir, no application has been made of course but
5 if McLelland are here today -- I'm not sure if they
6 are -- they made general submissions in their letter but
7 didn't specifically address this. This particular
8 redaction, if we really think it would be helpful for
9 them to address it today, then they are here.

10 **LORD CARLILE:** Yes. It seems to me that the best way --
11 isn't the first step in relation to document 51A for the
12 OFT to exercise their disclosure obligations and decide
13 whether this should be disclosed for the just disposal
14 of the case? If that is so, then there will have to be
15 some involvement of McLellands, won't there?

16 **MS SMITH:** Sir, yes. We've heard what Miss Rose says.
17 Unfortunately, given all the other things we had to deal
18 with last night, we have not yet raised this point with
19 McLelland but we will and we'll come back to Tesco on
20 that.

21 **LORD CARLILE:** You've got until 4.30, that's fine.

22 **MS SMITH:** Sorry, I should correct the situation. We have
23 raised this point with McLelland and we will -- we did
24 raise the point with them last week, I'm instructed now.
25 They said they were not prepared to disclose this but we

1 will pursue it further given what Tesco has said.

2 **LORD CARLILE:** Their view may beg the question slightly
3 because, if it should be disclosed on the grounds of its
4 materiality, then the Tribunal may have to determine in
5 relation to that matter whether it should be disclosed,
6 whatever the OFT and McLelland's view of the matter.

7 **MS SMITH:** Sir, absolutely. We are in the appeal stage now.
8 The OFT's powers, as I've already said, are different
9 from those of the Tribunal, and if Tesco wish to make an
10 application or you wish of your own volition to consider
11 that matter now, then of course that's open to you
12 applying the test in schedule 4.

13 **LORD CARLILE:** We can take the application as having been
14 made because it was raised yesterday. I don't think we
15 need another piece of paper.

16 **MS SMITH:** No.

17 **LORD CARLILE:** So what I suggest is that the application is
18 now considered on conventional disclosure principles by
19 the OFT. If we have to make a decision about that
20 document, we will make the decision when we sit again
21 after the break --

22 **MS SMITH:** Sir, I would only make the point that --

23 **MISS ROSE:** Sir, with respect --

24 **MS SMITH:** If I could answer your question, sir.

25 **LORD CARLILE:** One at a time, and you first.

1 **MS SMITH:** The disclosure request has been considered by the
2 OFT. I think now the ball, with the greatest respect,
3 is in the Tribunal's court and the Tribunal can consider
4 that and make an order one way or the other.

5 **MS POTTER:** I don't think we have an unredacted version of
6 the document.

7 **LORD CARLILE:** No, that's the problem.

8 **MS SMITH:** We can supply that to the registrar and then that
9 can be considered.

10 **LORD CARLILE:** If we can have an unredacted copy with -- you
11 were going to say something, Miss Rose?

12 **MISS ROSE:** Yes, I was going to say two things.

13 The first is the OFT say they've considered it but
14 they don't say whether it's their view that this is
15 a disclosable document. Having considered it, they must
16 have formed that view and they ought, with respect, to
17 tell us, particularly since we can't see it, and the
18 Tribunal whether their view, having looked at it, is
19 that subject to questions of confidentiality it's
20 properly disclosable. That's the first point.

21 The second point is that, when we reconvene, it's
22 really going to be too late because --

23 **LORD CARLILE:** I understand the point. I regretted what I'd
24 said as soon as I said it.

25 Do we happen to have a copy of the unredacted?

1 **MS SMITH:** We're getting it and we can provide it if not
2 immediately --

3 **MR MORRIS:** We're doing it now.

4 **LORD CARLILE:** Has the OFT reached a preliminary conclusion
5 as to whether it's disclosable or not?

6 **MS SMITH:** With respect, that's obvious. Having asked the
7 party whether they would consent to disclosure, we have
8 of course taken the view that it is relevant and
9 disclosable.

10 **LORD CARLILE:** Ms Watson, I'm sorry you've been left
11 standing there whilst others participated. I think
12 we're going to have to look at the unredacted document
13 and hold a small hearing in which you and the two
14 parties to the appeal are present to deal with that
15 document.

16 **MS WATSON:** Yes. We, I'm afraid, do not know what
17 document 51 is because the reference --

18 **LORD CARLILE:** You don't know what the document is?

19 **MS WATSON:** No. The reference number is different to the
20 referencing numbers we have and I have not had -- I'm
21 sure I've had sight of document 51 in the past but
22 I haven't had sight of what is referred to as
23 document 51 today.

24 **MS SMITH:** I apologise. Ms Watson makes a very good point.
25 The reference numbers in the documents bundle obviously

1 are different from the reference numbers that were in
2 the SO bundle. If you give me one second I can give the
3 reference number.

4 **LORD CARLILE:** Can you give me the reference number as we
5 saw the document yesterday, please?

6 **MS SMITH:** 51A is annex -- it's a document --

7 **LORD CARLILE:** Document bundle?

8 **MS SMITH:** Document bundle 1, 51A.

9 For the record, that is a document taken from
10 annex 2 to the SO, document 226E, pages 306 to 307.

11 **LORD CARLILE:** So this is a McLelland internal document of
12 about 16 to 21 October 2002.

13 **MS SMITH:** And now I think, having got the SO reference,
14 McLelland will be able to identify it.

15 **MR MORRIS:** We're handing them a copy now.

16 **MS SMITH:** Also I have a copy for the Tribunal as well.

17 **LORD CARLILE:** Yes.

18 **MISS ROSE:** There is one further matter that arises out of
19 this. We've just been told by the OFT that in fact they
20 concluded that this passage was relevant and disclosable
21 but then sought consent which was refused. We were not
22 told any of that until now. Sir, we would like to know
23 today whether there are any other documents or parts of
24 documents in relation to which the OFT formed a view
25 that they were relevant and potentially disclosable but

1 then did not disclose them on the basis that the other
2 parties didn't consent, because we did not know that was
3 the case in relation to this document until now.

4 **MS SMITH:** Sir, document 51A is one of the small number of
5 the nine documents that were submitted by the OFT with
6 its skeleton. The OFT submitted those documents with
7 its skeleton and, as part of its preparation of the
8 skeleton, asked the parties whether those documents
9 could be unredacted. Insofar as they were unredacted
10 they were provided to Tesco. That is the context within
11 which contact was made with the third parties on these
12 documents.

13 **LORD CARLILE:** Can I see the unredacted document, please?

14 **MS SMITH:** Yes. (Handed)

15 Just to clarify, sir, of course we thought those
16 documents were relevant, they were put in with our
17 skeleton.

18 **MISS ROSE:** Sir, the point is not about the document but
19 it's the point about the redacted section. We were not
20 told by the OFT that they considered the redacted
21 section to be relevant and disclosable until now. What
22 I would like to know from the OFT now is whether there
23 is any other material that is redacted as against us
24 which they consider to be relevant and disclosable but
25 which they have not disclosed because parties haven't

1 given their consent and we would like those documents
2 identified today, because we are handicapped. We don't
3 know whether the material is relevant if we can't see
4 it.

5 **LORD CARLILE:** Insofar as the Tribunal can be used as a post
6 box, we are used as a post box. You've heard the
7 request. I'm sure that the OFT, if there is any such
8 material, will inform you of it.

9 **MS SMITH:** Sir, we've heard the request.

10 **MISS ROSE:** Sir, we do need to know today because time is
11 running out.

12 **LORD CARLILE:** I'm sure they'll tell you today.

13 Ms Watson, is there any reason why that redacted
14 piece should not be red boxed? I can tell you that the
15 information that is contained in that, without reading
16 it out, the information contained in that paragraph is
17 information which the Tribunal is aware of generally
18 from other sources anyway. It's a part of the
19 background to this case which has been repeatedly
20 referred to and it's pretty historic anyway.

21 **MS WATSON:** No, that paragraph can be put into a red box.

22 **LORD CARLILE:** Into a red box, right, very good. We've
23 resolved that. Can I keep this one? We had better have
24 a photocopy. I have a red pen, it now has a red box.

25 Right. We've resolved that one, it shows it was

1 worth having a hearing.

2 Can we help you further, Ms Watson?

3 **MS WATSON:** No. I thank you for the help you've given us.

4 **LORD CARLILE:** We like advocates like you, Ms Watson. Thank
5 you very much.

6 Right. Is there anything else that we need to raise
7 in this hearing?

8 In which case we will adjourn for a few minutes so
9 that those who do not wish to hear your further words of
10 wisdom, Mr Morris, can leave the court rapidly and go
11 elsewhere.

12 Sorry, Mr Thompson.

13 **MR THOMPSON:** I'm sorry to take up more time but you may
14 have seen in correspondence that there is another issue
15 about lack of information that Dairy Crest has about the
16 ongoing nature of this case and whether either the
17 Tribunal or the parties have any objection to our
18 receiving the pleadings and the transcripts.

19 **LORD CARLILE:** The Tribunal has absolutely no objection to
20 your receiving anything but it's not for us to decide.

21 **MR THOMPSON:** That's a helpful indication again, so I'll
22 echo Ms Watson's words. Perhaps we can then speak to
23 the representatives of the parties.

24 **LORD CARLILE:** Don't read too much into what I've said.
25 I've simply said that the Tribunal has no objection and

1 no jurisdiction to answer your question. We are
2 receiving transcripts on LiveNote; whether anyone is
3 willing to give you transcripts on payment of a very
4 large sum of money, I don't know. They will have to
5 decide for themselves.

6 **MR THOMPSON:** I'm sure we're prepared to pay the marginal
7 costs of the emailing.

8 **LORD CARLILE:** I think I may have provoked Mr Morris into
9 saying something now.

10 **MR MORRIS:** The only concern expressed is questions of
11 confidentiality in relation to the transcript. Once
12 they're checked, then we don't see any problem.

13 **LORD CARLILE:** That seems pretty reasonable, doesn't it,
14 Mr Thompson?

15 **MR THOMPSON:** Yes, I obviously don't know what that is but
16 that seems reasonable in principle.

17 **LORD CARLILE:** We'll leave you to sort that out amongst
18 yourselves I think.

19 Right. So we will resume around about noon. You're
20 going to be about an hour?

21 **MR MORRIS:** About, yes.

22 **LORD CARLILE:** Well, what we'd like to do, I think, is sit
23 through.

24 (11.46 am)

25 (A short break)

1 (12.02 pm)

2 **LORD CARLILE:** You plainly have even fewer fans than
3 I thought, Mr Morris.

4 **MR MORRIS:** It was only because you put them off!

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

6 Opening submissions by MR MORRIS (continued)

7 **MR MORRIS:** I'm turning to Cheese 2003 now and I'm going to
8 try to get through this as quickly as I can. Everybody
9 will appreciate that.

10 Just let me summarise quickly the nature of the
11 infringement. In the late summer of 2003, McLelland was
12 concerned about its margins on all its cheeses and it
13 sought cost price increases from its main, principal
14 retailer customers. Tesco at that time had a specific
15 concern about its margins on one cheese,
16 Seriously Strong.

17 By this time, Asda, Sainsbury's and Tesco, we say,
18 had previously been involved in initiatives, as far as
19 Tesco is concerned in the Cheese 2002 initiative and the
20 others in cheese and in milk 2003. And by this time
21 McLelland had shown itself to be willing to pass on
22 retailer information between retailers. In other words,
23 by this time we know McLelland had been an intermediary.

24 McLelland then planned to bring about a market-wide
25 increase in retail prices for its cheeses in order for

1 it to secure the cost price increase that it is looking
2 for and in the period from September onwards was
3 approaching retailers to that end. Tesco and the other
4 retailers were aware of this plan.

5 For your note, I don't intend to take you because
6 I'd rather describe it, but this is described in our
7 skeleton at 53 to 59 {Magnum}. I think it's even
8 shorter if I just summarise it.

9 Tesco, Sainsbury and Asda were willing to raise
10 their retail prices conditionally on their competitors
11 going up, and Tesco made that fact clear. It was thus
12 against that background and in that context that between
13 26 September 2003 and 9 October, Tesco on four occasions
14 received from McLelland the future pricing intentions of
15 its competitors and, in particular, of Asda and
16 Sainsbury. And then, and this is an important point,
17 particularly in the context of Cheese 2003, having
18 received that information from McLelland, on 9 October,
19 Tesco in turn disclosed back to McLelland its own future
20 pricing intentions. As a result, Tesco's cost and
21 retail prices went up.

22 Now, in terms of the strands, there are five strands
23 or A-B-Cs in relation to Cheese 2003 and I'll just
24 summarise them. I mean, I've effectively told you, but
25 if I can give a little bit more detail.

1 Strand one is Tesco receiving Asda's future pricing
2 intentions, the receipt being on 26 September 2003.

3 Strand two, Tesco received Sainsbury's and Safeway's
4 future pricing information on 30 September 2003.

5 Strand three, Tesco received Sainsbury's future
6 pricing information on 2 October 2003.

7 Strand four, Tesco received Asda's future pricing
8 intention information on 7 October 2003. Those are the
9 four incoming, where Tesco is a C.

10 Then strand five is where Tesco is an A, and that's
11 Tesco disclosing its future pricing intentions to
12 McLelland on 9 October, and then McLelland passing them
13 on to Asda.

14 There were two concerns at the time. There was
15 McLelland's overall cost recovery, they wanted £200 per
16 tonne more generally on all cheese and from all its
17 customers. And at the same time there was a particular
18 issue with Tesco about Seriously Strong and their
19 margins and Asda's position on pricing in relation to
20 Seriously Strong.

21 The infringement in 2003 is not about
22 Seriously Strong, it is about coordination of prices
23 generally, cheese prices. The cost price was
24 implemented, it's not in issue. The OFT's case is that
25 that cost price increase resulted in retail price

1 coordination through the A-B-C exchanges as retailers
2 sought to maintain their margins in the face of the
3 increased cost price.

4 Can I just take one moment. (Pause)

5 Now, that takes us -- with that background, we can
6 go to the documents. We start at 97 {Magnum}, which is
7 a document that you have seen, and it's already been
8 through in some detail. This is a Stuart Meikle
9 internal memorandum of 25 August and I don't propose to
10 take you through it again. It shows that the
11 background, in particular the concern, the background at
12 that stage related to the Seriously Strong issue which
13 was an issue at the time.

14 We of course accept that Seriously Strong was an
15 issue at the time and it was one of the things on the
16 agenda between Tesco and McLelland. But in our
17 submission, as I've just said, Tesco in its opening
18 places too much reliance on that element of the story.
19 We submit that the Seriously Strong aspect is not the
20 issue.

21 That's the 25th, that was from Stuart Meikle to
22 Jim McGregor.

23 If you go to document 99 {Magnum}, we then go to
24 29 August 2003, and this is a document from
25 Stuart Meikle to Lisa Oldershaw and this is the

1 beginning. You will see over the page the actual letter
2 in which Mr McGregor makes the request for a cost price
3 increase, and you will see also, in the email itself,
4 she refers to:

5 "I will send you an agenda for next Thursday but
6 main topics will be ..."

7 That meeting is the meeting of 4 September which is
8 a first staging point in the chronology. In fact, the
9 document is in exactly the same form as at 98 {Magnum},
10 which I believe is the version that Miss Rose took you
11 to.

12 Then at 100 {Magnum} you see a similar letter, and
13 this is relevant, which I don't think you've been taken
14 to before. A similar letter being written to -- hang
15 on, I might have got this wrong. Yes, 100, and you have
16 been taken to it, I apologise.

17 This is a letter to Safeway from Jim McGregor.
18 I haven't checked whether it was in exactly the same
19 terms but it looks pretty similar. This is the -- we
20 would like -- "a price increase that we will be making
21 across our range", so it is an increase for all cheeses.
22 And the explanation given is rising costs on labour,
23 distribution, insurance, and they've not increased their
24 costs outside fluctuation of the milk price.

25 So that's the general request, and it's significant

1 because they're not just asking Tesco, they're asking
2 all their retailers.

3 There were then what appeared to be meetings with at
4 least two of the retailers, and Tesco met with --
5 McLelland met with Tesco on 4 September, and I will come
6 back to the content of that meeting in a moment, but the
7 first document you go to in that context is the document
8 at 100A {Magnum}, which you have seen, which is
9 McLelland's presentation to Lisa Oldershaw on
10 4 September, and it looks as though there's an industry
11 habit of putting each party's logo at the bottom.

12 You have seen this before, and you'll see on the
13 second page the reference to various things on the
14 agenda: "Cost Recovery", that's the overall item,
15 "Seriously Strong", on the agenda. Then you will see,
16 two pages on, "Cost Recovery":

17 "£200 per Tonne cost increase required on all
18 business from 1st October..."

19 That reflects the letter.

20 Then there's the proposal:

21 "Protect margin by moving retail prices in line with
22 cost increase."

23 Then they deal with Seriously Strong, which is three
24 slides, and then they deal with the business plan and
25 that is the slide presentation at 100A.

1 Now, at 101 {Magnum} is a presentation sent the day
2 after, and I'll come back in a moment to the meeting on
3 the 4th, but I just want to put what the communications
4 are with each of the retailers. This is a presentation
5 by Calum Morrison to Sarah Mackenzie at Sainsbury's, and
6 the covering email:

7 "Please find attached our rationale for moving
8 prices... I will give you a call this afternoon..."

9 Then we have a Powerpoint presentation or a slide
10 presentation, or it looks as though it's some slides,
11 but he's sent them. There we have, on the second page,
12 "Price Increase":

13 "£200-tonne increase on all business from October..."

14 "This is to bring margin back into cheese for the
15 manufacturer.

16 "Not related to milk prices.

17 "This will be a total market move.

18 "All major suppliers.

19 "All major retailers.

20 "All RSP's will move.

21 "Contract and brand."

22 Then over the page you will see the justification
23 for the overheads and the price increase and
24 a discussion of the market.

25 Now, we say that this document shows that the

1 underlying plan that McLelland has in mind is the same.
2 It is the case that this slide has got more detail upon
3 it, but the basic proposition that McLelland is
4 proposing an across the board cost and -- cost price and
5 retail price increase is established by both those
6 documents. It is one and the same proposal being put by
7 McLelland to Tesco, Sainsbury's and others. We say that
8 those two documents together are highly relevant for the
9 context in which McLelland's cost price increase was
10 taking place.

11 If you turn over to 102 {Magnum}, which is again on
12 5 September, we say that that proposition is supported
13 by communications you can see there with Somerfield. So
14 this is Calum Morrison on the same day, a few hours
15 later, sends an email to Somerfield:

16 "Following on from our last meeting, I can confirm
17 that our increase is based on the total market moving
18 in October."

19 Now, that's a document I'm not sure you've been
20 taken to before, but that is the total market move that
21 is being referred to and that is a reference to
22 a proposal that all retails will go up to justify or
23 to -- justify is not the right word -- in order to
24 ensure that McLelland get their £200 per tonne.

25 Now, the next document I would like to take you to,

1 to show you what actually happened at the meeting on
2 4 September, is document 112 {Magnum}, and this is the
3 Tesco briefing note. This is a document upon which the
4 OFT does play -- you've seen it before, this is the --
5 I think I call it the Tesco briefing note.

6 This is Mr Meikle's document which we believe was
7 prepared before the 6 October meeting, probably around
8 about 2 October. It was prepared as a briefing by
9 Mr Meikle to his bosses, to those who were going to
10 attend that meeting, who were Mr Irvine and Mr McGregor,
11 I think at the least.

12 It is a document upon which the OFT places reliance.
13 It is a contemporaneous document or near contemporaneous
14 document, obviously it's describing events a matter of
15 two or three weeks before. But as you will see, we say
16 that it is by far from being the only evidence relied
17 upon, and indeed, as we track through the immediately
18 contemporaneous documents, the exchanges, you can see
19 how it matches the events described here.

20 This note, we say, contains a detailed chronology of
21 the events between about 4 September and just before the
22 meeting on 6 October. We also submit, and as you will
23 see as the case develops, that much of its contents are
24 not contested.

25 Now, what the note shows, and this is an important

1 point, it is right at the beginning, is that at the time
2 of this note being written, that is let's say 2 or
3 3 October for argument's sake -- I'm not sure we've ever
4 quite nailed it but it's close to that -- it shows that
5 at the time of its writing, Tesco had not accepted the
6 cost price increase.

7 Mr Meikle in the note is very frank because in the
8 first sentence he says:

9 "Present situation [present situation] is that Tesco
10 are not accepting the £200 cost increase."

11 But what the note also shows, and what the documents
12 show, is that at an earlier stage Tesco, as he says, had
13 accepted the cost price increase in principle, on
14 4 September, but had done so on condition that others
15 would move across the market, and I'll read the passage
16 in a moment.

17 There is nothing inconsistent between those two
18 propositions. Proposition one: by 2 October, he
19 recognises that they hadn't accepted it. Proposition
20 two: earlier on, they had said that they would accept it
21 in principle, conditional upon others moving.

22 What happened in fact is that Tesco withdrew its
23 initial acceptance of McLelland's cost price increase,
24 the initial acceptance being on 4 September, when Asda
25 did not move on its retails, and then Tesco did accept

1 the cost price increase when it was then presented with
2 the evidence that showed that Asda would be -- and
3 I emphasise the words "would be" -- would be moving its
4 retail prices. Not "had", "would be".

5 With that background if we then just read the first
6 bit. After the "present situation", the next five or
7 six or seven lines are a description of the 4 September
8 meeting:

9 "I had a meeting with Lisa on 4 September at which
10 we discussed the £200 increase. We ran through all the
11 arguments as to why we were looking for an increase at
12 that time. Lisa requested a further explanation [you'll
13 see that -- pick that up in a moment] as to why we
14 arrived at the figure of £200 and I subsequently
15 e-mailed this to her detailing the fact that butter,
16 curd and powder are currently being sold at £200 per
17 Tonne above Mild and that £200 was required to re-dress
18 the balance and make sure that we continued to
19 manufacture cheese rather than other products."

20 For your note, and I've scribbled on it, the
21 "I subsequently e-mailed this to her" is document 110
22 {Magnum}.

23 Then it carries on:

24 "At the close of the meeting [the 4 September] my
25 understanding was that Lisa had accepted the cost

1 increase on the basis that we would work to increase
2 retail prices across the market [and that echoes the
3 across the market move that we've already seen in other
4 documents] to maintain retailer margin. Lisa also
5 stated that she might even move her retail price prior
6 to 1 October."

7 If one draws a line there in the document, that is
8 what she says about 4 September.

9 The OFT says that the briefing note accurately
10 records that she had accepted the cost price increase in
11 principle at the outset but on condition that there was
12 a total market move.

13 Now, with that background, I need to go back to the
14 documents now, and if I go -- in fact, the next document
15 is 110 {Magnum}.

16 I'm slightly conscious of time.

17 110, this is the further explanation. The bottom
18 half of document 110 is 12 September. It's a little bit
19 confusing because the top half is 30 September, which is
20 a different -- we'll come back to that bit in the story.
21 But at 12 September, the bottom two-thirds of that page
22 is Stuart Meikle's explanation to Lisa, as he said he
23 would give, for the justification for the cost price
24 increase. I don't propose to read that out again,
25 I think you've read it once before.

1 **LORD CARLILE:** We have read it.

2 **MR MORRIS:** That's what the document is concerned with.

3 If we then go back to 103 {Magnum}. Briefly, 103,
4 16 September, is dealing specifically with
5 Seriously Strong. I think you've been taken to that.
6 The middle passage of that document identifies the two
7 issues, the separate issues that need to be resolved.
8 The first is the Seriously Strong problem and the second
9 is achieving the objective of the £200 per tonne
10 increase generally.

11 Then we go to 104 {Magnum}, and this is on
12 24 September. We've now moved forward by about two
13 weeks and we're getting close to the event which is the
14 further element of strand one. The 24th is, I think,
15 the Wednesday, and what happens is Stuart Meikle sends
16 Lisa Oldershaw a file detailing the new case costs by
17 line:

18 "On the McLelland random weight brands we will be
19 increasing the retail price by 30p per kilo, I have also
20 detailed the new retail prices for these lines.

21 "Can you please advise when these costs will be live
22 ... and also what changes you wish to make to the retail
23 prices on the Tesco label random weight products?"

24 106 {Magnum} is an important document. This is the
25 25th, which is the Thursday -- actually it's the 24th,

1 I correct myself. The covering email, if you look down
2 a few lines you'll see it's from Gerry Doyle to
3 Jim McGregor, Tom Ferguson, 24 September at 3.42. An
4 internal email which shows that McLelland has received
5 Asda's future retail pricing intentions. We see that
6 from the words:

7 "Further to my telephone conversation with Tom who
8 confirmed that Asda will be moving to new retails
9 effective from Monday the 29th."

10 That's the Monday and this is the Wednesday before.
11 The "will" has got two elements to it really. The
12 "will", we say, is (a) definitive, in other words it's
13 not speculation, and (b) is future. That shows that
14 when we come in a moment to the actual -- what we say is
15 the document that relates to strand one, that the
16 information that was then passed on was future pricing
17 information.

18 If you go briefly forward to 112 {Magnum} again, the
19 wording in that email at 106 {Magnum} matches very
20 closely the wording, if you then go down, into the Tesco
21 briefing document, to -- it's about a third of the way
22 down:

23 "Lisa rang me last Friday..."

24 I don't know if you're with me. It's ten lines
25 down.

1 **MS DALY:** In the main paragraph at the top.

2 **MR MORRIS:** In the main paragraph, ten lines down. I gave
3 you the first eight lines or so and it's about two or
4 three lines below that:

5 "Lisa rang me last Friday..."

6 Just for your note, "last Friday" is 26 September,
7 and that is strand one.

8 Then the following words:

9 "... I told her [this is on the Friday] that it was
10 our understanding that Asda would move retail prices
11 from Monday 29th September."

12 Well, the "that Asda would move retail prices from
13 Monday 29th September" is pretty close to "will be
14 moving ... effective from ... the 29th" at 106 {Magnum}.

15 That in fact is the -- that in fact is the actual
16 phone call on 26 September which the OFT says is the
17 passing of information about Asda's future retail
18 prices, and the prospective nature of that information
19 is established, we say, by document 106.

20 Just for your note, 107 {Magnum}, which you have
21 been taken to, is the day before. You were taken to it
22 by Miss Rose. This is to Sainsbury's from McLelland,
23 and the sentence, "Everybody has agreed this with us",
24 indicates, we submit, that McLelland did believe at that
25 time that Tesco and others would move. And the OFT's

1 case, as I said at the outset, is that by this time she
2 had said they would move; the fact that she later
3 changed her mind in the intervening period is not
4 relevant to what was in fact happening at that time.

5 We then go to 108 {Magnum}, and now we're moving
6 towards a second strand, and this is relevant
7 information because of the -- when we get to the second
8 strand, the key element of evidence in the second strand
9 is the sending of some labels which you will see in
10 a moment. They are pristine labels, and I emphasise the
11 word "pristine" labels. They are not labels off a pack
12 of cheese that has been bought in a supermarket, nor are
13 they in-store till receipts. They are pristine labels.
14 And the OFT's case is the fact that they are sending
15 pristine labels indicates that these are future prices,
16 and what 108 shows is actually why these pristine labels
17 were being sent.

18 This is internal at McLelland, 29 September, this is
19 the day before the event that evidences strand two:

20 "To confirm earlier telephone call in which I asked
21 for your assistance to provide photocopy examples of all
22 pre-pack labels that have been packed with the new
23 retail prices as advised by Alasdair and Gerry... last
24 week.

25 "This information is to send to the buyers this

1 afternoon so that they can be encouraged with proof that
2 retails have moved and expedite price increases across
3 the board."

4 We say that is very important evidence because it
5 shows the purpose of the sending of these pristine
6 labels which we submit, on the evidence, clearly are
7 labels of advance price changes and not price changes
8 that have already happened.

9 If we then go back to document 112 {Magnum} --
10 I keep doing this to show how the story develops -- you
11 will then see that there is a telephone conversation in
12 the afternoon of 30 September, I think that's the
13 Tuesday afternoon:

14 "On Tuesday afternoon I spoke to Lisa ..."

15 This is now two-thirds of the way down the main
16 block of text:

17 "... I spoke to Lisa to ask her to increase her
18 costs and to help start the ball rolling on retail
19 prices. It was at this time that Lisa said she had not
20 agreed to the £200 cost increase and that further
21 justification was needed..."

22 So at that point, that's the backtracking.

23 Then we go back to document 110 {Magnum}, and
24 document 110 is the central document in relation to
25 strand two. And just to remind you, strand two is the

1 passing by McLelland to Tesco of Sainsbury's future
2 retail pricing intentions.

3 That document at the top of 110 reads:

4 "Copy of e-mail as requested.

5 "I have faxed copies of the Safeway & JS [that's
6 Sainsbury's] labels to you...

7 "Safeway Savers Mild has increased in price by 26p
8 per kilo and JS Isle of Bute has increased by 20p per
9 kilo."

10 In order to make it absolutely clear, the OFT's case
11 is that those are changes that appear on the label but
12 are not in-store at that point in time. And we will see
13 in a moment from two further documents, documents 111
14 and 113, that Isle of Bute -- that as at 30 September,
15 Isle of Bute had not changed in-store.

16 Then 109 {Magnum}, going back, is 30 September also.
17 This is Calum Morrison to Somerfield:

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

20 To make our case clear, our submission is the words
21 "effective from today" does not mean effective in-store.
22 "Effective" actually means, we say, effective in the
23 sense that they are going into packing, the instruction
24 has been given for them to be packed with those new
25 prices on.

1 Then you go to 111 {Magnum}, and you see that
2 Stuart Meikle on 1 October, which is the day after.
3 I can't remember what day of the week the 1 October is,
4 it will be in our chronology.

5 I'm not, by the way, taking you through the
6 chronology, but all this is there and it will match.

7 It was a Wednesday.

8 "We have picked up some more retail price movement
9 today. [Sainsbury's] have increased the price on
10 Seriously Strong... and Taste the Difference
11 Mull of Kintyre..."

12 Two categories mentioned there.

13 Then 113 {Magnum}, 2 October:

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

16 Isle of Bute are two of the ones mentioned.

17 We say that what those two documents, 111 and 113,
18 show is that the new prices for Isle of Bute had not
19 moved in-store until 2 October at the earliest, but that
20 certainly by 30 October, if you go back to 110 {Magnum},
21 those labels, the Sainsbury's labels for Isle of Bute,
22 was a future price.

23 That is the evidence which establishes that the
24 pricing information passed on was future pricing
25 information on strand two in relation to Sainsbury's

1 information.

2 We then go to strand three, documents 115 and 114.
3 I'm going to take you to 115 {Magnum} first and then go
4 back to 114 {Magnum}.

5 This is 2 October, this is forwarding Sainsbury's
6 future retail pricing information:

7 "Hi Lisa,

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

14 "Give me a call if you want any more information."

15 If you go over the page, this is a document you were
16 taken to before, a spreadsheet of prices across the
17 retailers. And you see, particularly in the
18 "Sainsbury's" column you've been referred to, you've got
19 "Old Retail" and "New Retail", and you've got a list of
20 prices. It is the OFT's case that those new retail
21 prices are new prices of Sainsbury's which are not yet
22 in-store as at the date that this information is sent.

23 Now, Tesco say that that column, "New Retail" is new
24 prices in-store and that is obviously a matter in issue
25 between us. They refer back, and this is where I'll

1 take you back to 114 {Magnum}, to the document to which
2 Mr Meikle was responding, and that document, Tesco
3 points out, is Lisa Oldershaw to Stuart Meikle:

4 "Can you please produce me a matrix of all your
5 lines [and that's what he does], who stocks what and
6 what retail they are currently at."

7 So the request is for "currently", and Tesco say
8 that's what the reply was.

9 The point we would -- a point that we would ask you
10 to note in particular is that when -- you will note in
11 his reply that Mr Meikle describes the old prices as
12 being the current prices. So he puts "old/current ...
13 and the new retail price". We say that he does reply
14 specifically to what he's asked for, and then he also
15 gives more information which is future retail.

16 Then, as a matter of chronology, the next event is
17 the 6 October meeting attended by Mr Scouler,
18 Ms Oldershaw, Mr Irvine, Mr McGregor, and you were taken
19 to document 110A {Magnum}, which is the -- it's prepared
20 by Lisa Oldershaw for Mr Scouler for the meeting.

21 You've seen this before, and you will see the point
22 relied upon by Tesco at point 7:

23 "Competition commission training desperately
24 needed."

25 You will hear evidence and you will see in the

1 witness statements that this is addressed. Tesco say
2 that at this meeting Tesco raised a great objection or
3 objected to receiving the information it was receiving
4 and said, "Hang on a minute, you need some Competition
5 Commission training", the reference to Competition
6 Commission presumably perhaps being due to Tesco's
7 involvement in enquiries.

8 Anyway they -- basically Tesco's case is that at
9 that meeting they pushed back and said, "Don't go
10 there".

11 We then move to document 117 {Magnum}, we're now
12 after the meeting, the next day, 7 October, early in the
13 morning. Mr Meikle writes to Lisa Oldershaw:

14 "Hi Lisa,

15 "Quick update on the retail price position of
16 Seriously Strong.

17 "These prices are taken from the Asda website. We
18 will buy some product [from] store this morning and
19 I can fax the receipts ..."

20 So that's till receipts as confirmation, not labels.

21 The point to note about this email is this is
22 clearly in-store information because it refers to
23 information taken from the website and they're going to
24 buy it in-store and fax the receipts.

25 By contrast, document 118 {Magnum}, which is strand

1 four, which he sends under two hours later:

2 "Hi Lisa,

3 "Please find attached an updated spreadsheet
4 including the new retail prices that Asda will run on
5 McLelland random weight branded lines."

6 Now, a number of points to be made about that
7 sentence. First, these are random weight products, so
8 an increase in price takes time, at least a week more to
9 work its way into stores. Secondly, the words "will
10 run"; this is not -- if you look back to 117 {Magnum},
11 those are products which have already appeared. So
12 "will run", in our submission, is a clear indication
13 that he is talking here about future prices.

14 Then you go over the page to the schedule and you
15 see the various -- against Asda -- this is strand four
16 and this is Asda information, not Sainsbury's, this is
17 Asda information, and the point in dispute between the
18 parties is Tesco says that these are in-store prices,
19 the OFT submits they're not, they're future prices.

20 If you run down the column, just for your note, the
21 Asda "New Retail", you'll see the first two items,
22 there's nothing for Seriously Strong 500 grammes because
23 they've only got the information on 250 I think. But
24 the new retail for Seriously Strong, that's fixed
25 weight, but the remainder, 6.98 downwards, are all

1 McLelland random weight.

2 The next set of documents which relate to this are
3 documents 116A to 116C, these are documents which cover
4 the period from 29 September to 6 October. Without
5 taking you to them in detail just now, these documents
6 show that the prices contained in that 7 October email
7 are future prices and that they could not have been
8 in-store by 7 October. What these documents show is
9 that these are prices going into production, starting on
10 6 October, and that they will not be on the shelves for
11 a week or so.

12 What you have, just running through very quickly is
13 you have, on document 116A {Magnum} you start with an
14 email of 29 September and that is from McLelland to
15 Asda, Jonathan Betts. There's obviously a discussion in
16 the morning of the 29th because it's:

17 "... as discussed earlier this morning ..."

18 Then later on the 29th, Reid emails Betts with the
19 new prices discussed earlier.

20 Then at 7.05 pm on the same date, Betts of Asda
21 emails back to McLelland. And at 8.44 the next
22 morning -- I'm working up the email at the moment,
23 I don't know if you're following me -- at 8.44 the next
24 morning, Mr Reid forwards this to Tom Ferguson. And at
25 8.49 that morning, Mr Ferguson acknowledges receipt back

1 to Chris Reid.

2 Later that day, if you jump ahead to 116C {Magnum},
3 and again this is all in the chronology but I'm just
4 picking out the events, at 116C you will see an email
5 from Asda to McLelland saying:

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

8 We say that's an important document.

9 Then you go to 116B {Magnum} which is a McLelland
10 internal document. It looks as though it was initially
11 produced by 3 October, confirming Asda's new retails
12 dated from 4 October, and we submit that that document
13 shows these are future prices.

14 So these documents show that this is going into
15 production and not that it's in-store, and remember it's
16 random weight labels, you've got all the time lag.

17 We then go to 119 {Magnum}, I think. Yes, this is
18 a document to which Miss Rose took you. This is
19 7 October, at 11.00 in the morning. She referred to the
20 sentence "Brands", this is the second paragraph of the
21 email. This is an email within Asda:

22 "Brands moved in the market this Monday, with all
23 retailers except JS and Morrisons taking a cost plus
24 view on retails. Retails on our branded products moved
25 this morning in line with increased costs."

1 We say that that is not evidence of an in-store move
2 but that is evidence confirming that Asda's decision to
3 move has been taken.

4 **MS POTTER:** Just one question, Mr Morris. Has the OFT sort
5 of clarified this position about products from the depot
6 from 6 October, how quickly products move from depot to
7 store? I had assumed that supermarkets turned product
8 over quite quickly so that, if things were in depot on
9 the 6th, they could easily have been in-store on the
10 7th?

11 **MR MORRIS:** I haven't got an immediate answer.

12 **MS POTTER:** It was probably asked at some point in the
13 investigation.

14 **MR MORRIS:** Can I come back on that? It's obviously
15 something that will be -- perhaps something that
16 Mr Ferguson can usefully deal with.

17 **MS POTTER:** Yes, thank you.

18 **MR MORRIS:** It is our case that there is a process of -- it
19 says depot onwards, I will take, if I may, instructions
20 on it, but there's nothing further I think I can say on
21 that at the moment.

22 Where was I? I'm not far from being there so
23 I think 1 o'clock is looking a reasonable prospect.

24 **LORD CARLILE:** Good.

25 **MR MORRIS:** 121 {Magnum}, this is an important email because

1 this is the background email leading up to the final
2 event, which is the passing back. This is the email in
3 the middle, on 8 October, from Stuart Meikle to
4 Lisa Oldershaw:

5 "Following our conversation I have updated the
6 attached spreadsheet on all the points that we
7 discussed.

8 "McLelland Random Weight Brands

9 "The file is updated to show the new retail prices
10 that we will pack the McLelland random weight brands at
11 for supply to Tesco. We will begin packing at the new
12 retail prices with immediate effect."

13 So that is -- someone is going to tell me what day
14 of the week that is, the 8th.

15 "As discussed I will inform Sarah the day before we
16 supply any of these lines at the new retail prices.
17 I would expect us to begin supply of these lines to
18 Tesco early next week."

19 So that -- "early next week" would be the week
20 beginning the 13th, and these are Tescos.

21 Then we go to document 123 {Magnum}, which is the
22 document which evidences the passing of Tesco's future
23 retail pricing intentions back to McLelland. This is
24 strand five:

25 "I have amended some of the suggested RSP's - for

1 ease I have highlighted them in RED, please pack to
2 these RSP's ASAP - thanks.

3 "As for Costs, as clearly pointed out at our meeting
4 on Monday [that's the 6 October meeting] we will
5 increase your cost price by £200 per tonne. It is our
6 wish that this is passed back to the farmers but as they
7 are your costs you must do as you see fit. I do not
8 foresee any further cost increases being needed...

9 "Costs on Seriously Strong prepacks will move on [a
10 particular date]. Costs on all other ... lines (with
11 the exception of SS Deli as I need to discuss) will move
12 on [another date]."

13 Then we have attached to that a schedule of prices.
14 We say that that is disclosure of future -- plainly
15 disclosure of future retail pricing information, there's
16 no doubt about that.

17 Now, the point that is made by Tesco is that all
18 this information was required for labelling. The point
19 we make -- and that's a matter that will obviously be
20 explored. But the point I would make in response to
21 that is a very important point which I'm not sure I got
22 across yesterday, which I should have done, and I'm
23 going to come back to it in a moment, is what you must
24 be aware of at this point in time, Tesco have just
25 received Asda's future prices, future retail prices.

1 And the crucial point here is that here is Tesco telling
2 McLelland its future retail prices immediately following
3 receipt by it of the all important news that Asda is
4 going to be moving.

5 Now, this is a clear case of what we, and it may be
6 counsel uses shorthand -- as an instance of disclosed
7 having received. As you will recall, and I will remind
8 you in closing my opening in a moment, disclosed having
9 received is one of the key elements that we say goes to
10 state of mind.

11 If A discloses its future retail pricing intentions
12 to B in circumstances where it has already received from
13 B the future retail pricing intentions of its competitor
14 retailer, C, that is very strong evidence of A's state
15 of mind when it sends the information back. That was
16 a point that I think was emphasised in the Replica Kit
17 case both at first instance and in the Court of Appeal.
18 In our submission, that's strong evidence that A may be
19 taken to intend B to pass on to C.

20 To put it bluntly, they know that B is acting as
21 a conduit because they've just received something,
22 future pricing information, they know B is a conduit, it
23 is an intermediary, and that is a very important case.

24 Just for your note, and I won't go back to it, the
25 point also arises on Cheese 2002 in relation to strand

1 two, where Tesco was the recipient, and strand seven,
2 where Tesco disclosed back to McLelland.

3 Then at document 124 {Magnum}, we see the evidence
4 that Asda passed this -- that McLelland passed this
5 information on to Asda. This is an email, internal
6 email from Jonathan Betts, who you will have seen
7 cropped up already at documents 116A and 116C, to
8 Peter Pritchard and a variety of others:

9 "Further update below.

10 "Retailers.

11 "Tesco have now moved to increase retailers on [own
12 label]. Value and Territorials have moved between 23p
13 and 29p per kg and I have line detail. Cheddar has
14 moved on average 35p per kg though I have no visibility
15 on exact prices. These packs should be instore in... 10
16 days time."

17 So he's not talking about what he can get from
18 in-store, he's talking about something he knows about
19 what Tesco is going to do. And given the correspondence
20 that has gone on before between Tesco -- between
21 McLelland and Asda, the OFT submits that what this is
22 referring to is information that it has received about
23 Tesco's pricing intentions at strand five through
24 McLelland. That is the B to C for strand five.

25 Then you see -- can I just take instructions for

1 a moment. (Pause)

2 So that is the run-through on Cheese 2003, and it
3 gives me a few minutes to just make some closing remarks
4 if I may, closing to my opening. We are very grateful
5 for the additional time this morning.

6 In respect of each infringement, by which I mean
7 each A-B-C, there are two essential issues. First,
8 there is the question of the fact of the transmission of
9 the information, information from A to B and then B to
10 C. Transmission by A, receipt by B, and the key
11 question is, did it happen and was it future pricing
12 information?

13 The OFT's case is that this is clearly established
14 both in respect of Cheese 2002 and Cheese 2003 on
15 a substantial number of occasions. It is clear from the
16 evidence, from the documents, first of all, that the
17 information was future and not in-store and, secondly,
18 that it was retail pricing information and not just cost
19 information. You can see that clearly in relation to
20 Cheese 2002 at, for example, strand two,
21 21 October 2002, which is document 52 {Magnum} from
22 recollection; strand three, 30 October, that's Tesco
23 passing information to Dairy Crest, that's document 63
24 {Magnum}; and also at the ensuing strands in 2002 at
25 four to nine, and I won't run through them all now.

1 And at Cheese 2003, again, you can see clearly that
2 it's plainly retail information and we say it's plainly
3 future.

4 The second element is the element of state of mind
5 and we say -- or the question is, when disclosing or
6 receiving these future pricing intentions, was there the
7 requisite state of mind?

8 Now, as you will recall from both our defence and
9 our skeleton, in relation to state of mind we rely on
10 the facts, we rely on four particular elements.

11 The first element is that Tesco was aware of the
12 plan or of a plan and, in relation to the Dairy Crest --
13 in relation to 2002, you have all the information about
14 the Dairy Crest briefing document, and in relation to
15 2003, we have the evidence this morning about the
16 presentations and the plan to be a total market move.
17 That's the first element.

18 The second element is what we describe in shorthand
19 as conditionality. These are statements by Tesco and
20 indeed by other retailers that they will go up but on
21 condition that others go up. Now, how does that work
22 and why is that relevant to state of mind? I'll put it
23 in a sort of A-B-C logic.

24 If A says to B, B being the middleman, "I will go up
25 if C goes up", and if at that time B is seeking to get

1 everyone else to go up, or perhaps when he receives that
2 information from A that may act as an incentive on B to
3 seek to get everyone else to go up; he knows that A will
4 go up if C goes up. And at the same time as B receives
5 that information from A about what A will do, that he's
6 conditional, B also knows that C is conditional. In
7 other words, B knows that C has told him. In this case
8 we have evidence that Sainsbury's have said, "I will go
9 up if others go up". In those circumstances, we say
10 that A must foresee that when he tells B his position on
11 conditionality, B will then go to C and tell him what he
12 knows about A.

13 It's a very -- perhaps it's slightly too many As and
14 Bs and Cs, but the essence of conditionality is that it
15 indicates that when A tells B that he will go up if his
16 competitor goes up, he will foresee that B will then go
17 to C and say, "I can tell you that A has told --" He
18 might not even say that, but he will go to C and A
19 foresees that. And that is why the statements of
20 conditionality which I took you to yesterday are
21 relevant to the question of state of mind.

22 The third element of state of mind is the one I've
23 just referred you to, it's disclosed having received. I
24 don't think I need to explain that again.

25 The fourth and final element of state of mind is

1 that we say that the information is not required for
2 price labelling and no other -- there is no other reason
3 for the information to be passed on -- no other reason
4 for the information to have been given by A to B or,
5 looking at it from C's point of view, for B having
6 received it from A. That's the issue of the labelling.

7 We say, when you take all those four elements
8 together, you will conclude that the -- that Tesco had
9 the requisite state of mind, first when it was A and
10 secondly when it was C.

11 Now, if I may finish by just making a couple of
12 observations on the legal test. These are covered in
13 our defence and in our skeleton. We will respond to the
14 specific points made in the Tribunal's letter on this
15 aspect and we will do so in writing. I'm not going to
16 say -- I hope we will do it in the intervening break,
17 our intention is obviously to respond just as Tesco has,
18 and we will address these legal issues as necessary in
19 closing. But I just touch upon them here if I may.

20 Let me say at the outset that the OFT's case is that
21 the tests for state of mind, applied by the Court of
22 Appeal in Replica Kit are clearly satisfied on the
23 evidence in this case. On the facts you can be
24 satisfied that Tesco may be taken to have intended that
25 the information would be passed on and, similarly, Tesco

1 as recipient may be taken to have known the
2 circumstances in which the other retailers had disclosed
3 the information towards them.

4 Nevertheless we do say this: the precise standard
5 for the requisite state of mind is not settled as
6 a matter of law. In principle, we submit that having
7 suspicions or taking the risk or hoping or reasonable
8 foreseeability, as suggested in the Anic case, may be
9 sufficient in the particular circumstances of any case.

10 Now, the reason I flag this now is in the event --
11 this is contrary to what I've just said, but in the
12 event that you were not satisfied that the higher test
13 for intent and foresight which the Court of Appeal
14 applied on the facts in Kit is met here, nevertheless
15 the Tribunal should consider and make findings of fact
16 on these issues at the lesser level of state of mind.
17 In other words, we invite the Tribunal to consider
18 making findings on suspicion, hope, taking of risk, in
19 the event that you are not satisfied on the facts, which
20 we say you will be, that the Kit in the Court of Appeal
21 test is met.

22 This point -- these points are made, and we put them
23 very much in the alternative, at paragraphs 55 and 56 of
24 our defence {Magnum}. They're also mentioned in our
25 skeleton briefly but I do not immediately have the

1 reference. And I say this about that finally, that in
2 the decision -- for your note, this is paragraph 3.46 of
3 the decision {Magnum} -- the OFT addressed the point of
4 this lower test but concluded, as it invites you to
5 conclude now, that it did not have to consider the issue
6 of reasonable foreseeability because the higher test
7 applied on the facts in Kit were satisfied.

8 As I say, that is our case. And we say the
9 documents that I've taken you to over the last two
10 days -- or perhaps over several days now -- will be
11 sufficient to satisfy you that that is the case. But
12 nevertheless we canvass it because, effectively, the
13 legal test is not settled.

14 Now, subject to anything that somebody behind me is
15 going to tell me that I haven't mentioned that I want to
16 mention, those are my opening submissions.

17 **LORD CARLILE:** Thank you very much, Mr Morris.

18 I see Miss Rose. You have provoked her.

19 **MISS ROSE:** Reluctantly, sir.

20 I just want to flag up, I understand that there are
21 discussions taking place at the moment in relation to
22 the question of confidentiality and unredaction.
23 I don't know if there is a problem or what is going on.
24 I've been endeavouring over the last few minutes to find
25 out what they're doing in there and no one will tell me.

1 We will stay here and try to sort it out.

2 Can I just reserve my position. If there does turn
3 out to be an impasse, and I very, very, very much hope
4 this won't happen, but if necessary if we could perhaps
5 come back tomorrow, I don't know if you're available
6 tomorrow, if absolutely necessary?

7 **LORD CARLILE:** At some time tomorrow.

8 **MISS ROSE:** I'm very grateful. I'm very hopeful that won't
9 be necessary.

10 **LORD CARLILE:** It might be me sitting alone, I think. We
11 would need notice.

12 **MISS ROSE:** Yes. We will stay here now and try to sort
13 everything out. I just wanted to -- because I haven't
14 been able to get a clear picture of what is actually
15 happening --

16 **LORD CARLILE:** Just bear with me for a moment, please,
17 Miss Rose.

18 Yes, we would need notice by email. I could be
19 available at some point mid-morning tomorrow. I'm going
20 out of town tonight and coming back in the morning.

21 **MISS ROSE:** When would you need notice by?

22 **LORD CARLILE:** 5 o'clock.

23 **MISS ROSE:** I'm extremely grateful. I hope very much it
24 won't be necessary.

25 **LORD CARLILE:** You may get some more information now because

1 Ms Lester is coming hotfoot into court.

2 **MISS ROSE:** If I can just take instructions for one moment.

3 (Pause)

4 Apparently there is an issue that Glanbia are saying
5 they won't consent to the order but, as I understand it,
6 Glanbia did not --

7 **LORD CARLILE:** They're not a party.

8 **MISS ROSE:** Indeed, and then didn't make any submissions
9 today when they were given the opportunity to do so.

10 **LORD CARLILE:** Glanbia are not invited to consent to an
11 order.

12 **MS SMITH:** It is their information and they are being asked
13 to disclose it into the confidentiality ring. They
14 need -- as I understand it, I mean, we've only been
15 trying to agree this for an hour and we will obviously
16 try to get in touch with Glanbia, and we've just managed
17 to get hold of them and are in touch with Glanbia.

18 They are concerned, before they agree to disclosure
19 of this evidence into the confidentiality ring, that
20 they're happy with the terms of that confidentiality
21 ring. That is what we're discussing at the moment.

22 **MISS DAVIES:** Sir, the position is that, as Ms Smith said,
23 the OFT has been attempting to contact Glanbia to ask
24 them that they agree the terms of the order as it stands
25 at the moment, because the OFT considers that that is

1 preferable for all parties and most particularly the
2 OFT. At the moment voice messages and emails have been
3 left for Glanbia and my instructing solicitor is
4 expecting to hear back from them very shortly.

5 There is a second issue of confusion surrounding the
6 boxing that Glanbia have put around their documents at
7 present which appears to relate to a slight
8 misunderstanding on their part of the role of red and
9 blue boxes and the size which is appropriate for those
10 boxes on any particular document. That is something
11 which will be resolved with them as soon as we're able
12 to get hold of them. We very much hope that that will
13 be done very shortly.

14 **LORD CARLILE:** Well, down in Maes Y Clawdd, Oswestry, where
15 I notice they have their offices, they have the
16 opportunity to pop off to lunch to the very pleasurable
17 Wynnstay Arms, which is just around the corner, so
18 I suspect you might get some sense from them this
19 afternoon.

20 **MISS DAVIES:** I shall volunteer myself to go and find them
21 at lunch perhaps, sir.

22 **LORD CARLILE:** Perhaps all we can say is that if we are
23 required, if somebody sends us an email tonight, then we
24 will be here for 12 o'clock tomorrow, but we would need
25 information before 5.30 anyway.

1 **MISS ROSE:** I'm grateful. We will let you know one way or
2 another so that your rest is not disturbed by
3 uncertainty.

4 **MR MORRIS:** I don't think there was any suggestion of you
5 having any rest, was there, sir?

6 **LORD CARLILE:** That's why I was raising my eyebrows. I was
7 hoping to get a rather good dinner in Portsmouth
8 tonight, but after that.

9 Right. Is there anything else we need to deal with
10 otherwise? I really do hope we will not be required
11 tomorrow, and I'm sure every effort will be made to --

12 **MR MORRIS:** We have that message loud and clear. We will do
13 what we can.

14 **LORD CARLILE:** Right.

15 (1.06 pm)

16 (The hearing adjourned until Monday, 14 May 2012)

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