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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16 May 2012

Before:

LORD CARLILE OF BERRIEW CBE QC
MARGOT DALY
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING (DAY 8)

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, 16 May 2012

2 (10.00 am)

3 **LORD CARLILE:** Good morning.

4 MR THOMAS FERGUSON (continued)

5 Cross-examination by MS SMITH (continued)

6 **MS SMITH:** Good morning, Mr Ferguson. Can I ask you to take
7 out, I think you have the document there already, two
8 bundles, the yellow-spined bundle 1, which is documents
9 bundle 1 and the pink-spined volume 2B. The pink-spined
10 volume 2B has your witness statement in it so can I ask
11 you to open that at tab N.

12 When we finished on Monday, I was asking you about
13 the Tesco Dairy Supply Group meeting of
14 13 September 2002, and I was also asking you about your
15 approach generally to negotiations with retailers at
16 that time, in the autumn of 2002. Now I want to ask you
17 about the actions that you took following the Dairy
18 Supply Group meeting of 13 September.

19 You've said at paragraph 19 of your witness
20 statement [Magnum], which is, very small, page 7,
21 paragraph 19, we talked about this on Monday, you say
22 that McLelland supported paying the farmer 2p per litre
23 more for their raw milk, recognising that it would lead
24 to cost price increases of £200 a tonne on cheese. You
25 agreed that was the position McLelland took at the time?

1 **A.** Yes, I did, yes.

2 **Q.** You set about, in September, October 2002, trying to
3 achieve those cost price increases with your retailers,
4 that's right, isn't it?

5 **A.** Yes, that's correct, yes, we did do that.

6 **Q.** Can I ask you to turn in the documents bundle, the
7 yellow-spined bundle 1, to tab 34, please [Magnum].

8 **A.** Yes, I have it, tab 34.

9 **Q.** If you have that, you will see that is a letter from you
10 to Sarah Mackenzie of Sainsbury's of 1 October 2002.
11 Sarah Mackenzie was the cheese buyer at Sainsbury's, is
12 that right?

13 **A.** That's correct, yes.

14 **Q.** You say in that letter:

15 "Following on from our discussions, I have attached
16 the price increases on cheese that will result from the
17 recent market movements on milk pricing."

18 When you talk about, in that letter, the "recent
19 market movements on milk pricing", what you mean is the
20 statements and the general agreement to achieve a 2
21 pence per litre increase on the farm gate price of milk,
22 is that right?

23 **A.** Yes, that would refer to the 2p situation.

24 **Q.** In the discussions that you refer to in that letter, you
25 would have been talking about that issue, wouldn't you?

1 **A.** Yes, we would be, yes.

2 **Q.** You say in the letter:

3 "It is our intention to pass this increase on milk
4 through to our suppliers and we will work with you to
5 ensure there is transparency in this process. We intend
6 to move the cost of all cheese across the board for the
7 reasons we discussed."

8 So you're telling her that you want to increase the
9 price on all your cheese, that's right, isn't it?

10 **A.** Yes, that's correct. Yes. What I'm saying here is we
11 intend to agree the cost increase and that we intend to
12 pay our farmers 2p per litre.

13 **Q.** Attached to that letter is a spreadsheet that I think
14 sets out all the lines that McLelland supplied to
15 Sainsbury's at the time, is that right?

16 **A.** Yes, I would say that's correct, yes.

17 **Q.** You needed to increase the price on all your cheeses,
18 across the board, so as to work towards the target of
19 achieving an overall 2p per litre increase in the
20 farm gate price, didn't you?

21 **A.** Yes, absolutely. Yes. Everything had to move by that
22 level.

23 **Q.** Then you finish the letter by saying:

24 "We will action this during October and will work on
25 agreeing a date with you."

1 So you were anticipating further discussions with
2 Sarah Mackenzie?

3 **A.** Yes, I would be, in order to agree on the final dates of
4 the cost movement, yes.

5 **Q.** You had frequent discussions with Sarah Mackenzie as you
6 did with Lisa Oldershaw, so a number of times a week?

7 **A.** It would be. I can't say exactly how many times it
8 would be but, yes, it would be an ongoing discussion in
9 order to reach a conclusion, yes.

10 **Q.** Right. Do you recall you sent a letter like this to
11 other retailers as well?

12 **A.** I would send similar styled letters I would expect, yes.

13 **Q.** Can I ask you, on that point, to turn back to tab 33
14 [Magnum], which is a document you may not have seen
15 before. That's an internal note produced by Glanbia.
16 You'll see at the bottom it's dated 27 September by
17 Colin Stump, who was the managing director of Glanbia,
18 wasn't he?

19 **A.** I believe he was, yes.

20 **Q.** It reports on a discussion between your managing
21 director, Alistair Irvine, and Colin Stump. If you look
22 at paragraph 2 of that document, it says:

23 "I had a further lengthy discussion with
24 Alistair Irvine on the same subject."

25 This is about -- sorry, in paragraph 1, Colin Stump

1 had spoken to Sarah Mackenzie about the initiative on
2 raised cheese prices with full remittal back to farmers.
3 In paragraph 2, Colin Stump reports that he had
4 a further lengthy discussion with Alistair Irvine on the
5 same subject.

6 Then on the second paragraph, under the numbered
7 paragraph 2:

8 "Alistair Irvine believes that this will set the
9 milk price now until next April and therefore we should
10 not be expected to pay farmers any more than the current
11 prices plus 2ppl. We discussed whether this increase
12 would be applicable in the food service and ingredients
13 sectors. His approach was to issue a letter to all
14 customers in all sectors, indicating that there would be
15 an increase in order to resolve the farmers' current
16 problems and in his letter would hope that our customers
17 would support this initiative. His letter is to go out
18 next week and will be followed up by detailed one-to-one
19 sessions with each customer in turn."

20 So you had been instructed by Mr Irvine to send
21 a letter like the one you sent to Sarah Mackenzie to all
22 your retailer contacts, is that right?

23 **A.** The letter -- I was instructed to send a letter, because
24 that's the normal practice you would have, but the style
25 of the letter would be my own personal style -- with the

1 rest of the team, they would have their own style as
2 well. We wouldn't have the exact letter, it depends on
3 the style of the -- the potential of the relationship
4 you have with the customer. It could be more formal or
5 informal. So it still could be different, it wasn't the
6 same.

7 **Q.** Yes, I was asking a slightly different question.

8 The plan or the instruction that you were given by
9 your MD, Alistair Irvine, was to send a letter to
10 everyone. Is that right?

11 **A.** I wouldn't say that was an instruction. That's a normal
12 position that you would send a letter to your customer
13 because you're asking for a cost increase.

14 **Q.** Again, you're not answering the question I asked. At
15 this stage in time, in September 2002, you were seeking
16 an across the board price increase on your cheese?

17 **A.** Yes.

18 **Q.** A simple question, and you were seeking it from all your
19 retailer customers, that's right, isn't it?

20 **A.** Correct.

21 **Q.** If you go back to your letter at tab 34 [Magnum], and
22 you look at the attachments to that letter, the first
23 attachment is a table in landscape?

24 **A.** Yes.

25 **Q.** Sorry, in portrait. I always get them the wrong way

1 round.

2 Look at the table in portrait which goes over two
3 pages. You'll see at the top it sets out, as you've
4 agreed, all the lines you supplied to Sainsbury's, and
5 the columns at the top, "DCP codes, product, invoiced
6 by, current retail, current case price, current tonne
7 price, new tonne price, new case price, proposed
8 retail". So we have here you setting out a table
9 containing both the cost prices, current and new. Is
10 that right?

11 **A.** Yes, setting out, confirming current case cost.

12 **Q.** And your proposed new tonne price?

13 **A.** Yes, proposed new case cost and tonnage cost, which is
14 just a practice to keep everything in line, and
15 a proposed retail, which is a recommended retail, which
16 should be --

17 **Q.** Yes, so for some of the lines we have got a current
18 retail and what's described as a proposed retail?

19 **A.** Yes.

20 **Q.** All the proposed retail, take your time to check this if
21 you want, but all of the proposed retails are 20p per
22 kilo more than the current retails, is that correct?

23 **A.** Yes, that's correct, yes.

24 **Q.** So what you are proposing here to Sainsbury's is cash
25 margin maintenance rather than percentage margin

1 maintenance, that's right, isn't it?

2 **A.** That's correct, yes.

3 **Q.** I think, as you explain in your statement, cash margin
4 maintenance has two advantages. First of all, it shows
5 the farmers there has been a cost price increase so that
6 hopefully they will stop picketing depots, is that
7 right?

8 **A.** That's correct.

9 **Q.** And, secondly, it also avoids accusations of
10 profiteering on the part of the retailer. They are
11 passing through to their retail prices the 2p per litre
12 and no more, is that right?

13 **A.** Yes, that's correct. It was publicly well-known at the
14 time that the 2p was a requirement the farmers were
15 expressing that they wanted, and the industry had
16 publicly expressed that they wanted that to be
17 transparent in a way. So the 2p was no surprise so far
18 as my assessment of what the proposed retail should be.

19 **Q.** To get that transparency, you were proposing 20p per
20 kilo on retail prices, is that right?

21 **A.** Correct, yes.

22 **Q.** So if we could then turn to tab 39 of the bundle
23 [Magnum], two days later, 3 October, you send
24 Sarah Mackenzie a follow-up email. It says:

25 "Good morning, Sarah.

1 "Please find enclosed the details which will cover
2 off the proposed £200 per tonne movement across the
3 cheese range we supply. Our target date is the 20th
4 of October and we can work together to achieve this.
5 With regard to new retail levels I have left this open
6 for discussion and we can agree on this position as time
7 develops, a movement of £200 per tonne on retail will
8 protect your cash margin although % margin will probably
9 drop slightly.

10 "We can discuss this at our meeting on Friday this
11 week.

12 "Thanks, Tom."

13 There are no attachments disclosed with this letter
14 but I assume you sent her a spreadsheet, a similar
15 spreadsheet to that which you had sent her on 1 October
16 with the letter, do you recall?

17 The email says "Please find --"

18 **A.** I can't recall, but the email does say "Please find
19 enclosed the details" so I would expect some details to
20 be attached to the email, yes.

21 **Q.** It says:

22 "Our target date is the 20th of October..."

23 So we've now got a date of 20 October rather than
24 I think the date in the previous letter -- no date was
25 specified I think, but we now have a date of 20 October.

1 Where did that date of 20 October come from? Do you
2 recall?

3 **A.** I can't recall specifically but I would say that that
4 date would be the date that I was agreeing with
5 Sarah Mackenzie.

6 **Q.** Yes.

7 **A.** And that would have been extended from the discussions
8 that we had.

9 **Q.** My understanding is where you got that date that you
10 discussed with Sarah Mackenzie. Where do you think you
11 got it from, can you remember?

12 **A.** I would only get that date from my discussions with
13 Sarah Mackenzie.

14 **Q.** Did Sarah suggest that date to you, do you think?

15 **A.** I can't remember.

16 **Q.** Did other processors suggest it to you?

17 **A.** Absolutely not. I would be agreeing a date with
18 Sarah Mackenzie, that's the way you conclude --

19 **Q.** It's just, if you flip back, if you can, Mr Ferguson, to
20 the tab 24 -- I think I've got the wrong reference, can
21 you hold on for a second.

22 It's tab 28, sorry [Magnum]. It's 24 September.
23 Have you got this? It's the document entitled "Action
24 Points from Cheese Price Increase Meeting" held Tuesday
25 24th September. This is a Dairy Crest document so you

1 may not have seen it before?

2 **A.** I haven't, no.

3 **Q.** It says in the first paragraph:

4 "It was agreed that we should set a cheese price
5 implementation date for retailers of 20th October 2002."

6 Obviously, that is now exactly the same date that
7 you are proposing to Sarah Mackenzie on 3 October. Did
8 you talk to Dairy Crest about that date? Is that where
9 that date came from?

10 **A.** Absolutely not. I did not speak to Dairy Crest at all.

11 **Q.** So it's just a coincidence that you set exactly the same
12 date?

13 **A.** An absolute coincidence, yes.

14 **Q.** Did you speak to your processors much at the time
15 in September 2002, to other processors?

16 **A.** No.

17 **Q.** Dairy Crest, Glanbia?

18 **A.** No.

19 **Q.** You did not speak to them at all, are you saying?

20 **A.** I can't recollect if I spoke to them or not.

21 **Q.** So as a general matter, you must recollect your general
22 conduct. You know these people, it was a relatively
23 small industry, there were a relatively small number of
24 processors, you, Glanbia, Dairy Crest who were producing
25 cheese at the time. Are you really seriously saying you

1 never spoke to your --

2 **A.** I have no recollection of speaking to them at the time.
3 You know, I would have been at the Tesco meeting that
4 Rob Hirst organised, and I would have exchanged social
5 conversation with them but that's it. I wouldn't have
6 spoken to -- we have got our own business to run so I'm
7 not interested in speaking to them.

8 **Q.** Your boss, Alistair Irvine, he regularly spoke to other
9 processors, didn't he?

10 **A.** Well, Alistair would obviously, because of his position
11 in the industry, speak to other industry bodies. One
12 practice that does take place, and Alistair would have
13 been involved in this, is we do sell each other cheese.
14 It's a natural process. We all manufacture cheese and
15 we sell volumes of cheese to each other, so there would
16 be potential discussions in that context, yes.

17 **Q.** So he regularly spoke to his equivalents at Glanbia and
18 Dairy Crest, didn't he?

19 **A.** I wouldn't say regularly spoke but he did on occasion
20 speak to them.

21 **Q.** And he was speaking to them actually at this period, end
22 of September, beginning of October 2002, wasn't he?

23 **A.** I think you have a document that says that.

24 **Q.** We'll explore that.

25 Let's go back to your email to Sarah Mackenzie.

1 **A.** Okay, which number was that again?

2 **Q.** That was at tab 39 [Magnum]. About halfway through that
3 first paragraph, it says -- your email says:

4 "With regard to new retail levels I have left this
5 open for discussion and we can agree on this position as
6 time develops, a movement of £200 per tonne on retail
7 will protect your cash margin although % margin will
8 probably drop slightly."

9 So you were quite clearly discussing retails with
10 Sarah Mackenzie, weren't you, in this email?

11 **A.** I was, and the reason for that would be that we had to
12 panic(?) with the potential new retails, so I would need
13 that information to instruct my factory and packing
14 station to implement.

15 **Q.** The statements that you made in the email, we've already
16 established that what you were seeking from Sarah and
17 what was attached to your letter to her at tab 34
18 [Magnum], 1 October, was a list of all the products you
19 supplied to Sainsbury's, not just those random weight
20 products that required to be labelled by McLelland,
21 that's right, isn't it?

22 **A.** It is. It's a full list of everything that we supplied,
23 yes.

24 **Q.** So when you're talking about covering off the proposed
25 £200 per tonne movement across the cheese range we

1 supply, in this email of 3 October, you're talking about
2 every product you supply to Sainsbury's, not just the
3 random weight lines, aren't you?

4 **A.** The cost increase is referring to every line that we
5 supplied Sainsbury's with, yes.

6 **Q.** And the new retail price levels are also referring to
7 every line you supply to Sainsbury's, aren't they,
8 Mr Ferguson?

9 **A.** The only retail level that I need definite conclusion on
10 is the random weight product, because that's what we
11 pack. The other retail levels are entirely up to the
12 retailer.

13 **Q.** Yes. You were proposing in this email, and in your
14 previous letter, a cash margin maintenance position on
15 retail prices and that proposal was not limited, was it,
16 to random weight? It was on all lines supplied by
17 McLelland?

18 **A.** I'm afraid the email doesn't be as specific as that.

19 **Q.** No, that's why I'm asking you, Mr Ferguson.

20 **A.** My request would be to confirm the random weight retail
21 levels because that's the position I would need to
22 instruct my business. The other retail levels would be
23 entirely up to Sainsbury's.

24 **Q.** That email is not limited in that way, is it, what you
25 say in the email? It's general?

1 **A.** The email is not specific but the only interest I have
2 is the random weight retail level.

3 **Q.** You also say in that email:

4 "... we can agree on this position as time
5 develops..."

6 So you weren't just discussing retail levels with
7 Sarah Mackenzie, you were saying to her that the levels
8 of those retail prices can be agreed, weren't you?

9 **A.** The level of that increase, that retail movement, has to
10 be agreed by Sarah Mackenzie. In order for me to
11 instruct the factory, I need a definite agreement from
12 Sainsbury's and I don't have it at this stage.

13 **Q.** Well you wouldn't normally agree retail prices with your
14 customer. You might on some random weight lines --

15 **A.** Yes.

16 **Q.** -- await her instruction on retail levels but, usually,
17 you wouldn't agree retail prices with your customers,
18 would you?

19 **A.** What I'm referring to is her agreement to me that that's
20 the retail levels that I can instruct my factory to
21 pack. So, to me, that's still an agreement.

22 **Q.** You say at the end of your email:

23 "We can discuss this at our meeting on Friday this
24 week."

25 That was Friday 4 October. Did you have regular

1 weekly meetings with her on Fridays?

2 **A.** No.

3 **Q.** But you appear to be having, or be planning to have
4 a meeting with her on Friday, 4 October?

5 **A.** It looks like that way, yes, and that would just be,
6 again, a coincidence. Friday is not a great time for me
7 to visit London when I live in the north of Scotland so
8 it wouldn't be that convenient for me.

9 **Q.** Right. If we can turn to tab 41 [Magnum], again this is
10 a letter that you haven't seen before but I want to ask
11 you some questions about it. It's a letter from
12 Finn Cottle of Sainsbury's, who is the general manager
13 of dairy and cheese for Sainsbury's. She was --

14 **LORD CARLILE:** Forgive me for interrupting, Ms Smith, but
15 I was reflecting on this letter as you were
16 cross-examining earlier, I thought we would come to
17 this.

18 Do we know that this letter was sent? There's
19 a manuscript note on this letter by Mr Merton, who was
20 Finn Cottle's boss as we were told earlier.

21 **MS SMITH:** Yes.

22 **LORD CARLILE:** I would just be interested to know whether
23 there is evidence as to whether this letter was sent or
24 not because it may be germane.

25 **MS SMITH:** I can check what is said about it in the decision

1 and what the OFT's position is on that.

2 **LORD CARLILE:** If anybody else can help with this I'm sure
3 we would be very grateful because it may be of some
4 importance.

5 **MISS ROSE:** Sir, we had the same thought that you did and we
6 are not aware of any evidence that this letter was sent.
7 Certainly we have not seen any.

8 **MS SMITH:** Sir, I will come back to you on that --

9 **LORD CARLILE:** Yes. I don't want to stop you now but it is
10 in my mind.

11 **MS SMITH:** The only point I would make on that point is that
12 it is a signed letter and it ticks "CC" to Ian Merton.
13 I submit a reasonable inference from the letter is that
14 what we have here is the copy of the letter that was
15 kept on file and handwritten notes, but I will check it
16 out and see what we can find.

17 **LORD CARLILE:** You may well be right.

18 **MS SMITH:** If I can ask you, Mr Ferguson, to have a look at
19 this, you know David Handley was the leader of Farmers
20 for Action, is that right?

21 **A.** Yes, I knew that from the publicity, yes.

22 **Q.** Finn Cottle was Sarah Mackenzie's boss or immediate line
23 manager, is that right?

24 **A.** She was. She was the general manager at the time, yes.

25 **Q.** So this is a letter of 4 October 2002.

1 **A.** Okay.

2 **Q.** It's the day after your email to Sarah Mackenzie that
3 we've looked at and the day of your meeting with her on
4 the Friday.

5 Let's look at the third paragraph of that letter:

6 "With regards to cheese we are still discussing the
7 implementation of cost price increases with all our
8 processors."

9 As we've seen, Sainsbury's was discussing cost price
10 increases with you, weren't they?

11 **A.** Yes, they were.

12 **Q.** Given the market generally, you would have thought at
13 the time that Sainsbury's was probably discussing cost
14 price increases with other processors?

15 **A.** Yes, I would expect that, again because of the,
16 certainly, publicity at the time.

17 **Q.** Everyone was seeking to achieve the 2p per litre
18 increase in the farm gate price?

19 **A.** Correct.

20 **Q.** Then the letter says:

21 "It is intended that we will pass on an increase in
22 our buying prices by £200 per tonne in approximately 3
23 weeks, for all of our standard cheese range."

24 Pass on the increase in buying prices means, must it
25 not, that you pass on the cost price increase to

1 Sainsbury's customers by way of a retail price increase?

2 **A.** I feel she's referring there to the cost increase; she's
3 saying an increase in her buying prices.

4 **Q.** That's being passed on. She says it's her buying price
5 and she's going to pass on that increase in her buying
6 price in approximately three weeks provided other
7 retailers also accept this.

8 So if she's passing on an increase in Sainsbury's
9 buying price, she's passing that increase on to
10 Sainsbury's customers by way of a retail price increase?

11 **A.** Well, you would expect that but you can't say that
12 definitely from that letter, I'm afraid.

13 **Q.** What I suggest to you is what she is saying, what
14 Finn Cottle is saying to David Handley, that Sainsbury's
15 will be passing on a cost price increase by way of
16 a retail price increase in about three weeks' time,
17 towards the end of October, is exactly what Sainsbury's
18 had discussed with you, that they would be implementing
19 both a cost price increase and a retail price increase
20 towards the end of October, about 20 October. That's
21 correct, isn't it?

22 **A.** Well, I'd asked for that price increase from that date
23 in October, and if a supplier pays you a cost increase
24 you would expect them to implement a retail movement.

25 **Q.** What she also says in this letter is:

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

5 That is, if I'm going to increase my retail prices,
6 everyone else must do so as well. She was saying that
7 David Handley and Sarah Mackenzie had said the same
8 thing to you in her meeting with you on 4 October,
9 hadn't she?

10 **A.** I can't remember what we said at the meeting of
11 4 October because I don't have the detail in front of
12 me.

13 **Q.** She was pretty explicit in this letter:

14 "... if I find I am uncompetitive in the wider
15 market place [I will have to withdraw my support for
16 cheese]."

17 That was obviously the position she was taking on
18 4 October and I'm suggesting to you that they took that
19 position with you as well.

20 **A.** Yes, I would say she's taking a general position against
21 all cheese suppliers, yes. And we're one of them.

22 **Q.** Against all cheese suppliers and you were one of them?

23 **A.** Yes.

24 **Q.** If you could just turn to tab 47 of the bundle [Magnum],
25 that's an email from you to Jim McGregor, your immediate

1 line manager, on 16 October 2002, Friday late morning,
2 about 11.47, Friday 16 October now. It says:

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

5 So it appears that you had been discussing matters
6 with Sarah Mackenzie between 4 October and 16 October?

7 **A.** Hmm-hmm.

8 **Q.** Is that a yes?

9 **A.** Yes, sorry, yes. I would say that -- now that I'm
10 confirming that back to my line manager, I must have had
11 confirmation from Sarah that that's the position.

12 **Q.** She's confirming -- you report that she is confirming
13 that there will be now three waves of price movements.
14 The first wave, number 1:

15 "Seriously Strong Pre-pack will move on costs and
16 Retails from the 21st of October [2002]."

17 Or from the 21st of October, full stop.

18 Seriously Strong pre-pack, as we've discussed, is fixed
19 weight pre-pack, isn't it?

20 **A.** It is, absolutely.

21 **Q.** So it wasn't labelled with the retail price by
22 McLelland?

23 **A.** Yes.

24 **Q.** It was labelled with the retail price by Sainsbury's in
25 stores, that's right, isn't it?

1 **A.** Yes.

2 **Q.** But she's telling you here, or you're reporting that she
3 has confirmed that she will be moving Seriously Strong
4 on costs and retails from 21 October. So she's given
5 you information on retail prices, what she's going to be
6 doing on retail prices as well as cost prices; that's
7 right, isn't it?

8 **A.** She's definitely confirming that cost is moving and,
9 again, there would be an assessment that the retail
10 would move in line with that.

11 **Q.** Let's see what you say. You say:

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

14 "1. Seriously Strong Pre-pack will move on costs
15 and Retails from the 21st of October."

16 You say she has confirmed movement on both costs and
17 retails, don't you?

18 **A.** The statement says that and, again, I would expect,
19 because cost has moved, the retail will move.

20 **Q.** What the email doesn't say is, "She has confirmed to me
21 that she will move costs on Seriously Strong and from
22 that I deduce that she will move retails"?

23 **A.** It doesn't say that.

24 **Q.** You have quite clearly recorded she has told you both,
25 hasn't she?

1 **A.** It depends how you read the statement again.

2 **Q.** I'm asking you, because this was written by you, and I'm
3 suggesting to you what it says, which to me seems
4 abundantly clear, is that she has confirmed to you that
5 she will be moving both her cost price and her retail
6 price on Seriously Strong from 21 October. That's what
7 you wrote and that's what you meant, isn't it,
8 Mr Ferguson?

9 **A.** Yes, I'm definitely confirming the cost movement, and
10 again it's my market assessment that the retail movement
11 would move in line with that, and again it was
12 publicly --

13 **LORD CARLILE:** Where does it say it's your market
14 assessment?

15 **A.** I haven't put that in the detail, sir, but it's the
16 language. To me, the confirmation that I'm looking for
17 is the cost movement, because that's what I need to
18 recover within my business.

19 **LORD CARLILE:** Because the retail movement is of no concern
20 to you?

21 **A.** It's of no concern because that's up to the retailer to
22 do. But in this time, so when the 2p movement was
23 publicly being expressed, the industry wanted to be
24 transparent so, therefore, I wanted to make sure the
25 costs increase was at that level, and retailers wanted

1 to express that 2p movement at retail point. So, to me,
2 it's my language to my line manager that I expect I've
3 got an agreement on cost and the retail will move at the
4 same time.

5 **MS SMITH:** You see, it is an unusual statement because, as
6 you say, there's actually no commercial reason for
7 McLelland to be told when the retail price on
8 Seriously Strong will be moving, because you're not
9 labelling that product for Sarah Mackenzie.

10 **A.** Yes.

11 **Q.** Nevertheless you record explicitly in this email that
12 she has said costs and retails will be moving?

13 **A.** Correct. The language is there but just, to me, it's
14 the language of the email. The most determinative part
15 of that email was the cost because that's what we are
16 interested in achieving here.

17 **Q.** The reason, in fact, why you recorded that Ms Mackenzie
18 had told you that retail prices were moving is because
19 you were recording that she had agreed to your plan to
20 raise both costs and retail prices from 21 October and
21 she wanted you to pass that on to other retailers so
22 they would do the same. That's why you were recording
23 this information in this email?

24 **A.** Well, I wouldn't agree with that. I was agreeing a cost
25 increase from that date.

- 1 **Q.** Well, the only reason you would even -- if, which
2 I don't accept, this was simply a prediction by you that
3 she would be moving her retails on 21 October, the only
4 reason you would be recording this internally is, again,
5 because it was part of your plan to ensure that all
6 other retailers would also move retail prices. There
7 was no reason why you had to tell your line manager, no
8 commercial reason, no need -- no requirement for
9 labelling, that retails would be moving on 21 October.
10 There was no commercial reason for you to record that
11 internally, was there?
- 12 **A.** There's no commercial reason to record it but, again,
13 it's the language. The cost increase will happen, and
14 that's my assessment, that the retail would move at the
15 same time.
- 16 **Q.** You see, because just as Finn Cottle had said in her
17 letter to Handley that we looked at of 4 October,
18 Sainsbury's would only agree retail price increase
19 provided other retailers also accept this, that is
20 exactly what -- the reason why you are recording this in
21 your email of 16 October. You have got agreement or
22 Sarah Mackenzie has told you that she's agreeing to move
23 both costs and retails on 21 October and she wants you
24 to ensure that other retailers are going to do that as
25 well?

1 **A.** Again, I go back to the point. I'm agreeing the cost
2 movement, and the assessment is there that the retail
3 would move, and on 21 October we'll see the live
4 evidence of that.

5 **LORD CARLILE:** Did you ever see the OFT's decision
6 of July 2011 in relation to these documents?

7 **A.** I haven't, no.

8 **LORD CARLILE:** You haven't read them.

9 **MS SMITH:** You didn't read it as part of your preparation
10 for the witness statement with Tesco's solicitors? They
11 didn't take you through the relevant paragraphs of the
12 decision?

13 **A.** Of the OFT decision? I can't recollect, but there has
14 been so much of this information passed on to me that...

15 **LORD CARLILE:** I was just reminding myself of
16 paragraphs 5.243 to 50 [Magnum], which deal with these
17 documents, briefly but comprehensively. Whether it's
18 right or wrong, of course, is another matter.

19 **MS SMITH:** You were obviously shown various documents, which
20 you list at the beginning of your witness statement, by
21 Tesco's solicitors when you were preparing your
22 statements of July 2011 and October 2011.

23 **A.** Yes.

24 **Q.** Can you tell us now whether or not you recall being
25 taken to paragraphs of the decision when you were

1 preparing those witness statements?

2 **A.** I can't recollect that, to be honest.

3 **Q.** Just while we're there, we talked yesterday about the
4 fact that you prepared a statement of July 2011 which
5 you signed. Then you changed various points in that
6 statement and prepared a statement of October 2011 which
7 you then signed.

8 Why did you change your statement between July
9 and October 2011?

10 **A.** Well, the changes were just some changes on the language
11 and potentially reducing some of the overelaborate
12 language that was in the original statement. None of
13 the specifics were changed, it was more of a --

14 **Q.** So you sat down with a solicitor for Tesco and they went
15 through with you and asked about certain passages in the
16 witness statement of July, whether or not you wanted to
17 change --

18 **MISS ROSE:** I think we are --

19 **LORD CARLILE:** We might be straying into LPP, Ms Smith. Be
20 careful.

21 **MS SMITH:** There was just one point that I wanted, if I may,
22 sir, to bring up from yesterday (sic). Yesterday, when
23 we were talking on that point -- yesterday, Monday, when
24 we were talking about the Tesco Dairy Supply Group
25 meeting, you agreed with me yesterday that Mr Hirst

1 chaired the meeting.

2 **A.** Correct, he did.

3 **Q.** Now, that is what you had recorded in your July 2011
4 statement. However, in your October 2011 statement,
5 that was removed from the statement, the reference to
6 him chairing the meeting. Why was that? Because you
7 confirmed yesterday that, in fact, he did chair the
8 meeting. Why did you remove that from your statement
9 in October 2011?

10 **A.** When I look at the statement, which is paragraph 14
11 [Magnum], it still says that he led the meeting.

12 **Q.** He led the meeting. It's a strange sort of playing down
13 of the role Mr Hirst took at the meeting and I just
14 wondered why you'd changed the language?

15 **A.** I can't confirm why we changed the language but, to me,
16 if somebody is leading the meeting, they're still
17 chairing the meeting.

18 **Q.** Well, you confirmed quite honestly that he did chair the
19 meeting.

20 **A.** Yes.

21 **Q.** Okay, let's go back --

22 **MS POTTER:** Before we move on, could we have a little bit of
23 clarity around the relationship between cost prices
24 increases and retail prices increases upwards and
25 downwards. I was just thinking, if Sainsbury's had

1 decided to move their retail prices back downwards,
2 would the cost price have remained the same? Ie were
3 you getting a firm commitment to £200 per tonne increase
4 or would you have expected them to say, "Actually we're
5 moving our retails back down, therefore the cost price
6 is going to go back down"?

7 **A.** I think on this occasion, because of the widespread
8 publicity at the time, the cost increase would still
9 have remained and that would have been a personal
10 decision by Sainsbury's if they wanted to reduce
11 retails. It's entirely up to them, they could have made
12 that decision to be more competitive, or expressed that.
13 But the cost increase would have remained, because at
14 the end of the day we had to pay the farmer.

15 **MS SMITH:** So once they had agreed to put up the cost price,
16 if they then found, having moved up their retail prices
17 in line with that cost price increase, that other
18 retailers had not moved their retail prices up, they
19 would have to move their retail prices back down to
20 match those other retailers' retail prices, is that
21 right?

22 **A.** Correct, they would want to be competitive if they made
23 that decision, yes.

24 **Q.** But that would have had the result -- that would not
25 have impacted -- you would not in that situation have

1 reduced the cost prices?

2 **A.** We would not have reduced the cost prices unless we
3 were, I'd have to say, put in a position of being forced
4 to reduce the cost price. It was going to be part of
5 a negotiation.

6 **Q.** But in the situation that we were in, in 2002, you'd
7 made, you say, a commitment in effect to get the
8 2p per litre back to farmers?

9 **A.** Correct.

10 **Q.** And you were going to do that by way of a cost price
11 increase of £200 per tonne?

12 **A.** Yes.

13 **Q.** Once you'd got that cost price increase agreed, really,
14 as you say, it was up to Sainsbury's -- once you got
15 that cost price increase agreed, excuse me, if
16 Sainsbury's decreased their retail prices it was highly,
17 highly unlikely that you were going to decrease the cost
18 price?

19 **A.** It would be highly unlikely but, again, commercial
20 pressures could force you to do that.

21 **Q.** So the most likely result, if Sainsbury's were forced to
22 go or wanted to go back down on their retail prices to
23 remain competitive, was that they would have to take
24 a hit on their retail margins, that's the most likely
25 result?

1 **A.** That's the most likely result because at the time it was
2 widely expressed that farmers had to have this increase,
3 and it would have been bad publicity for Sainsbury's if
4 they started not paying the cost increase.

5 **Q.** So it was in Sainsbury's interests, I think you would
6 agree with this, it was in Sainsbury's interests, as
7 they've already been quite explicit in their letters to
8 David Handley, and I suggest in their conversations with
9 you, it was in Sainsbury's interests to ensure that
10 everyone else would also put their retail prices up,
11 wasn't it?

12 **A.** I would say it would be in Sainsbury's interests, yes,
13 that the industry managed to pay the cost increase, yes,
14 I would say that.

15 **Q.** Just go back to the email, your email of 16 October at
16 tab 47 [Magnum]. You should still have that open.

17 **A.** I have, yes.

18 **Q.** There are two further waves of price increases, one on
19 4 November, the Sainsbury's own label and pre-packed
20 brands, do you see that?

21 **A.** I do yes.

22 **Q.** You were confirming.

23 **A.** Yes.

24 **Q.** And one on 11 November for deli and Taste the
25 Difference?

-
- 1 **A.** Hmm-hmm.
- 2 **Q.** That's right?
- 3 **A.** That's correct.
- 4 **Q.** You didn't at the time supply any Taste the Difference
5 products to Sainsbury's, did you? They're none of them
6 listed in the document --
- 7 **A.** Can I just check that file again. What tab was that?
- 8 **Q.** I'm just trying to remember, 34 [Magnum].
- 9 **A.** I'd need to go back in time and check... but I've got
10 a feeling that the Sainsbury's Mull of Kintyre product
11 could have been a Taste the Difference line. It doesn't
12 express that on the --
- 13 **Q.** No, it doesn't. None of the products there are listed
14 as Taste the Difference. Sainsbury's own brands are
15 listed.
- 16 **A.** Yes.
- 17 **Q.** Sainsbury's own brands are listed as JS or Sainsbury's.
- 18 **A.** Yes.
- 19 **Q.** There are in fact or there were in fact no -- let's just
20 get this straight, Mr Ferguson. You did not --
21 McLelland did not supply any Taste the Difference
22 products to Sainsbury's in 2002, did it? It's quite
23 clear from the evidence?
- 24 **A.** To me it's not clear because I do feel that the
25 Mull of Kintyre line could have been a Taste the

1 Difference line. It doesn't express it on the list.

2 Q. No, it doesn't because it wasn't.

3 A. It may have been. It's certainly a Taste the Difference
4 line at the moment.

5 Q. Finally on this email, at tab 47 [Magnum], the statement
6 in the last paragraph:

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

12 So they wanted to make a public statement, you to
13 make a public statement, on the price increases, that's
14 right, isn't it?

15 A. Yes, they asked for that there, yes, they did.

16 Q. This was, as all the actions taken at this time were,
17 this was basically to try and get David Handley and the
18 Farmers for Action off their backs, is that right?

19 A. Well, I would say here I think, at that time, some of
20 the farmers were picketing supermarket depots so,
21 obviously, the desire was there for the cost increase
22 and that would allow us to make that statement to our
23 farmers, and at that time we did have farmers on the
24 board of the business at McLelland.

25 Q. Can we then turn on to tab 51A [Magnum]. This is an

1 internal McLelland memo that you may recall. It was
2 produced -- you do recall this memo?

3 **A.** This memo, 51A?

4 **Q.** Yes, "Price Move Update" it says.

5 **A.** Got it.

6 **Q.** Yes, the tabs are a little bit confusing. This appears
7 to have been produced by McLelland after your email of
8 16 October. You have produced, or Tesco's solicitors
9 have produced a witness summary of the evidence that
10 you'll give on this document which you verified in
11 examination-in-chief.

12 If we could just look at paragraph 6, it's at N1 of
13 the other bundle, tab N1 [Magnum], your witness summary,
14 if you could have that open at the same time?

15 **MISS ROSE:** Can I just ask for confirmation that the witness
16 has the unredacted copy of this document?

17 **A.** I don't have, no. It's redacted.

18 **LORD CARLILE:** Yes, at the moment he's looking at the
19 redacted copy. I have both.

20 If he could be provided with an unredacted copy.

21 (Handed)

22 Thank you, Miss Rose.

23 **MS SMITH:** You were asked about this and you commented on it
24 in your witness summary, if you could have your witness
25 summary open.

1 **A.** Whereabouts is that?

2 **Q.** It's at tab N1, just behind your witness statement in
3 the bundle, 2B, appeal bundle 2B [Magnum].

4 You were taken to it by Miss Rose in
5 evidence-in-chief, if you recall.

6 **A.** Could you just hold on a second.

7 It's just right behind this one, is it?

8 **MS SMITH:** There were some problems with this. Has it not
9 been inserted in the bundle overnight?

10 **MS DALY:** I think it's hidden right behind those numbers.

11 There it is, that's it.

12 **MS SMITH:** I can't remember whether it was put in or not.

13 **A.** Got it, thank you.

14 **Q.** Good, thank you.

15 N1 I think it is.

16 **A.** Yes, I have it now.

17 **Q.** Your witness summary. Now, you address this document in
18 paragraph 6 and you say in this witness summary, or you
19 have confirmed the summary of your evidence. You think
20 it is an internal working document recording McLelland's
21 then understanding of the changing position becoming
22 apparent from its discussions with retailers as you
23 sought to achieve a cost price increase.

24 **A.** Yes, that's correct.

25 **Q.** So an internal working document, yes?

1 **A.** Yes, I would say it's an internal summary document that
2 someone pulled together that's in the business.

3 **Q.** It came about as a result of discussions with retailers,
4 that's what you say?

5 **A.** Yes, that's what I said, yes.

6 **Q.** If we look at the price move update document at 51A
7 [Magnum], the record of what Sainsbury's is going to do
8 pretty much reflects what we've seen in your previous
9 contact with Sainsbury's in the email of 16 October?

10 **A.** Correct.

11 **Q.** Yes. If you have that email of 16 October, your finger
12 in that one at tab 47 [Magnum], at the same time as 51A,
13 you'll see that Sainsbury's -- for Sainsbury's it is
14 recorded again the three waves of price movements, on
15 21 October, 4 November and 11 November, do you see that?

16 **A.** Yes, I do, yes.

17 **Q.** The first entry for 21 October, it says:

18 "Seriously Strong Pre-pack will move on costs and
19 Retail from the 21st of October..."

20 This is the document at 51A.

21 **A.** Hmm-hmm.

22 **Q.** That first clause appears to be a cut and paste from
23 your email, or a verbatim copy of number 1 on your email
24 of 16 October, and you agree with that?

25 **A.** It seems to be, yes, I would agree with that, apart from

1 the second line.

2 Q. Then there's a second line which now appears to have
3 been added?

4 A. Yes.

5 Q. Presumably as a result of your discussions with
6 retailers as you explain in the witness summary?

7 A. Well, I wasn't adding the statements so I didn't pull
8 the document together.

9 Q. Do you know who did?

10 A. No.

11 Q. Because we'll look at the second and third entries which
12 are also cut and paste from your email of 16 October,
13 exactly the same words?

14 A. Yes.

15 Q. Do you see:

16 "Sainsbury own label and pre-back Brands will move
17 on the 4th of November, allowing for the proper market
18 conditions etc."

19 It's an exact copy of what was at number 2 of your
20 email of 16 October, isn't it?

21 A. It's the exact language, yes.

22 Q. Exact language, exact commas and full stops, exactly the
23 same?

24 A. Yes.

25 Q. And then:

1 "Deli and Taste the Difference will move on the 11th
2 of November."

3 Again, that is an exact copy, right down to the use
4 of capitals, of what was in your email of 16 October?

5 **A.** So someone has been cutting and pasting.

6 **Q.** It does look as though someone has been cutting and
7 pasting.

8 Then we have, as you said, in the first entry, what
9 has been added is:

10 "... along with Cath. City and Pilgrims Choice."

11 You say in your witness summary that this was
12 a working document recording McLelland's understanding
13 of the position, becoming apparent from its discussions
14 with retailers. So I'm suggesting that what has now
15 been added to this document, 51A, would have come about
16 as a result of discussions with retailers, as you say --
17 discussions in fact with Sainsbury's. It's what you say
18 in your witness summary.

19 **A.** I don't refer in my witness summary to the Cath City and
20 Pilgrims Choice comment, no.

21 **Q.** Where do you think -- let's have a look at that then.
22 You would agree, would you, that what is being recorded
23 here is that Sainsbury's, you're recording for your
24 internal purposes at McLelland:

25 "Seriously Strong Prepack will move on costs and

1 Retails from the 21st of October, along with Cath.City
2 and Pilgrims Choice."

3 Now, Seriously Strong was a McLelland produced
4 cheese.

5 **A.** Correct, yes.

6 **Q.** Cathedral City was produced by Dairy Crest?

7 **A.** Correct, yes.

8 **Q.** And Pilgrims Choice was produced by North Downs?

9 **A.** Yes.

10 **Q.** So you're recording here --

11 **A.** I'm not recording anything here because again I
12 didn't -- this document was not pulled together by me.
13 So whoever is recording this document is making that
14 assessment.

15 **Q.** Sainsbury's had told you on 16 October that they would
16 be moving costs and retails on Seriously Strong pre-pack
17 from 21 October, and now it is being recorded that they
18 are also going to move their retails on other branded
19 products not produced by McLelland.

20 You've said in your witness summary that this
21 document was produced as a result of discussions with
22 retailers. What this document shows is that Sainsbury's
23 had told McLelland they would also be moving on other
24 branded products, Cathedral City and Pilgrims Choice,
25 which are not produced by McLelland, that's the

1 position, isn't it?

2 **A.** I wouldn't be able to confirm that. Again, the document
3 has been pulled together by someone cutting and pasting
4 and adding in their other assessments, so I wouldn't
5 know where they get the information from.

6 **Q.** Well, you purported to know where they got that
7 information from. When you produced your witness
8 summary, which you verified in evidence-in-chief, you
9 said it came from discussions with retailers. Are you
10 now changing that evidence?

11 **A.** No, the specific points that I have come from that.

12 **Q.** Sorry, I asked you a particular question. You said in
13 your witness summary that the contents of this price
14 move update document came from McLelland's discussions
15 with retailers.

16 **A.** Let me just --

17 **Q.** It lists what retailers are going to do, and I'm asking
18 you whether you're now changing that position. You're
19 saying, no, no, it doesn't come from what we discussed
20 with retailers, actually I was wrong then, I'm now going
21 to change it again.

22 **A.** No, I'm not changing that.

23 **MISS ROSE:** I'm sorry to intervene, but the question is
24 being put on a false premise. All that the witness
25 summary says is that the witness has no specific

1 recollection of the document but that he thinks it's an
2 internal working document recording McLelland's
3 understanding of the changing position becoming apparent
4 from its discussion with retailers as McLelland sought
5 to achieve a cost price increase.

6 He gives no positive evidence in that summary as to
7 what is for the obvious reason that he didn't write it
8 and has no recollection of it. He's simply expressing
9 an opinion.

10 **LORD CARLILE:** I suspect we're going to come to tab 52
11 fairly shortly.

12 **MS SMITH:** Sir, I have put up with a lot of interventions
13 but really Miss Rose's submissions on what the witness
14 should say or is going to say are really not acceptable.
15 He is quite able to make that point himself if it is
16 a point that he wants to give in evidence. I really
17 object --

18 **LORD CARLILE:** Am I correct in assuming that the context of
19 this is that we're approaching tab 52?

20 **MS SMITH:** We will be, sir, yes, but it is also important to
21 try to work out with the witness, who has confirmed this
22 summary, what exactly he was saying in that summary,
23 sir, and really being told by Miss Rose what the answer
24 he should give is really not acceptable. He can give
25 the answer himself.

1 **LORD CARLILE:** Well, we can read the summary for ourselves.

2 **MS SMITH:** What this document also says in the fourth line
3 under "Sainsbury's", which did not appear in your email
4 of 16 October, is that Sainsbury's "intend to maintain
5 cash margin". Now, would you agree that the normal
6 position a retailer would take when faced with a cost
7 price increase is that they would want to maintain
8 percentage margin, is that right?

9 **A.** Yes, that's correct. That would be the normal
10 situation.

11 **Q.** But now we are told that Sainsbury's intend to maintain
12 cash margin, which is an out of the ordinary situation.
13 It's the case, isn't it, that Mackenzie or someone else
14 from Sainsbury's had told you that that is what they
15 intended to do, that they intended to maintain cash
16 margin?

17 **A.** Yes, on this occasion that information would come from
18 Sainsbury's, yes.

19 **Q.** So in fact that's what you had been encouraging them to
20 do, isn't it, in your various emails and your letter?

21 **A.** I would say the industry was encouraging that again,
22 because there were so many public statements about it,
23 that the farmer required the 2p per litre, and everyone
24 wanted to make sure that that was quite clear and the
25 retailers weren't taking more than 2p per litre because,

1 again, that would upset the farming position in the UK
2 at that time. It was quite a clear, documented,
3 publicly available position.

4 **Q.** You said:

5 "... on this occasion that information [the
6 information about cash margins] would come from
7 Sainsbury's, yes."

8 So you're accepting that on this occasion
9 Sainsbury's were talking to McLelland about what they
10 were going to do on retail prices, that's right, isn't
11 it?

12 **A.** Yes, that's what they'd be referring to, to maintain
13 cash margin, yes.

14 **Q.** Okay. So under the heading "Tesco":

15 "[Tesco] will probably commence move from
16 [REDACTED] staggered across Brand/Own label.

17 "Want to maintain percentage margin. (This would
18 mean on Galloway an increase of [and a figure is
19 given])."

20 Now, again this was information that McLelland had
21 obtained from Tesco, from their discussions with Tesco?

22 **A.** That would be an assessment at that particular position
23 in time.

24 **Q.** You were Tesco account manager at the time, weren't you?

25 **A.** Yes.

1 **Q.** We've established that you were talking to
2 Lisa Oldershaw most days, is that right, or a number of
3 times a week?

4 **A.** It would be regular conversations, yes.

5 **Q.** You say in your witness summary that you understood this
6 document to record McLelland's then understanding of the
7 changing position becoming apparent from its discussion
8 with retailers, and I'm asking you to confirm that the
9 most likely source of this information under the heading
10 "Tesco" was from Tesco?

11 **A.** I would say that was the source, yes.

12 **Q.** Also, under the heading "Asda":

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

16 So it appears that discussions had been had when
17 Asda was saying, "We can't confirm yet but we'll
18 probably maintain cash position"; does that appear to be
19 the situation?

20 **A.** That would be an assessment quite clearly there, that
21 there was no information coming back on margin, so,
22 again, whoever is producing this document is making that
23 assessment because he is using the language "probably".

24 **Q.** Yes, an assessment based on the discussions that
25 McLelland were having with Asda at the time?

1 **A.** That plus the assessment of the market position at the
2 time.

3 **Q.** Then under "Safeway" it says:

4 "Commence 4th November.

5 "Moving across the board. Intention is to maintain
6 cash margin."

7 **A.** Yes.

8 **Q.** Again, that is an indication that was obtained by
9 McLelland due to its discussions with Safeway. That's
10 the position, isn't it?

11 **A.** Yes, that would be the result of meetings that were
12 taking place with Safeway.

13 **Q.** Can we now move on, as anticipated, to tab 52, please
14 [Magnum]. That's an email from you to Lisa Oldershaw,
15 as she now is, of Tesco, 21 October, just before
16 5 o'clock in the evening, 16:59:55.

17 **A.** Yes.

18 **Q.** You address this email in paragraph 21 onwards of your
19 witness statement [Magnum] so you might want to have
20 that open at the same time. You also address it again
21 at paragraphs 4 and 5 of your witness summary [Magnum].

22 I'll ask you some questions about the email itself
23 first, if I may.

24 **A.** Sure.

25 **Q.** The email says:

1 "Spreadsheet attached which will cover off the
2 Current supply prices and the new position with the
3 proposed £200 per tonne recovery. I have provided the
4 recommended Retail going forward plus the position to
5 protect your own margin."

6 So if we look at the spreadsheet that you attached,
7 we've been here, I think at the very beginning of your
8 cross-examination we came to this document.

9 **A.** Sure.

10 **Q.** And you confirmed that it contained all the lines that
11 McLelland supplied to Tesco at the time?

12 **A.** It does, yes.

13 **Q.** You'll see that the spreadsheet sets out in the columns
14 "Current Case Price, Current Tonne Price, New Tonne
15 Price, New Case Price, Current Retail, Recommended
16 Retail, Retail Protecting Margins".

17 The current tonne price versus the new tonne price,
18 if you just run your finger down that, you'll see that
19 for each of those prices, the new tonne price is
20 obtained by adding £200 per tonne to the old tonne
21 price?

22 **A.** Yes, I would agree with that. That looks exactly the
23 position, yes.

24 **Q.** Now, the current retail versus the recommended retail,
25 the recommended retail is obtained by adding 20p per

1 kilo to each of the current retail prices?

2 **A.** Correct, yes.

3 **Q.** So what is being recommended there is cash margin
4 maintenance, that's right, isn't it?

5 **A.** That's correct, yes.

6 **Q.** Then you also set out the retail protecting percentage
7 margin in the last column?

8 **A.** Yes.

9 **Q.** Now, in paragraph 22 of your statement [Magnum], you
10 say:

11 "When a cost price increase was being proposed it
12 was standard procedure for McLelland to produce new RRP's
13 [recommended retail prices] for its customers [ie the
14 retailers]. These RRP's would be a simple arithmetical
15 calculation applying the existing retail margin to the
16 new cost prices."

17 That's what you say.

18 But in this case, in the document attached to your
19 email of 21 October, you were also providing cash
20 margins as the recommended retail price, not Tesco's
21 existing percentage retail margin, weren't you?

22 **A.** Yes, I was, yes.

23 **Q.** So you were doing something over and above what you
24 would normally do, is that right?

25 **A.** Yes, I would say that was the case, yes.

1 Q. You were trying in fact to persuade Tesco to maintain
2 cash margin in this instance when normally they would
3 seek to maintain percentage margin. That is what you
4 were recommending to them?

5 A. I was recommending that, yes, and, again, giving Tesco
6 the opportunity to make the decision.

7 Q. And that is in fact what you were proposing and
8 recommending to all other retailers?

9 A. Yes, and that was the industry position that was being
10 publicly expressed at the time, that they wanted to have
11 visibility that the cost increase moved by the same
12 level as the retail moved.

13 Q. You say that's what was being said publicly. Let's see
14 what you actually say about it in your email at tab 52
15 [Magnum], which is the same email, just back to the
16 email from the spreadsheet. You actually make
17 a statement about this in your email to Ms Oldershaw:

18 "As we discussed last week other parties are
19 confirming that they will protect Cash Margin on this
20 occasion but not % margin."

21 First of all, you say "As we discussed last week",
22 this is Monday 21 October, so this discussion probably
23 took place between about Wednesday, 16 October, when you
24 sent your email to Sainsbury's, which we find at tab 47
25 [Magnum], and Friday, 18 October. Does that appear to

1 be reasonable? Sorry, when you sent your email about
2 Sainsbury's, not to Sainsbury's.

3 **A.** It would be just through that last week. It just says
4 discussions last week, so I can't be specific about the
5 timings of the discussions but it would be that week,
6 yes.

7 **Q.** Let's see what it said you actually discussed. Can you
8 recall a conversation?

9 **A.** I can't recall the conversations at all, no, I don't
10 have --

11 **Q.** You're not denying one took place because it's clearly
12 recorded in this email?

13 **A.** Yes, I'm not denying a conversation. They would take
14 place, that was a critical time of trying to achieve
15 a cost increase.

16 **Q.** Yes, so you were talking to Lisa pretty frequently at
17 that time?

18 **A.** Yes, I would say so.

19 **Q.** In that conversation, as you record in your email, you
20 told her that other parties, other retailers, would be
21 maintaining cash margin and not percentage margin;
22 that's what you told her, isn't it?

23 **A.** Yes, that's what that statement says there.

24 **Q.** Now, that was, you say in paragraph 24 of your witness
25 statement [Magnum], your understanding of how the market

1 was going to react to the cost price increase. That was
2 your understanding?

3 **A.** Absolutely, yes.

4 **Q.** Based on what you had been told and the discussions you
5 had had with other retailers, wasn't it?

6 **A.** It was based on those type of discussions and it was
7 also based on the position within the industry. There
8 was a lot of public statements at the time being made
9 through the dairy industry press, and those statements
10 were expressing that, that need to ensure that the 2p
11 was being passed down the line in effect, and that would
12 have been visible at the retail level. So it was
13 a combination of all that information.

14 **Q.** You agree that it was based on discussions you had with
15 the retailers, among other things, and at 51A [Magnum]
16 it reflects pretty clearly what was recorded internally
17 by McLelland as to what they had been told, McLelland
18 had been told, by Tesco, Asda and Safeway -- sorry,
19 Sainsbury's, Asda and Safeway. Sainsbury's intend to
20 maintain cash margin, Asda will probably maintain cash
21 position, Safeway intention is to maintain cash margin.

22 You've agreed that memo was based on your
23 discussions with retailers, or on McLelland's
24 discussions with retailers?

25 **A.** That was part of the basis for it, and the industry

1 press, as I say, there would be a lot of information
2 being spread around.

3 **Q.** That was part of the basis for it. That information is
4 the information passed on to Lisa Oldershaw in the email
5 of 21 October. That's right?

6 **A.** That's what the statement says, yes.

7 **LORD CARLILE:** We'll have a break about 11.30 for our
8 hard-working LiveNote team.

9 **MS SMITH:** I'm sorry, I didn't catch what you said, sir?

10 **LORD CARLILE:** Around 11.30.

11 **MS SMITH:** Absolutely. I was expecting it would be about
12 halfway through the morning, sir.

13 **LORD CARLILE:** Yes.

14 **MS SMITH:** Mr Ferguson, let's look at the email again at
15 tab 52 [Magnum].

16 We've agreed, I think, that you probably had, or it
17 was recorded there, that a discussion -- you had
18 a discussion with Lisa the previous week and you were
19 having plenty of discussions with Lisa in that week or
20 at that time. It's likely, is it not, that in that
21 discussion not only did you tell her what other
22 retailers were going to do on their margins, but she
23 told you what Tesco were going to do as regards their
24 prices. She gave you the information that was recorded
25 in the document, the internal document at 51A [Magnum].

1 **A.** Yes, I would say that that -- that information would
2 have -- came from Tesco, yes.

3 **Q.** Now, you told her in the email of 21 October that other
4 retailers were confirming that they would protect cash
5 margin on this occasion but not percentage margin,
6 because you were trying to persuade her to move her
7 position, as recorded in 51A that she wanted to go with
8 percentage margin, to go with cash margin, is that
9 right?

10 **A.** That decision was entirely up to Lisa.

11 **Q.** Well, you were giving her certain information, I'm
12 asking you why you were giving her that information, and
13 I'm suggesting that you were doing it in order to
14 persuade her to go with cash margin. The best way to
15 persuade her to do that would be to say, "Well, everyone
16 else is doing that, don't worry".

17 **A.** But again that decision was entirely up to her. It's
18 her decision or the Tesco business decision to --

19 **LORD CARLILE:** You're not answering the question.

20 Would you put the question again?

21 **MS SMITH:** I'm asking: the reason you gave her this
22 information was in order to try to persuade her to go
23 with cash margin?

24 **A.** That's not what the email says.

25 **Q.** It's not what email says but, again, you're not

1 answering the question which is relatively simple.

2 You gave her information in this email that other
3 parties are confirming they will protect cash margin.

4 **A.** Yes.

5 **Q.** I'm asking you: the reason why you gave her that
6 information in your email was that it was to seek to
7 persuade her, whether it would or not is another matter,
8 but seek to persuade her to go with cash margin as
9 opposed to percentage?

10 **A.** Well, I feel that the email is still stating the fact
11 that, you know, through the information I have, the
12 industry was looking to focus on this cash margin
13 emphasis and, again, I'm just advising Tesco that that's
14 the position.

15 **Q.** You're advising her that's the position, absolutely.
16 You're just repeating what's in the email.

17 I'm asking you a really very simple question.

18 **A.** Sure.

19 **Q.** The reason why you gave her that information.

20 I'm suggesting to you the reason why you gave her
21 that information was to seek to persuade her to go with
22 cash margin rather than percentage margin?

23 **A.** Okay. I feel I'm giving her that information in order
24 for her to make a decision.

25 **LORD CARLILE:** What decision did you hope for, if any?

1 **A.** Again, that would be up to Tesco, sir. If I'm referring
2 to that specific line there, we would have to --

3 **LORD CARLILE:** But there has to be a point in giving her the
4 information, there has to be a reason. What was your
5 rationale?

6 **A.** I would feel, thinking of it, my rationale would be to
7 give her that advice because the industry was stating
8 quite clearly that they wanted to see this visibility of
9 a cost increase at the same level as a retail increase.

10 **MS SMITH:** So what was that advice?

11 **A.** I would say that that advice was to go with the cash
12 margin.

13 **Q.** Thank you.

14 Back to the email. You say:

15 "We will need to discuss this as time develops this
16 week and reach a conclusion. The time scales are as we
17 proposed.

18 "Ie 4th of November for Pre-pack and the 11th
19 of November for Deli..."

20 You can confirm I think, flick back to 47 if you
21 want to check [Magnum], that these were the dates that
22 you had been given by Sainsbury's for their cost and
23 retail price moves on own label and pre-packed brands,
24 4 November, and deli, Taste the Difference on
25 11 November. Those are the dates that Sainsbury's gave

1 you --

2 **A.** Yes, I can see that.

3 **Q.** You can also confirm, and look back at tab 51A if you
4 want [Magnum], that the dates recorded for Sainsbury's
5 in the internal McLelland memo are again exactly the
6 same dates, 4 November and 11 November for the same
7 products. Can you confirm that?

8 **A.** I can, yes, it's on the document.

9 **Q.** So you can also confirm that, as of the date that you
10 wrote the email to Lisa Oldershaw on 21 October at
11 tab 52 [Magnum], you had in possession those dates as
12 dates on which Sainsbury's was going to move its prices
13 for those products?

14 **A.** No, the dates I have on the email --

15 **Q.** No, that's not what I'm -- sorry, I may have made myself
16 unclear.

17 As of the date you wrote the email, 21 October, in
18 your possession you were aware of the information that
19 Sainsbury's was going to move its products on the 4th
20 and 11th?

21 **A.** Yes, I would have that awareness, it's there quite
22 clearly.

23 **Q.** You would also agree, I think, that all of the
24 information in this email of 21 October, leaving to one
25 side at the moment the dates of 4 November and

1 11 November, but all the other information is about
2 retailers, what retailers other than Tesco were going to
3 do, either Sainsbury's or other retailers, can you agree
4 that?

5 **A.** Were you referring to the cash margin statement?

6 **Q.** To the cash margin statement and to the statement in the
7 last sentence:

8 "Sainsbury's are confirming the new retailers will
9 be in place this week".

10 **A.** Yes, I would say that that's a fact, yes.

11 **Q.** You are also aware, and I think you were aware at the
12 time, that Tesco moved its prices on Sundays but 4 and
13 11 November are Mondays, which is when Sainsbury's moved
14 its prices. Can you confirm that?

15 **A.** I can't confirm that exactly. Again, it's ten years
16 ago.

17 **Q.** Just to refresh your memory, if you just flick to tab 62
18 [Magnum] on that one particular point, we'll be coming
19 back to tab 62, but just on that one particular point,
20 at the bottom of the page, an email from Lisa Rowbottom
21 to you and a number of other processors. Second
22 paragraph:

23 "At the moment the plan is for the following to be
24 changed from Sunday 3rd November (we have to change
25 costs on a Sunday, please note that you must change on

1 a Sunday also)."

2 That was Tesco's general practice at the time wasn't
3 it?

4 **A.** Sure.

5 **Q.** That they would change on a Sunday, is that right?

6 **A.** Okay, I can see that statement. It's quite clear from
7 it.

8 **Q.** Do you recall, that was their general practice at the
9 time, wasn't it?

10 **A.** Well, you're refreshing my memory, but it's ten years
11 ago as I said.

12 **Q.** Now, you suggest that the dates of 4 and 11 November, in
13 the email of 21 October, you suggest in paragraph 23 of
14 your statement [Magnum] that these were dates for new
15 cost prices for Tesco.

16 **A.** Correct, yes.

17 **Q.** But actually it's clear, when you read the email in
18 context and as a whole, that in fact these were the
19 dates for Sainsbury's cost and retail price increases,
20 weren't they?

21 **A.** I am referring quite clearly there to my cost agreements
22 for Tesco.

23 **Q.** It might be that you had proposed to Tesco that it moved
24 on these dates, and here you are confirming to them that
25 the timescales you proposed, you're confirming that

1 other retailers are also moving on those dates. Is that
2 what you're saying?

3 **A.** No, those dates I'm referring to there are the -- my
4 dates for the effectiveness of the cost increase for
5 Tesco.

6 **Q.** Even though there is --

7 **A.** Even though they're possibly -- it sounds as if they're
8 the Monday and not the Sunday, so it would be up to Lisa
9 to correct me and agree to go from the 3rd or to go from
10 the 10th on one of them.

11 **Q.** And even though there is plenty of documentary evidence,
12 which you've looked at, saying that these are the dates
13 Sainsbury's had confirmed, but absolutely no documentary
14 evidence that these are dates Tesco had mentioned,
15 you're still standing by your statement?

16 **A.** Yes, I'm standing by, that is the dates I would be
17 referring to when I need the cost increase.

18 **Q.** Final sentence in that email, if I may, just before we
19 break. Finally you say:

20 "Sainsbury's are confirming that the new retails on
21 Branded pre-pack will be in place Tuesday this week."

22 In your statement at paragraph 25 [Magnum], you say,
23 last sentence:

24 "I have no specific recollection of where this
25 information on Sainsbury's came from. However, it is

1 information that we generally would have had for the
2 purpose of printing their labels."

3 **A.** Correct, yes, we would have had that confirmation, yes.

4 **Q.** Right. We've been to your email of 16 October at tab 47
5 [Magnum], which is where you record Sainsbury's giving
6 you the information that they will move on cost and
7 retails from 21 October?

8 **A.** Sure.

9 **Q.** And then they confirm that in fact it appears that's
10 going to be delayed for a day until 22 October, the
11 following day, Tuesday the 22nd. And you were shown
12 that email of 16 October when you were preparing your
13 witness statement for Tesco. It is SO document number
14 178 [Magnum], which is one of the documents that you
15 refer to in paragraph 1 of your witness statement
16 [Magnum].

17 Do you recall being shown that email of 16 October
18 when you were preparing this statement?

19 **A.** Yes, I do.

20 **Q.** The one at 47.

21 But the problem is, you make absolutely no reference
22 to it at all in your witness statement. In fact you say
23 you have no idea where the information about Sainsbury's
24 came from, in paragraph 25 [Magnum].

25 **A.** Yes, but what I'm saying, though, we would have had the

1 information for the printing of the labels.

2 Q. And, in fact, you've failed again to address this email
3 of 16 October in your most recent witness summary.

4 Again, it has been completely ignored, hasn't it?

5 A. I would need to refer to the witness summary.

6 Q. You can check it if you wish but I can confirm it
7 doesn't say anything about this email of 16 October.

8 The reason why it was ignored, I suggest,
9 Mr Ferguson, is because it clearly shows you receiving
10 Sainsbury's future pricing intentions, and then the
11 email of 21 October clearly shows you passing them on to
12 Tesco. That's right, isn't it?

13 A. The email of 21 October, what I'm saying here is that
14 Sainsbury's are confirming that the new retails will be
15 in place tomorrow morning. This is at 5 o'clock in the
16 evening and that's why that --

17 Q. We'll get on to that point. I'm sure you're very keen
18 to give that evidence but we'll get on to that point.

19 What I'm talking about at the moment --

20 **MISS ROSE:** The witness ought to be able to finish his
21 sentence.

22 **LORD CARLILE:** Yes, finish your answer, if you want to add
23 anything.

24 A. Yes, so therefore that's why I'm sending that out at
25 that time in the evening because, in my opinion,

1 meetings.

2 Q. The email doesn't just say, "Sainsbury's are confirming
3 that the new retails on Seriously Strong will be in
4 place Tuesday this week", it's broader than that, it
5 says "Branded pre-pack". And in light of the internal
6 memo at 51A, what you were referring to there by
7 "Branded pre-pack" was all of the branded pre-pack
8 referred to in the document at 51A, Seriously Strong,
9 Cathedral City and Pilgrims Choice?

10 A. That document states that but, again, it's not my
11 document.

12 Q. I'm looking at your document, which is the email of
13 21 October. You don't say, "Sainsbury's are confirming
14 that the new retails on Seriously Strong will be in
15 place this week", you say "Branded pre-pack" which is
16 much broader than Seriously Strong, do you agree with
17 that?

18 A. I would agree it's a broader statement but I would be
19 referring to Seriously Strong.

20 Q. I suggest to you that in the words "Branded pre-pack"
21 what you meant was not just Seriously Strong but the
22 other processors' cheeses as well?

23 A. I would still be referring to the Seriously Strong brand
24 in that email.

25 Q. When you meant to refer to Seriously Strong, as you did

1 in the email of 16 October at tab 47 [Magnum] you
2 referred to Seriously Strong:

3 "Seriously Strong pre-pack ..."

4 Number 1, this is tab 47:

5 "... will move on costs and retails from
6 21 October."

7 **A.** Okay.

8 **Q.** Your email of 21 October at tab 52 [Magnum] you're not
9 just referring to Seriously Strong, are you, you're
10 referring to branded pre-pack, including the other
11 processors' products as well?

12 **A.** No, I would still feel I'm referring to
13 Seriously Strong, and again it's just the language, it's
14 the brand, Seriously Strong was the brand, so it was the
15 branded pre-pack.

16 **Q.** It's not the only brand that's referred to in the
17 internal McLelland document, is it? Other brands that
18 were not produced by McLelland were referred to in that
19 document as well?

20 **A.** They are referred to in the document, but I'm referring
21 to Seriously Strong here when I say branded retail.

22 **Q.** Even on the basis, which we don't accept, that you're
23 referring here only to Seriously Strong, you're talking
24 about new retails for Sainsbury's, aren't you?

25 **A.** Yes, I am.

1 Q. And that is retails on fixed weight pre-pack, that is
2 retails that you would not have needed to be given by
3 Sainsbury's for the purpose of packing those products,
4 that's correct, isn't it?

5 A. I would have to see if -- it may be referring to the
6 Galloway pre-pack, which is a random weight brand as
7 well, which is a --

8 Q. I'm sorry, you've just told me that it was
9 Seriously Strong, now you're saying it's Galloway.

10 A. I don't have the detail in front of me confirming what
11 happened on that specific day but, even if it is
12 Seriously Strong, then we're talking about the
13 Seriously Strong retail.

14 Q. Let's look at 51A [Magnum]. The first entry for
15 Sainsbury's talks about Seriously Strong pre-pack,
16 Cathedral City and Pilgrims Choice, all of those are
17 fixed weight pre-pack, aren't they?

18 A. That's the price move update document?

19 Q. Yes.

20 A. Yes, they are.

21 Q. Then the second entry on 4 November:

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

23 The pre-pack brands referred to there are the random
24 weight brands, such as Galloway, because those need a
25 little more time to move because you've got to change

1 the price labels. That's what's being referred to in
2 the second entry, isn't it?

3 **A.** I would say you're correct with that, yes.

4 **Q.** So when we're talking about --

5 **A.** So I'm talking about --

6 **Q.** -- the document at 52 [Magnum], we're talking about
7 fixed weight pre-pack?

8 **A.** We're talking about fixed weight pre-pack, it looks that
9 way, yes.

10 **Q.** You say at paragraph 25 of your witness statement
11 [Magnum] that the information that you gave to
12 Lisa Oldershaw in the email of 21 October, confirming
13 Sainsbury's specific retail price moves on Tuesday,
14 22 October, "was to all intents and purposes public
15 information".

16 **A.** Yes.

17 **Q.** You say it would have been of no commercial use to Tesco
18 because they wouldn't have had time to adjust their
19 prices to match it before it came into store. That's
20 the evidence in your witness statement?

21 **A.** That's correct. That's what's in the document, yes, the
22 witness statement.

23 **Q.** You repeat that, if you want to look, in paragraph 4 of
24 your witness summary [Magnum], but you also add there:

25 "Tesco was unable to take any steps, in the light of

1 this information that it would not otherwise have been
2 unable to take [sic], when it was informed of
3 the publicly available retail prices on the morning of
4 22 October."

5 **A.** Correct.

6 **Q.** What you do not explain, if that is the case, is why you
7 didn't wait until the morning, the following morning,
8 when the information was in fact publicly available, to
9 send it to Tesco, perhaps with a till receipt as proof?

10 **A.** Hmm-hmm.

11 **Q.** You don't explain that, do you?

12 **A.** I don't explain that and I can't remember why it wasn't
13 sent on the Tuesday, the 22nd. I may have been out of
14 the business that day, I'm not sure why. But again it
15 was sent, as you can see, at 5 o'clock in the evening,
16 and as far as I was concerned that, in my view, would
17 have been in the public domain.

18 **Q.** Well, what was the urgency that meant you had to provide
19 the information to Tesco at 5 o'clock on the Monday
20 rather than when it was in store on the Tuesday?

21 **A.** I don't have an answer why there was an urgency, but
22 I think there's always an urgency to achieve a cost
23 increase so I was encouraging the movement of the cost
24 agreement. That would be the only urgency.

25 **Q.** You gave her this information because the urgency from

1 your point of view was to achieve a cost increase, or
2 you were encouraging the movement of the cost agreement,
3 is that what you say?

4 **A.** Yes, the whole position is about agreeing and concluding
5 the cost increase, yes. So moving that along.

6 **Q.** Because your evidence elsewhere is that Lisa Oldershaw
7 only valued information from you when it was backed up
8 by till receipts, but here you are sending her
9 information that, on your evidence, Tesco would be
10 unable to do anything with?

11 **A.** Yes.

12 **Q.** Well, you obviously thought there was some benefit in
13 sending the information to Tesco and -- you must have
14 thought there was some benefit, you say the benefit was
15 to help you achieve the cost price increase?

16 **A.** Yes, to me --

17 **LORD CARLILE:** That's bordering on a closing speech, Ms
18 Smith.

19 **MS SMITH:** I'm sorry, sir?

20 **LORD CARLILE:** I understand the temptation, but the question
21 you just put isn't really a question, it's a comment.

22 **MS SMITH:** Now, you're giving her information here at
23 5 o'clock on a Monday evening?

24 **A.** Yes.

25 **Q.** It's going to be in store Tuesday, very shortly, so you

1 knew that it had to be correct information, didn't you,
2 because Tesco could see almost immediately whether or
3 not you were telling the truth?

4 **A.** They would be able to see that in store that Tuesday
5 morning, yes. That's what I'm saying.

6 **Q.** So it had to be correct information, it couldn't just be
7 speculation?

8 **A.** I would say it's never correct until it's live in store,
9 and although I'm stating quite clearly that the retails
10 would be there on the Tuesday morning, I would still
11 have to have that final evidence of it being live in
12 store.

13 **Q.** You're telling Lisa Oldershaw from Tesco, who we have
14 established is McLelland's most important account,
15 that's right, isn't it?

16 **A.** That's correct, yes.

17 **Q.** You've also agreed that you have a good relationship
18 with her and that she trusted you, that's right, isn't
19 it?

20 **A.** It is, yes.

21 **Q.** You've also agreed that you wouldn't want to have lost
22 her trust by giving her false information, that's right,
23 isn't it?

24 **A.** That's correct, yes.

25 **Q.** The information you were giving her here was information

1 that she could very quickly check as to whether or not
2 it was correct? In fact she could check the very next
3 morning whether that information was correct?

4 **A.** She could. She could check that at store level.

5 **Q.** In fact, that is why you sent her that information,
6 isn't it, to show her that you were receiving
7 information from other retailers, and that the
8 information you were receiving was correct, and that she
9 could rely on it. That's why you were sending it to her
10 the evening before it went into store?

11 **A.** Yes, again, that's my confident assessment that that
12 would be the position in store that Tuesday morning,
13 yes.

14 **Q.** I'm asking you why, I'm suggesting to you the reason why
15 you sent Lisa the information showed her a number of
16 things. It showed her, first, that you were receiving
17 information from other retailers, didn't it?

18 **A.** I would say yes to that, it does say we're receiving
19 information from other retailers, and that is part of
20 this process of achieving the cost increase.

21 **Q.** You've also agreed that she could, the very next day,
22 check as to whether or not that information was correct.
23 So you were sending it to her to show her that the
24 information you were receiving from other retailers was
25 correct, that's right, isn't it?

1 **A.** Yes, and again I was sending it out that Monday evening
2 because, in my view, that was again in the public
3 domain.

4 **Q.** Slightly different from what I asked you. The question
5 I asked you was: the reason you were sending her this
6 information was to show her that you were receiving
7 information from other retailers that was correct
8 because the very next day she could check that that
9 information was correct?

10 **A.** Yes, I'm saying, yes, the very next day she could check
11 that position in Sainsbury's.

12 **Q.** And that was the reason why you were sending it to her,
13 to show her that you were receiving correct information
14 from other retailers?

15 **A.** I would say that is the case, plus my, again, assessment
16 of that position.

17 **LORD CARLILE:** Can I just be clear that you accept what's
18 being put to you, or not.

19 What Ms Smith put to you was that the reason you
20 were sending her this email was to show her that you
21 were receiving true information from other retailers, do
22 you agree with that or not?

23 Your motive in sending her this email, it is put,
24 was to demonstrate to her that you were receiving
25 correct information from other retailers?

1 **MS SMITH:** With the greatest respect, sir, I think that
2 question has already been answered but I'm very happy
3 for the witness to answer it again.

4 **LORD CARLILE:** I just want to be sure that he meant what he
5 said.

6 **A.** Yes, the information that we -- I would say what we have
7 received here is a clear confirmation that the cost
8 increase is in place.

9 **LORD CARLILE:** Sorry, this is the reason why I repeated
10 a question that might already have been answered.

11 What was put to you was that your reason, which
12 I think means your motive, for sending this email, your
13 motive was to show Lisa Oldershaw that you were
14 receiving true information from other retailers.

15 **A.** Okay.

16 **LORD CARLILE:** In other words, to make her believe that you
17 were a credible informant?

18 **A.** Okay.

19 **LORD CARLILE:** Is that a "yes" or a "no" or "I really can't
20 answer the question"?

21 **A.** I'm thinking about it, sir.

22 **LORD CARLILE:** Or are you still processing it?

23 **A.** I'm still processing it at the moment.

24 Yes, I would say that I was expressing that
25 position, that I knew what was happening on that

1 particular product on the Tuesday morning, yes.

2 Does that answer it?

3 **LORD CARLILE:** It doesn't quite, no. It's the motive for
4 sending this email.

5 **A.** Well, the motive for sending the email, again, I'm
6 trying to conclude on the cost increase and, therefore,
7 if that position in the public domain shows that the
8 cost increase is going through in other areas, then that
9 gives Tesco encouragement to pay me the cost increase.

10 **LORD CARLILE:** Well, it was worth a try but we'll carry on.

11 **MS SMITH:** Can we then move on to another document, please,
12 Mr Ferguson. Can we look at 62A [Magnum], the tabs are
13 slightly difficult to find. 62A is an email of
14 29 October from Jim McGregor.

15 **A.** Yes.

16 **Q.** To sales and Alistair Irvine and Gerry Doyle. Do you
17 think sales would have included you?

18 **A.** Yes, I would have expected sales to have included me,
19 yes.

20 **Q.** So it's dated 29 October, that email, just gone
21 7 o'clock in the evening, and attached to it is a price
22 move matrix which is dated 28 October. Do you see that?

23 **A.** Yes, got it, yes.

24 **Q.** Over two pages. You address this document in your
25 witness summary at paragraph 8 [Magnum]. You say -- you

1 don't just say, you believe, you say:

2 "This document was an internal planning matrix of
3 dates for cost price changes."

4 **A.** Yes, that's what I'm saying in the statement, yes.

5 **Q.** And that:

6 "The purpose of this document was to track the
7 retailers' various arrangements with McLelland."

8 So that's what you say?

9 **A.** Yes.

10 **Q.** Let's look at the entry for Sainsbury.

11 **A.** Yes.

12 **Q.** We have recorded here, 21 October, price move on

13 Seriously Strong, Cathedral City; 4 November, brands;

14 11 November, own label, other McLelland brands;

15 18 November, deli and Taste the Difference.

16 **A.** Hmm-hmm.

17 **LORD CARLILE:** Sorry, could I just be reminded who

18 Gerry Doyle is?

19 **A.** Yes, Gerry Doyle was operations manager within

20 McLelland.

21 **MS SMITH:** So that's Sainsbury's row. We have

22 Seriously Strong, which is a McLelland brand, and

23 Cathedral City, which is not produced by McLelland but

24 is a Dairy Crest-produced brand, that's right, isn't it?

25 **A.** That's right, it is, yes.

1 **Q.** So the reference there to Cathedral City cannot be
2 a reference to cost prices because it's not even a brand
3 that you supply, can it?

4 **A.** It won't be but, again, it's history, isn't it, because
5 Jim has produced this document on 29 or 28 October. So
6 I think all he's doing here is highlighting that
7 Cathedral City has moved, he must have seen a retail
8 movement, so he's putting down some information.

9 **Q.** So he must have seen a retail movement, and he's
10 recording here then that the retail price of Cathedral
11 City has moved?

12 **A.** Yes, because he wouldn't have awareness if the cost had
13 moved or not because -- he's making an assumption.

14 **Q.** My suggestion is that actually all these entries are for
15 retail prices, not cost prices, because they refer
16 first, by reference to Cathedral City, not to the brand
17 that -- as you freely admit, you have no knowledge as to
18 whether or not -- what is happening on cost prices for
19 Cathedral City because you don't even supply it?

20 **A.** Yes, we don't. And again I didn't pull together the
21 document so I'm not sure why Jim would have put that in
22 there, because it's the only reference outside of our
23 own business. But, again, that to me would be Jim's
24 statement on 28 October, his price move matrix which is
25 referring to cost increase, and that's his statement in

1 time on 28 October.

2 Q. It's equally likely, is it not, that actually this was
3 referring to the information you had already received
4 from the retailers as to what they were going to do on
5 their prices generally, both cost and retail?

6 A. Could you repeat that question again, sorry?

7 Q. We've already seen there's a reference here to Cathedral
8 City, which is not a McLelland brand?

9 A. Yes.

10 Q. A Dairy Crest brand, and therefore can only be
11 a reference to the retail price moves on that brand, do
12 you agree?

13 A. Yes, that can only be a reference to retail, yes, on the
14 21st.

15 Q. I put to you that you suggested that this was a record
16 of cost price increases. I was putting to you that it's
17 equally likely that this is a reference to what
18 McLelland -- this document records what McLelland had
19 been told by the retailers as to their movements on
20 prices generally, both cost and retail prices.

21 A. Yes, I would say it would refer to the overall position
22 there, and to give -- what Jim is trying to do here is
23 communicate to the business the expectation of when we
24 would be moving cost increase, and retail would be part
25 of that, because there would have to be some of the

1 random weight products managed as far as new retailers are
2 concerned. That's why Gerry Doyle was involved in the
3 communication, because he would manage that situation
4 within our business.

5 **Q.** Not just for the management of labels, because we have
6 here references on the Sainsbury's row to deli, where we
7 have established that McLelland don't obviously pack the
8 deli with labels, that's a matter for the retailers?

9 **A.** Correct, and that's why this document would be Jim's
10 expectation of cost and, where it has to happen, retail
11 movement.

12 **Q.** Not just where it has to happen but where it's going to
13 happen, for example on deli and Taste the Difference,
14 where he would have no knowledge of what Sainsbury's
15 were going to do on deli unless they had told him what
16 they were going to do on the retail prices of deli?

17 **A.** I would say on the deli situation there, Jim is
18 referring to when the cost increase would move.

19 **Q.** So you can't be sure where this -- you personally can't
20 be sure where this document refers to retail and when it
21 refers to cost?

22 **A.** I would say it refers to cost and, where it has to be,
23 referring to retail.

24 It's a planning document to allow internal planning
25 within McLelland to take place, an expectation of it, an

1 expectation of how Gerry Doyle would have to plan the
2 administration of the cost increase and, where he has
3 to, plan the effectiveness of new retail levels on
4 random weight products. So Jim is giving that
5 information to the sales team, Alistair Irvine and
6 Gerry Doyle, and particularly for Gerry.

7 **Q.** It bears a striking resemblance to the internal document
8 we've seen at 51A [Magnum], particularly with the
9 information on Sainsbury's, and to your email of
10 16 October at tab 47 [Magnum] which, I think you have
11 accepted, related to both cost and retail price
12 movements, information that you had been provided by
13 Sainsbury's on their cost and retail price movements
14 over these three waves.

15 **A.** Hmm-hmm. Correct, yes.

16 **Q.** It's most likely, is it not, Mr Ferguson, that this
17 document was produced from the same information that you
18 used to produce your document, your email of 16 October,
19 and that McLelland used to produce the internal memo at
20 tab 51A, that is information given to you by retailers
21 as to what they were going to do on both their cost and
22 retail prices. That's most likely, isn't it?

23 **A.** It's most likely the information would have been coming
24 from that, that area. I can't refer to the timing of
25 the price move update document, but this certainly, the

1 matrix, is again Jim's stake in the ground on
2 28 October.

3 Q. So it's most likely that that information would have
4 been coming from that area, that is the retailers, and
5 it's most likely as well, isn't it, that the information
6 was not just about cost price movements but also about
7 retail price movements, isn't that the case,
8 Mr Ferguson?

9 A. Yes, it would refer to -- again, as I've said, we have
10 to plan the retail position on the random weight
11 product, so therefore...

12 Q. You've accepted it doesn't just refer to random weight
13 products, it also refers to fixed weight products and
14 products such as deli where there's no need for
15 McLelland to put a retail price on the product?

16 A. Yes. On the fixed rate lines, the emphasis would be on
17 the cost increase, that's the timings of Jim's
18 expectation of when he expects the costs to move.

19 Q. Now, if we can just compare that document, if we can, to
20 the document at 51A, if you can have your finger in both
21 documents.

22 A. 51A is the price move update, isn't it?

23 Q. That's right, yes.

24 A. Because I remember I have the redacted --

25 Q. Yes. So if we look again at Sainsbury's, there has been

1 a little movement between the two documents. There are
2 now four waves on the price move matrix of 28 October,
3 Seriously Strong and Cathedral City were, as
4 anticipated, moved on 21 October. You will see that on
5 the document at --

6 **A.** Yes, I see that.

7 **Q.** -- 62A [Magnum]. On 4 November it's now just brands --

8 **A.** Hmm-hmm.

9 **Q.** -- and no longer own label, as was recorded on the price
10 move update at 51A. You see that's moved? On
11 11 November, Sainsbury's is now moving own label and
12 other McLelland brands. By "the other McLelland brands"
13 I assume what we're talking about here are the random
14 weight pre-packed such as Galloway, et cetera?

15 **A.** Yes, it would be. Yes, that's what that would refer to,
16 yes.

17 **Q.** Do you have any idea why the price movement on those
18 brands has moved to 11 November?

19 **A.** I have no idea, I can't recollect why, and I'm sure if
20 Jim was doing this document the week after it would
21 potentially move again. It's always a -- it's a
22 negotiation that can continually change and the timings
23 can change.

24 **Q.** We'll come back to the question of the McLelland random
25 weight pre-pack brands.

1 **A.** Sure.

2 **Q.** But we now have a new wave, the wave of 18 November, and
3 deli and Taste the Difference have been moved,
4 previously they were planned to move on the 11th and now
5 they're going to move on 18 November, do you see that?

6 **A.** Correct, yes.

7 **Q.** Can we move on then to the document at -- actually it's
8 the next in the chronology but it's just one tab before,
9 tab 62 [Magnum]. This is an email from you to
10 Lisa Oldershaw of 29 October?

11 **A.** Yes, got it.

12 **Q.** At the top. Sorry, we should start with the one at the
13 bottom, that is the lower email. That's from
14 Lisa Oldershaw, as she now is, to you and a number of
15 other processors, Butlers Cheese, Joseph Heler,
16 North Downs, Kerrygold, McLelland and Neil Arthey of
17 Dairy Crest. Do you see that?

18 **A.** Yes, I see that, I've got it.

19 **Q.** "Subject: cost price increases".

20 What she says is:

21 "Hi

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

24 "At the moment the plan is for the following to be
25 changed from Sunday 3rd November (we have to change

1 costs on a Sunday, please note that you must change on
2 a Sunday also)

3 "3rd November

4 "Brands

5 "Regionals

6 "Stilton

7 "Speak tomorrow

8 "Cheers Lisa."

9 This is an email that she sent to all processors at
10 once. It was not normal practice, was it, for
11 a retailer such as Tesco to tell all their processors at
12 once about price increases in one email?

13 **A.** I would agree it's not normal practice.

14 **Q.** It wouldn't have been normal practice to let other
15 processors know, as she did by this email, that she was
16 going to agree a cost price increase with you?

17 **A.** I would agree it's not normal, yes.

18 **Q.** It's also not normal for a price increase to occur on
19 the same day for all processors, you would agree with
20 that?

21 **A.** I wouldn't be able to comment on that. That would be --
22 that could happen. I couldn't comment on that.

23 **Q.** Now, Lisa gave you information here about price moves
24 taking place on 3 November on brands and regionals?

25 **A.** Correct, yes.

1 **Q.** We're talking here about brands. She was sending this
2 email to every processor. When you received this email,
3 you understood the reference to "Brands" not just to be
4 to your brand, Seriously Strong, but also to other
5 brands such as Cathedral City for Dairy Crest,
6 Pilgrims Choice for North Downs. Is that what you
7 understood?

8 **A.** Reading that email, that's what I would understand, yes.

9 **Q.** Now, again, for regionals, this is an email to all
10 processors, and for processors such as Dairy Crest,
11 North Downs, regionals would mean products such as
12 Red Leicester, Gloucester, Wensleydale, products that
13 you didn't supply?

14 **A.** I would say regionals, with our reference, would be
15 potentially some of the Scottish lines. I think
16 I explained that on Monday, that Scotland didn't have
17 regionals in effect but the different creameries that we
18 had in Scotland were very similar in terms to having
19 a regional position, be it Campbeltown, be it
20 Isle of Bute, be it Isle of Arran, be it Orkney. So
21 I think that would be -- she would be referring in that
22 context there.

23 **Q.** You explained that for McLelland?

24 **A.** Yes.

25 **Q.** This email was not just sent to McLelland, it was also

1 sent to Dairy Crest?

2 **A.** Sent to others. Yes, so regionals would be
3 territorials, potentially, Red Leicester, Double
4 Gloucester, Cheshire et cetera.

5 **Q.** That's what you understood at the time, this being an
6 email sent to all processors, not just to you?

7 **A.** Yes.

8 **Q.** The third product is stilton and Lisa is telling you
9 that she will be moving on 3 November on stilton, or
10 Tesco will be moving. McLelland didn't supply stilton
11 to Tesco in 2002, did it?

12 **A.** No.

13 **Q.** So Lisa Oldershaw was giving you information that you
14 understood related to products that you did not produce,
15 is that right?

16 **A.** I didn't produce --

17 **Q.** You have just confirmed.

18 **A.** Yes, we didn't produce stilton so that's definitely
19 a reference -- stilton is not part of our range.

20 **Q.** Also, other brands, which you've confirmed would include
21 brands that you didn't produce, and regionals, which
22 would include regionals that you didn't produce, you've
23 confirmed that?

24 **A.** I have but I'd also confirm that, regionals, I would
25 still identify that as the Scottish regionals.

1 Q. Now, she was giving information to all her processors at
2 once; she was giving information about products which
3 some of those producers did not produce and, therefore,
4 did not need. You didn't respond by saying, "Why are
5 you sending me this information about stilton", for
6 example?

7 A. Yes.

8 Q. "I don't need to know about stilton", did you?

9 A. I didn't say that in my reply, I didn't feel it was
10 relevant.

11 Q. You didn't say, "Why are you sending me this
12 information -- why are you sending this information to
13 me and/or my competitor processors"; you didn't question
14 that either, even though you said it was not a normal
15 thing to do?

16 A. Well, it wasn't specific, so -- there's no other
17 information on it apart from a date so, therefore,
18 I didn't feel that, again, it was relevant.

19 Q. She was telling all of you that your prices were going
20 to move on the same date. As you've indicated, that was
21 unusual but you didn't question it at the time?

22 A. I certainly haven't. It's not questioned on my reply,
23 no.

24 Q. Your email in fact says:

25 "Thanks for that, I will be out of the office

1 tomorrow ... you [can] get me on the mobile."

2 Then you say:

3 "I will be able to change all the relevant costs on
4 pre-pack and Deli from Sunday the 3rd but on the
5 Scottish Branded pre-packs ie Galloway, McLelland mature
6 et cetera..."

7 That is the Scottish branded pre-packs that were
8 random weight?

9 **A.** Correct, it is, yes.

10 **Q.** "... I propose that we go from the 10th of November with
11 the retails that you can confirm from the spreadsheet
12 I sent on to you. The reason I suggest that we move the
13 Branded pre-pack from the 10th is that we obviously have
14 stocks of our current retails that we would prefer to
15 supply until the 9th of November."

16 In response to her email you came back suggesting
17 that, instead of 3 November, you would prefer to move
18 retails on the random weight branded pre-pack from
19 10 November. That's right, isn't it?

20 **A.** Yes, that's correct, yes.

21 **Q.** That was because you had stock that was already labelled
22 at an old price that you needed to run down?

23 **A.** Yes.

24 **Q.** So your response was clearly talking about both costs
25 and retail prices, is that right?

1 **A.** I'm referring to the retails on the random weight
2 products which I need to pack within the packing
3 station, yes.

4 **Q.** That's right. Because those brands, that is the brands
5 other than Seriously Strong, which are fixed weight, you
6 could change the retails on Seriously Strong -- well,
7 you didn't need to do it?

8 **A.** No, Tesco would do that.

9 **Q.** Tesco did it. The retails on the random weight
10 pre-pack, you appear to have had about two weeks of
11 stock in your warehouse at the time, is that right, at
12 the old price?

13 **A.** Well, it's about ten days of stock.

14 **Q.** Ten days, eleven days, about a week and a half?

15 **A.** Yes. Yes, that's the position there which -- I probably
16 wasn't happy about that because I'm delaying my cost
17 increase.

18 **Q.** Yes, but it's not unusual to have about ten days',
19 a week's worth of stock?

20 **A.** It can absolutely vary. At this time, when you are in
21 a cost increase mode, you're trying to keep the factory
22 stocks at a bare minimum and it could be two days. You
23 could be fortunate, you have one day's stock. It's just
24 that it's quite a frantic time for the factory to plan
25 people, plan production. So, yes, you could have ten

1 days' stock. I would be unhappy with that but that's
2 what we had.

3 Q. At that frantic time, when, as you say, there was lots
4 of movement on costs and expectation that costs would
5 move, you were holding ten days' stock?

6 A. Not on everything I wasn't. On that occasion I was --

7 Q. No. On random, yes?

8 A. Yes, for Tesco.

9 Q. For Tesco.

10 A. Yes.

11 Q. Now, in your email, you say:

12 "The retails you can confirm from the spreadsheet
13 I sent on to you."

14 That appears to be a reference, I think, to the
15 spreadsheet that you'd sent to her on 21 October back in
16 tab 52 [Magnum]?

17 A. Yes, it would have been, yes.

18 Q. You said to Lisa that she could get you on your mobile
19 on the following day, 30 October?

20 A. Hmm-hmm.

21 Q. And you did speak to Lisa Oldershaw the following day as
22 anticipated in your email?

23 A. I'm not sure. I can't confirm that.

24 Q. Let's look at her evidence then on this, see if you can
25 remind yourself from that.

1 **A.** Sure.

2 **Q.** If we could have a different bundle, it's 2A of the
3 appeal bundle. It's a pink bundle, 2A.

4 Now, Lisa Oldershaw's second witness statement is at
5 tab J, if you can find that, it's about a quarter of the
6 way through. Sorry, these tabs are very confusing.

7 **A.** Yes, they are.

8 **Q.** It's a letter and then numbers, followed by a letter and
9 numbers. Second witness statement of Lisa Oldershaw.

10 **A.** Yes.

11 **Q.** If you can turn in that to page 36, paragraph 103(d)
12 [Magnum].

13 **A.** Hold on a minute. Page?

14 **Q.** Page 36, a very small number down at the bottom right,
15 page 36.

16 **A.** Yes, I have it.

17 **Q.** You can see there that's (d), that's paragraph 103(d).
18 She says:

19 "Later on 29 October 2002, I emailed Neil Arthey and
20 a number of my other cheese suppliers including
21 Tom Ferguson at McLelland."

22 **A.** Yes.

23 **Q.** She attaches a copy of that email, she reproduces it, so
24 it's the email at tab 62 [Magnum] that we've been
25 looking at?

1 **A.** Yes.

2 **Q.** Then she says:

3 "I had a series of discussions with my cheese
4 suppliers on 30 October 2002 to take them through the
5 changes that were coming through so they could run down
6 any stocks if needed and prepare for their system
7 changes."

8 So, as anticipated in your email exchange on the
9 29th, it appears that she did speak with you as well as
10 all her other cheese suppliers on 30 October; can you
11 recollect that?

12 **A.** I would have to say the statement says that. I can't
13 recollect it but I would feel -- she's saying that quite
14 clearly she did speak to her cheese suppliers and I'm
15 one of them.

16 **Q.** You were anticipating a call from her because you said
17 she could get you on her (sic) mobile?

18 **A.** Yes.

19 **Q.** It's most likely in those circumstances that you did
20 speak to her on the 30th?

21 **A.** It's most likely I did, yes.

22 **Q.** At subparagraph (e) of Ms Oldershaw's statement, she
23 says:

24 "On 30 October 2002 I emailed my draft cheese
25 pricing spreadsheet and a Word document containing an

1 outline of the proposed cost and retail price changes to
2 myself. A copy of this email is attached as exhibit
3 [tab 25]."

4 Then about halfway down that paragraph, if you can
5 find it, after the reference to John Scouler and
6 Rob Hirst, she says:

7 "I did not send this document to any of my suppliers
8 although it was the prompt for the discussions I had
9 with them on the 30th of October and the timing of the
10 cost price moves listed in Neil Arthey's email matches
11 the dates in the Word document."

12 **A.** Hmm-hmm.

13 **Q.** Now, that document she's referring to is a document that
14 you may not have seen. It's at tab 64 of the documents
15 bundle, to your right, if you could turn that up
16 [Magnum].

17 **A.** My own documents. Have we finished with this one or...?

18 **Q.** Yes, we probably are at the moment. Why don't you leave
19 it open just in case you want to cross-refer.

20 Tab 64. This is the email she's talking about in
21 her evidence, 30 October, and this is the email that she
22 says a Word document is attached to that email. If you
23 turn over the page you can see a Word document entitled
24 "Cheese £200 T plan"; do you see that?

25 **A.** Yes, I can.

1 Q. That is the Word document that she says was the prompt
2 for the discussions that she had with her cheese
3 suppliers on 30 October.

4 A. Yes.

5 Q. So this is the cheese £200 per tonne plan and it says
6 "Cost and Retail moves". We have dates, "Sunday
7 3rd November, standard regionals, brands, stilton", that
8 echoes, I think you would agree, what was in her email
9 of 29 October?

10 A. It does, yes.

11 Q. Then we further have 10th November, certain products;
12 17th November, certain products.

13 A. Yes.

14 Q. Having seen what Ms Oldershaw says, can you agree that
15 when you spoke to Ms Oldershaw on 30 October she gave
16 you information to the effect that she was going to move
17 her prices not just on 3 November but there would be two
18 further waves for Tesco on 10 November and 17 November?

19 A. Well, I don't have the comment to back that, to be
20 honest, apart from this document.

21 Q. Well --

22 A. She hasn't stated that in her email she sent me, did
23 she?

24 Q. No, I'm asking you -- she said that she had
25 a conversation with her suppliers --

1 **A.** Yes, on the 30th.

2 **Q.** -- and you've agreed that it's likely that she had
3 a conversation with you on the 30th?

4 **A.** Yes, and I would feel that conversation would be focused
5 on this 3 November position.

6 **Q.** Right. You can't recall?

7 **A.** I can't recall the rest of it, no.

8 **Q.** So you can't now recall whether she mentioned
9 10 November and 17 November?

10 **A.** I can't recall that, no.

11 **Q.** Now, you'll also see that this document says "Cost and
12 Retail moves"?

13 **A.** Yes.

14 **Q.** I suggest to you that when she spoke to you on
15 30 October she also told you that she would be moving
16 not just her cost prices on those dates but also her
17 retail prices. Do you remember that?

18 **A.** Well, I can't remember the discussion but I'm sure it
19 happened on that date. She would be confirming the
20 random weight retails to allow me to plan the packing of
21 them.

22 **Q.** Because, as you see, on this list, as we've established
23 as well, on this list and on the email of 29 October,
24 Ms Oldershaw told you the dates for price moves on
25 products that had nothing to do with McLelland and which

1 she didn't need to tell you for labelling purposes. I'm
2 suggesting to you that, when she spoke to you on
3 30 October, she also told you that she would be moving
4 cost and retail prices on all these products and not
5 just what she described as retails where relevant, not
6 just where you needed to know the retail prices for
7 labelling purposes?

8 **A.** I don't have the content of the conversation but my
9 conversation with Lisa on 30 October would cover our
10 retails, and it would be the branded random weight
11 pre-packs, she wouldn't discuss the other ones with me.
12 She stated in her email that, obviously, cost prices
13 were going on 3 November, she wouldn't discuss any other
14 retails with me.

15 **Q.** She told you that prices were moving, both cost and
16 retail prices were moving on 3, 10 and 17 November for
17 Tesco, in order to show you and her other processors
18 that Tesco was following the plan with the
19 across-the-board cost and retail price increases that
20 you were seeking?

21 **A.** Well, I have no detail of that. The conversation on
22 30 October would be focusing on the 3 November
23 implementation of brands and regionals and my
24 involvement in regionals would have been the Scottish
25 random weight products. That's what we would have been

1 talking about on 30 October.

2 **Q.** Now, you never questioned her in response to her email
3 of 29 October as to why she was sending you information
4 for products which weren't supplied by you and for which
5 you had no labelling need?

6 **A.** Yes.

7 **Q.** I suggest to you that she was also supplying you, in
8 this conversation of 30 October, with similar
9 information and you never questioned her as to why she
10 was telling you this information, information about
11 Tesco moving on these products on 10 and 17 November,
12 products that you did not supply to Tesco and you never
13 questioned why she was giving you that information?

14 **A.** Again, I've no recollection of that specific information
15 and I wouldn't have been expecting to even discuss that
16 information, you know. I'm certainly not involved in
17 cheese with bits on 10 November.

18 **Q.** If you keep this document open and compare it to what we
19 have at 62A [Magnum], the price move matrix for Tesco.
20 If you compare Lisa Oldershaw's internal document at 64
21 [Magnum] and the price move matrix of 28 October, two
22 days previously, at 62A, in the price move matrix,
23 McLelland had recorded that Tesco own label mild, medium
24 and farmhouse would go on 11 November and mature and
25 extra mature would go on 18 November?

1 **A.** Yes.

2 **Q.** But in the document at tab 64, we see that all own
3 brand, mild, mature, extra mature and farmhouse, will be
4 moving on 17 November. So when you spoke to
5 Lisa Oldershaw on 30 October, she told you that all own
6 brand would go on 18 November -- 17 November, it would
7 appear to be the case?

8 **A.** I can't confirm that. I do feel the 30 October we'd be
9 focusing on 3 November. I've never seen this document.

10 **Q.** Yes, I'm trying to see if you can recollect the
11 conversation.

12 **A.** I can't recollect the conversation. I think -- to me,
13 30 October, I would be focused on ensuring that we got
14 this part of my cost increase in place which was the
15 Galloway position, which I went back to her on the email
16 on.

17 **Q.** But you would agree that the information recorded in the
18 document at 62A, the price move matrix, shows Tesco's
19 mild, medium and farmhouse moving on the 11th and its
20 mature and extra mature on the 18th?

21 **A.** It does say that and again -- yes, as I said earlier,
22 that's Jim's stake in the ground on what his expectation
23 was but I can guarantee that would have moved
24 potentially every week.

25 **Q.** Yes, and by 30 October, when Lisa was having the

1 conversation with you, it appears in fact to have moved,
2 as you say, so that all mild, medium, mature, extra
3 mature and farmhouse are to go on 17 November, a week
4 later. That appears to have been what happened, isn't
5 it?

6 **A.** That's Lisa's document but there's no urgency for her to
7 tell me that on 30 October. 30 October --

8 **Q.** Just one final document to see if we can jog your
9 memory.

10 **A.** Sure.

11 **Q.** At 63 [Magnum], this is an email from Neil Arthey,
12 internal to Dairy Crest, of 30 October, 6 o'clock in the
13 evening. You've seen Lisa Oldershaw's evidence in her
14 witness statement that, on 30 October, she spoke to all
15 her cheese suppliers?

16 **A.** Yes.

17 **Q.** Which would have included Neil Arthey and you, as you've
18 agreed?

19 **A.** Hmm-hmm.

20 **Q.** On 30 October, Neil Arthey is recording -- reporting
21 back on a conversation that he had "late this afternoon"
22 with Tesco, you'll see on the first line, in which Tesco
23 confirmed certain things. I can take you to it if
24 necessary but I think Ms Oldershaw has confirmed that
25 the conversation was between her and Neil Arthey.

1 **A.** Yes.

2 **Q.** Then you see the fourth paragraph:

3 "They [Tesco] have now informed me that they intend
4 to move all the other own label lines on 18 November, ie
5 mild, medium, mature, extra mature and farmhouse, sliced
6 and grated and healthy eating.

7 "This is a 1 week delay on mild and medium."

8 That appears to be exactly the same as the
9 information recorded in your McLelland documents at 62A
10 [Magnum], a week's delay on mild and medium.
11 Neil Arthey says he was told by Lisa Oldershaw that they
12 were going to move all own label lines on the 18th,
13 a week's delay. She said the same thing to you in the
14 conversation on 30 October, didn't she?

15 **A.** I can't confirm that at all. This is a Neil Arthey
16 document which I've never seen and, as I say, I can't
17 recollect the conversation I had with Lisa on
18 30 October.

19 **Q.** You've suggested in evidence that, although you can't
20 recollect exactly, you think it's likely that
21 Lisa Oldershaw only spoke to you, or the conversation
22 I think you said was focused on the moves on
23 30 November -- 3 November, I apologise. But it appears
24 that the conversation between Neil Arthey and
25 Lisa Oldershaw, of the same day, he was told all moves

1 for 11th and 18th, as set out in Ms Oldershaw's document
2 at 64 [Magnum]. In light of that, it's likely she also
3 spoke to you about those three waves of price movements?

4 **A.** Again, I can't confirm that. I can't recollect the
5 conversation.

6 **Q.** Can we move on to a document that's slightly out of
7 sequence, I'm afraid, out of sequence in the bundles but
8 the next document chronologically. Tab 76 of -- you can
9 close the file with Lisa Oldershaw's witness statement
10 in it, which is the appeal bundle, volume 2A, the
11 pink-spined volume 2A, just to clear away a few of the
12 bundles. Perhaps keep open your witness statement
13 bundle but put that away for the moment.

14 If you could please get out document bundle, which
15 is a yellow-spined bundle, number 2, don't put away 1
16 yet, but if we can just get out number 2 and turn in
17 that to tab 76 [Magnum]. This has gone out of sync
18 because I want to take you to the document at the bottom
19 of that page on 76 which you'll see is an email from you
20 to Sarah Mackenzie of 31 October, 9.13 in the morning,
21 so early morning, after your conversation with
22 Lisa Oldershaw.

23 Can you see that?

24 **A.** I've got that, yes, sorry, 31 October, I have that.

25 **Q.** It says:

1 "Sarah [you say]

2 "Details enclosed confirming the changes across the
3 branded area which will be effective from [it's a date I
4 can't refer to] of November. This will be in line with
5 the rest of the market. With regard to your movement on
6 deli and own label pre-pack can you please confirm your
7 timescales by Monday the [again a date I can't refer to]
8 of November, I currently have packed stock at the
9 current retails to supply up to the 11th of November,
10 and we will need to pack on Monday supplies to hit depot
11 from the [other date].

12 "I will be out of the office on Friday but you will
13 be --"

14 **LORD CARLILE:** This is all a bit artificial, those dates are
15 plain as a pikestaff to anyone who has read any of this
16 material.

17 **MS SMITH:** And Mr Ferguson can see those dates.

18 **LORD CARLILE:** You can see those dates.

19 **MS SMITH:** You talk there about changes across the branded
20 area which are going to move. You say you've got -- you
21 currently have packed stock at current retails to supply
22 up to 11 November.

23 **A.** Yes.

24 **Q.** So that is McLelland's range of Scottish branded random
25 weight, is that right? As you said to Lisa Oldershaw in

1 your email of 29 October, you had old -- you had stock
2 at old prices for that random weight pre-pack, the
3 Scottish branded random weight pre-pack. You're saying
4 the same thing to Sarah Mackenzie of Sainsbury's?

5 **A.** Yes, I'm also referring to own label pre-pack in that
6 email as well, so I'm not sure of that detail then on
7 stock levels as referring to brands and own label. It
8 would be hard to define that, looking at the email.

9 **Q.** Yes, the date for the own label pre-pack appears to be
10 earlier, and when you say "I currently have packed stock
11 at the current retailers to supply up to the 11th
12 of November", that appears to be the branded area, in
13 the first sentence, and those dates, up to 11 November,
14 appear to be consistent with what you were telling
15 Lisa Oldershaw about Scottish branded random weight on
16 29 October, does that appear to be consistent?

17 **A.** It does appear to be consistent.

18 **Q.** When you're saying this will be in line with the rest of
19 the market, you're absolutely right. The same thing is
20 being done with Tesco as with Sainsbury's?

21 **A.** Yes, I'm referring to the market, yes.

22 **Q.** You were doing the same thing for Sainsbury's as you
23 were doing for Tesco, that's correct, isn't it?

24 You were supplying old price Scottish branded random
25 weight pre-pack --

1 **A.** Yes, we were, random weight.

2 **Q.** -- up to 11 November and then you were going to supply
3 the newly priced stock?

4 **A.** That's what that refers to, yes.

5 **Q.** For both Tesco and for Sainsbury's?

6 **A.** And there may have been others in the party as well, for
7 all I know.

8 **Q.** But we can be sure from these documents, and the
9 document at tab 62 [Magnum], your email to
10 Lisa Oldershaw of 29 October that, at the very least --
11 as you say, there may be other people at the party, but
12 at the very least you were doing the same thing for
13 Tesco and Sainsbury's?

14 **A.** Yes, it looks -- yes, that's exactly the case. I'm not
15 referring to that there.

16 **Q.** Now, if we could put away bundle 2 for the moment,
17 because that document is slightly out of sync, and go
18 back to document bundle 1, tab 66 [Magnum], towards the
19 end, almost at the very end.

20 **A.** Tab 66, yes.

21 **Q.** We have an email from Lisa Oldershaw of 31 October, so
22 the day after you had the conversation with her, again
23 to you and to a number of other processors. She says:

24 "Hi there

25 "As you can see from my hiding away and changing all

1 the figures this week, the £200 per tonne price increase
2 is happening."

3 Then she asks you to outline:

4 "(a) how you are proposing to get this money back to
5 the farmers..."

6 And:

7 "(b) how you address the issue of the fact that
8 Tesco for X number of months, depending on the cheese
9 maturity, is paying a £200 per tonne inflated price for
10 cheese made with milk £200 per tonne cheaper than on the
11 new cost implementation date."

12 She asks you to come back to her on that.

13 **A.** Hmm-hmm.

14 **Q.** So she's referring there to changing "all the figures
15 this week" in her email to you following the
16 conversation she had with you on 30 October. In light
17 of that again, to refresh your memory, is it not more
18 likely than not that when she spoke to you on 30 October
19 she gave you information about all her proposed price
20 changes, that is the price changes on the 3rd, the 10th
21 and the 17th?

22 The very next day, she was confirming "I have been
23 hiding away and changing all the figures this week and
24 the £200 per tonne price increasing is happening".

25 **A.** I can't recollect that, again, because I don't have the

1 detail in front of me. She might just be -- she might
2 have changed some of my figures, she might have changed
3 more of the other respondent's figures in the email.

4 I'm not sure what she's actually referring to there.

5 **Q.** What she's doing is she's sending an email to all her
6 processors?

7 **A.** Yes.

8 **Q.** And referring to changing all her figures. In light of
9 that, it's most likely, isn't it, that when she spoke to
10 you on 30 October, she also told you all her figures,
11 the three price moves, three waves of price moves?

12 **A.** I can't confirm that because I don't have the detail.

13 **Q.** If we can then move on to the document at 70 [Magnum],
14 almost the second to last document in this bundle, again
15 I want to ask you about this document because it appears
16 to show consistency with the information and documents
17 that you've produced. This is an email from, you see at
18 the bottom of the page, Stuart Meikle?

19 **A.** Sorry, what page number are we again?

20 **Q.** Tab 70. An email from the bottom of the page,
21 Stuart Meikle to Mike Owen of Co-op on 4 November. Then
22 it was forwarded by Stuart to Jim McGregor the following
23 morning, 5 November.

24 **A.** Sure.

25 **Q.** The email says to the Co-op:

1 "Mike,

2 "As per our conversation I have detailed below what
3 I believe is happening with retail prices over the next
4 2 weeks."

5 Can I just confirm what job Stuart Meikle had in
6 2002?

7 **A.** Stuart Meikle was national account manager in 2002 for
8 the Co-op and potentially one other account and
9 reporting to Jim McGregor.

10 **Q.** Co-op and possibly one other account?

11 **A.** Yes, I can't remember what account it was.

12 **Q.** It says what I've just read out. He then provides -- he
13 then says:

14 "Seriously Strong retails have already moved in some
15 cases. We will be checking stores all this week and
16 I will keep you updated on anything that filters through
17 over the next few days."

18 Then under the first two paragraphs he says:

19 "Seriously Strong prices checked today (I can fax
20 you receipts if required)."

21 He says:

22 "Asda, Tesco and [Sainsbury's] have all moved their
23 retails on [Seriously] Strong as of today."

24 That's 4 November.

25 **A.** Yes.

1 **Q.** So this information that Tesco has moved its retails on
2 Monday, 4 November, on Seriously Strong, as evidenced by
3 till receipts, is consistent with what I suggest
4 Lisa Oldershaw told you on 30 October in her telephone
5 conversation. That's tab 64 [Magnum]. Also in her
6 email to you at tab 62 [Magnum], that she would be
7 moving brands on 3 November into store on Monday,
8 4 November, that's consistent, isn't it?

9 **A.** It would be consistent with that message, yes.

10 **Q.** Consistent with the information that she gave to you,
11 that's right?

12 **A.** Hmm-hmm.

13 **Q.** Sorry?

14 **A.** Yes, sorry, yes. And also consistent with --

15 **Q.** The transcript writers can't pick it up unless you say
16 yes.

17 **A.** -- Stuart checking the stores that day.

18 **Q.** Yes, absolutely.

19 It's also consistent with the information -- we see
20 it's not just Tesco, it's Asda, Tesco and Sainsbury's
21 have all moved their retails on Seriously Strong as of
22 today. It's also consistent with the information you
23 obtained from Sainsbury's as recorded in your email of
24 16 October, which is at tab 47 [Magnum], that they would
25 be moving before 4 November. They would be moving from

-
- 1 21 October. That's correct, isn't it?
- 2 **A.** This is again the Seriously Strong position you're
- 3 talking about here?
- 4 **Q.** Yes.
- 5 **A.** Yes.
- 6 **Q.** It's consistent with that information, which is the
- 7 information that you passed to Tesco in your email of
- 8 21 October at tab 52. That's right, isn't it?
- 9 **A.** Yes, that's again consistent, yes.
- 10 **Q.** So the information you passed to Tesco about Sainsbury's
- 11 movements on Seriously Strong was correct. That's
- 12 right, isn't it?
- 13 **A.** Well, there's no -- yes. There's no specific dates
- 14 there of when those retails moved. It's actually just
- 15 confirming that they were evident then on 4 November.
- 16 **Q.** They were in store by 4 November?
- 17 **A.** Yes.
- 18 **Q.** Now, what Stuart Meikle then says, under those prices
- 19 that he has checked in store, he then goes to say: "What
- 20 I believe will happen elsewhere...", and this is his
- 21 prediction as to what will happen in the future, "is
- 22 Asda..." He gives information and then:
- 23 "Tesco
- 24 "11 [November] random weight McLelland retails."
- 25 Now, random weight McLelland retails, as we've

1 discussed, are the branded random weight McLelland
2 retails such as Galloway et cetera, aren't they?

3 **A.** They are, yes.

4 **Q.** Those are the products that you told Lisa Oldershaw in
5 the email of 29 October, you agreed with her that
6 because you had stock in your plant, that's Scottish
7 branded pre-pack, the random weight McLelland retails,
8 you would move retail prices on 10 November? I think
9 it's 62 you said that... Yes, you will move them from
10 10 November.

11 Now, there's one-day difference but we see
12 essentially the same information. The 10th is the
13 Sunday, the 11th is the Monday so the retails will be in
14 Tesco's store, Stuart Meikle says, on Monday,
15 11 November. That is the information that you had
16 confirmed to Lisa in that previous email, isn't it?

17 **A.** It is, yes. That's what it said, yes.

18 **Q.** Right. The other entry that Mr Meikle makes for Tesco
19 is on 18 November, "All own label lines will move".
20 That is consistent, is it not, with what is recorded in
21 Lisa Oldershaw's internal email or internal document,
22 Word document at tab 64 [Magnum], where she records that
23 all her own label lines will be moving on Sunday, the
24 17th, mild, medium, mature, extra mature and farmhouse.
25 Then Mr Meikle says those lines will be in Tesco Monday,

1 18 November. That's consistent with that information,
2 isn't it?

3 **A.** Consistent with Lisa's information?

4 **Q.** The information recorded in Ms Oldershaw's internal
5 document that I suggested to you she told you on
6 30 October?

7 **A.** It seems to be but it's also consistent with our own
8 price move matrix. We had there that own label would be
9 confirmed --

10 **Q.** The price move matrix -- which one are you talking
11 about, 62A [Magnum]?

12 **A.** The McLelland one, 62 isn't it?

13 **Q.** Yes, you see that's why I took you to that. The price
14 move matrix says that, for Tesco, some of the own label,
15 mild, medium and farmhouse, will be moving on the 11th;
16 some of it, mature and extra mature, will be moving on
17 the 18th.

18 **A.** Yes.

19 **Q.** It's only in fact Ms Oldershaw's document at tab 64
20 [Magnum], the information contained in that changes the
21 situation: all own label will be moving on 17,
22 18 November?

23 **A.** It does but, again, Stuart is speculating and this is
24 Stuart's document to Jim McGregor.

25 **Q.** He's speculating in pretty accurate terms, isn't he, at

1 this stage? In light of the fact that there is a clear
2 consistency here between Ms Oldershaw's document that
3 she said she used as a prompt for her discussions with
4 retailers including you, on 30 October, a clear
5 consistency between that document and the email from
6 your colleague, Mr Meikle, to Co-op on 4 November. The
7 reality is that she gave you that information, that all
8 own label would be moving on 17, 18 November, in her
9 conversation with you on 30 October; you told
10 Stuart Meikle and he passed on that information, exactly
11 the same information, to Co-op in his email of
12 4 November. That's what happened, isn't it?

13 **A.** I can't recollect that and I can't comment on an email
14 that Stuart Meikle sent to Jim McGregor. Stuart was
15 sending his own information to Jim but I'm not involved
16 in it.

17 **Q.** No, but I'm asking you because the only source for this
18 information or the source that appears most likely for
19 this information, on the basis of the documents --
20 I suggest to you that, clearly, this information came
21 from your discussion with Lisa Oldershaw on 30 October.
22 That's where the information came from, isn't it?

23 **A.** I still feel Stuart could have used the McLelland
24 internal matrix to come up with that information.

25 **Q.** Well, if he had used that, he would have said -- really,

1 Mr Ferguson, if he had used that, he would not have said
2 "All own label lines are moving on 18 November"; he
3 would have said "Mild, medium and farmhouse are moving
4 on 11 November, mature and extra mature are moving on
5 18 November"?

6 **A.** Well, I can't --

7 **Q.** He didn't say that, did he? He said --

8 **A.** I can't confirm why he said that. I wasn't involved in
9 the email, it's Stuart's email to Jim.

10 **Q.** No, but you were involved in the conversation with
11 Ms Oldershaw in which she gave you the information
12 referred to in her document at 64 [Magnum] and you then
13 gave that information to your colleagues in McLelland,
14 to Mr Meikle who passed it on to the Co-op?

15 **A.** I can't recollect --

16 **Q.** The documents are absolutely -- there can be no other
17 explanation for where that information came from, can
18 there, Mr Ferguson?

19 **A.** I can't recollect it and, again, I could go back to the
20 internal matrix with Stuart. I could even say he's
21 playing safe by putting that date on it to the Co-op.
22 I can't speculate why Stuart has pulled the email
23 together.

24 **Q.** If the only information he had was that contained in the
25 internal matrix, he wasn't playing safe, he was passing

1 on information that was completely inconsistent with the
2 internal matrix. It was consistent --

3 **A.** Again, I can't recollect giving the information, so
4 I can only speculate where Stuart is on it.

5 **LORD CARLILE:** Is it time for a cheese sandwich?

6 **MS SMITH:** I think it is, sir, thank you. I'm going to move
7 on to a different document after lunch.

8 **LORD CARLILE:** Sorry, Miss Rose wants to delay our sandwich.

9 **MISS ROSE:** I'm so sorry to delay your sandwich, sir.

10 **LORD CARLILE:** That's all right. No apology needed.

11 **MISS ROSE:** I simply would like to know whether there is
12 a requirement for Mr Irvine to attend this afternoon or
13 not.

14 **LORD CARLILE:** Why doesn't Ms Smith tell you in the next
15 five minutes after we've left court.

16 (1.02 pm)

17 (The short adjournment)

18 (2.00 pm)

19 **MS SMITH:** Thank you, sir.

20 You can put away the first document bundle, that's
21 the yellow-spined document bundle with 1 on it, you can
22 get rid of that one. We're just going to look at
23 documents in the second document bundle.

24 If you still have the number 2 yellow-spined bundle,
25 if you can turn to tab 71 which is at the very beginning

1 of that bundle [Magnum]. That is further contact
2 between you and Sarah Mackenzie of Sainsbury's, an email
3 from you to her of 5 November 2002.

4 The second paragraph in that email says:

5 "A quick update on the generic cheddar area. Asda
6 have moved all sizes of Smart Price mild cheddar to
7 £2.69 per kilo and Smart Price mature cheddar to £3.69
8 per kilo. This will be matched by Tesco."

9 You address that email in paragraph 29 onwards of
10 your statement, if you want to look at that [Magnum].
11 Have you got that?

12 **A.** I have, yes, I've got it open.

13 **Q.** You say in your statement, first, that the Asda prices
14 would have been in store and, second, you say that your
15 statement, "This will be matched by Tesco", was just an
16 assumption as to how Tesco would have reacted to the
17 price move by Asda. That's what you say in your --

18 **A.** That's what I've said in my statement, yes.

19 **Q.** So let's examine that statement.

20 **A.** Okay.

21 **Q.** You say in paragraph 31 [Magnum] that:

22 "The statement this will be matched by Tesco was an
23 assumption made by me on [the basis of] my market
24 experience and, in particular, [your] knowledge of how
25 the Tesco basket policy operated."

1 That's correct, isn't it?

2 **A.** Yes, that's correct.

3 **Q.** Now, can I ask you to get out the pink-spined appeal
4 bundle 2A and look at Ms Oldershaw's description of how
5 the basket policy operated. It's at tab J. That's
6 Ms Oldershaw's second witness statement, paragraphs 90
7 and 91. Actually the page I want you to look at is
8 page 30 [Magnum]. The last sentence in paragraph 90:

9 "My suppliers knew about Tesco's price basket policy
10 so McLelland would have known that if another major
11 retailer dropped its retail prices I would have to match
12 them, and that if another major retailer raised its
13 retail prices I would probably decide, although I was
14 not required, to raise my retail prices too to maximise
15 my margin."

16 She says much the same thing in the last two or
17 three lines of paragraph 91. So Tesco's basket policy
18 required Tesco not to be undercut by Asda, so they would
19 have to follow Asda if Asda reduced prices, that's the
20 case, isn't it?

21 **A.** Yes, that's what she's stating.

22 **Q.** But if Asda increased prices, Ms Oldershaw retained
23 a discretion as to whether or not she followed Asda up
24 on those increased prices. That's what she says,
25 doesn't she?

1 **A.** Yes, she says she would decide what to do.

2 **Q.** So she retains some discretion?

3 **A.** Sure.

4 **Q.** She doesn't have to match a price increase. She might
5 choose, depending on the circumstances, to steal a march
6 on Asda by remaining lower than them on those prices?

7 **A.** Correct, yes.

8 **Q.** Put that away, we can get rid of Ms Oldershaw's
9 evidence, and go back to the email at tab 71, your email
10 at tab 71 [Magnum]. It says:

11 "Asda have moved all sizes of Smart Price mild
12 cheddar to £2.69 per kilo and Smart Price mature cheddar
13 to £3.69 per kilo."

14 At least some of those prices were price increases,
15 can you remember that, by Asda, the price movements by
16 Asda?

17 **A.** I can't remember if they're price increases because it
18 doesn't say that on the email, but I would have make
19 that -- you would have to make that assumption.

20 **Q.** So if it's a price increase, it wasn't an automatic
21 application of Tesco's basket policy that Tesco would
22 follow Asda up on price, was it?

23 **A.** According to Lisa's statement, yes, that's what she
24 said.

25 **Q.** In fact she said slightly more than that. She said:

1 "That's what suppliers, including McLelland,
2 understood my basket policy to mean."

3 You remember in paragraph 90 [Magnum]?

4 **A.** Hmm-hmm.

5 **Q.** That's a yes?

6 **A.** Yes, I do.

7 **Q.** We've established you had at this time regular
8 discussions, frequent discussions with Lisa Oldershaw.
9 The more likely position is that she in fact provided
10 you with this information, that Tesco would be following
11 Asda up on the prices of Smart Price mild and mature
12 cheddar; that's more likely, isn't it?

13 **A.** I can't recollect that again. Again, I'm quite clear
14 that I'm making that assumption that Tesco will match
15 the Asda retail prices on Smart Price which are, from
16 this email, live in the market place, so I'm just making
17 the assumption.

18 **Q.** I've already suggested to you that it's an assumption
19 that's not consistent with Tesco's basket policy, and
20 I think you agreed with that? Tesco's basket policy did
21 not require them to follow Asda up on prices?

22 **A.** It doesn't but -- the point I would make on this piece
23 of business here is it's the Smart Price cheddar, and
24 Tesco have an equivalent which is Value cheddar. So my
25 assessment would be that Tesco would also move the

1 retails on that because it's a significant part of their
2 business. Value cheddar is a very significant part of
3 their business, so it's an assumption I've made.

4 **Q.** I'm sorry, I misled you, I do need to take you to one
5 document in document bundle 1 to see if we can jog your
6 memory on this. Document bundle 1, the yellow-spined
7 document, just at the very end.

8 **A.** Which tab is it?

9 **Q.** Tab 69 [Magnum]. This is an email of the day before
10 your email, it's an email you won't have seen before but
11 again to see if we can jog your memory. From
12 Neil Arthey of Dairy Crest to Lisa Oldershaw of Tesco,
13 4 November. He tells her in that email, second
14 sentence:

15 "My understanding is that Asda will be applying £200
16 per tonne, ie 20p per kilo to the RSPs of Smart Price
17 mild and mature."

18 So Neil Arthey is telling Lisa Oldershaw that Asda
19 were moving up on Smart Price mild and mature. You can
20 see that?

21 **A.** Hmm-hmm.

22 **Q.** That's a yes? I'm sorry --

23 **A.** Sorry, yes. I can see that, but it's an email from
24 Neil Arthey to Lisa Rowbottom and I'm not involved in it
25 at all.

1 Q. Then if you look back at your email to Sarah Mackenzie
2 of 5 November, you pass information that Asda's move on
3 Smart Price mild and mature will be matched by Tesco?

4 A. Yes --

5 Q. My suggestion is that, having seen that email from
6 Neil Arthey to Lisa Oldershaw of Tesco, it's most likely
7 that the information as to what Tesco will be doing in
8 response to Asda's moves on Smart Price, Lisa Oldershaw
9 had that information and she gave it to you?

10 A. Again, I would have no recollection of that and, again,
11 I'm quite clear that I'm making that assumption. As
12 I say, the Value business is a significant part of
13 Tesco's business, and my market assessment would be Asda
14 have moved live in the market place with Smart Price and
15 I'm making the assumption that Tesco would move as well.

16 Q. Let's see what Ms Oldershaw says about that email. She
17 refers to it in her second witness statement, I don't
18 know if you still have that open, paragraph 124.

19 A. No, I haven't got it open at the moment.

20 Q. I'm sorry.

21 A. Which folder is that in?

22 Q. That's in 2A, pink 2A.

23 A. Which tab is that?

24 Q. J. Page 43, paragraph 124 [Magnum].

25 A. Okay.

1 **MISS ROSE:** Sir, I think in order for this point to be
2 fairly put, the witness needs to be asked to read from
3 paragraph 122 which shows that, in fact, Tesco was
4 decreasing four of its six prices to match Asda's
5 prices.

6 **MS SMITH:** I'm going to take the witness, if I'm allowed to,
7 to 122. I'd like to do it in the order I'd prefer, if
8 that's okay, sir.

9 **LORD CARLILE:** Good idea.

10 **MS SMITH:** Paragraph 124, Lisa says -- she's referring here,
11 you'll see on the heading above 121, "Email from
12 McLelland to Sainsbury's dated 5 November 2002", so
13 she's referring to the email at tab 71.

14 She says at 124:

15 "I'm not sure whether I had told McLelland the new
16 retail prices for these random weight products by
17 5 November. If Tom Ferguson had received this
18 information from me by 5 November it was certainly not
19 with the intention he should pass this information to
20 Sainsbury's."

21 So although she says "I didn't intend him to pass
22 this information", she appears to accept at least
23 a possibility, and I put it no higher than that, that
24 she provided you with this information. In light of
25 that, can you recall whether or not she did provide you

1 with that information?

2 **A.** Again I have no recollection of her passing that
3 information to me.

4 **Q.** In paragraph 122 [Magnum], she says -- this is an
5 exhibit which does not appear in the bundle, I'll take
6 you to it if you need to see it but I think it's
7 summarised properly in paragraph 122.

8 She says:

9 "Exhibit LO/1 [Tab 30] shows the dates on which
10 Tesco moved the retail prices per kilo for its
11 equivalent Tesco Value cheese lines. This shows that
12 Tesco did match the £2.69-kilo Asda price for all three
13 sizes of Tesco Value mild white coloured cheddar and the
14 £3.69-kilo Asda price for all three sizes of Tesco Value
15 full flavoured cheddar. For both the mild and full
16 flavoured cheddar, the Tesco retail price moves to align
17 all packs at the same price involve price decreases for
18 the small and medium packs but a price increase for the
19 large size packs."

20 So there are two points there. As I indicated, for
21 at least some of these Smart Price mild and mature
22 lines, Tesco were matching a price increase, do you see
23 that, by Asda?

24 **A.** They are matching a price decrease, is that?

25 **Q.** A price increase for the -- last six words:

1 "... a price increase for the large size packs."

2 **A.** Yes, a price increase for the large pack and a price
3 decrease for the other two sizes.

4 **Q.** That's right. I think if you look back at the
5 transcript, my question to you was for at least some of
6 these lines Tesco was following Asda up.

7 So you would accept that for at least some of these
8 lines it appears that Tesco was following Asda up.

9 The second point we take from this, from 122, is
10 that the information you passed on to Sainsbury's on
11 5 November was correct, Tesco did match Asda's prices on
12 Smart Price mild and mature, do you see that?

13 **A.** Yes, that's exactly what I'm saying there, and again
14 it's my assessment of the market because the value
15 business is such a significant sector, that if Asda had
16 made a move we would match it.

17 **Q.** It's a significant sector, it probably accounts for
18 quite a large volume of Tesco's and Asda's cheese?

19 **A.** It will do, absolutely.

20 **Q.** So with regard to the price increases, which is what
21 we're looking at at the moment, Lisa Oldershaw might
22 have wanted, in such a significant sector, to have
23 stolen a march on Asda and not increased their prices in
24 line with Asda on such a significant product. She had
25 the discretion to do that and, with such a high value

1 and significant product it would have been worth her
2 while doing that, wouldn't it? It might have been worth
3 her while?

4 **A.** It might have been but, again, it's the Tesco policy to
5 be competitive.

6 **Q.** Yes, and where you can undercut one of your biggest
7 competitors on one of their biggest lines, and you're
8 not required by your basket policy to follow them up,
9 you might want to be competitive by undercutting them on
10 that important line, might you not?

11 **A.** Again you may want to but again that's a decision that
12 Lisa would take.

13 **Q.** Exactly, that's what I'm saying. It's not an assumption
14 that you could reasonably draw that she would
15 necessarily follow Asda up on those prices. What you
16 were saying in the email of 5 November was information
17 that you had been given by Tesco, wasn't it?

18 **A.** No, I would still stand by my statement that that would
19 be my market assessment of what was happening.

20 **Q.** Let's move on then to tab 76 in the second document
21 bundle [Magnum]. This is an email from you to
22 Sarah Mackenzie of Sainsbury's of 7 November. It says:
23 "Good morning Sarah
24 "Busy times. I have updated the spreadsheet with
25 the proposed new retails covering the straight £200 per

1 tonne movement. Can you please sign this off by
2 lunchtime today and I will complete the planning
3 process. With the timings you have submitted we would
4 plan to deliver at the new costs and retails in the
5 following way.

6 "Monday the 18th November all Sainsbury own label
7 pre-pack.

8 "Monday the 25th of November all deli.

9 "The McLelland range of branded random weight
10 cheddars will be effective from the 11th of November and
11 we have already actioned the Seriously Strong pre-pack
12 costs from the 22nd of October."

13 So you are giving her the various dates at which you
14 plan to deliver the new costs and retails. So you're
15 talking here about costs and retail prices?

16 **A.** Yes, that's what it says.

17 **Q.** We see here that the date for own label has slipped now
18 by a week, it was previously 11 November, if you recall,
19 it's now 18 November, do you recall that?

20 **A.** Yes, I see that.

21 **Q.** The date for deli has slipped by a week as well. It was
22 18 November, it's now 25 November, you see that?

23 **A.** Yes, I can, yes.

24 **Q.** But the date for the McLelland branded random weight
25 cheddar is still 11 November, as you indicated in your

1 previous emails?

2 A. Yes.

3 Q. To enable you to sell through the old price stock, do
4 you remember that?

5 A. Yes, I do.

6 Q. And it confirms that they have already actioned the
7 Seriously Strong pre-pack costs from 22 October, as had
8 been indicated on your internal price move matrix.
9 I won't take you back to it if you can remember it.

10 A. Okay, yes.

11 Q. But do you remember that?

12 A. Yes, I do.

13 Q. They've acted in accordance with the information -- in
14 fact they were doing what they had told you they would
15 do on those products?

16 A. Hmm-hmm.

17 Q. That's a yes?

18 A. Yes. Sorry, yes.

19 Q. I know, I'm sorry, it's just that the transcribers can't
20 pick up --

21 A. I understand, it's my fault.

22 Q. Can we then look at tab 78 [Magnum]. There are two --
23 an email from you to Lisa Oldershaw on the same day,
24 Thursday, 7 November 2002:

25 "Hi Lisa

1 "Time marches on, guess who goes on holiday now
2 until Tuesday next week. I will be out of the office
3 now [that was Thursday 7 November] until Tuesday and we
4 need to confirm the new retails for packing on Monday
5 the 11th for supply from the 17th. Can you please
6 either send the information to Jim McGregor by
7 completing the initial spreadsheet I sent over and
8 sending it back or phone Jim in the office on Friday."

9 Which would have been Friday, 8 November.

10 "I will obviously see you on Wednesday and I will
11 catch up on Tuesday when I am back in the office.

12 "Cheers Tom."

13 So you refer to "initial spreadsheet I sent over",
14 I think we've seen that you sent her a spreadsheet on
15 21 October, which is tab 52 [Magnum], and we also see
16 reference to a spreadsheet on 29 October, an email at
17 tab 62 [Magnum]. But you sent her -- those are what
18 you're referring to, the spreadsheets you'd previously
19 sent her?

20 **A.** Yes, I would say that's what I'm referring to there,
21 yes.

22 **Q.** Then at tab 79 [Magnum], the next tab, we see an email
23 from Jim McGregor of 8 November, lunchtime on the
24 Friday?

25 **A.** Yes.

1 Q. To Alastair Irvine and to you, this was while you were
2 on holiday actually?

3 A. I was on holiday, yes, correct.

4 Q. It says:

5 "Lisa called to state Tesco will not commit to
6 moving own brand until they see that Asda have moved and
7 therefore will not give us their rsps."

8 That's retail selling prices.

9 "While they are relatively confident that everything
10 is in place with Asda, they are taking a 'we won't
11 believe it until we see it' stance."

12 As we see, this is about movement on own brand, so
13 that's Tesco's own label products, is that right?

14 A. That's correct, yes. Yes.

15 Q. Now, we know from Lisa's internal note that we looked at
16 before lunch, at tab 64 [Magnum], that own label
17 products were included in her last wave and were
18 supposed to be moving from 17 November. Do you remember
19 that?

20 A. I do, yes.

21 Q. But now it appears that Tesco is hesitating on this
22 movement and they are saying -- or Mr McGregor is
23 reporting to you that Lisa is saying Tesco will not
24 commit to moving own brand until they see that Asda have
25 moved. That's an accurate statement of what's going on?

1 **A.** Yes, that's the statement that Jim is making to Alastair
2 and obviously came from his conversation with Lisa.

3 **Q.** If we look at the words -- he says this:

4 "While they are relatively confident that everything
5 is in place with Asda, they are taking a 'we won't
6 believe it until we see it' stance."

7 You address this document in paragraph 33 of your
8 statement, which you should also have in front of you
9 [Magnum], and you say in paragraph 33 that your
10 interpretation of that phrase -- this is the last
11 sentence of your paragraph 33 -- is that this was:

12 "... just a reference to a general expectation trend
13 in the market of general movement implementing the £200
14 per tonne cost price increase."

15 That's what you say, isn't it?

16 **A.** It is what I say, yes.

17 **Q.** But first, in this email, Tesco were talking or saying,
18 reported -- Jim McGregor was reporting that Lisa was
19 saying that Tesco would not commit to moving own brand
20 until they see that Asda has moved. So that's clearly
21 a reference to Asda's retail prices isn't it? It's
22 Asda's retail price movement?

23 **A.** Yes, that's what she's stating there.

24 **Q.** The same reference to RSPs. It's about Tesco's retail
25 prices, isn't it?

1 **A.** Yes, what Jim is saying there is she won't give us our
2 new RSPs for us to pack into the own brand business, so
3 she's saying that quite clearly.

4 **Q.** That's right. She's saying, Jim is reporting Lisa
5 saying that Tesco would not give you her new retail
6 prices --

7 **A.** Yes.

8 **Q.** -- for own label, until she had seen Asda moving theirs;
9 that's correct, isn't it, their retail prices?

10 **A.** Yes, she's making that statement, that she wants to see
11 the evidence in store of the Asda retail movement and
12 then she will make her decision on her retail movement.
13 That's what she's saying.

14 **Q.** And McLelland -- let's see the previous contact that
15 McLelland had had with Asda. Sorry, we're going now
16 back again, cross-referring to the first document
17 bundle, tab 57 [Magnum].

18 **A.** Is this yellow-spined 1?

19 **Q.** Yes, please. So this is just, by way of background, an
20 email from Stuart Meikle to David Storey of Asda, and it
21 says:

22 "As discussed, we will move prices for pre-packed
23 cheese and butter from the 4th and deli cheese from the
24 11th. Please can you send me confirmation of these
25 dates."

1 So they're discussing dates at that stage, and then,
2 at 62A [Magnum], we've looked at this document before
3 but now let's look at it just for what's recorded as to
4 Asda, the entry for Asda. 62A is the internal price
5 move matrix.

6 **A.** Yes.

7 **Q.** That is consistent with what was in the previous email,
8 own label cheese and butter is to move -- brands and own
9 label cheese and butter are to move on the 4th, deli is
10 to move on the 11th?

11 **A.** Yes.

12 **Q.** Then at tab 70 [Magnum], again we've looked at this
13 document before but now I just want to look at what is
14 said about Asda. The Meikle email to the Co-op for
15 Asda, it says:

16 "Asda on 4 November moved on Seriously Strong
17 McLelland random weight brands. Will move all deli
18 lines in pre-pack own label on 11 November."

19 The deli lines and pre-pack are now delayed until
20 11 November.

21 **A.** Hmm-hmm.

22 **Q.** So there are two pieces of information on Asda in this
23 email of 4 November. There is the information as to the
24 movement on Seriously Strong prices, which Mr Meikle had
25 checked and said he can provide till receipts if

1 necessary, that is that Asda had already moved to their
2 retails on Seriously Strong as of 4 November, you can
3 see that?

4 **A.** Hmm-hmm.

5 **Q.** It says that:

6 "Asda will be moving their deli lines and pre-pack
7 own label on 11 November."

8 **A.** That's what it says, yes.

9 **Q.** So it's specific information, again as regards Asda.
10 I suggest to you that that information came to McLelland
11 from Asda. That's the most likely source of that
12 information, isn't it?

13 **A.** Which information are you referring to, sorry?

14 **Q.** The information that they had moved, obviously that was
15 by price check?

16 **A.** Yes.

17 **Q.** But the information they would be moving deli lines and
18 pre-pack own label on 11 November?

19 **A.** Yes, that would have come from ongoing discussions with
20 them, yes.

21 **Q.** So if we now go back to the email in tab 79 of the
22 second document bundle [Magnum], when in that email
23 Mr McGregor says:

24 "While they are relatively confident that everything
25 is in place with Asda..."

1 "Everything is in place with Asda" is a statement he
2 made based on information obtained by McLelland from
3 Asda, that Asda were moving pre-pack own label on
4 11 November, they would be moving their pre-pack own
5 label.

6 **A.** Well, we see Jim is not making any statement of timings
7 on his email to Alastair, and I feel that again he's
8 just raising and confirming his expectation of what he
9 expects to see happening.

10 **Q.** What he expects to see happening is everything is in
11 place with Asda, Asda had agreed to move their prices,
12 increase their prices on own brand. He's saying that,
13 isn't he? He's maybe not giving in this email an exact
14 date --

15 **A.** He's not being very specific. I think he's just making
16 a statement that they are confident that within the
17 industry everything will be in place. He's making
18 a statement, he's not being specific.

19 **Q.** And his confidence is based on what he's been told by
20 Asda?

21 **A.** I would feel his confidence is because of the market
22 expectation again. It's hard to say when he's not being
23 specific here.

24 **Q.** We've seen from the documents that McLelland have
25 specific information that Asda will be moving own brand

1 on 11 November. All I'm suggesting to you is that, when
2 Mr McGregor says he's confident that everything is in
3 place with Asda, he is confident that Asda will also be
4 moving their own brand and he got that information from
5 Asda?

6 **A.** He would have got that information from discussions with
7 Asda but, again, it's an expectation and not a definite
8 statement.

9 **Q.** He says he's relatively confident that everything is in
10 place with Asda.

11 **A.** Yes, so it's an expectation I would say, still.

12 **Q.** He says:

13 "... they are relatively confident that everything
14 is in place with Asda..."

15 So it appears that he reassured Tesco, "they",
16 reassured Lisa Oldershaw of Tesco, that everything was
17 in place with Asda. So he told her during the phone
18 call, "Don't worry, everything is in place with Asda,
19 you can be relatively confident that they were", and he
20 got the impression they were confident that everything
21 was in place with Asda?

22 **A.** Well, he may have but I wasn't party to the phone call
23 so I can't confirm that.

24 **Q.** I think what you can confirm is that Lisa was concerned
25 whether Asda was complying with the plan, the plan to

1 put up own brand on this last wave, and so, although
2 Tesco's movements were going ahead for 11 November as
3 planned, she put the brakes on in respect of the own
4 brand which had been scheduled for 17 November, is that
5 what you recollect?

6 **A.** I recollect that that is what happened, yes. She has
7 certainly put the brakes on, I would say, yes.

8 **Q.** It does appear that Tesco's movements for 11 November
9 were going ahead as planned, and if I could ask you to
10 turn to tab 82 [Magnum], that is an email from
11 Stuart Meikle of 13 November to David Storey, and he
12 reports:

13 "All McLelland random weight brands have moved to
14 increased retail prices in Tesco..."

15 So by 13 November he was reporting back that, as
16 anticipated and as agreed, McLelland's random weight
17 brands increased their retail prices in Tesco by the
18 13th. I think the date in your emails was 11 November.
19 So that's what happened, wasn't it?

20 **A.** Yes, Stuart is saying quite clearly there that the
21 McLelland random weight brands are live in Tesco, that's
22 what he's saying here.

23 **Q.** So the McLelland random weight brands were anticipated
24 in your email to Lisa Oldershaw of 29 October at tab 62
25 [Magnum], which we've seen, you said "I want to move

1 retails on those on 10 and 11 November because I've got
2 stock in"?

3 **A.** Yes, that's correct.

4 **Q.** That's exactly what happened, they moved as anticipated
5 on that date, is that right?

6 **A.** Correct. Yes, that's exactly --

7 **LORD CARLILE:** Can I just ask, was Mr Meikle given
8 a specific role in relation to the strategy around these
9 cheese price changes?

10 **A.** No, Stuart Meikle was one of the national account team
11 so he would look after -- the Co-op is his customer, and
12 I'm sure he would have had one other customer but
13 I can't remember what it was. So he was the national
14 account manager looking after the Co-op account.

15 **LORD CARLILE:** Morrisons?

16 **A.** I can't remember, sir, I can't remember which accounts
17 he was looking after.

18 **LORD CARLILE:** But he didn't have a strategic role in
19 relation --

20 **A.** No.

21 **MS SMITH:** Because in this email he's talking to Asda as
22 well, isn't he?

23 **A.** Yes.

24 **Q.** We've seen him talking to Co-op, here he's talking to
25 Asda --

1 **A.** Yes, my correction, he would be looking after, as I can
2 see clearly now, because we did have one earlier on from
3 the Co-op, yes? So he would be doing the Co-op and
4 Asda, but he didn't have a strategic role outside of
5 being an account manager.

6 **LORD CARLILE:** Sorry, I was looking at 79A as well [Magnum]
7 which seems to suggest he was looking at Morrisons too,
8 which is why I asked the question as to whether he had
9 a strategic role.

10 **MS SMITH:** And the document in fact I was about to take you
11 to, Mr Ferguson, was at tab 85 [Magnum], which is an
12 email from Stuart Meikle to Somerfield. You'll see the
13 second email on that page, 14 November, Stuart Meikle to
14 Prasheel Kunwardia from Somerfield, copied to you. That
15 email also shows he's reporting to Somerfield in the
16 second paragraph:

17 "Asda, Safeway and [Sainsbury's] have moved by 20p
18 per kilo across all random weight lines. Tesco and
19 Co-op have moved by more to allow for margin maintenance
20 on some lines."

21 So he's again reporting now to Somerfield confirming
22 that Tesco has moved as planned on 11 November?

23 **A.** I feel that he was reporting to Somerfield on this
24 occasion because the Somerfield account manager was not
25 available. My own understanding would be -- was it

1 Calum Morris we had then, looking after the Somerfield
2 business?

3 Q. But we've seen Stuart Meikle talking to Morrisons, Asda,
4 Somerfield.

5 A. I've seen him talking in the emails certainly to Asda
6 and to the Co-op.

7 Q. And Co-op?

8 A. Yes. I haven't seen a Morrisons one yet.

9 Q. That was 79A [Magnum] which the chair referred you to.

10 A. Was it? Okay.

11 Q. Going back to the situation for Tesco at this time, so
12 we've seen Tesco implemented the moves planned for
13 11 November but they're still being pushed on the own
14 label moves which were planned for 17 November. So can
15 I take you in that regard to tab 80 [Magnum].

16 A. Yes, got it.

17 Q. This is an internal McLelland email from you to
18 colleagues in McLelland, 12 November, and its subject is
19 "Tesco own label cheddar".

20 A. Correct.

21 Q. I stress that because what is said in the body of the
22 document refers only, I think, to that subject, to Tesco
23 own label cheddar. We've already discussed, in line
24 with Lisa Oldershaw's internal document at tab 64
25 [Magnum], own label cheddar was planned to move on

1 18 November. You remember that?

2 **A.** Yes, that document, yes.

3 **Q.** So Tesco appear to be dragging their feet on the move of
4 own label cheddar on 18 November. The document says:

5 "Dialogue is still continuing with Tesco regarding
6 the market movement of £200 per tonne. As of today,
7 Tesco have not confirmed any movement on retails and the
8 likely outcome of this is that we could have the
9 confirmation by the end of the week."

10 So what it appears is that there has been no
11 confirmation on the retails of own label cheddar yet
12 from Tesco but you were hoping to get confirmation by
13 the end of the week?

14 **A.** Yes, I would say that's quite clearly saying that the
15 dialogue is continuing and that would obviously be the
16 hopeful conclusion, yes.

17 **Q.** This is about dialogue not generally but just for the
18 movements on own label cheddar, that's right, isn't it?

19 **A.** Yes, because that's what I'm referring to on the email,
20 yes.

21 **Q.** In fact, it appears that you had some difficulty getting
22 Lisa Oldershaw to commit to the date to move on own
23 label and you went over her head and spoke to Rob Hirst.
24 Let's see the document at --

25 **A.** I wouldn't agree with that at all, I'm sorry.

1 Q. Let's see the document at 87 [Magnum].

2 A. Yes, it's a document to Rob Hirst.

3 Q. This is an email from you to Rob Hirst and I'm not sure,
4 I'll be corrected if I'm wrong, I'm not sure that
5 previous emails were copied to Rob Hirst. But this one
6 is from you to Rob Hirst, copied to Lisa Oldershaw, and
7 it says:

8 "Dear Rob, please find enclosed my completed control
9 document which will cover our complete range."

10 If you look at the completed control document
11 attached, that is a spreadsheet which sets out again --
12 in fact I think it's in the same form as your previous
13 spreadsheet?

14 A. Yes. I would say they're very similar.

15 Q. All the products that McLelland supplied to Tesco at the
16 time, is that right?

17 A. Yes.

18 Q. Unfortunately this is one of those documents that has
19 been printed out on portrait so it runs over a number of
20 pages. But if you can see, what it does is it -- let's
21 take "Contract Lines". It says "Product, Invoiced By,
22 Current Case Price, Current Tonne Price", then go over
23 two pages, "New Tonne Price, New Case Price, Current
24 Retail, Recommended Retail", and this is not blacked out
25 in any sort of confidentiality ring, I think it is just

1 highlighting, I think it says "Retail Maintaining
2 Percentage Margin" and then it says "Effective From".

3 **LORD CARLILE:** Sorry, I can't see under the -- "Retail
4 Maintaining Percentage Margin"?

5 **MS SMITH:** I thought we had obtained better copies of this.

6 **LORD CARLILE:** It's all right, it's not a problem, as long
7 as we know what it says.

8 I can read "Recommended Retail" but not -- "Retail
9 Maintaining Percentage Margin" or something like that?

10 **MS SMITH:** I'll see if I can get better copies. It's what
11 was on the column in the previous spreadsheets.

12 Then this has now a date column, "Effective From",
13 and you'll see the dates, the various different dates
14 for the various products, 3 November, 10 November,
15 17 November and 1 December for different products.

16 If you go back to the email itself, having seen the
17 spreadsheet, you refer to that completed control
18 document which will "cover our complete range", and as
19 you've agreed, it's now the complete McLelland range for
20 Tesco?

21 **A.** Yes, I would agree that's the complete range that we
22 supplied, yes.

23 **Q.** And it says -- your email says:

24 "I will therefore plan to increase costs on the
25 Tesco own label range from 1 December and also move the

1 deli range from that same date."

2 So that is the increase on cost prices for own
3 label, 1 December, do you agree?

4 **A.** Yes, that's what I'm saying here, I would:

5 "... plan to increase the costs on the Tesco own
6 label ... from 1 December ..."

7 **Q.** Then you say:

8 "As agreed I will start packing the Tesco named
9 creamery range at the new retails protecting your
10 existing margin, and I would plan to deliver the new
11 retails from 1 December."

12 So the Tesco named creamery range, that is a subset,
13 as it were, of Tesco own label?

14 **A.** Yes, it's a sub-brand as we would call it. I think the
15 example there would be Tesco -- Tesco Caledonian would
16 be an example.

17 **Q.** Tesco Caledonian, for example.

18 **A.** Yes.

19 **Q.** So the date for the new retails for that is 1 December,
20 is that right?

21 **A.** Yes, I'm saying here I plan to deliver the new retails
22 from 1 December.

23 **Q.** "On the Scottish mild and medium pre-pack I have
24 included suggested retails on the control document if we
25 can agree on your new retail position on these lines by

1 Wednesday next week and then pack for delivery on
2 1 December."

3 If we look at the control document, those Tesco own
4 brand Scottish are, for example, Tesco Scottish coloured
5 mild, towards the bottom of the first page of the
6 spreadsheet. That's Tesco own brand Scottish, is that
7 right?

8 **A.** That's correct, yes.

9 **Q.** It's not the McLelland Scottish branded random weight,
10 it's different?

11 **A.** No, it's Tesco Scottish only, but yes.

12 **Q.** So it's Tesco Scottish coloured -- Tesco Scottish
13 coloured I think is all of it actually.

14 You are waiting for confirmation as to the exact
15 retail price but, again, the date for new retails for
16 those products is 1 December, is that right?

17 **A.** Yes, that's correct, that's what I'm stating here on the
18 email.

19 **Q.** Again, that is a subset of Tesco own label, is that
20 right?

21 **A.** It is Tesco own label, yes.

22 So we see the spreadsheet: all of Tesco prices, both
23 cost and retail, are to have moved by 1 December.
24 That's right, isn't it?

25 **A.** That's correct, yes.

1 **Q.** You say in the covering email:

2 "This completed movement will allow us as a business
3 to confidently commit to our 2p per litre increase on
4 milk from the 1st of December."

5 So Tesco had now agreed a cost and retail price
6 increase on all their range, that's right, isn't it, for
7 1 December?

8 **A.** Yes, that's what it's saying here, yes.

9 **Q.** So now you can finally confidently commit to your
10 2p per litre increase on milk from 1 December. Now
11 they've agreed to everything, you can increase the
12 farm gate price for milk by 2p per litre, that's what
13 you're saying there, isn't it?

14 **A.** Yes, that's what I'm saying.

15 I just need to examine the document because I still
16 have here "we can agree on your new retail position".
17 There still had to be some final decision by Tesco just
18 to sign that off, I would say.

19 **Q.** I would suggest to you that what "we can agree" means is
20 do they go with cash margin maintenance or do they go
21 with percentage margin maintenance?

22 **A.** Yes, it would be, but I would still need that
23 information because you can see time is moving on, and
24 if we have to supply by 1 December then again I would
25 need to instruct the packing station to be clear about

1 that.

2 **Q.** You say:

3 "This completed movement will allow us as a business
4 to confidently commit to our 2p per litre increase..."

5 So you were confident that you would be in
6 a position to commit to the 2p per litre increase, and
7 you would be able to commit to that if Tesco went with
8 cash margin maintenance, 20p per kilo, ie 2p per litre,
9 or it went a bit more, either of those would allow
10 you --

11 **A.** Yes, exactly, that's their decision, they would decide
12 on that.

13 **Q.** But either of those, either choosing cash margin
14 maintenance or choosing for one or two of these lines to
15 go with percentage margin maintenance, would allow to
16 you deliver that 2p per litre to the farmers, wouldn't
17 it?

18 **A.** It would be, because that would be the cost increase
19 confirmed and I could then commit, yes.

20 **Q.** You also say:

21 "This completed movement will allow us as a business
22 to confidently commit to our 2p per litre increase..."

23 In order to allow you as a business to do that, you
24 needed not just the increase by Tesco but you needed the
25 increase by all supermarkets, didn't you?

1 **A.** As an overall business, yes, we would do, but I just
2 feel it's language again I've got in this email, to be
3 quite frank.

4 **Q.** Let's take you finally to tab 88 [Magnum], this is
5 a reply email, it reproduces the email we've just been
6 looking at at the bottom. An email now from you to
7 Lisa Oldershaw, not copied now to Rob Hirst. He appears
8 to have done his bit.

9 There's an email from you to Lisa Oldershaw on
10 27 November:

11 "Good morning Lisa

12 "I will contact you this morning to confirm the
13 retails on mild, medium and generic mature. I have
14 updated the control document with the named creamery
15 retails, ie Caledonian mature at £6.82 and £6.62 per
16 kilo. We have started to pack at these retails in
17 preparation for delivery from the 1st of December."

18 So when we're talking about mild and medium here,
19 you appear to be talking about Scottish mild and medium,
20 which you were talking about in the previous email, or
21 the email just below, because you had not, in the email
22 of 22 November, got agreement from Tesco as to their
23 exact retails, but now you were contacting Lisa this
24 morning to confirm the retails on those outstanding
25 products. Is that what we're talking about here?

1 **A.** Yes, that's exactly what we're talking about. I'm still
2 waiting on the confirmation in order to move to packing,
3 yes.

4 **Q.** You were going to call her that morning, the 27th, to
5 confirm those retails so that you could then pack,
6 that's what happened?

7 **A.** Yes, that's correct.

8 **Q.** And you say you've updated the control document with the
9 named creamery retails, and you have started to pack
10 with those because you had already been given
11 confirmation as recorded in your 22 November email?

12 **A.** Correct, that's right. I think we can see why I
13 contacted Rob because I think Lisa was off at the time.

14 **Q.** Where do we get that from?

15 **A.** I put:

16 "Cheers Tom (put your feet up now and relax)."

17 Because I do feel that -- she had some sports
18 injury -- I would have to say that your comment about me
19 going above Lisa Rowbottom would not have happened in
20 the relationship I had with Tesco.

21 **Q.** "Put your feet up now and relax", was that not instead
22 because of the busy times that you'd been talking about,
23 the frantic --

24 **A.** I think she did have a sports injury at the time,
25 I recollect that happening. We can check that out.

1 Q. So at tab 89 [Magnum], you see the second email on that
2 page, from Lisa Rowbottom, 27 November to Simon Hossack,
3 who I think was her assistant?

4 A. I believe he was at the time, yes.

5 Q. And copied to you, "Cost and Retail Selling Price
6 Changes":

7 "Simon, here are more cost changes and retails to be
8 changed as stocks run out - so you will need to keep
9 this well in control and liaise with the suppliers."

10 So you see the spreadsheet attached to her email,
11 and you see the date on the far right column of that
12 email is consistent with the date that you'd been
13 previously discussing, isn't it?

14 A. It is, yes, yes.

15 Q. This table does not include deli lines, but the retails,
16 the RSPs, which is in the fourth column, if you want to
17 put your finger in that, they match the RSPs you sent to
18 her earlier that day at tab 88. It's the bottom part of
19 your table at tab 88 [Magnum].

20 A. Okay.

21 Q. "Tesco cheddar, Scottish mild."

22 A. Okay, yes, I see that.

23 Q. You'll see that the RSPs are the same as those that you
24 had recommended at tab 88.

25 As you can see from tab 88, the prices she had gone

1 with on those products are the recommended retail which
2 was [REDACTED] maintenance, is that right?

3 Sorry, I should break that down into two questions.
4 First of all, the RSPs that she has listed at tab 89
5 [Magnum] in her document are the RSPs that are listed
6 under "Recommended retail" column in your document at 89
7 (sic), is that right?

8 **A.** Yes, I would say that's correct, yes.

9 **Q.** And those "Recommended retail" are moving up from
10 current retail by 20p per kilo, which is [REDACTED]
11 maintenance. Do you see that from your document at 88
12 [Magnum]?

13 **A.** Let me just check one...

14 I would say it isn't. I would say it's the other
15 column that's been put through here.

16 **Q.** Right.

17 **A.** Looking at the -- because it's scored out at the top
18 I can't read that properly.

19 **Q.** I'm sorry, you're absolutely right. Some are [REDACTED]
20 [REDACTED] and some are [REDACTED]. But they
21 reproduce what's in your --

22 **A.** Okay, yes. So --

23 **Q.** -- email, so they match, don't they, so --

24 **A.** -- they match a retail --

25 **Q.** -- they match either the [REDACTED] or --

1 **A.** So again Lisa has made her decision with the earlier
2 information that I gave her to either make the decision,
3 go with margin maintenance or go with the [REDACTED]
4 position. You decide and you confirm back to me what
5 you want me to do.

6 **Q.** So in 88 [Magnum] you were recommending some [REDACTED]
7 maintenance, some [REDACTED] --

8 **A.** Yes, I gave that in the overall information just to
9 provide everything so that they can make the decision,
10 and that's what they've done here.

11 **Q.** In fact in 88 you had chosen by then I think, or she had
12 chosen and told you, because on some of them you put in
13 the recommended retail, which is the [REDACTED]
14 maintenance, and some of them you put in [REDACTED]
15 [REDACTED] maintenance?

16 **A.** There is some with that, yes.

17 **Q.** Whereas, when you first sent it to her in 87 [Magnum]
18 you had both figures, by the time you got to tab 88
19 I think she had indicated to you which of those she was
20 going with [REDACTED] and which by [REDACTED]?

21 **A.** Potentially, there had been discussions ongoing and she
22 had probably made decisions as she was moving along the
23 process.

24 **MS POTTER:** I'm a bit concerned here because without the
25 headings it's quite difficult to follow on this

1 document, but it looked to me as if actually we have
2 just got figures for both for every product.

3 **MS SMITH:** Which document are you looking at?

4 **MS POTTER:** In 88 [Magnum].

5 **MS SMITH:** If you look in 88 towards the bottom where we
6 start with "Tesco Scots col mild 300 grammes" -- I'm
7 sorry, it starts at Tesco Caledonian, those are the ones
8 that you have in 89.

9 If you start from below Seriously Strong, Tesco
10 Caledonian, there is --

11 **MS POTTER:** Right, there are some there that have just one,
12 yes, I can see that, whereas further up you've got both.

13 **A.** Yes.

14 **MS SMITH:** If you count the number of entries below
15 Seriously Strong, there are 16 entries, starting with
16 Tesco Caledonian extra mature coloured. Those 16
17 entries, although they're not in exactly the same order,
18 are the 16 entries on the table at 89. You'll see for
19 those 16 entries a choice has been made by this date
20 between [REDACTED] or [REDACTED].

21 **MS POTTER:** Thank you.

22 **MS SMITH:** And the choice is reflected on Mr Ferguson's
23 table at 88, and then copied, in effect, into
24 Ms Oldershaw's table at 89.

25 **MS POTTER:** That's helpful, thank you.

1 **MS SMITH:** Right. Can we move now on to 2003 which I hope
2 will be a little bit shorter, I know will be a little
3 bit shorter.

4 Just to get some background on 2003, Mr Ferguson,
5 you deal with 2003 in paragraph 34 of your statement
6 [Magnum], and you say that in the autumn of 2003
7 McLelland was trying to get a cost price increase across
8 all of its cheese lines. Is that right?

9 **A.** That's correct, yes.

10 **Q.** And that cost price increase was to address its internal
11 costs, I think that's right?

12 **A.** That's right, that's exactly right.

13 **Q.** The proposed cost price increase was, again, £200 per
14 tonne, is that right?

15 **A.** It was, yes.

16 **Q.** That was one issue that was live in 2003?

17 **A.** Hmm-hmm.

18 **Q.** The other issue that was facing McLelland specifically
19 as regards Tesco, rather than generally, was that, in
20 this period, late summer/autumn 2003, Tesco was
21 complaining to McLelland, Lisa Oldershaw was complaining
22 to you about her margins on Seriously Strong, is that
23 right?

24 **A.** There was that issue at that time and it would be
25 directed at Stuart Meikle and not directed to me.

1 Q. I'm sorry, you're right, it was directed at Meikle --

2 A. Yes.

3 Q. As you can see from tab 98 [Magnum], I think you've
4 already agreed, tab 98 is a letter from Jim McGregor to
5 Lisa Rowbottom as she then was, now Oldershaw,
6 29 August 2003:

7 "Dear Lisa,

8 "I am writing to inform you of a price increase that
9 we will be making across our range of products from
10 1st October 2003."

11 This was the cost price that McLelland was seeking
12 across all its lines from all retailers, is that right,
13 not just from Tesco?

14 A. Yes, we would be, again, moving the total cost structure
15 of our business, yes.

16 Q. We see a very similar letter from Jim McGregor to
17 Trevor Young of Safeway at tab 100, so similar letters
18 were going to, I think you've agreed, all retailers
19 probably at this time?

20 A. Yes, Jim would be using a similar letter to get the
21 initial message out, yes.

22 Q. Now, we know that Stuart Meikle and Lisa Oldershaw had
23 a meeting to discuss the issues that were live with
24 Tesco at the time on 4 September, you're aware of that,
25 aren't you?

1 **A.** Yes, I am, yes.

2 **Q.** And some slides have been produced by Tesco that appear
3 at 100A, tab 100A [Magnum]:

4 "Business meeting 4th September... Lisa Rowbottom,
5 Stuart Meikle, McLelland, Tesco."

6 You've seen these before?

7 **A.** I haven't no. I've got to say, it's obviously Stuart's
8 presentation for the meeting so I haven't seen it.

9 **Q.** In your witness statement you comment on the slides that
10 were presented by Calum Morrison of McLelland to
11 Sainsbury's?

12 **A.** Yes.

13 **Q.** In preparation for this trial, although maybe not at the
14 time; you've seen this document, have you?

15 **A.** I haven't seen this one. I've seen the Calum Morrison
16 one.

17 **Q.** Right.

18 **A.** Yes.

19 **Q.** Let's look at this one and then compare it with the
20 Calum Morrison one if we can.

21 **A.** Okay.

22 **Q.** Look at the fourth slide, which is headed "Cost
23 Recovery". The first bullet, you'll see is:

24 "£200 per tonne cost increase required on all
25 business from 1st October 2003."

1 The second bullet point:

2 "Protect margin by moving retail prices in line with
3 cost increase."

4 You've already confirmed that the proposal that
5 McLelland was making to its retailers, presumably
6 including Tesco at the time, was that there be a cost
7 price increase of £200 per tonne?

8 **A.** Yes.

9 **Q.** You'd also agreed that at the time McLelland were
10 proposing that retailers, including Tesco, protect
11 margin by moving their retail prices in line with that
12 £200 per tonne cost price increase?

13 **A.** Yes, Stuart on this occasion is saying that but, again,
14 it's -- he's just trying to make it easier, I would say.
15 We wanted £200 per tonne cost increase, and in order for
16 a retailer to pay that, they can protect their margin by
17 moving retails. He's just making a statement.

18 **Q.** Let's see what Calum Morrison said to Sainsbury's
19 because you comment on this in your witness statement at
20 paragraphs 36 to 37 [Magnum]. The slides are at tab 101
21 [Magnum], attached to an email from Calum Morrison to
22 Sarah Mackenzie of 5 September 2003.

23 The first slide says "Price Increase":

24 "£200 per tonne increase on all business
25 from October 2003.

1 "This is to bring margin back into cheese for the
2 manufacturer.

3 "Not related to milk prices.

4 "This will be a total market move.

5 "All major suppliers.

6 "All major retailers.

7 "All RSPs will move.

8 "Contract and brand."

9 In your witness statement you say that if you had
10 seen these slides at the time you would have told Calum
11 to tone it down and that he was being "a bit
12 over-enthusiastic in trying to achieve a cost price
13 increase".

14 I think what you're referring to there is the
15 statement of a total market move by all major retailers,
16 is that right?

17 **A.** Yes, that's correct, he's getting carried away with
18 enthusiasm.

19 **Q.** The proposal he was making to Sainsbury's, and if you'd
20 seen it you might have said to tone it down a bit, but
21 the proposal he was making to Sainsbury's was that all
22 retailers were going to go up on retail prices. That's
23 what he's proposing, isn't it?

24 **A.** He is saying that, he's saying RSPs will move, so, yes,
25 he's getting carried away with enthusiasm I'd say.

1 Q. He gets a bit carried away as well with Somerfield,
2 you'll see at tab 102 [Magnum]. At tab 102, same day,
3 5 November, Calum Morrison sends an email to Guy Welford
4 of Somerfield saying:

5 "Guy, following on from our last meeting, I can
6 confirm that our increase is based on the total market
7 moving in October."

8 So he says the same thing, the total market will be
9 moving; that's right, isn't it?

10 A. He does say that in his email, and again it's an email
11 that Calum has sent to Guy Welford so I wouldn't have
12 seen the email.

13 Q. Now, McLelland generally, including you, knew at the
14 time, as I think you've indicated, that in order to get
15 a cost price increase, the easiest way to get that was
16 for retailers to increase their retail prices, because
17 they weren't prepared to take a hit on their margins?

18 A. Yes, it makes life easier; if they can agree to pay the
19 cost increase and they can pass it on to the market,
20 then they're comfortable. Yes, I would agree with that.

21 Q. McLelland also knew that if retailers were going to put
22 up their retail prices, they didn't want to do so if
23 they were going to be undercut by their competitors.
24 They needed to be assured that others would also put
25 their retail prices up to avoid that risk of being

1 undercut, you knew that at the time as well, didn't you?

2 **A.** Again, that's an industry piece of knowledge, I would
3 say. It's an expectation --

4 **Q.** McLelland knew that which is why they were proposing
5 you -- your colleagues were proposing a total market
6 move to all retailers?

7 **A.** Yes, the language is proposing that but, again, they
8 can't confirm anything, it's the language they're using.

9 **Q.** Were you Calum Morrison's boss or manager at the time in
10 2003?

11 **A.** Yes, I had Calum Morrison reporting to me at that time.

12 **Q.** And Meikle was also reporting to you?

13 **A.** Yes.

14 **Q.** So it's unlikely that they would have been making
15 proposals like this without you being aware of them?

16 **A.** We gave them autonomy to operate as a national account
17 manager, that was the role that they had, and I can't
18 oversee every document and every email they send out.
19 So we did trust the people we employed and they were
20 very well-trusted account managers and they still have
21 good careers.

22 **Q.** It may be up to them as to exactly how they implement
23 what you had decided, but you would have been involved
24 in deciding the way in which the plan, which, as we've
25 discussed, you wanted your cost price, McLelland and

1 you. You were aware that retailers wouldn't take a hit
2 on their margin so there would need to be a retail price
3 increase, and you also knew that retailers would not put
4 up their retail prices unless they could be assured that
5 others would do so, so they could avoid the risk of
6 being undercut?

7 That was the situation at the time that you were
8 aware of and that your managers were implementing by the
9 statements they were sending out to the retailers?

10 **A.** I would say that's a general market position of -- we
11 are asking for a cost increase, and if a retailer can
12 move the retail, again, it makes life easier to
13 progress, that's all. But the language that the account
14 managers are using, they're making their own assessments
15 and assumptions.

16 **Q.** We've seen the language that Calum Morrison was using
17 for Somerfield and Sainsbury's.

18 **A.** Yes.

19 **Q.** As to Stuart Meikle, who you say was also managed by
20 you, let's look at the document at tab 112 [Magnum].

21 **LORD CARLILE:** Forgive me just for a moment, Ms Smith. Just
22 to clear my head, an increase of £200 per tonne in the
23 cost price was required?

24 **A.** Yes.

25 **LORD CARLILE:** The underlying cause of this increase was

1 different from 2002?

2 **A.** Yes.

3 **LORD CARLILE:** It was a shortage of cheese in the creamery
4 basically?

5 **A.** That was one of the factors, yes.

6 **LORD CARLILE:** So it's a shortage of supply anyway. And to
7 achieve the £200 per tonne consistently, it would have
8 to be a total market move or close to it, would it?

9 **A.** It would be, to achieve £200 per tonne across the total
10 business, yes, yes.

11 **LORD CARLILE:** What would have happened if there had not
12 been a total market move?

13 **A.** If we hadn't had a total market move, it would have been
14 a variable position, it could have varied from maybe 140
15 to £180.

16 **LORD CARLILE:** According to the bargain you could drive with
17 each of the customers?

18 **A.** Correct.

19 **LORD CARLILE:** If there were going to be differential
20 bargains between McLelland and the customers, would the
21 account managers have had to obtain their approval from
22 you?

23 **A.** They would have obtained approval from myself and
24 Jim McGregor, who was our group sales director. So the
25 objective would be to achieve £200 per tonne. But if

1 they had to negotiate to agree anything less than that,
2 they would come through us.

3 **LORD CARLILE:** Or more?

4 **A.** Well, yes, fantastic.

5 **LORD CARLILE:** You were going to have to balance it out.

6 Some were going to be --

7 **A.** That may be the case, yes.

8 **LORD CARLILE:** So there was a strategy?

9 **A.** The strategy was -- the objective was £200 per tonne.

10 **LORD CARLILE:** Total market move?

11 **A.** Yes.

12 **LORD CARLILE:** Thank you, Ms Smith. Very helpful.

13 **MS SMITH:** Let's look at the document at 112 [Magnum].

14 **A.** Yes.

15 **Q.** This is a document called "Tesco Briefing" and you may
16 have seen this before. This is produced by -- it
17 appears to be produced by Stuart Meikle and it appears
18 to have been produced at the beginning of October. He
19 refers, you'll see, almost exactly halfway down the
20 document:

21 "This morning Lisa has scheduled a meeting with her
22 and John Scouler for next Monday to discuss the cost
23 increase and the rationale behind £200."

24 That was a meeting that was scheduled for Monday
25 6 October so it appears that this document was produced

1 the previous week?

2 **A.** It looks like it, yes, I would agree with that, with his
3 language again.

4 **Q.** Now, you've told us that Stuart Meikle was reporting to
5 you at this time. Was this a briefing that he prepared
6 for you?

7 **A.** I would say this was a briefing he just prepared for
8 myself and Jim McGregor, so it would be Stuart's
9 briefing on where his position was with Tesco.

10 **Q.** Right. Let's look at the top. He reports back to you
11 and to McGregor on the meeting with Lisa Oldershaw on
12 4 September, we've seen the slides?

13 **A.** Yes.

14 **Q.** He says:

15 "I had a meeting with Lisa on 4th September at which
16 we discussed the £200 increase. We ran through all the
17 arguments as to why we were looking for an increase at
18 that time. Lisa requested a further explanation as to
19 why we arrived at the figure of £200 and I subsequently
20 e-mailed this to her detailing the fact that butter,
21 curd and powder are currently being sold at £200 per
22 tonne above Mild and that £200 was required to re-dress
23 the balance and make sure that we continued to
24 manufacture cheese rather than other products."

25 For your reference, if you want to check, that's

1 a 12 September email which is at tab 110 [Magnum].

2 The chair asked you questions about the reasons for
3 the £200 increase, it appears there were quite a few
4 reasons as to why you needed that increase in your
5 costs, is that right?

6 **A.** Yes, that's correct, yes.

7 **Q.** Then he says:

8 "At the close of the meeting [this is still the
9 meeting of 4 September] my understanding was that Lisa
10 had accepted the cost increase on the basis that we
11 would work to increase retail prices across the market
12 to maintain retailer margin."

13 He is reporting back to you, Stuart Meikle. First
14 of all it would appear, see if you can remember this
15 because this was a document reporting back to you, that
16 although it was not spelt out in Stuart Meikle's slides,
17 he made exactly the same proposal to Lisa Oldershaw on
18 the 4 September meeting as Calum Morrison was proposing
19 to Sainsbury's and Somerfield. That is, retail price
20 increase across the market. That's what he's saying,
21 isn't he?

22 **A.** He's stating that here but, again, he's making that --
23 to me, he's making an assumption.

24 **Q.** Well, no, he's actually reporting back to you on what he
25 said at the meeting.

1 **A.** Hmm-hmm.

2 **Q.** And what his understanding was. It seems likely, does
3 it not, that at the meeting, having seen what
4 Calum Morrison was saying, and you having agreed that it
5 was a strategy of McLelland's at the time for all
6 retailers to move by £200 per tonne, in response to the
7 question from the chair, that was your strategy at the
8 time, total market move, it's likely that Stuart made
9 that proposal to Lisa Oldershaw at the meeting on
10 4 September?

11 **MISS ROSE:** I'm sorry, again, but this is another instance
12 of this witness who didn't attend that meeting being
13 asked what was likely to have been said at that meeting.
14 Lisa Oldershaw will give evidence, she was at that
15 meeting and she can give evidence about what was said.
16 The Tribunal also has this document and will be able to
17 weigh it against her evidence. But, with respect, this
18 witness cannot assist the Tribunal on the question of
19 what was said at a meeting that he did not attend.

20 **MS SMITH:** Perhaps I can rephrase the question.

21 You've confirmed that this was a document reporting
22 to you by Calum Morrison --

23 **A.** By Stuart Meikle.

24 **LORD CARLILE:** Miss Rose, if he's in charge of the strategy,
25 let's call it, because that was the word I used before,

1 he can surely answer questions which relate to whether
2 the document reflects the strategy. If so, how? If
3 not, how didn't it?

4 **MISS ROSE:** I accept that, but what he can't do is answer
5 the question he was asked which is, is it likely what
6 was said at the meeting, when he wasn't at the meeting?

7 **LORD CARLILE:** I'm sure that Ms Smith can rephrase the
8 question to get it within scope, can't you?

9 **MS SMITH:** I'll do my very best, sir.

10 You have agreed that this is a report from
11 Stuart Meikle to you reporting back on what he'd done,
12 that's correct, isn't it?

13 **A.** I would say it's an assessment of Stuart's position with
14 Tesco, yes.

15 **Q.** It also says:

16 "I had a meeting with Lisa on 4 September ..."

17 And it tells you what was discussed at that meeting,
18 doesn't it?

19 **A.** Yes.

20 **Q.** So he's reporting back on the meeting with Lisa, on
21 4 September, and he's telling you what was said at that
22 meeting?

23 **A.** Well, he's not telling you everything that was said at
24 the meeting. He's making specific points that were made
25 at the meeting.

1 **Q.** Yes. It's likely when he referred -- when he reported
2 back to you on what had been said at the meeting, he
3 also reported back to you at the time; having seen what
4 he says in this document, it's also likely he told you
5 at the time that he had in fact proposed the same thing
6 to Lisa Oldershaw as had been proposed by Calum Morrison
7 to Sainsbury's and Somerfield?

8 **A.** Well, he may have but I can't confirm that. I'm sorry,
9 I can't confirm that at all. Our objective was a £200
10 per tonne cost increase.

11 **LORD CARLILE:** Would it be possible for me to have another
12 copy of this document? The reason why I'm asking may be
13 obvious if I hold this up. My copy is so heavily scored
14 that I feel I need, if possible, a clean-ish copy that
15 I can mark for other purposes. It may be that my
16 colleagues would like one too.

17 **MS DALY:** I'd like one.

18 (Handed)

19 **MS SMITH:** We'll see if we can get some other ones as well
20 that are similarly unmarked.

21 **LORD CARLILE:** It's just I can't overscore scoring and see
22 what I've scored, if you see what I mean.

23 Thank you very much. Just bear with me for
24 a moment, if you wouldn't mind, I just want to make
25 a note.

1 (Pause)

2 Yes, thank you very much indeed.

3 **MS SMITH:** What Mr Meikle also says, he says:

4 "At the close of the meeting [reporting back to you]
5 my understanding was that Lisa had accepted the cost
6 increase on the basis that we would work to increase
7 retail prices across the market to maintain retailer
8 margin."

9 Now, Tesco suggests that Mr Meikle was wrong and
10 that Lisa Oldershaw had not agreed the price increase as
11 at the date of that meeting. But Mr Meikle told you
12 that his understanding was that she had, that's correct,
13 isn't it?

14 **A.** Stuart is saying that but I don't know anything about
15 the position from Tesco there, that's news to me.

16 **Q.** That's what he told you?

17 **A.** Stuart is stating clearly here that his understanding
18 was that Lisa had accepted the cost increase. So he's
19 communicating that to our business.

20 **Q.** He's communicating it to his boss, in effect, and his
21 boss' boss?

22 **A.** Correct.

23 **Q.** To you and Mr McGregor, that's right, isn't it?

24 **A.** Yes.

25 **Q.** It appears, and again I'm happy for you to confirm this

1 or not, that he is communicating this to you in
2 preparation for the meeting that was to take place with
3 Lisa Oldershaw and John Scouler on 6 October, is that
4 your recollection?

5 **A.** My recollection would be that Stuart had pulled this
6 document together to do that, because that meeting was
7 taking place --

8 **Q.** For that meeting?

9 **A.** So he's giving whoever is attending that meeting on
10 6 October the background of where he has been in
11 discussions with Tesco leading up to 6 October.

12 **Q.** So his boss and his boss' boss are going to a meeting
13 with Tesco on 6 October. He is briefing them for that
14 meeting. He would have been very careful to ensure that
15 the information he was giving to his boss and his boss'
16 boss was correct? You would have understood that when
17 you received this document, wouldn't you?

18 **A.** I would have expected that.

19 **Q.** If I can go back to the document at tab 103 [Magnum],
20 this is an email from Stuart Meikle of 16 September to
21 you and to Jim McGregor, and its subject matter is
22 "Tesco - Seriously Strong". He talks about -- he fills
23 you in essentially on the situation, as he says in the
24 first line, the Seriously Strong situation in Tesco
25 "following our recent discussions", do you see that?

1 **A.** I do, yes, I see that, yes.

2 **MISS ROSE:** Once again, can I check that the witness has an
3 unredacted version of this document?

4 **A.** I don't have, no.

5 **LORD CARLILE:** Well, we're going to have a short break for
6 the LiveNote team.

7 **MS SMITH:** Thank you, sir.

8 **LORD CARLILE:** So shall we have a ten-minute break now so
9 that the document can be produced.

10 (3.18 pm)

11 (A short break)

12 (3.35 pm)

13 **LORD CARLILE:** Just before we go on, a request which I'm
14 going to pass on. I've been in quite a lot of cases
15 where LiveNote has been used and I must say I think the
16 quality of the first-off LiveNote transcript we've been
17 getting here is better than I've seen in any other case.

18 However, I have had a request which runs something
19 like this: there have been occasions when more than one
20 person has been speaking at the same time and it's very
21 difficult to put that into LiveNote. So could you
22 please bear that in mind, everyone, including you, sir.

23 **A.** Sure.

24 **LORD CARLILE:** Thank you.

25 **MS SMITH:** Mr Ferguson, could I ask you to turn to tab 106,

1 please [Magnum].

2 This is an email from Gerry Doyle, who I think
3 you've explained is McLelland's operations manager. Was
4 he still doing that job in 2003?

5 **A.** He was, yes.

6 **Q.** It's an email from him to Jim McGregor and to you of
7 24 September 2003. He says:

8 "Jim, Tom, further to my telephone conversation with
9 Tom who confirmed that Asda will be moving to new
10 retails effective from Monday, the 29th, I urgently
11 require the following information before I can proceed
12 with the price change."

13 So it appears that you had told him that Asda will
14 be moving to new retails effective from Monday, the
15 29th, is that right?

16 **A.** That's exactly what it says there, yes, that's correct.

17 **Q.** And you had received that information from Asda, one
18 presumes?

19 **A.** Yes, I would presume so.

20 **Q.** You then forwarded that email the following day. On
21 25 September at 9.26, you forwarded that email to
22 Calum Morrison, Chris Reid and Stuart Meikle, who were
23 various sales account managers, weren't they?

24 **A.** That's correct, yes. That was in effect the sales team
25 at McLelland at the time, yes.

1 **Q.** They didn't need the information contained in this email
2 of 24 September for labelling purposes. Gerry Doyle was
3 the individual at McLelland who was dealing with the
4 mechanics of changing labels, Calum Morrison, Chris Reid
5 and Stuart Meikle wouldn't have been involved in that
6 job, would they?

7 **A.** They wouldn't have been involved in changing the labels,
8 no, but they would be providing the information that
9 Gerry was requesting. If you look at item 1, which
10 customers are moving and from what dates, so I would
11 need that information from Calum, Chris and Stuart.

12 **Q.** Also, you were forwarding them the questions, you were
13 also forwarding them the confirmation that Asda will be
14 moving to new retails effective from Monday, the 29th.

15 **A.** Yes, because that's on the email that Gerry sent out,
16 yes.

17 **Q.** It then appears that Stuart Meikle passed that
18 information on, that Asda will be moving to new retails
19 effective from Monday, the 29th, to Tesco. Do you
20 recall that?

21 **A.** I can't recall that, no.

22 **Q.** Let's look back to tab 112 [Magnum], just next to the
23 first hole-punch:

24 "Lisa rang me last Friday [that's 26 September] and
25 I told her that it was our understanding that Asda would

1 move retail prices from Monday 29th September."

2 So you had forwarded the email containing that
3 information, that Asda will be moving to new retails
4 effective from Monday, 29 October. You'd forwarded that
5 email to Stuart Meikle on 25 September, and he then
6 reports to you that he told Lisa the same information,
7 Asda would move retail prices from Monday, 29 September,
8 he told her that last Friday, which was 26 September.

9 **A.** Yes, he's stating that in his document here, that that
10 was her understanding, yes, that's the word he's using.

11 **Q.** No, that it was your understanding, "our understanding",
12 McLelland's understanding that Asda would move retail
13 prices from Monday, 29 September?

14 **A.** He's saying that in this document, yes.

15 **Q.** He's saying he told that to Lisa, that's what he's
16 reporting back to you. Having seen that document, you
17 can agree with me, can you, that he got that information
18 from you, the email that you forwarded to him on
19 25 September?

20 **A.** Which document was that again?

21 **Q.** 106 [Magnum].

22 **A.** Yes, it's on the document so --

23 **Q.** And you got that information from Asda, I think you've
24 already confirmed that?

25 **A.** Yes.

1 **Q.** If you could turn now to tab 110 [Magnum], this is an
2 email from Stuart Meikle to Lisa Oldershaw, and it
3 states, of 30 September 2003:

4 "Copy of e-mail as requested.

5 "I have faxed copies of the Safeway & Sainsbury's
6 labels to you... Safeway Savers mild has increased in
7 price by 26p per kilo and JS Isle of Bute has increased
8 by 20p per kilo."

9 I can take you to the evidence if you want, but
10 Ms Oldershaw gives evidence on these labels and she
11 says, it's at paragraph 153 of her witness statement
12 [Magnum], that she was concerned when she received them
13 because they were, she says, pristine, she thought they
14 might have come from McLelland's packing units and that
15 the products they related to might not yet be in store.

16 At paragraph 154 of her statement [Magnum] she says
17 she telephoned Meikle to say he should not send her
18 information like this.

19 She says she then raised that complaint at Tesco's
20 next meeting with McLelland on 6 October. We now know
21 that you didn't attend that meeting with Tesco on
22 6 October, that's the position, isn't it?

23 **A.** Yes, I wasn't at that meeting on 6 October.

24 **Q.** At the time, although you were Mr Meikle's direct line
25 manager, you were not aware that Tesco had made any

1 complaint to Mr Meikle or McLelland generally about the
2 passing of inappropriate information?

3 **A.** That's correct. I'd no awareness of that complaint.

4 **Q.** Can we then turn to tab 118 [Magnum], that's an email
5 from Stuart Meikle to Lisa Oldershaw, 10.47 am on
6 Tuesday 7 October 2003. It says:

7 "Please find attached an updated spreadsheet
8 including the new retail prices that Asda will run on
9 McLelland random weight branded lines."

10 You'll see the spreadsheet sets out prices for
11 Seriously Strong branded fixed weight pre-pack, you see
12 the first two entries on the table?

13 **A.** Got it, yes.

14 **Q.** A number of random weight lines, which are the random
15 weight McLelland brands, they've got "RW" under them,
16 and we see the key is "random weight", do you see that?

17 **A.** Yes, I do.

18 **Q.** Then deli lines, various deli lines. Do you see that?

19 **A.** Yes. Got them.

20 **Q.** Now, you are probably aware, because you've addressed
21 this in your witness summary, that the OFT's case is
22 that these prices under the columns for Asda, we see old
23 retail prices and new retail prices. The OFT's case is
24 that the new retail prices are future prices not yet in
25 store. Do you understand that?

1 **A.** I understand the statement, yes, but --

2 **Q.** You understand that it is Tesco's case that these are --
3 the new retail prices are current retail prices which
4 were in store as of 10.47 on 7 October?

5 **A.** Yes, I would say that's why Stuart is sending that
6 information over.

7 **Q.** Now, you address that issue in your witness summary and
8 various documents that go to that issue. Let's start,
9 if we may, with the document at 116A [Magnum]. If you
10 can look at the email -- there are a number of emails,
11 there's an email right at the bottom of 29 September
12 from Chris Reid of McLelland to Jonathan Betts of Asda.
13 Just above that we see an email from Jonathan Betts of
14 Asda back to Chris Reid and A McLelland, do you know who
15 that might have been sent to in addition to Chris Reid?

16 **A.** I think A McLelland -- it might have been a composite
17 email address that Jonathan Betts had. I'm not sure
18 what that refers to. We didn't have anyone under that
19 description working for the business. I don't know what
20 he means by that.

21 **Q.** This is an email, the time is 7 o'clock in the evening,
22 19.05, on 2 October, Thursday, 2 October 2003. Mr Betts
23 from Asda says:

24 "Chris.

25 "1. To confirm we will apply cost increases

1 requested effective this weekend through deli and
2 prepack."

3 Then he says in number 2:

4 "I will advise Friday PM what changes we will be
5 making, if any, to our retail position."

6 So he is giving Chris Reid notice, quite late on
7 2 October, the Thursday, that he is going to tell him
8 what changes will be made to retail prices on Friday
9 afternoon?

10 **A.** Yes, that's exactly what he's saying there, yes.

11 **Q.** We see that Chris Reid forwarded that email to you;
12 first thing the next morning, 8.44 on Friday, 3 October,
13 Chris Reid forwarded that email to you, just above it?
14 Do you see --

15 **A.** Sorry, yes, got it now, 8.44, and then I replied at
16 8.49.

17 **Q.** You replied five minutes later, very efficiently. You
18 say:

19 "Cheers Chris.

20 "I assume that Melanie and ?? will confirm the
21 effective dates.

22 "Tom."

23 Do you recall who Melanie was?

24 **A.** Melanie was the buying assistant for Asda, the assistant
25 to Jonathan Betts.

1 Q. So as of the morning of Friday 3 October, 8.50, you knew
2 that Asda would be notifying McLelland of its changes to
3 its retail prices on Friday afternoon, that's the
4 position?

5 A. Yes, that's the position from these emails, yes.

6 Q. Next in the story, if we can turn to 116C [Magnum], the
7 lower down email, from Jonathan Betts of Asda, sent on
8 3 October, 5.07 in the evening, to Chris Reid, subject
9 "Revised retails - random weight lines":

10 "Chris

11 "Attached above please find the revised retails per
12 kg I would like applying to your brands supplied to
13 Asda. Products priced at these levels should be sent
14 into our depots from Monday 6 October onwards."

15 So, as he had indicated, the instruction on Asda's
16 new retail prices was sent to McLelland just after
17 5 o'clock on the evening of Friday, 3 October. That's
18 the position?

19 A. That's correct, yes. Yes.

20 Q. And that email was forwarded, we see at the top, by
21 Chris Reid to Stuart Meikle and Calum Morrison on
22 Tuesday, 7 October, at 9.59. Do you see that at the
23 top?

24 A. Yes, I see that, yes.

25 Q. Now, then if we can look at the document at 116B

1 [Magnum], this is a document entitled in typeface "Asda
2 New Retails, October 4, 2003".

3 The handwriting that is on that document, is that
4 your handwriting?

5 **A.** I believe it is, yes.

6 **Q.** And we have a signature on the top, T -- I assume that's
7 T Ferguson, 6 October 2003, that's your signature?

8 **A.** The top one is scored out a little bit, I can't see,
9 I can see "10/03" but I'm not sure --

10 **Q.** It's "06", so if you have a proper copy of it --

11 **A.** Is it 6? I don't have a proper copy.

12 **MS SMITH:** I hope the Tribunal can see that that top date is
13 6 October 2003.

14 **LORD CARLILE:** Yes.

15 **MS SMITH:** It's slightly faint but here's a better -- you
16 can see "06" on that one (Handed)

17 **A.** Yes, that's better.

18 **Q.** The signatures below the table, on the right-hand side,
19 that's your signature, isn't it, 3 October 2003?

20 **A.** It is, yes. Yes.

21 **Q.** The one on the left, is that Chris Reid?

22 **A.** I believe that's Chris Reid. It's hard to make out
23 again but I believe it's Chris Reid.

24 **Q.** So under the table we see the signatures of, we think,
25 Chris Reid, 3 October, and your signature, 3 October?

1 **A.** Correct.

2 **Q.** And the table has the various Asda products, old Asda
3 prices, and then a column that just says "Asda". Then
4 just above it, someone has written "6/10/03"?

5 **A.** Yes.

6 **Q.** Is that you again, that writing?

7 **A.** I would say it is my writing, yes.

8 **Q.** So if one looks at the 06/10/03 Asda prices in that
9 column, on that document, they're exactly the same as
10 those attached -- well, for those that are provided,
11 they are the same as those attached to the email from
12 Jonathan Betts of 3 October at 116C [Magnum]

13 So we see for Galloway coloured pre-pack,
14 227 grammes, in his email it says £6.98, and the same
15 figure we find in your document at 116B, 6/10/03, Asda.

16 Those are the prices that you had been instructed by
17 Asda to price at by -- or McLelland had been instructed
18 by Jonathan Betts at 5 o'clock on Friday, 3 October?

19 **A.** Yes, instructed by Asda to do that and supply on
20 6 October.

21 **Q.** Right.

22 **LORD CARLILE:** There may be nothing in this but we've seen
23 a lot of documents of this general description that
24 don't have signatures all over them, and this one has
25 got four signatures on it. Can you explain why that

1 would be the case?

2 **A.** It's difficult to recollect, sir, but what I would
3 suggest is that I was signing this document to send it
4 on to Gerry Doyle, who was the operational manager at
5 the time. Gerry would have been instructing the
6 pre-pack station to immediately attend to this situation
7 and get these retails in place so that we could supply
8 on Sunday.

9 So I would think -- I would say that rather than me
10 communicate that over the phone to Gerry, he probably
11 wanted me to give him a signed copy --

12 **LORD CARLILE:** Why would it have Mr Reid's signature on it
13 as well?

14 **A.** Mr Reid was the account manager so he got the
15 information from Asda.

16 **LORD CARLILE:** It suggests a high degree of caution or
17 verification --

18 **A.** It does a little bit. I would say Gerry Doyle would
19 always work with a high degree of caution, his
20 characteristics and mannerisms would be that. That
21 would probably be signed in blood, to be honest, with
22 the packing instruction.

23 **LORD CARLILE:** Right.

24 **MS SMITH:** I see there's two signatures dated
25 3 October 2003, your signature and Chris Reid.

1 **A.** Yes.

2 **Q.** Under the table at 116B [Magnum].

3 **A.** Yes.

4 **Q.** Presumably you signed it on 3 October when you received
5 the go-ahead from Asda at 5 o'clock that evening,
6 Friday, 3 October?

7 **A.** Yes, I would say that's exactly what happened, and then
8 we'd the clear instruction that we had to make this
9 effective to deliver from Sunday, 6 (sic) October.

10 **Q.** Let's just get these dates straight because it's very
11 important that we get this date straight.

12 **A.** Sure.

13 **Q.** 6 October was Monday, not Sunday.

14 **A.** Sorry.

15 **Q.** Now, you suggest in your witness summary, you can have
16 a look at it if you want, paragraph 10(d) [Magnum] --

17 **A.** Can you just remind me -- yes, sorry.

18 **Q.** It's N1, just after your statement.

19 **A.** 10(d), yes.

20 **Q.** 10(d), it says:

21 "Tom Ferguson recalls that this period in early
22 October 2003 was quite a frantic time and believes that
23 the retail price changes would have gone into production
24 over the weekend."

25 **A.** Yes.

1 Q. So that's what you believe, but what we see from that
2 document, that belief completely ignores, we go back to
3 the document itself at 116B, your belief that it went
4 into production over the weekend, I think you've already
5 agreed that the plant working over the weekend was not
6 normal, it would only have been during particularly
7 unusual frantic circumstances, is that right?

8 A. It would have been, and this was an absolute example of
9 a frantic circumstance, yes.

10 Q. Because that statement or that belief that you now have
11 that, contrary to the normal course of things,
12 production went in over the weekend ignores what you
13 have written at the bottom of page 116B [Magnum]:

14 "Retails to be effective from next production week.

15 "Commences 6th October 2003."

16 Then you have signed it. So your instruction to
17 Gerry on this document was not: get this into production
18 on Saturday, 4 October, but it was to get it in
19 production from the next production week, "commences
20 6th October 2003". You were instructing him to start it
21 from Monday, 6 October, weren't you?

22 A. I would say no to that, because quite clearly we
23 received the instruction from Asda to deliver, and we
24 haven't said to Asda that we will not deliver, so
25 therefore -- again, it's just the language. It's

1 a frantic email, it's not a very professional document.

2 **Q.** Well if it was frantic, and you wanted him to do
3 something which was really out of the ordinary, you
4 wanted him to pull out all the stops, wouldn't you have
5 made it clear, because he needs these things clearly as
6 you've said, he's a cautious man who needs it spelt out
7 clearly:

8 "Gerry, this is out of the ordinary, you've got to
9 get this into production tomorrow, Saturday, 4 October."

10 That's not what you said. You said:

11 "Retailers to be effective from next production week.

12 "Commences 6th October 2003."

13 You have signed it, presumably in blood as you've
14 said, "T Ferguson", that was your instruction to
15 Gerry Doyle?

16 **A.** There would also be a verbal discussion by phone and --

17 **Q.** Oh, we're adding this? That's not in your witness
18 summary.

19 **A.** It's not in the witness summary but I would be speaking
20 to Gerry. I wouldn't just be sending him something.

21 **Q.** Mr Ferguson, it's quite clear from the document that
22 your instruction to Gerry Doyle was that the retailers
23 were to be effective from the next production week,
24 starting 6 October. You're now trying to claw back the
25 position in your witness summary saying, "I believe it

1 might have gone into production over the weekend".

2 There's absolutely nothing to support that and that is
3 not the case, is it?

4 **A.** I can't agree with that because we have had an email
5 from Asda requesting we deliver on 6 October and we
6 haven't said we can't do that.

7 **Q.** Your belief that you set out in the summary also ignores
8 the fact that your document at 116B was signed not just
9 on Friday, 3 October, but it was signed by you also on
10 Monday, 6 October, at the top of the document.

11 **A.** Yes.

12 **Q.** Under the instruction:

13 "Asda retails effective from the 6th October 2003."

14 You gave that instruction on Monday, 6 October and
15 that's the date you've signed the instruction. So the
16 instruction you were giving to Gerry Doyle was given on
17 Monday, 6 October, as signed, for the retails to go into
18 production from 6 October. That's the situation, isn't
19 it, Mr Ferguson?

20 **A.** It's not. I would say the situation is still those
21 retails have to be effective in their delivery on
22 6 October.

23 **Q.** You've referred to the instruction from Asda.

24 **A.** Yes.

25 **Q.** You've said in your witness summary at paragraph 10(d),

1 you believe, again, last line of that page 4 of your
2 witness summary:

3 "... that if the cheeses bearing the new retail
4 price labels had been sent to Asda's depots on Monday,
5 6 October 2003, as requested by Asda in the email at
6 tab 116C, they would have to start being delivered to
7 Asda stores that evening."

8 **A.** That is possible, yes. We deliver to a retailer and
9 then they can either deliver that evening or first thing
10 in the morning. It's entirely up to their system.

11 **Q.** You say in that statement that Asda had requested that
12 the cheese bearing the new retail price labels be sent
13 to its depots on Monday, 6 October?

14 **A.** Yes.

15 **Q.** Let's actually look at what the email says, shall we?
16 The email at 116C [Magnum], the instruction from Asda
17 says, from Jonathan Betts:

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

20 **A.** It does say that.

21 **Q.** It's not saying, "I need them in the depots on Monday,
22 6 October". He's not saying, "There is great urgency,
23 I need them by that date". He's saying, "From Monday
24 onwards". Your witness summary does not actually set
25 out what the instruction was. The instruction was quite

1 different?

2 **A.** It says from Monday, 6 October but I would include
3 Monday, 6 October in that statement.

4 **Q.** "From Monday 6 October onwards" equally could mean
5 Tuesday, 7 October, Wednesday, 8 October, Thursday,
6 9 October, couldn't it?

7 **A.** But my understanding would be it would be from Monday,
8 6 October inclusive and obviously following onwards.

9 **Q.** Actually what you said in your witness statement, which
10 was a mischaracterisation of what Asda say in their
11 email, you said:

12 "Asda requested the newly priced cheese be sent to
13 its depot on Monday, 6 October."

14 That's not what they said, is it?

15 **A.** Monday, 6 October was when it would start, that's when
16 the deliveries would start. That's what I've expressed
17 in my witness statement.

18 **Q.** Well, let's go back to what your instruction was. Your
19 instruction at 116B [Magnum] was:

20 "Retails to be effective from next production week.

21 "Commences 6th October 2003."

22 On the basis of that instruction, the earliest that
23 McLelland would be packing with labels showing the new
24 retails was Monday, 6 October, wasn't it?

25 **A.** But that's not an explicit instruction there. I'm

1 still --

2 Q. I'm not sure what it is if it isn't an explicit
3 instruction, Mr Ferguson.

4 A. I'm still going back to the fact that Asda have asked us
5 to supply from Monday, 6 October and that's what we were
6 determined to do.

7 Q. Asda was asked to supply from Monday, 6 October and
8 that's what you were determined to do?

9 A. Yes.

10 LORD CARLILE: Sorry, what does the term "Retails to be
11 effective" mean?

12 A. To me, it means to be live or to be in place, when I say
13 it's to be effective.

14 LORD CARLILE: To start from?

15 A. To be live from that date.

16 LORD CARLILE: What does it mean to commence from that date?

17 Does it mean any more than to commence from that date?

18 You have a new retail price provision, the labels are
19 going to be put on the blocks of cheese.

20 A. Sure.

21 LORD CARLILE: At Mauchline.

22 A. Yes.

23 LORD CARLILE: Starting on that date. Does it mean any more
24 than that?

25 A. No, the effectiveness would be the date of the delivery

1 of the retail --

2 **LORD CARLILE:** What, of the first delivery or of some
3 particular delivery?

4 **A.** The first delivery.

5 **LORD CARLILE:** The first delivery.

6 **A.** Yes.

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

8 Sorry, Ms Smith.

9 **MS SMITH:** The other thing that you don't mention in your
10 witness summary is that, even at busy times, it would
11 take about a week between McLelland starting to pack
12 cheese at new retail prices in its plant and that cheese
13 being supplied by McLelland to the supermarket depots.
14 Even at busy times, that's about how long it took,
15 wasn't it?

16 **A.** That's what I did comment on in 2002 and, again, we were
17 quite clear here with the instruction from Asda that
18 they wanted this in place from 6 October.

19 **Q.** From 6 October. So you say --

20 **A.** Yes, so there are occasions where you can achieve that
21 and obviously this could be achieved.

22 **Q.** Let's look in document bundle 1 at tab 54 [Magnum].

23 **MISS ROSE:** Sir, can I just ask how we're doing for time
24 because of course this witness, as has always been made
25 clear, is returning to Scotland tonight and is in fact

1 going on holiday, I believe, tonight. I will need
2 a little bit of time for re-examination so I just wanted
3 to explore --

4 **LORD CARLILE:** How are we doing, Ms Smith?

5 **MS SMITH:** I will be finished with this witness in good
6 time, sir.

7 **LORD CARLILE:** For a finish at what time?

8 **MS SMITH:** It very much depends. As Miss Rose will know,
9 I cannot anticipate exactly what answers I'm going to
10 get to my questions but I wouldn't think I would be more
11 than half an hour at the very most.

12 **LORD CARLILE:** How long do you need for re-examination, do
13 you think?

14 **MISS ROSE:** I would like up to half an hour, sir.

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

16 (Pause)

17 I've just rearranged an appointment so that we can
18 carry on until 5 o'clock.

19 **MS SMITH:** I'm very grateful.

20 We have bundle 1, I hope, open at tab 54, an email
21 from you to Sarah Mackenzie on 22 October 2002, an
22 equally busy time with all the prices being changed, you
23 would agree?

24 **A.** Yes, I've got that document here, yes.

25 **Q.** It says:

1 "I will need the detail confirming your new retails
2 on Sainsbury Brand ASAP, we will be packing product for
3 supply week commencing the 4th of November on Monday
4 next week."

5 "Monday next week" was 28 October 2002. You were
6 planning to pack from Monday, 28 October, in order to
7 supply stock into Sainsbury's retail depots at new
8 retail prices from Monday, 4 November, about a week it
9 takes.

10 **LORD CARLILE:** Just would you mind pausing.

11 Carry on at the moment.

12 **A.** Yes, that's correct. That's what it says there, yes.

13 **MS SMITH:** Similarly, in the second document bundle, tab 78
14 [Magnum], the yellow-spined bundle with all the
15 documents in, this is you to Lisa Rowbottom on
16 7 November 2002:

17 "Time marches on ... we need to confirm the new
18 retails [prices] for packing on Monday the 11th for
19 supply from the 17th."

20 So, again, McLelland needs a full working week to
21 pack the new retail prices before they could be supplied
22 to Tesco's depots. That's the position, isn't it?

23 **A.** That was the position in 2002.

24 **Q.** Yes.

25 **A.** And things can change.

1 Q. Things can change. Things haven't changed between the
2 frantic situation in October 2002 and the equally
3 frantic situation in 2003. It still took about a week
4 to get from starting new packing to supply into the
5 supermarket depots. That was the position, wasn't it?

6 A. No, that wasn't the position because things can change.
7 It can be variable. It was the position in those two --

8 Q. We have no evidence at all, apart from your general
9 statement "Things can change", anything can change, that
10 the position had changed. The position hadn't changed?

11 A. You can see quite clearly from the emails that
12 Jonathan Betts sent to Chris Reid that we -- Chris Reid
13 did not reply stating that he would have a problem on
14 achieving the 6 October.

15 Q. No, because he was only asked to send the product into
16 depots from 6 October onwards, so of course he didn't
17 say, "I'm going to have a problem in doing that"?

18 A. You've got to be specific, that includes 6 October.

19 Q. Your evidence also ignores the fact that, even when
20 McLelland was anticipating an imminent instruction to
21 change retail prices, McLelland would be holding at
22 least one week's stock of product priced at old prices.

23 Now, if you look in the second document bundle, the
24 same document bundle, at tab 80 [Magnum], this is an
25 email we looked at earlier this afternoon. You were

1 expecting an imminent instruction from Tesco to change
2 retails on own label cheddar and you were pushing to get
3 that instruction:

4 "We hope to have confirmation by the end of the
5 week. This scenario obviously makes it very difficult
6 to control our availability of Tesco packed stock. In
7 order to ensure that we continue with our service levels
8 I propose the following course of action.

9 "1. Communication will be daily with Tesco to
10 target retail movements.

11 "2. Stock packed at the current retails should be
12 made available for supply into next week ...

13 "3. Stock levels as before should be restricted to
14 1 weeks stock."

15 So normally you would hold more than one week's
16 stock at old prices but, when you were anticipating an
17 imminent instruction on a retail price change, you would
18 reduce that to hold just one week's stock. That was
19 your minimum stock holding, I think you described it
20 earlier today?

21 **A.** In normal circumstances it would be.

22 **Q.** No, we're not talking about normal circumstances. We're
23 talking about the circumstances in that email at tab 80
24 where you're anticipating an imminent instruction on
25 a retail price change and you reduce your stocks down to

1 the minimum. You're holding only one week, but the
2 minimum is one week?

3 **A.** Yes, and again that's referring to Tesco and it's
4 referring to 2002. It's not impossible to have less
5 than that.

6 **Q.** It's not impossible to have less than that but it would
7 be exceedingly risky, and I say wholly unrealistic and
8 unfeasible, to suggest that you had run your stocks down
9 to zero by Friday, 3 October, waiting for an instruction
10 from Asda that might have been delayed -- you don't
11 know -- you had run your stocks down to zero? So that
12 you had nothing in stock, so that you might on Monday,
13 6 October, have run out of stock? That's just not
14 realistic, is it, Mr Ferguson?

15 **A.** On this occasion, I would say it is realistic because we
16 haven't communicated back to Asda that we cannot deliver
17 on Monday, the 6th or Tuesday, the 7th.

18 **Q.** Of course you had not communicated back. I'm going to
19 keep going back to it because you keep misrepresenting
20 the instruction from Asda. The instruction from Asda
21 was that products should be sent into their depots from
22 Monday, the 6th onwards. Of course you could meet that?

23 **A.** And that would include the Monday.

24 **Q.** Now, you say in your witness summary, paragraph 10(d)
25 [Magnum] that:

1 "[You] believe if the cheeses bearing the new retail
2 prices had been sent to Asdas depots on Monday,
3 6 October, they would have started to be delivered to
4 Asda's stores that evening or on the morning of Tuesday,
5 7 October."

6 You have absolutely no basis for that assertion, do
7 you?

8 **A.** Retailers do deliver -- once we deliver on a day, they
9 do deliver either evenings and early mornings, that's
10 how they operate --

11 **Q.** So you're saying that the stock would have gone into
12 Asda on Monday morning, it would have been rushed out of
13 Asda's depots, into their shops Monday evening so it's
14 there on the shelves Tuesday morning?

15 **A.** Monday evening/Tuesday morning because they don't hold
16 stock, that is how they operate.

17 **Q.** You're suggesting Asda was acting with incredible
18 urgency. Absolutely no urgency is suggested in Asda's
19 emails to you, is it?

20 **A.** No, they don't need to act in urgency, that's a normal
21 procedure. It goes in one day and then delivered --

22 **Q.** You have absolutely no idea how much stock at old prices
23 Asda was holding in its depots, do you? It was likely
24 to be holding at least some, again, it wasn't going to
25 run its stocks down to zero?

1 **A.** My understanding and my assessment of the situation is
2 that Asda do not hold stock at depot, the same as most
3 modern retailers. What they do is they take stock into
4 depot and they transmit it direct to store so they do
5 not hold stock at depot.

6 **Q.** You don't know.

7 **A.** That's my --

8 **Q.** Again this is assertion and you're now adding --

9 **A.** It's my --

10 **Q.** -- what was said to your witness summary.

11 **A.** It's my understanding of the way retailers operate, and
12 I am experienced in that business.

13 **Q.** Here's another assumption based on assumption and
14 assertion that you've made with absolutely no evidence.
15 Even if, which we don't accept, that Asda would have
16 started to deliver from their depots to their stores on
17 the evening of Monday, 6 October, or the morning of
18 Tuesday, 7 October, it does not follow that the newly
19 priced product would be on the shelves in those stores
20 on the morning of Tuesday, 7 October. It has to be
21 there by 10 o'clock on Tuesday, 7 October.

22 That's just not realistic, is it? The stores would
23 be selling off their old price stock first before
24 putting the new price stock on the shelves. You can't
25 feasibly say they would have no old price stock in the

1 stores, can you?

2 **A.** I can't comment one way or the other, but what I can say
3 is --

4 **Q.** Well you have been, that's the problem.

5 **A.** What --

6 **Q.** You've been making assertions for which you have
7 absolutely no evidence.

8 **A.** What I can say is that stores would have that stock
9 delivered to them.

10 **Q.** They would have old price stock in --

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

12 **LORD CARLILE:** It is turning into a bit of an argument at
13 the moment.

14 **MISS ROSE:** Yes, it is a bit. There is just one point
15 I want to make which is the OFT, if it's that concerned
16 about getting reliable evidence of Asda's production
17 of --

18 **MS SMITH:** This is a submission that could be made, sir.

19 **MISS ROSE:** -- then they could have obtained evidence from
20 Asda. It was the OFT's choice not to call any evidence
21 from Asda in this case, and in those circumstances, it
22 is not fair for Ms Smith to attack this witness when she
23 has chosen not to call evidence on this point.

24 **LORD CARLILE:** Ms Smith, my concern is that the questioning
25 was turning into a bit of an argument.

1 **MS SMITH:** I'm sorry, sir, it's just that those are
2 submissions that Miss Rose can make at the appropriate
3 time.

4 **LORD CARLILE:** Well, she has already made them.

5 **MS SMITH:** Her clients have put in a statement from this
6 witness which, in our submission, is pure conjecture and
7 wholly unsupportable. I am testing that with the
8 witness, and I think I have tested that with the
9 witness, sir.

10 The point, the final point is just this,
11 Mr Ferguson. Despite your best endeavours, the
12 timetable you're suggesting, that this stock could be in
13 store by 10 o'clock on Tuesday, 7 October, was
14 impossible, wasn't it? There is no way that the new
15 Asda prices on these cheeses could have been in store
16 and on the shelves by 10.00 am on Tuesday, 7 November
17 (sic). It was impossible, wasn't it?

18 **A.** I can't say that's impossible because it could be
19 possible.

20 **MS DALY:** Sorry, can I ask a question, not to retread.

21 On this document at 116B [Magnum], just in terms of
22 the dates, if I understand it correctly, October 3rd is
23 a Friday?

24 **A.** It is, yes.

25 **MS DALY:** And you and you think Chris Reid have signed this?

1 **A.** Yes.

2 **MS DALY:** Then at the top there is another signature and
3 date by you on the 6th, which is a Monday, and then
4 there's some words here about things that are moving
5 on October 12th.

6 What happened Friday? What's going on? How come so
7 many signatures, dates --

8 **A.** Yes, I can't explain why there's so many signatures on
9 it because it's just not a professional document, I've
10 got to say, to even explain -- it looks to me as if it's
11 a very rushed document, and I may not have even been in
12 the office at the time when I got all this information
13 through from people.

14 So I can't explain why the document is in that
15 style, but I do know that the information is there from
16 3 October, and we would have wanted to make sure we were
17 complying with what Asda asked us to do.

18 **MS DALY:** Let me ask you one other question. At the top
19 it's headed in typeset with October 4th.

20 **A.** Yes.

21 **MS DALY:** So you signed it on the day before the header and
22 then some days later you re-sign it.

23 **A.** Yes. I can't explain why there's so many dates on it.
24 I'm sorry, it's confusing.

25 **MS DALY:** Thank you.

1 **MS SMITH:** Just back to the email at 116C [Magnum]. We've
2 seen that the email from Jonathan Betts to Chris Reid
3 was forwarded by Chris Reid to Stuart Meikle and
4 Calum Morrison on 7 October.

5 **A.** Yes.

6 **Q.** We then see at 118 [Magnum], 10.47 on 7 October,
7 Stuart Meikle sends an email to Lisa Oldershaw of Tesco:
8 "Please find attached an updated spreadsheet,
9 including the new retail prices that Asda will run on
10 McLelland random weight branded lines."

11 The retail prices attached to that email for the
12 random weight McLelland brands, that is those that have
13 "RW" after them, are exactly the same as those contained
14 in the email from Jonathan Betts of Asda at 116C.

15 Can you agree with that?

16 **A.** Yes, sorry, I can agree with that.

17 **Q.** In his covering email, Stuart Meikle doesn't say, "These
18 are the prices that Asda have put in store and I have
19 checked them and here are some till receipts to show
20 you", he says:

21 "These are the new retail prices that Asda will
22 run."

23 So they are presented as future retail prices and
24 that's what they were, isn't it?

25 **A.** Well, it's Stuart Meikle's email to Lisa, and again it's

1 not my email, it's an email from Stuart to Lisa, and
2 I can only, again, I make the point that Stuart would
3 have -- be giving this information because he feels it's
4 in the public domain. It's Stuart's email to Lisa.

5 **Q.** If we can finally look at tab 123 [Magnum], this is an
6 email, the bottom of the page, from Lisa Oldershaw of
7 9 October, 5.30 in the evening, to Stuart Meikle. Then
8 the next day, we see on 10 October at 1.37, it was
9 forwarded by Stuart to various individuals including
10 copied to you. Do you see that?

11 **A.** Yes, I do, yes.

12 **Q.** In the Lisa Oldershaw email, she refers to:

13 "As for costs, as clearly pointed out at our meeting
14 on Monday, we will increase your cost price by £200 per
15 tonne..."

16 That was the meeting between McLelland and Tesco on
17 Monday, 6 October which we've established you didn't
18 attend?

19 **A.** Correct.

20 **Q.** She indicates that, as pointed out at that meeting,
21 Tesco are increasing McLelland's cost price by £200 per
22 tonne. So you had managed, by that date, to get the
23 across-the-board cost price increase that you were
24 seeking from Tesco?

25 **A.** That's what it states, yes. Yes, I agree with you.

1 Q. And Meikle was forwarding that email to you to show you
2 that he had obtained that?

3 A. That that had been done, yes.

4 Q. She also gives McLelland, in the second paragraph, the
5 dates for the cost price increases for particular
6 categories of cheese. She attaches a table of retail
7 prices and she asks in the first paragraph for Meikle to
8 pack to these RSPs "asap", do you see that?

9 A. Yes, so she's amended some of the detail that Stuart had
10 originally sent out, yes.

11 Q. We can see in the attachment to her email she has set
12 out the new retail prices and on some of them she has
13 maintained percentage margin, on some of them she has
14 not.

15 A. Yes, and some she's improved as well, by the looks of
16 it.

17 Q. Yes, and some are lower, some are higher, some are at
18 the --

19 A. Yes.

20 Q. But all of them there, she's increased her retail prices
21 as well as increasing her cost prices?

22 A. She has, yes.

23 Q. Now, as we've already seen, that email, the email from
24 Lisa Rowbottom to Stuart Meikle, was forwarded to you on
25 10 October and a number of other individuals,

1 including -- a number of other individuals in McLelland.

2 Then at tab 124 [Magnum], we have an internal email
3 from Asda at 3.01 pm on Friday, the 10th, so just under
4 an hour and a half later, which says "Retailers":

5 "Further update below.

6 "Tesco have now moved to increase retailers on own
7 label. Value and territorials have moved between 23 and
8 29p per kg, I have line detail. Cheddar has moved on
9 average 35p per kg though I have no visibility on exact
10 prices. Those packs should be instore in [circa] 10
11 days time. On balance the extent of their price changes
12 suggests they have maintained margin % across the cheese
13 category."

14 There, it would appear, because he's talking about
15 packs being in store in ten days' time, that these were
16 future prices for Tesco?

17 **A.** Yes, I'm sure -- I feel that's what Jonathan Betts is
18 referring to but, again, it's an Asda internal memo,
19 I would never have seen that and I've no involvement in
20 it at all so I can't comment on it.

21 **Q.** I'll put to you, and you may or may not be able to
22 comment on this, that this information was obtained,
23 this information about Tesco was obtained by Asda from
24 McLelland who had -- McLelland had obtained it
25 themselves from Asda the previous day in the email of

1 9 October at tab 123 [Magnum].

2 **A.** I can't make any comment on that at all. It's an Asda
3 internal email.

4 **Q.** Mr Meikle had sent the email from Lisa Oldershaw. He
5 had forwarded it on to you.

6 **A.** Yes.

7 **Q.** And you passed the information on to Asda or you passed
8 it on to Chris Reid, Asda's account manager, so that he
9 could pass it on to Asda?

10 **A.** Absolutely not.

11 **MS SMITH:** Thank you, Mr Ferguson. Those are all my
12 questions.

13 **LORD CARLILE:** Thank you very much, Ms Smith.

14 Yes, Miss Rose.

15 Re-examination by MISS ROSE

16 **MISS ROSE:** Mr Ferguson, I would like to ask you to take up
17 document bundle 1 again and turn back to an email that
18 occupied a considerable amount of time earlier today.
19 Which is tab 52 [Magnum].

20 **A.** Yes, I have it, yes.

21 **Q.** You were asked some questions about the statement:

22 "Other parties are confirming that they will protect
23 cash margin on this occasion but not % margin."

24 **A.** Yes.

25 **Q.** You said that you had considered this was information

1 that was known in the industry or was in the public
2 domain at the time because of the £200 per tonne
3 initiative?

4 **A.** Correct, it was very much in the public domain, yes.

5 **Q.** I don't think you were shown any of the documents
6 concerning what was in the public domain at that time.
7 If we can just look at some of them. Tab 23 first of
8 all [Magnum].

9 **A.** I've found it, yes.

10 **Q.** This appears to be an extract from Dairy News, what is
11 Dairy News?

12 **A.** Dairy News is a dairy industry publication, it would go
13 round the whole of the dairy industry.

14 **Q.** We see that the date of this is 20 September 2002, do
15 you see that?

16 **A.** I do, yes.

17 **Q.** "Milk processor Dairy Crest is calling on the major
18 retailers to increase the retail price of cheese, butter
19 and cream vowing that it will pass any extra cash back
20 to its farmers.

21 "David Lattimore, managing director of direct milk
22 supplies for the dairy, told Farmers Weekly: 'It is
23 a similar initiative to when the retailers increased the
24 price of milk -- and all the extra cash will be passed
25 back to the producer.'

1 "He defended Dairy Crest's position of asking
2 supermarkets to fund any increases rather than dipping
3 into its own coffers. 'We always pay some of the best
4 prices for our milk, so we are already doing this'."

5 How do you understand those paragraphs, what do you
6 understand them to be saying?

7 **A.** I would understand that to be saying that the initiative
8 on the 2p per litre has to be passed into the cheese
9 area as well.

10 **Q.** If we go now to tab 36 [Magnum].

11 **MS SMITH:** Sorry, I hesitate to rise, but Miss Rose is
12 taking this witness to documents I did not take him to
13 in cross-examination. That is not the proper subject of
14 re-examination. I did not take the witness to those
15 documents. She can't introduce new documents to the
16 witness in re-examination and then ask him to confirm by
17 way of what are effectively leading questions what was
18 in those documents.

19 **LORD CARLILE:** Shall we see how we go? I don't accept that
20 she can't introduce new documents. It depends what the
21 target is.

22 **MISS ROSE:** Sir, the point is a simple one, that in response
23 to cross-examination on the document at tab 52, this
24 witness said that he considered that the information
25 that the retailers would be only seeking to maintain

1 cash margin and not percentage margin was in the public
2 domain and, therefore, I'm taking him to material which
3 shows --

4 **MS SMITH:** Well, in response to that, surely the nonleading
5 question would be, what is the basis for that statement?
6 Not to take him to documents and say, this is the basis
7 for your statement, this is the basis for your
8 statement.

9 **LORD CARLILE:** What strikes me, Miss Rose, is that to those
10 of us who have been here, like counsel and the Tribunal,
11 for the whole of this hearing, it is absolutely clear to
12 us that what is contained at document 23 [Magnum] has
13 been repeated again and again and again, and that what
14 had to be borne in mind was that a pint of milk obtained
15 at the farm gate doesn't turn into a pint of cheese.

16 **MISS ROSE:** Yes, sir, but in fact, of course, the document
17 at 23 goes further because it says, in the public domain
18 there, that Dairy Crest were asking for a retail price
19 rise and that all the extra cash was to be passed back
20 to the farmers. That's the point.

21 **LORD CARLILE:** We know that. That's been covered
22 ubiquitously in these papers.

23 **MISS ROSE:** Sir, indeed. Perhaps I don't need to labour the
24 point that this was a point that was in the public
25 domain.

1 **LORD CARLILE:** No, we have got that point. We've managed
2 that point.

3 **MISS ROSE:** If we just come back to tab 52 [Magnum].

4 **A.** Yes, I have it, yes.

5 **Q.** The statement is made here that:

6 "... other parties are confirming that they will
7 protect cash margin on this occasion but not % margin."

8 Do you know whether in fact that was accurate about
9 Sainsbury's who, as we know, raised their prices the
10 following day?

11 **LORD CARLILE:** I think we're going to have to establish some
12 lines here, Miss Rose. That was pretty near to the most
13 leading question I've heard even in this Tribunal over
14 a few years, and this is re-examination, so if you can
15 be careful, otherwise we're going to have a spat, if
16 I can be forgiven that word, between the two sides as to
17 the form of re-examination, which we really don't need
18 to have.

19 **MISS ROSE:** Do you know whether or not Sainsbury's price
20 increase that was applied on the following day
21 maintained cash margin or percentage margin?

22 **A.** I would say it protected cash margin.

23 **Q.** If you look at document 54 [Magnum], this is the
24 following day.

25 **A.** It is, yes.

1 **Q.** An email from yourself to Sarah Mackenzie of
2 Sainsbury's:

3 "I can confirm your retail movement on
4 Seriously Strong today after visiting the Darnley store
5 in Glasgow.

6 "250gm has moved from £1.79 to £1.85 per pack (£240
7 per tonne)..."

8 Do you have any comment to make about that?

9 **A.** The comment I make on that is that is not cash margin,
10 that is a percentage margin they're losing there. And
11 the 500 gramme pack, which they made a statement on, has
12 moved by the cash margin.

13 **Q.** Do you know which of these was the biggest seller?

14 **A.** The 500 gramme. The 500 gramme was the biggest seller.

15 **Q.** You were asked a number of questions about the reason
16 why you sent the document at tab 52 [Magnum]. Just
17 reading that email, can you explain why did you send
18 that email to Lisa Rowbottom, as she then was?

19 **A.** Well, I sent the email to, first of all, attach the
20 spreadsheet and the details et cetera, and then I was
21 also confirming that the movement would be in place on
22 the Tuesday morning, so that was the reason why I was
23 sending that.

24 **Q.** What was the purpose of sending that?

25 **A.** It would be an ongoing process with the discussions

1 I would be having at the time to obviously try and
2 conclude on the cost increase so, therefore, that retail
3 movement would be good evidence that the cost increase
4 was, again, justified and had to be in place.

5 **Q.** Now, if we go to tab 71 [Magnum].

6 **LORD CARLILE:** The next volume.

7 **A.** Is that the next book?

8 **LORD CARLILE:** Yes.

9 **MISS ROSE:** It's the beginning of the next volume.

10 So this is an email from yourself to
11 Sarah Mackenzie.

12 **A.** Yes.

13 **Q.** Saying that:

14 "Asda have moved all sizes of Smart Price mild
15 cheddar to £2.69 per kilo and Smart Price mature cheddar
16 to £3.69 per kilo. This will be matched by Tesco."

17 You said in cross-examination that that, you
18 thought, was your assumption based on your knowledge of
19 the market and Tesco's basket policy.

20 It was put to you that some of these price rises
21 were decreases by Asda but some were increases?

22 **A.** Sure.

23 **Q.** Tesco's basket policy would not necessarily require
24 Tesco to increase its price to match Asda, even though
25 it did require it to decrease its price to match Asda.

1 **A.** Correct.

2 **Q.** Were you aware whether there was any constraint on
3 Lisa's ability to raise prices if Asda raised its
4 prices?

5 **A.** I wouldn't be aware of any constraint, no.

6 **Q.** If we go on now to tab 112 [Magnum], this is the
7 briefing that Mr Meikle prepared in advance of the
8 meeting of 6 October?

9 **A.** Yes.

10 **Q.** That was going to be a meeting between senior management
11 at McLelland and Mr Scouler and Ms Oldershaw at Tesco?

12 **A.** That's correct, yes.

13 **Q.** But Mr Meikle was not going to attend that meeting?

14 **A.** He would not attend that meeting, no.

15 **Q.** Even though he was the account manager?

16 **A.** Even though he was the account manager.

17 **MS SMITH:** Again, sir, we're really rather leading now.

18 **LORD CARLILE:** Well, let's carry on.

19 **MISS ROSE:** At this time, were you aware whether there were
20 concerns within McLelland about the relationship with
21 Tesco?

22 **MS SMITH:** Sir.

23 **LORD CARLILE:** That is a very, very, very, very leading
24 question.

25 **MISS ROSE:** What was the situation as regards McLelland's

1 relationship with --

2 **A.** Stuart Meikle, as the account manager, was under a lot
3 of pressure managing the Tesco account.

4 **Q.** Why was that?

5 **A.** At the time we were potentially going to lose some
6 distribution on Seriously Strong, which is our key
7 brand.

8 **Q.** How serious would that have been for you?

9 **A.** It's very serious to lose distribution on a key brand in
10 a key retailer. That's a serious issue and that's why
11 on 6 October Alastair Irvine and Jim McGregor would be
12 at that meeting with Lisa and John Scouler.

13 **Q.** As at this date, he was saying in this note that Lisa's
14 position was that she had not agreed the £200 per tonne
15 cost price increase. Do you see that:

16 "It was at this time Lisa said she had not agreed
17 [this is just between the hole punches] the £200 cost
18 increase and that further justification was needed
19 before Tesco would consider accepting the increase."

20 Would that have been welcome news?

21 **A.** It wouldn't have been welcome news, no, because the
22 objective was the cost increase, so to be told that that
23 wasn't happening would be unwelcome news.

24 **Q.** Ultimately, who was responsible for maintaining good
25 relationships between McLelland and Tesco on

1 a day-to-day basis?

2 A. The account manager.

3 Q. And that would be who?

4 A. That would be Stuart Meikle at the time.

5 Q. You were also asked some questions about document 79
6 [Magnum], this is dated 8 November 2002.

7 A. Yes, found it.

8 Q. It includes the comment which is attributed to Lisa:

9 "While they are relatively confident that everything
10 is in place with Asda..."

11 Again you said you thought this might be industry
12 knowledge at the time.

13 Can we just go back to tab 72 [Magnum], this is an
14 article from -- sorry, I can't see what this is, it's
15 something K News?

16 A. It's a Dairy Industry News article, I can recognise --

17 Q. So is this a public document, do you know?

18 A. Yes, it is. It's the Dairy Industry News --

19 Q. Dated 5 November, so that is three days before this
20 conversation?

21 A. Correct.

22 Q. We see the first bit:

23 "Tesco, Sainsbury, Asda and others, will increase
24 wholesale cheese prices by £200 a tonne as from this
25 week, and their retail prices will be increased over the

1 next 2-3 weeks."

2 **A.** Yes, I see that quite clearly.

3 **Q.** Now can we go to document 116B [Magnum], it may be that
4 we can't take this very much further, but can you just
5 explain again, what do you understand the word
6 "effective" to mean, where it says "retails effective"?

7 **A.** My understanding of the "effective" word, again, is if
8 you say the cost increase is effective from 5 October,
9 that's the day it's implemented. If the retail is
10 effective from 5 October, that's the day it will be
11 delivered on.

12 **Q.** Delivered to whom?

13 **A.** To the depot.

14 **Q.** To the --

15 **A.** Customer's depot.

16 **Q.** So in this case that would be the Asda depot?

17 **A.** That would be Asda in this case.

18 **Q.** We see that at the bottom of the document there are
19 signatures dated 3 October?

20 **A.** Yes.

21 **Q.** And that the instruction there says:

22 "Retails to be effective from next production week.

23 "Commences 6th October 2003."

24 **A.** Yes.

25 **Q.** Then at the top of the document it says:

1 "Asda retails effective from the 6th October 2003."

2 So "to be effective" has now become "effective" and
3 that's dated 6 October?

4 **A.** Yes.

5 **Q.** Does that help you in considering the meaning of those
6 two signatures?

7 **A.** It does in some context. I've got to say it's not
8 a professional document this. But, to me, if the retail
9 is effective from a date, that is the first day that we
10 will deliver that retail, because I'm saying that quite
11 clearly.

12 **Q.** But having signed on the 3rd saying "to be effective"
13 from the 6th, why did you sign again on the 6th saying
14 "effective" from the 6th?

15 **A.** I have no recollection.

16 **Q.** You don't know that.

17 It was put to you repeatedly, if we go to 116C
18 [Magnum], that the phrase in this email:

19 "Products priced at these levels should be sent into
20 our depots from Monday 6 October onwards" is in some way
21 different from them being sent "on" that day. What's
22 your response to that?

23 **A.** My understanding, if I have a request to supply
24 something from Monday, 6 October, that's the first day
25 that I will deliver that.

1 **Q.** It may be a statement of the obvious, but if you only
2 delivered cheese on the 6th and then not in the future
3 after the 6th, presumably there would be a problem with
4 the distribution chain quite quickly?

5 **A.** There certainly would be.

6 **MS SMITH:** Sir, really that's --

7 **LORD CARLILE:** The words speak for themselves, don't they?
8 If one takes a common sense view of these documents,
9 Miss Rose, they seem to suggest that there was an
10 instruction that deliveries should start on 6 October.

11 **MISS ROSE:** Yes.

12 **LORD CARLILE:** The first delivery was made on 6 October and
13 presumably other deliveries followed after 6 October.

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

15 **A.** Yes, they would do. That's exactly how it was.

16 **LORD CARLILE:** That's the way the documents speak, whether
17 that's what they mean may be a matter of evidence.

18 **MISS ROSE:** Yes, sir. I have no further questions.

19 **LORD CARLILE:** Right.

20 Okay, what awaits us tomorrow? Who have we got
21 tomorrow?

22 **MS SMITH:** Sir, we have Mr Irvine tomorrow, I don't think we
23 need to start early. 10.30 should be absolutely fine.

24 **LORD CARLILE:** You think you'll deal with Mr Irvine
25 comfortably tomorrow?

1 **MS SMITH:** Comfortably, yes.

2 Sir, if I can just hand over for one more point.

3 **LORD CARLILE:** Welcome to the party.

4 **MR MORRIS:** Yes, it's been a long time.

5 **LORD CARLILE:** Yes, we've been missing you.

6 **MR MORRIS:** And I've been missing you too.

7 Before Mr Ferguson leaves the witness box, can I
8 just raise one matter. Mr Ferguson is an ex-colleague
9 of Mr Irvine's, and Mr Irvine is due to appear tomorrow.
10 Could we ask the Tribunal to remind Mr Ferguson, and
11 indeed anyone else present in the courtroom today, that
12 they should not talk to Mr Irvine or any other witness
13 still to be called about the content of the proceedings
14 so far.

15 **LORD CARLILE:** Yes, can I make it clear that the Tribunal
16 will take an extremely serious view if the evidence
17 that's been given so far were to be discussed in any
18 detail whatsoever, or at all, with any witness who has
19 not yet given evidence, beyond pure administrative
20 matters as in where is the building? Can you get a cup
21 of coffee? That sort of thing.

22 Will that do?

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

24 **LORD CARLILE:** So you know that, although your evidence has
25 now finished, and indeed you are released -- that means

1 you don't have to come back unless something happens --
2 please do not discuss your evidence with anybody until
3 you're told by some lawyer or other that you're allowed
4 to do so.

5 Is that all right?

6 **MISS ROSE:** Yes.

7 **LORD CARLILE:** That's the safe course. I'm looking at your
8 instructing solicitors, Miss Rose.

9 Okay. Then we'll adjourn until 10.30 tomorrow
10 morning which should give us that extra half hour we'll
11 need for Friday.

12 (4.45 pm)

13 (The hearing adjourned until
14 Thursday, 17 May 2012 at 10.30 am)

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