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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

17 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 7)

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 Thursday 17 May 2012

2 (10.30 am)

3 **LORD CARLILE:** Good morning.

4 **MISS ROSE:** Shall we call Mr Irvine?

5 **LORD CARLILE:** What, no applications?

6 **MISS ROSE:** No applications, sorry to disappoint you. I'm

7 sure we can think of one.

8 **LORD CARLILE:** Tomorrow we'll hear any applications at

9 06.30. I believe you cycle into town, don't you,

10 Mr Morris?

11 **MR MORRIS:** No.

12 **LORD CARLILE:** So rumour has it.

13 Welcome back Miss Davies.

14 **MR ALASTAIR IRVINE (sworn)**

15 Examination-in-chief by **MISS ROSE**

16 **LORD CARLILE:** Do sit down. That microphone with the red

17 light does not amplify your voice but it's very

18 important because it records what you say. So don't

19 relax backwards too much.

20 **THE WITNESS:** All right.

21 **LORD CARLILE:** Can I say to you, before you start, if there

22 are any breaks in your evidence, please do not discuss

23 your evidence with anyone at all until it's completely

24 finished.

25 **THE WITNESS:** Yes, sir.

1 **LORD CARLILE:** Miss Rose?

2 **MISS ROSE:** Please could the witness be given bundle 2B.

3 Mr Irvine, can I ask you to turn in that bundle to
4 tab K [Magnum], which is about a third of the way
5 through. Do you have there a document headed "First
6 Witness Statement of John Alastair Irvine"?

7 **A.** I do.

8 **Q.** If you go to the last page of that document, is that
9 your signature?

10 **A.** Yes, that is my signature.

11 **Q.** Are the contents of this statement true?

12 **A.** Yes, the contents of this statement are true.

13 **Q.** Can I ask you to turn in the same bundle to tab L
14 [Magnum], is this a document headed "Second Witness
15 Statement of John Alastair Irvine"?

16 **A.** Yes, it is.

17 **Q.** Again, is that your signature?

18 **A.** Yes, that's my signature.

19 **Q.** Are the contents of this statement true?

20 **A.** Yes.

21 **Q.** In fact, you'll see that this statement corrects
22 a statement that was made in your first statement?

23 **A.** Yes.

24 **Q.** Do you want to qualify what you just said about your
25 first statement?

1 this case.

2 **Q.** So far. And that your ex-colleague, Tom Ferguson,
3 you're aware he gave evidence yesterday, are you?

4 **A.** Yes, I am aware that Tom Ferguson gave evidence
5 yesterday.

6 **Q.** Have you discussed the evidence given in this case so
7 far with anyone?

8 **A.** I haven't discussed the evidence given in this case with
9 anyone.

10 **Q.** Joe Cairns, who I believe was your adviser, is he still
11 your adviser?

12 **A.** Joe Cairns actually is our financial director of our
13 current business enterprises.

14 **Q.** He was in court yesterday, are you aware of that?

15 **A.** Yes, I'm aware that he was in court yesterday afternoon.

16 **Q.** Have you discussed any evidence that was given in court
17 yesterday with him?

18 **A.** No, I didn't discuss any evidence. He was quite
19 clear -- I did have a cup of tea with him last night
20 after and he was very clear that he had been warned
21 within an inch of his life not to discuss anything
22 within the court so, to that purpose, we quickly
23 finished the cup of tea and I went up to my bedroom to
24 revise the notes and that was -- we didn't discuss any
25 evidence or any details of the case at all.

1 Q. Until 2004, you were joint owner with your father and
2 brother and joint managing director of McLelland, is
3 that right?

4 A. That is correct. That was the situation within
5 McLellands in 2004 and also in 2002 and 2003.

6 Q. In September 2004, the company McLelland was sold to
7 Lactalis, is that correct?

8 A. Yes, that's correct. We sold the business to Lactalis
9 in 2004.

10 Q. And in 2002, 2003, you were the managing director with
11 particular responsibility for group strategy and
12 commercial development?

13 A. Yes, my role during 2002 and 2003 was primarily sales,
14 group strategy, which would involve milk purchasing,
15 expansion as in buying other creameries, expanding
16 business, and strategic development with our various
17 customers.

18 Q. You say your responsibility was primarily sales, so you
19 were responsible for overall company policy on sales, is
20 that right?

21 A. Overall company policy on sales? Certainly the sales
22 side of the company reported into myself.

23 Q. That's right. James McGregor, the group sales director
24 at the time, he reported to you?

25 A. Yes. James McGregor started with us in the beginning of

1 the summer of 2002, and so at the beginning of that
2 period there was a handover of responsibility for sales
3 to Jim which gradually took place over that period.

4 **Q.** And who had been sales director before that? Who had
5 handed over to him?

6 **A.** We didn't actually have a sales director before that.
7 We had myself as a managing director and we had
8 Tom Ferguson as a sales manager, and we felt we needed
9 to expand our strength in that area as our business was
10 growing quite quickly.

11 **Q.** So in 2002, first of all, you say Tom Ferguson was
12 a sales manager. He has also been described in the
13 papers as a national account controller. He reported to
14 James McGregor, Jim McGregor, when you recruited
15 Mr McGregor, is that right?

16 **A.** Yes, that's correct. We did consider Tom Ferguson for
17 the role of sales director but we felt that we wanted to
18 upweight and have someone who we could bring in to match
19 within our supermarket customers. So if you can
20 imagine, you have a sales buyer and then you'd have
21 often a sort of boss of the sales buyer and then
22 a trading director, and we were trying to find people
23 that we could actually cross-match so that the account
24 manager would deal with the buyer, Tom Ferguson would
25 deal with the buyer's boss, and then the sales director

1 would then come in and deal with the trading director.

2 I would really only be brought in for major negotiations
3 and strategic talks when the what we call the big guns
4 were brought out.

5 **Q.** In 2002, for which accounts did Tom Ferguson have
6 responsibility?

7 **A.** In 2002 Tom Ferguson would have had responsibility,
8 generally, for all the accounts so the -- as far as
9 I remember. There was a handover period in 2002, we
10 were sort of in transition. But Tom Ferguson would be
11 very much -- would have the account managers reporting
12 into him but then he in turn would report into the sales
13 director, once he was appointed, so he would be of an
14 overall responsibility across the accounts, certainly
15 once Jim McGregor came in and certainly before that. So
16 all the accounts I would say. And not just
17 supermarkets, all of the accounts including, you know,
18 wholesale and cash and carries and this sort of thing,
19 but not export.

20 **Q.** Let's try to get the situation clear between 2002 and
21 2003 because I think in 2003 Mr Ferguson was promoted to
22 national account controller and I want to know, first of
23 all, in 2002 we see lots of documents of him dealing
24 directly with Tesco and he described himself as the
25 national account manager for Tesco. He also managed the

1 account for Sainsbury's, did he, in 2002, before he was
2 promoted?

3 **A.** To be honest, I'm a little bit vague about when and if
4 responsibility handed over, but the structure generally
5 was we had the sales director of Jim McGregor, and below
6 Jim McGregor we had Tom, who was directly in control of
7 but also in the day-to-day interaction with each of the
8 accounts. But we also had an account manager who were
9 responsible for the accounts.

10 So an example of that would be, say, with Tesco,
11 with Stuart Meikle. Stuart Meikle would be the
12 day-to-day contact of, say, Lisa. Tom Ferguson would
13 also oversee that and get involved in meetings and
14 strategy and they would both report back to
15 Jim McGregor, who would from time to time update me in
16 progress or problems or discussions, particularly after
17 maybe a sales meeting, Jim McGregor might come in and
18 talk through what he felt was needed in the market and
19 give us some feedback.

20 **Q.** So, as you say, Tom was directly in control of
21 day-to-day interaction of each of the accounts, so he
22 would have direct interaction in this period with Tesco
23 but also with Sainsbury and other retailers as well, is
24 that the position?

25 **A.** Yes, that would be the case.

1 **Q.** Now, Mr Ferguson described to us, I think either
2 yesterday or maybe on Monday, that at the time,
3 2002/2003, McLelland was still a relatively small
4 business and you all worked in an open plan office in
5 Glasgow, is that right?

6 **A.** Yes. We very much liked, and I do think it was part of
7 our success, that we had a sort of open plan office and
8 all the sales team right up to sales director listened
9 to everybody else on the telephone calls. So, you know,
10 you could literally hear what was going on live, you
11 know. There was a board in the room which we wrote
12 up -- it was meant to be once a week but it became once
13 a day -- how much cheese had sold versus the various
14 targets. It became quite a central point or hub of our
15 existence, was that people used to come in and look at
16 the cheese board to see how they were doing against
17 target because that actually dictated the whole
18 organisation's bonuses.

19 But it was very open plan, very interactive, really
20 very casual. There weren't even any screens between the
21 desks. We liked it that way.

22 **Q.** Had McLelland put any precautions in place to ensure
23 that that information an account manager had obtained
24 from one retailer was kept confidential from that which
25 he had obtained from others? It sounds like, in that

1 situation, precautions would have been pretty vital?

2 **A.** There was no per se precautions, but I do think that the
3 culture within our company was very much one of we
4 understood that the supermarkets that we were dealing
5 with, one account, that that was very confidential to
6 that particular account and shouldn't be shared with
7 another account.

8 You know, it's -- the culture of our company was
9 very much an honest company. It was a small business,
10 we'd grown very quickly to where we were but we still
11 had sort of family business values, if you like, we
12 liked to think that, in that we employed people who we
13 felt were trustworthy and honest because we relied upon
14 them quite heavily.

15 The sales team really was the driving force that the
16 whole rest of the organisation thrived under.

17 **Q.** You've described that Mr Ferguson, in 2002, was having
18 direct day-to-day contact as account manager with Tesco
19 but also with other retailers including Sainsbury's.
20 Would Tesco have been aware, in 2002, that that was the
21 situation, that Mr Ferguson was also having direct
22 day-to-day contact with other retailers?

23 **A.** I think you've got to remember that we were a very small
24 company. We only had four salespeople, one sales
25 manager and ultimately then one sales director. So, you

1 know, I think our customers, who had all visited us,
2 seen our organisation, understood how we worked,
3 appreciated that we didn't have resources to have
4 individual groups of people to manage every single
5 account, we had to multitask, so they would have been
6 aware of that.

7 **Q.** As far as you can recall, did anyone from Tesco ever ask
8 you or your colleagues what steps were being taken to
9 ensure that their information about retail prices
10 et cetera was being kept confidential?

11 **A.** I can't remember any conversation or am aware of any
12 dialogue with Tesco in general terms whereby they were,
13 say, auditing us and, you know, checking to see if we
14 were -- there was any possibility of cross contamination
15 of information. So I'm not aware of, you know, any
16 audit of that in any way, or undertaking.

17 There were, of course, various contracts to supply
18 that would, I'm sure, have covered off these sorts of
19 issues but they weren't specifically highlighted or
20 brought to our attention in any way.

21 **Q.** Can I ask you a question about Stuart Meikle.

22 **A.** Yes.

23 **Q.** He was working for McLelland in 2002, that's right,
24 isn't it?

25 **A.** Yes.

1 Q. And he had been managing the account with Co-op in 2002?

2 A. To be honest, I can't remember specifically what
3 accounts he was managing. It did change from time to
4 time but that's very possible.

5 Q. But he would have been managing more than just Co-op, he
6 would have had contact with a number of other accounts
7 as well?

8 A. Yes. Sometimes, you know, if there's a lot of activity
9 within an account such as maybe -- I do remember
10 Sainsbury's at this time had a thing called Project
11 PICO, which was a sort of value engineering project that
12 they'd been running leading up to this point, whereby
13 they basically took their whole cheese range, brought in
14 all their cheese suppliers, got them all to requote.
15 Everybody gave them a sort of "This is how we think your
16 cabinet should look. This is the cheeses you should
17 highlight. Here is how we feel, as suppliers, each of
18 us, how you could best maximise your margin and your
19 sales and everything else within your counter".

20 So at that time, just as an example, we would
21 possibly take an account manager and Tom Ferguson, and
22 I think this was the case leading up to this, and ask
23 him to concentrate more or less solely on that account
24 until we're through this very important, very heavy
25 project.

1 So we did change round from time to time. But as
2 I say, we had four salespeople with more than four
3 customers and so it was very probable that --

4 **LORD CARLILE:** They would have to cover for one another when
5 they went on holiday or ill or --

6 **A.** Exactly. Exactly.

7 We had another person called Brian Skeffington who
8 used to be a very good sales manager but, in my opinion,
9 he'd been in sales too long and had become a little bit
10 confrontational and bitter. We found that salespeople,
11 if they get stuck in that level --

12 **LORD CARLILE:** He's really nice otherwise.

13 **A.** He was a very pleasant man but, you know, when you're
14 under constant bombardment with supermarket buyers, and
15 another new buyer comes in and starts the whole process
16 again, then sometimes -- and he just got to that stage
17 where he was getting intolerant of the same old
18 questions. So we took him off direct sales and we put
19 him on supply chain. But he was a very good cover if
20 someone was off sick or -- so we had a spare resource
21 there.

22 **MS SMITH:** Mr Meikle, in 2003, I think he was promoted to
23 manage the Tesco account, is that right?

24 **A.** Yes, I'm aware, particularly from the papers that I've
25 been looking at throughout this case, that Stuart Meikle

1 was managing the Tesco account.

2 **Q.** Is it safe to say, is it correct to say, that Tesco was
3 McLelland's biggest customer at the time?

4 **A.** Yes. Tesco at this time was McLelland's biggest
5 customer, closely followed by probably Safeway.

6 **Q.** You must have thought highly of Mr Meikle if you were
7 happy to put him in charge of your biggest account?

8 **A.** To be quite honest, I thought highly of all our
9 salespeople. We were quite intolerant, we had a small
10 team and if someone wasn't fitting in, or sometimes if
11 someone started and they were doing a good job to start
12 with then we would move them on quite quickly. So at
13 that time we would have been very happy with Mr Meikle.
14 He came with a very good CV when we employed him, quite
15 a blue chip CV from I think it was Mars or someone like
16 that, and we were very pleased, to be honest, to be
17 upweighting our recruiting efforts.

18 It was very difficult for a small company in Glasgow
19 to attract the cream of the blue chip companies, which
20 we needed to basically stand in front of people like
21 Tesco because they were very able and adept. So
22 Stuart Meikle particularly stood out. He'd been at
23 Mars, and then actually he'd worked for Wiseman, and
24 Robert Wiseman was a very good friend of ours. And so
25 it was a very tetchy moment when we poached one of his

1 key salespeople off him, he wasn't very happy with me at
2 the time, I do remember that.

3 **Q.** Do you remember when Mr Meikle stopped having
4 responsibility for the Tesco account?

5 **A.** No, I can't say I do remember when Stuart Meikle stopped
6 having responsibility for the Tesco account.

7 **Q.** I understand he no longer works for McLelland. Do you
8 know when he left?

9 **A.** He left after I sold the business.

10 **Q.** So he left after September 2004?

11 **A.** Yes.

12 **Q.** You don't recall having received any complaints about
13 Mr Meikle from Tesco, in particular, in 2002, 2003?

14 **A.** No, I would remember very clearly. Our relationships
15 with our supermarkets and customers was very, very
16 important, we understood that. It was one of the things
17 that I think differentiated us from our competitors. So
18 if there had been complaints about the conduct of any of
19 our salespeople then that would have absolutely stuck in
20 my mind.

21 **Q.** If there had been complaints, as you were the director,
22 the managing director with ultimate responsibility for
23 sales, you would have expected to have heard about those
24 complaints?

25 **A.** Yes. Unless there was some sort of cover-up, you know,

1 at sales level, but it wasn't that sort of organisation,
2 it was too open. You know, the other salespeople in the
3 organisation would have -- if they felt it wasn't
4 getting through to me they'd quite often just walk
5 through to my office and tell me directly themselves.
6 So there's no way, in my opinion, that I would not have
7 been aware of complaints.

8 **Q.** You have talked about your contracts of supply with
9 retailers, you mentioned it in one of your answers, and
10 you had a contract of supply with Tesco, I assume?

11 **A.** Contract of supply with Tesco? You know, I think
12 that -- I'm not really, to be honest, aware of
13 a contract to supply with Tesco. The quality side of
14 our business, we did get audits on, obviously, food
15 hygiene and, you know, these were quite involved
16 processes, and that area of the business didn't actually
17 come under myself.

18 So if there was within there some sort of contract
19 that we had to sign, you know, for quality and for, you
20 know, trading and other things, then there could have
21 been one that I wasn't aware of. I don't specifically
22 remember, for instance, on an annual basis signing
23 a contract of supply with any of our supermarket
24 customers. It was a more casual arrangement than that,
25 as far as I can remember.

1 **Q.** So with Tesco, was there a business -- did you sell
2 them, cheese, a certain volume per month or was it all
3 spot buying by Tesco?

4 **A.** We would -- with Tescos we'd set out at the beginning of
5 the year, and it was becoming more and more common, we
6 would set out a business plan at the beginning of the
7 year and we would target Tesco and our other customers
8 to sell certain volumes of cheese.

9 What we were trying to do, and this was promoted by
10 ourselves but encouraged by the supermarkets, what we
11 were trying to do was set targets for them to sell our
12 cheese and give them extra special overriding discounts
13 at the end of the year if they hit certain targets.
14 This was a much more satisfactory way for ourselves to
15 give discounts than to just drop the price of cheese all
16 the time, which was the pressure we were under.

17 So it was much better to make a plan for the year,
18 set an ambitious volume and give them a very big carrot
19 for achieving that, but to try to keep the day-to-day
20 price stable. So in other words, if they're not selling
21 the volume, they don't get the special price.

22 Yes, so we set out a plan at the beginning of the
23 year and that was the way we tended to operate.

24 **Q.** I just want to focus a little bit on your obligations,
25 McLelland's obligations, towards the retailer. Take,

1 for example, your selling them Seriously Strong, would
2 Tesco identify or say "I want a certain volume per month
3 of this product"?

4 **A.** Tesco wouldn't say they wanted a certain volume per
5 month of the product. The only exception to that would
6 be -- there was a different scenario on their sort of
7 Value cheese, the Value cheddar cheese which they bought
8 over certain periods, I think they were six-monthly
9 periods, on a blind auction. That was a much more
10 formal arrangement, and they had a process whereby you
11 bid prices in and you could basically -- so it was
12 a Dutch auction -- so you could basically see yourself
13 getting beaten, and then you rebid and you rebid and you
14 rebid, and eventually when there's no one else bidding,
15 that's who got the contract.

16 **LORD CARLILE:** So you'd be competing with other creameries,
17 as it were?

18 **A.** You wouldn't really see who it was that was putting in
19 the other bids, you would just see that the price was
20 going down, sort of like the wrong way round. So you
21 might bid, say, 2,400 for supplying their mild cheddar,
22 and then someone comes in at 2,350, so you go 2,320 and
23 it would go down. Almost always it got to the point
24 where we were saying, "No, that's too steep for us".

25 But in that scenario that was a much more formal

1 contract, this was for a volume of cheese which they
2 committed to at a price, and you committed to supplying
3 them at a price too. So that was quite a sort of
4 contractual understanding-type arrangement.

5 Other than that, volumes of cheese per month, there
6 was never any commitment to volumes of cheese per month.
7 So, for instance, Seriously Strong 250 gramme pre-packs,
8 they wouldn't say "We will buy a minimum of X amount per
9 month", there was nothing like that.

10 **MS SMITH:** So if they wanted, say, Seriously Strong pre-pack
11 or one of the McLelland branded random weight brands,
12 like Galloway, Tesco would place particular orders,
13 would they, for certain amounts of that cheese?

14 **A.** Yes -- no, they wouldn't place orders for amounts of the
15 cheese. What would happen is we would go along to the
16 supermarket, and let's say we wanted to get a new
17 listing, Seriously Strong was a new listing, we would
18 then negotiate how many stores and what sort of facings
19 within these stores we would have.

20 It was then up to us, along with -- sometimes some
21 supermarkets had forecasters or planners to try and
22 gauge what sort of volume that might look like, but
23 there was no commitment to any volume and no pre-orders.

24 The only orders that we got, or the way that the
25 order system worked was that, as the supermarket sold

1 the product through the till, that literally produced an
2 order for a replacement for that particular product.

3 **LORD CARLILE:** That's how supermarkets work, isn't it?

4 **A.** Yes. So they'd go through the scanners, and then at the
5 end of the day we would get a collation, so we would get
6 orders. Now this was a massive change to our business,
7 it happened a few years before this, and prior to this
8 we used to supply cheese into different depots which
9 were owned by the supermarkets and then they would send
10 that stock out.

11 Now, the supermarkets realised that that meant they
12 were carrying a huge amount of stock, which is a huge
13 amount of money, so they realised that if they passed
14 that on to the suppliers to be their responsibility,
15 then that saved them a huge amount of money in stock.
16 So what we did -- so what happened was that we went
17 from, say, a weekly delivery, which didn't really matter
18 if it wasn't 100 per cent right, to a daily delivery
19 which we were penalised if we didn't hit. So we would
20 literally get orders up to 8, 9, 10 o'clock at night for
21 delivery before 3 o'clock the next morning.

22 So how we managed that was, we employed -- we either
23 sent it out direct ourselves from our own warehouses, or
24 we employed distribution warehouses ourselves. Ours was
25 Culina, which is part of Muller yoghurt, and we supplied

1 them with stock which was immediately sent out to the
2 supermarkets every day, seven days a week.

3 You can imagine the change to our business that that
4 created. It was enormous. And the number of invoices;
5 bills were created at the supermarket therefore, so the
6 supermarket would then bill us, we wouldn't bill them,
7 they'd send us what they'd bought, and there was always
8 massive discrepancies on what they said they'd actually
9 received and what we'd actually sent. There was a whole
10 department trying to sort that out, and debit notes and
11 credits, and it was just a nightmare.

12 **Q.** You said the situation moved from where the supermarkets
13 would hold stock, that they then expected the processors
14 to hold the stock for them?

15 **A.** Yes. Basically, it took stock out of the system because
16 what happened was that when the private operators came
17 in -- we used Muller for a reason. We used Muller
18 because they were selling yoghurt and they really had
19 a tiny wee shelf life on that. They did have a store
20 but it wasn't big enough to cope with all their stuff
21 and all our stuff, so what it did was it tightened up
22 our stock enormously. We went from being a stockholding
23 business to practically live packing. And it was
24 difficult, and we didn't always get it right and that
25 created even more debit notes, as you can imagine.

1 The way Muller handled this problem, which we were
2 just amazed with, was they sent out 110 per cent of
3 every order. So if they'd get an order for 100 cases
4 they'd send out 110, and then they would expect to be
5 billed back for 100. That was easier for them than
6 trying to run around trying to chase a few cases of
7 yoghurt here and there, in their opinion.

8 But it just shows they must have a good margin in
9 that business!

10 **LORD CARLILE:** Certainly, yes.

11 **MS SMITH:** In 2002, 2003, the situation was I think that
12 McLelland had -- was it six production and packaging
13 sites in Scotland and one in Wales?

14 **A.** We had six production sites -- let me just qualify that
15 a little bit -- and one in Wales, that's correct. We
16 had five creameries and a packing station, and the
17 creameries were owned in conjunction with the farmers,
18 various groups of farmers.

19 Now, I don't want to spend too much time --

20 **LORD CARLILE:** Were they farm co-operatives?

21 **A.** Yes. If I can just tell you the background you might be
22 able to understand better the structure, and I'll try to
23 make it quick.

24 What happened was there was the Milk Marketing Board
25 and we were agents selling cheese on behalf of them.

1 Zoom forward, we'd bought a big creamery and we were
2 selling our own cheese into the market. That was really
3 my brother's and my first big move, I guess. The
4 smaller creameries around Scotland were still owned by
5 what was Scottish Pride and then Scottish Milk Products.

6 They were struggling to sell against us and they
7 asked us if we'd consider being agent for their
8 creameries and we said, "Well, no, we've sort of done
9 the agency bit for 40 years, you know, we never made
10 much money and we don't really want to go down that
11 route again". They said, "Well, how about if you buy
12 into the creameries and, you know, you buy the
13 creameries but we'll own them jointly, like a joint
14 venture, and then we still act as agents". So that's
15 what we did.

16 We had various shareholdings in different
17 creameries: Mull of Kintyre, Orkney, Isle of Bute,
18 Arran, and a packing station at Mauchline. So, really,
19 the farmers and ourselves were very, very integrated,
20 much more so than all the other cheese suppliers,
21 because we would literally go to board meetings with
22 these creameries and explain in detail how we were
23 getting on with their cheese sales. So that was an once
24 a month situation.

25 But they would also use that opportunity to speak to

1 us about milk price as well and, you know, where they
2 foresaw it and obviously if they were having a hard
3 time. And also opportunities: if they get extra milk,
4 for us to go out and try and get extra business.

5 **Q.** As you said, the packing station was Mauchline, which is
6 East Ayrshire?

7 **A.** Mauchline at that time was East Ayrshire. Other than we
8 had Aeron Valley, which was a new acquisition in Wales.
9 Again it was a close collaboration with Scottish Milk
10 Products. They'd bought it with Dairygold and it had
11 got into real financial trouble and we sort of went and
12 bailed them out in return, actually, for a milk deal.

13 **LORD CARLILE:** Where was that in Wales?

14 **A.** Where? Sort of mid to bottom.

15 **LORD CARLILE:** Breconshire, that sort of area?

16 **A.** Yes, exactly.

17 But we also got quite a lot of cheese packed by
18 others, and we had gone from having no packing
19 facilities at all to having Mauchline, and then, you
20 know, we eventually built a state of the art packing
21 station down at Caledonia, our biggest creamery, and
22 that got us independent of having to contract out to
23 others to pre-pack our cheese.

24 **MS SMITH:** You've explained that McLelland was a family
25 business, I think, owned by you, your brother Douglas

1 and your father Hugh. Had you always worked in the
2 business?

3 **A.** Yes, more or less. I went to school, university,
4 degree, sold encyclopedias door to door in America,
5 would you believe -- I did quite well, I earned enough
6 money to go round the world. I had a round the world
7 trip and then started with my father's business. I had
8 a small sabbatical with William Lows and worked for
9 a short time --

10 **LORD CARLILE:** A grocery retailer?

11 **A.** Yes, William Lows was a Scottish supermarket. At the
12 time Tesco didn't have any supermarkets in Scotland so
13 Tesco came in and bought William Lows and it became part
14 of the Tesco empire. We were very strong with William
15 Lows at the time; as a Scottish regional cheese supplier
16 to a Scottish regional retailer there were very close
17 ties. And so when Tesco came in and bought William Lows
18 we were very worried that we were going to lose a lot of
19 business, but as it turned out it turned into a very
20 good relationship with Tesco instead.

21 **MS SMITH:** It would be fair to say, I think then, that by
22 2002, 2003, you had been in the industry for a long time
23 and you knew the industry well?

24 **A.** Yes. I think that would be fair to say.

25 **Q.** And you knew the major players, you knew the other

1 processors and the other retailers?

2 **A.** Yes.

3 **Q.** And you describe the business in your witness statement
4 as small but growing, and you say that you supplied
5 cheese and butter mainly to the major grocery retailers
6 in the UK, and you say you managed to develop good
7 relations with the major grocery retailers, particularly
8 with Tesco, is that right?

9 **A.** Yes. It would be fair to say that our relations with
10 every supermarket weren't the same, it's like trying to
11 compare which friends are better friends. Sometimes,
12 you know -- and it very much depended on the buyer.
13 Every supermarket had the same strategy in that, you
14 know, they would bring in a new buyer after 18 months,
15 you would spend 18 months doing them favours and digging
16 them out of holes, and you're hoping that you're going
17 to get some sort of favour, or need some favour back the
18 other way, and the buyer changes and moves on.

19 So it was quite ruthless in that respect in that we
20 were constantly trying to build relationships and
21 constantly -- you know, the person that we had built a
22 relationship with, as soon as we had that, they moved on
23 to another area. It was a very effective strategy.
24 Then it was just pot luck who you got next.

25 I certainly remember one buyer, who I won't name,

1 previous to Lisa, absolutely hated us. We had a torrid
2 time. You know, the gentleman was coming up with all
3 sorts of "kick McLelland" strategies, and whether he
4 just felt that we had too close a relationship, or
5 whether he just wanted to get us on our toes --
6 I remember we were short delivering at the time, it was
7 through the transition process from central distribution
8 to our distribution, and he was trying to charge us loss
9 of profit on the lines that we short-delivered, which we
10 argued about for eight months and I eventually paid.

11 **Q.** So in 2002, 2003, Tesco accounted for about 30 per cent
12 of McLelland sales, would that be consistent with what
13 you recall?

14 **A.** Yes, 30 per cent more or less about that time.

15 **Q.** And the summer of 2002 was a particularly successful
16 time for you because -- I don't know if you remember
17 this -- Tesco doubled its Scottish cheese order from
18 McLelland to 8,000 tonnes a year in the summer of 2002?

19 **A.** Yes, we had produced a cheap version of their mild
20 cheese which was a real -- we won awards within Tesco
21 for value engineering in that -- you know, one of
22 McLelland's traits or styles was to question the old
23 school, the cheese industry and dairy is very old
24 school: this is how you make cheese, this is what it
25 tastes like, this is what it looks like, this is how

1 long it should take. Nobody liked anybody who wanted to
2 move away from that a wee bit and we liked to think that
3 we'd sort of challenged all these rules.

4 One of the things was that cheddar cheese has
5 a certain water content that it is allowed to have and
6 below that you can't call it cheddar cheese, you know,
7 so it's got a legal definition. We realised that with
8 Tesco there was an opportunity to take the word
9 "cheddar" off their mild cheddar cheese label and just
10 call it mild cheese. That allowed us to put extra water
11 in which meant it was much more lucrative to both sides.

12 **LORD CARLILE:** Because you can sell water at cheese prices?

13 **A.** Exactly. It's a nice trick if you can do it.

14 There was only a little -- the strange thing about
15 that was that they went to taste panel and they were
16 just convinced it was going to be -- it was how it
17 behaves in cooking and stuff like this, and at taste
18 panel it came out top over nine mild cheddars. So they
19 started to put these changes through.

20 It wasn't the most profitable thing, we're talking
21 small margins at mild cheese, but it was a very big coup
22 for us to have managed to do that within Tesco and
23 I think they enjoyed the concept of it as well because
24 no one else noticed.

25 **MS SMITH:** In paragraph 7 of your witness statement

1 [Magnum], if you want to have a look at that, you say
2 you had good personal relationships with the Tesco team:

3 "Although I was not involved in the day-to-day
4 administration of the relationship with Tesco
5 I participated in the important issues including major
6 price and sales negotiations with Tesco, and my main
7 contacts at Tesco were John Scouler, Rob Hirst and
8 Lisa Rowbottom."

9 **A.** Yes.

10 **Q.** You said, in response to one of my earlier questions,
11 that generally you had contact with the retailers at
12 higher level than the buyer did. So in McLelland there
13 would have been Stuart Meikle or the trading manager,
14 Jim the trading director and then you above that. Would
15 it be fair to say that your contacts with Tesco tended
16 to be at the higher level; although you knew Lisa, you
17 probably also had contact with John Scouler, Rob Hirst?

18 **A.** Yes, that was us sort of trying to work out the tree
19 strategy and we were successful to only a certain
20 degree. We sort of modelled it on the Wiseman, you
21 know, situation, whereby Robert Wiseman would tend to
22 operate at director level, main board director level,
23 and then he had a whole tier of people each dealing with
24 the appropriate level all the way down.

25 However, we were small, not a Robert Wiseman, we

1 were growing, and I was trying to leverage myself up the
2 tree a little bit by having more people below me. That
3 worked to a certain degree but it wasn't wholly
4 successful across everybody.

5 **Q.** You also knew and socialised with John Gildersleeve, is
6 that right?

7 **A.** I know and socialise with John Gildersleeve now but,
8 luckily, I didn't know him at the time.
9 John Gildersleeve was trading director at the time that
10 we were -- that we're talking about here, 2002/2003.
11 I only got to know John Gildersleeve later through
12 shooting with Robert Wiseman, I got introduced to him,
13 and really didn't have any relationship with him until
14 after we sold the business. He says it was just as
15 well.

16 **Q.** Do you recall when you first went shooting with
17 John Gildersleeve and Robert Wiseman?

18 **A.** When I first went shooting with Robert Wiseman? No,
19 I can't remember when I first went shooting with
20 Robert Wiseman. It could have been -- it was towards
21 the end of my career at McLellands. My brother shot
22 quite a lot but I didn't really -- and John Gildersleeve
23 only started coming along to shoot towards the end.
24 Whether that was after I sold the business or before I'm
25 really not sure, but I certainly didn't have any

1 relationship with him at that level.

2 I do remember the first shoot I was at, though, with
3 John Gildersleeve, he completely ignored me all day and
4 I made about three or four attempts to go and say hello
5 and so he didn't so much as look at me, so I wouldn't
6 constitute that as him being a friend at that time.

7 **Q.** At the time he was Tesco commercial and trading
8 director, and the commercial director below
9 John Gildersleeve at Tesco was Dido Harding, did you
10 have a relationship with her, did you know her?

11 **A.** I met her once.

12 **Q.** John Scouler reported to Dido Harding, so would it be
13 fair to say that John Scouler was more at your level, or
14 that that was the person you were at a level with at
15 Tesco?

16 **A.** Yes, I think it's fair to say that we were transitioning
17 up the tree a little bit. As buyers move on and get
18 promoted you try and stay with them, so good buyers tend
19 to become good buying managers and trading directors and
20 up they go. So you're always trying to sort of keep in
21 touch with as many people as you can, but yes,
22 John Scouler would be the person I would have known
23 best.

24 As you come down the tree we just knew them better
25 and better. So at the very top, you knew of them; at

1 the very bottom, you had people speaking to them every
2 day more or less.

3 Q. In your third witness statement, which is at tab M,
4 I don't know if you've got that open in front of you, in
5 paragraph 4 [Magnum], you start describing the situation
6 in the market in 2002 and you say that:

7 "Farmers were seeking an increase in the farm gate
8 milk price."

9 Do you recall that?

10 A. Yes, I do recall that.

11 Q. And you say:

12 "Their cause was helped [that is the farmers' cause
13 was helped] when in early September 2002 Tesco made its
14 public announcement calling for dairy processors to pay
15 more to the farmers and shortly afterwards increasing
16 its retail price of milk."

17 Then you say:

18 "This was a clear signal from Tesco it was on the
19 side of the farmers and a public relations win for them.
20 It also then shifted the focus on to processors who were
21 then threatened with strike action by certain of the
22 more militant farmers' groups."

23 A. Yes.

24 Q. Can I ask you to get out from the files next to you,
25 there's a yellow-spined bundle just to your left,

1 bundle 1. If you turn in bundle 1 to tab 6 [Magnum].
2 At tab 6 you see there's a Tesco news release,
3 September 2002:

4 "Tesco chief executive Terry Leahy today met with
5 Ben Gill, president of the NFU, to discuss the
6 difficulties facing British dairy producers and milk
7 prices.

8 "The meeting was a useful opportunity to listen to
9 the concerns of farmers and to discuss the reasons
10 behind the problems within the industry.

11 "Following the meeting, Tesco director
12 John Gildersleeve said 'It is clear that British dairy
13 farmers are currently struggling in a difficult and
14 complex market. Tesco is committed to helping those
15 farmers get through this and we believe that there is
16 a strong case for them to receive a significant price
17 increase in the forthcoming negotiations with
18 processors.'"

19 It says:

20 "Whilst Tesco cannot directly deliver this price
21 increase we can help to create a more sustainable
22 industry..."

23 They give reasons as to how they're going to help.

24 Then tab 7, if you just look at that as well.

25 **LORD CARLILE:** Presumably you're the company referred to in

1 the fourth bullet point on that page, the 8,000 tonnes?

2 **A.** Yes. That's us.

3 **MS SMITH:** Then behind tab 7 [Magnum] there's
4 a John Gildersleeve quote to be released to the Press
5 Association on Wednesday 4 September:

6 "Tesco director John Gildersleeve said:

7 "'Although we cannot determine the price paid to
8 farmers, we are today calling on all milk processors to
9 pay them at least two pence per litre more because of
10 the need to sustain the UK dairy industry'."

11 Do you recall seeing those statements at the time
12 they were made, early September 2002?

13 **LORD CARLILE:** Or knowing of them?

14 **A.** Yes. I mean, the message is familiar. Specifically,
15 that word for word, I can't say that I -- that I can
16 sort of recognise that format. But that message was
17 clear and, yes, I was very aware of Tesco supporting
18 this.

19 **MS SMITH:** So Tesco were specifically supporting the
20 2p per litre increase in the farm gate price for milk?

21 **A.** Yes. What I understood from it at the time was that, if
22 we can move backwards a little bit, we had a sort of
23 summer of discontent really whereby farmers were
24 blockading supermarket depots and, you know, it was
25 encouraged by action in France, the militant farmers in

1 France. The UK farmers thought that they should behave
2 in the same way because it seemed to work for the
3 French. So you literally had blockades of depots, you
4 know, particularly I remember Sainsbury's had just
5 opened a new beautiful state of the art distribution hub
6 and that was a particular favourite target of them. So
7 everybody was on the run. To me, this whole period was
8 about militant farmers blockading and shutting down
9 depots and that was -- the tone of the whole, you know,
10 period of time was that.

11 You were asking me about my number 4 here,
12 increasing the retail price of milk. The retail price
13 of milk in that context, I'm talking about the price of
14 milk to retailers. It's another minor point, when I've
15 been looking through various things, is the sort of
16 loose use of the word "retail": retail price, retailer
17 price, price to retailers. It does get quite confusing.
18 But, in that particular instance, what I was referring
19 to is the retail price of milk. In other words, the
20 price of milk to the supermarkets.

21 **Q.** Sorry, are you talking about paragraph 4 of your witness
22 statement [Magnum]?

23 **A.** Yes.

24 **Q.** Where you say:

25 "Tesco made its public announcement calling for

1 dairy processors to pay more to the farmers and shortly
2 afterwards increasing its retail price of milk."

3 Are you not saying there that Tesco increased its
4 retail price?

5 **A.** Yes, sorry, I am. Yes, yes. In this point here, the
6 processors --

7 **Q.** You're not saying Tesco sells milk to retailers, are
8 you?

9 **A.** No, what I'm saying is there's three stages. You've got
10 the farmers who are paid 2p per litre by the processors
11 and the processors' retail price of milk has gone up
12 accordingly. I think this is what Tesco is calling for
13 here so that, through the system, I actually can't
14 remember what happened, retail prices may well have gone
15 up, it wouldn't have been surprising for that to happen.

16 But there's three stages in this process and there's
17 prices all the way through.

18 **Q.** Yes, there's the farm gate price of milk to farmers?

19 **A.** Yes.

20 **Q.** The cost price of milk and the retail price of milk, and
21 I understood you were simply saying, I don't think
22 there's anything objectionable about this, that Tesco
23 made a public announcement calling for dairy processors
24 to pay more to the farmers and shortly afterwards
25 increased its, Tesco's, retail price for milk, and

1 that's what happened, isn't it?

2 **A.** To be honest, I don't know whether the retail price went
3 up at that time, I assume it did, but it wasn't
4 actually -- when I was giving this statement I did
5 re-read this and think, ah, that maybe sounds like it's
6 the retail price I'm referring to, but I wasn't.

7 **Q.** And what were you -- sorry, I'm now getting quite
8 confused.

9 **A.** I was referring to the fact that the processors would
10 increase their price to the supermarket customers.

11 **Q.** Yes.

12 **A.** So the price to retail, as opposed to wholesale or
13 a cash and carry or export or, you know.

14 **Q.** In fact, Tesco did raise their prices for fresh liquid
15 milk, that's the milk they sold on their shelves, from
16 Monday 9 September, their retail prices of milk.

17 **A.** Okay.

18 **Q.** No one has ever suggested there is anything
19 objectionable about that but --

20 **A.** I wasn't being defensive because I thought you were
21 objecting to it, I was just saying you read that through
22 and didn't ask me any questions on it and then went on
23 to the next part.

24 **LORD CARLILE:** If it's any help, Mr Irvine, because you
25 haven't been here up to now. We've heard a lot of

1 evidence, we know there was a 2p increase in the price
2 of milk paid at the farm gate, as it were, and that in
3 terms of liquid milk that was translated through the
4 system to a 2p increase on the price on the shelf. We
5 know there was a much more complicated equation in terms
6 of the price of cheese because it takes a lot of milk to
7 make a kilogram of cheese.

8 **A.** I may be slightly anticipating, you know, the same sort
9 of scenario when we come to start talking about cheese
10 and that's why I was highlighting it there.

11 **LORD CARLILE:** Well, assume we've heard evidence about that.

12 **MS SMITH:** I'll ask you specific questions and just try to
13 listen to the question and answer that specific
14 question. Don't worry about anticipating what I'm going
15 to ask you.

16 **A.** Okay.

17 **Q.** You say at the end of paragraph 4 in your witness
18 statement [Magnum] that:

19 "McLelland were following these developments with
20 interest as a 2p per litre increase in farm gate milk
21 prices would mean a £200 per tonne cost increase for
22 manufacturing cheese."

23 That is because it would take however many litres of
24 milk to make a tonne of cheese, 1,000 litres of milk to
25 make a tonne of cheese?

1 **A.** Are you asking me if £200 per tonne -- the 2p equates to
2 £200 per tonne?

3 **Q.** Yes.

4 **A.** Yes, it does.

5 **Q.** In order to get a 2p per litre increase in the farm gate
6 milk prices for farmers, it wasn't sufficient for there
7 to be an increase in the price of fresh liquid milk.
8 There also had to be an increase in the price of other
9 dairy products because that raw milk was being used not
10 just to make fresh liquid milk but also to make cheese
11 and other dairy products?

12 **A.** Yes, I believe that there had been two -- at least two
13 previous milk price initiatives which solely
14 concentrated on liquid milk. When the price rises came
15 to the farmer, the farmers were up in arms because they
16 didn't get the full -- what they thought was the price
17 rise that was coming to them, and they realised they
18 were only concentrating on a small part of the market.
19 So 2002 was really the first instance that the market
20 and Tesco and the farmers recognised that it had to be
21 much more holistic across all products for it to equate
22 to 2p per litre or get close to it.

23 **Q.** So when you, in 2002, heard Tesco made a public
24 announcement, as you describe it in paragraph 4 of your
25 statement, calling for processors to pay more to the

1 farmers, to pay them 2p per litre more for their raw
2 milk, you understood that that would entail an increase
3 in the cost price of cheese?

4 **A.** Yes.

5 **Q.** 2p per litre, as you've explained, a 2p per litre
6 increase in the raw milk price equated to £200 per tonne
7 price increase for cheese and that is the cost price
8 increase which McLelland subsequently asked for from the
9 retailers, is that correct?

10 **A.** That's correct.

11 **Q.** Now, about a week after the press releases that I've
12 taken you to, on Friday 13 September, Tesco hosted, in
13 Heathrow I think it was, a dairy producer forum, what
14 has become known in these proceedings as the Dairy
15 Supply Group meeting. Are you aware of that?

16 **A.** Yes, I'm aware there was a supply meeting, Tesco supply
17 meeting.

18 **Q.** Tom Ferguson and Jim McGregor attended that meeting for
19 McLelland, do you remember that?

20 **A.** I remember we had people there. I probably couldn't
21 have told you exactly who was there. I would assume Tom
22 would have been there and I would be surprised if Jim
23 hadn't been there.

24 **Q.** But you didn't attend the meeting?

25 **A.** No, I didn't attend the meeting.

1 Q. Mr Ferguson has confirmed he reported back to you after
2 the meeting, do you recall that?

3 A. Not specifically but I'm sure he would have.

4 Q. You were a small group, you were all in those offices
5 together in Glasgow, it was very likely he would have
6 been telling you, your biggest customer, you've just
7 gone to a meeting with your biggest customer, he would
8 come back and tell you what had happened?

9 A. I think it would be -- to be honest, at this time
10 I think it probably would have been more likely that Jim
11 would have come and spoken to me, being the sales
12 director, but I'm sure I would have got a full update on
13 what was discussed at the meeting.

14 Q. Do you recall discussing what went on at the meeting
15 with anyone from Tesco?

16 A. No, I don't actually recall any update coming direct
17 from Tesco about the meeting.

18 Q. Do you remember, at about this time, September, the
19 autumn of 2002, discussing with anyone from Tesco the
20 public statement that it had made, its commitment to
21 increase the farm gate price for milk by 2p per litre?

22 A. I can't specifically remember someone from Tesco phoning
23 me up about it but I'm sure that that may well have
24 taken place, although I can't specifically remember
25 a call.

1 Q. Were you talking with people from Tesco regularly at
2 this time?

3 A. At this time, no. I probably would be trying to defer
4 as much as I could to our new sales director, Jim, and
5 give him space to, you know, control and get
6 a relationship with the customers. It might well have
7 been that Jim was trying to make a relationship with
8 John Scouler at the time, allowing me a little bit of
9 space to try and elevate my contact level.

10 We're sort of in a time of transition here so it's
11 very difficult to gauge exactly, you know, what stage we
12 might have been at that point, but certainly Jim came in
13 and went round the customers as quickly as he could to
14 try and establish himself.

15 Q. Can I ask you to turn in that bundle in front of you,
16 the documents bundle, not the one with your witness
17 statement in but the other one with the yellow spine,
18 can I ask you to turn to tab 33 [Magnum]. At the top it
19 says "Cheese Pricing Movement -- Notes for
20 Consideration".

21 At the bottom you'll see the name of Colin Stump,
22 27 September 2002. This is an internal Glanbia memo
23 that you won't have seen produced by Colin Stump.
24 Colin Stump was the managing director of Glanbia at the
25 time, wasn't he?

1 **A.** Yes. Chief executive, managing director, something like
2 that.

3 **Q.** You were shown this document when you prepared your
4 third witness statement, do you remember that?

5 **A.** Yes, I remember seeing this document.

6 **Q.** You say in paragraph 7 of your witness statement
7 [Magnum], which you have open just to the left of that
8 document, keep them both open at the moment, you say:

9 "I did speak to Colin Stump on a fairly regular
10 basis as Glanbia and McLelland were the only cheese
11 processors in Scotland and importantly we had a working
12 trading relationship."

13 So you knew him quite well, did you?

14 **A.** Yes, regularly I'd speak to him now and then, maybe once
15 every four to six weeks I would have thought. You know,
16 it depends whether we were trying to do business with
17 him at the time. There could well have been periods
18 when I didn't speak to him for a while.

19 **Q.** Because this conversation that's recorded by
20 Colin Stump, and which you looked at the notes of when
21 you were preparing your witness statement, this
22 conversation wasn't about trading commodity cheese, it
23 wasn't about doing business between Glanbia and
24 McLelland, was it? It was more a general conversation
25 about developments in the market, what was going on in

1 the market. There's nothing in this note about you
2 selling each other cheese or trading between the two of
3 you. Is that correct?

4 **A.** Well, it's correct to say there's nothing in the note
5 about selling cheese or dealing in cheese. I do
6 remember at about this time we were desperately trying
7 to get hold of some stocks for our Seriously Strong
8 brand which we'd oversold and we were speaking to
9 everybody that might have spare cheese that they would
10 sell to us to supply cheese for Seriously Strong.

11 It doesn't mention anything about that in this note
12 though. I'm not even saying that that was even
13 discussed, but I guess it could have been.

14 **Q.** Do you recall having discussions with him either at this
15 particular time or generally about the developments in
16 the market, what was going on in the market place, how
17 the industry was moving, those sort of issues?

18 **A.** I can't actually specifically remember this phone call.
19 I have -- you know, in my witness statement I said
20 I couldn't remember it. I've been desperately trying to
21 piece together my memory with reading through various
22 bits and pieces and, you know, I've come to the
23 conclusion that I'm sort of putting together bits of
24 conversations that I knew I had with him and trying to
25 see if it fitted with this particular conversation. But

1 I can't specifically remember this conversation.

2 However I do know that around about this time,
3 because we were so well-connected with the farmers we
4 were very much sort of like -- we never got boycotted,
5 there were no threats to shut down our depots because
6 they would have felt like they were shutting down their
7 own depots. We very quickly came out with an
8 announcement, you know, through the summer in particular
9 when they were trying to get their prices up, that we
10 would support their prices, you know, so -- and I'm not
11 sure on timings here but I do wonder whether, you know,
12 we've made an announcement, we certainly went to press,
13 because we were getting a lot of hassle, on milk price
14 rises.

15 So whether we went to press and this has led to this
16 conversation about whether we're supporting it or not,
17 I'm not sure. But specifically the detail, I'm sorry,
18 I'm sort of speculating on it a wee bit.

19 **Q.** I was asking more about the general conversations you
20 had with Mr Stump --

21 **A.** Sorry, the general conversations that I had, sorry,
22 I misunderstood you, the general conversations that
23 I had with Mr Stump would be in all sorts of manner of
24 issues. We, for instance, jointly supplied Scottish
25 mature cheese to Sainsbury's, they get 50 per cent of

1 the contract, we get 50 per cent of the contract. When
2 they were short of cheese for their 50 per cent,
3 Sainsbury's accepted that they would come and buy stocks
4 from us and vice versa. It was a bit of a legacy of an
5 old arrangement that there had been from the Milk
6 Marketing Board days that it was split in such a way.
7 So we had dialogue about that.

8 We would have dialogue about the fact that Lockerbie
9 creamery was the only Scottish creamery we didn't have,
10 so if we needed any extra Scottish cheese at all, they
11 were the only people we could speak to, and they had to
12 speak to us if they were short for any of their
13 customers, other than Sainsbury's. Let's say they're
14 short of coloured mature because a certain production
15 run went bad, then we'd speak about that.

16 There was also a situation, I believe, with Asda
17 whereby they pre-packed for Asda all their own label
18 products, so if you had an own label contract with Asda,
19 you supplied it to the cheese company and they
20 pre-packed it and supplied it to Asda. So there was
21 lots of reasons why we might have been speaking to each
22 other.

23 Q. So you were speaking to each other not just about your
24 supplying each other with commodity cheese but you also
25 were common suppliers for certain retailers, so you were

1 talking to each other about those relationships you had
2 with those retailers and how you would fulfil your
3 relationships with those retailers?

4 **A.** That's quite a wide, you know, question. I think -- did
5 we ever mention retailers or ever discuss common
6 retailers? Yes, in very broad terms we might have, but
7 not in any specific details. If there was a need, for
8 instance, if there was a, oh, I don't know, there was
9 a recategory management of the Sainsbury's-led PICO,
10 then we might talk about whether we're going down to the
11 next meeting and this sort of stuff and a general how
12 are you getting on? But we were arch rivals, you know,
13 we wouldn't have shared intimate details on any level.

14 **MS POTTER:** Can I just ask you, you mentioned you had one
15 contract where you jointly supplied to Sainsbury. How
16 was the cost price worked out for that? Did you have
17 your own separate prices or was it a price that was
18 jointly negotiated?

19 **A.** Yes. How that worked out was that we both sold cheese
20 directly into Sainsbury's, just on a normal commercial
21 basis, but then we both packed into the same label so
22 that Sainsbury's Scottish mature pre-packs would come
23 from two sources and be supplied into different depots
24 and they would have the same retail price on all packs.
25 So the retailers would be the same but we were never

1 aware of what the cheese company's cost price would be
2 to Sainsbury's. It was always quite interesting if they
3 had to buy cheese off us, which was more often the case,
4 because we would certainly make sure we would plenty for
5 it because they were determined not to drop below their
6 50 per cent.

7 **MS SMITH:** There were separate arrangements but you still
8 talked to each other about those arrangements, even
9 though they appear to have been quite distinct you're
10 saying?

11 **A.** Sorry? Which arrangements?

12 **Q.** The arrangements with Sainsbury's. You say they came
13 from two sources and they were supplied into different
14 depots but you were never aware of what the cost price
15 of the cheese company, Glanbia, would be to Sainsbury's,
16 but you've also told us that you would regularly discuss
17 that supply arrangement with Glanbia.

18 **A.** I wouldn't say I would regularly discuss that particular
19 supply arrangement to Glanbia but that might have been
20 one of the many things we would discuss with Glanbia.
21 It was an example. And what we would discuss in that
22 particular instance would be if they phoned us up and
23 said they were short of cheese then it would just be
24 about whether we had extra cheese and whether we were
25 prepared to supply it to them and then at what price.

1 Then they would come up and grade the cheese, and if
2 they felt it was right for the purpose they would buy
3 it.

4 **LORD CARLILE:** Ms Smith, I'm getting a little bit anxious
5 about time. We've had a very, very interesting exegesis
6 about the cheese industry and I feel I know a great deal
7 more than I did at 10.30 this morning, but I think we
8 need now to focus on the OFT's findings.

9 And you, sir, if you wouldn't mind, would you listen
10 very carefully to Ms Smith's questions which are going
11 to be very precise, I think, and just try to focus on
12 them when you give your answers.

13 **A.** Yes, okay. Less wordy.

14 **LORD CARLILE:** Thank you.

15 **MS SMITH:** Let's look then at this note taken by
16 Colin Stump. You can see the first paragraph, it says:

17 "I have spoken to Sarah Mackenzie at Sainsbury's
18 today... and sought her views regarding how long this
19 initiative on raised cheese prices with full remittal
20 back to farmers is likely to last. She gave a clear
21 impression that JS had not given this any thought
22 whatsoever. I said this was a major issue for the
23 industry and at some stage we would need to move back to
24 normal market setting cheese prices in relation to the
25 usual influence of milk price and butter/skim markets.

1 I suggested that she might try and canvass a few on the
2 JS management team today and feedback to me at the
3 British cheese awards tonight. Any response we get from
4 her will come back into the system from Mark Grahame".

5 Then she says at paragraph 2:

6 "I had a further lengthy discussion with
7 Alastair Irvine on the same subject."

8 When he's referring to "on the same subject" he's
9 talking about the initiative on raised cheese prices
10 with full remittal back to farmers. That's what you
11 discussed, isn't it?

12 **A.** Sorry, you're asking me what we discussed in this
13 particular call and, as I said, I can't remember the
14 specific call.

15 From reading this, if you want me to give you my
16 opinion, it says that -- so I'm thinking, "I had a
17 further lengthy discussion", so further to his
18 discussion with Sarah Mackenzie he had a discussion with
19 me on the same subject. So it sounds as though he was
20 discussing the 2p to farm gate issue with me.

21 **Q.** Yes, that's the issue he was discussing with you?

22 **A.** It sounds like it.

23 **Q.** You say in paragraph 8 of your statement -- sorry, you
24 then go on to say, in paragraph 2 of the document:

25 "I had a further lengthy discussion with

1 Alastair Irvine on the same subject. He tells me that
2 Tesco will go if one other major player moves. He also
3 told me that DC are seeing Asda this afternoon. I have
4 asked MG to call Harvey Bennett later this afternoon to
5 elicit information on what Asda may now do on cheese
6 pricing. MG will feed this back into the system once we
7 have made contact."

8 Then you (sic) go on -- he reports further things
9 that you've said.

10 In paragraph 8 of your statement [Magnum] you say:

11 "I do not recall specifically making the statement
12 Tesco will go if one other major player moves in those
13 terms, but I could very well have speculated as to
14 Tesco's possible actions. As described above, Tesco had
15 earlier that month announced that it wished to be
16 supportive to farmers by calling for dairy processors to
17 increase the farm gate price. From my experience
18 Tesco's price matching policy and commercial strategy
19 had the effect that if Asda, for example, increased its
20 retail prices, then Tesco would often, but not always,
21 also increase its retail prices."

22 So when it's recorded -- Colin Stump records that
23 you say "Tesco will go if one other major player moves",
24 first of all, what we're talking about is Tesco's retail
25 prices, they will move their retail prices, is that

1 correct?

2 I'll break down this statement, but first of all
3 we're talking about retail prices, we're not talking
4 about cost prices?

5 **A.** I don't know, is the short answer to that.

6 **Q.** You say in your witness statement, from your experience:

7 "... Tesco's price matching policy and commercial
8 strategy had the effect that if Asda, for example,
9 increased its retail prices, then Tesco would often, but
10 not always, also increase its retail prices."

11 So when you were asked about this document in your
12 statement, you understood the reference to be to Tesco
13 and Asda moving their retail prices, that's right, isn't
14 it?

15 **A.** No -- well, I can't say whether it's right or not. It
16 might have been. It might have been. If I said, you
17 know, "Tesco will go if one other player moves", if I
18 said it, it was for a reason. But it doesn't seem to me
19 strikingly surprising, you know --

20 **Q.** I'm going to ask you about that but I first want to
21 establish that we're talking about here are retail
22 prices --

23 **A.** Are you asked me if I said that, or what I meant --

24 **LORD CARLILE:** One at a time because it can't be recorded
25 otherwise.

1 **MS SMITH:** I'm sorry.

2 I'm trying to break this down. You say:

3 "Tesco will go if one other major player moves."

4 You are reported as saying that in the document. In
5 your witness statement, you try to explain what you must
6 have meant or you could have meant?

7 **A.** Yes, I speculated on what it could have meant, yes.

8 **Q.** You say:

9 "From [your] experience Tesco's price matching
10 policy and commercial strategy had the effect that if
11 Asda, for example, increased its retail prices, then
12 Tesco would often, but not always, also increase its
13 retail prices."

14 It's a simple question. When you're talking here
15 about "Tesco will go if one other major player moves",
16 you're talking about movements on retail prices?

17 **A.** I could have been.

18 **Q.** The major player, you think, in paragraph 8 of your
19 statement [Magnum] is likely to have been Asda? If Asda
20 moves, Tesco will move? That's --

21 **A.** Yes, if I could just quantify that a little bit or
22 justify it a little bit.

23 I've read the statement, which I can't remember
24 making, and what I'm trying to do is piece together what
25 I might have meant had I said that. I would have

1 immediately assumed "one other major player" would have
2 meant Asda, because Tesco and Asda were very much the
3 two focuses in the market at that time. But I'm making
4 assumptions and speculating there a little bit.

5 **Q.** Now, you don't -- you say you don't specifically recall
6 making this statement but you say you could very well
7 have speculated as to Tesco's possible actions. So you
8 could very well have made that statement, that's what
9 you're saying, isn't it?

10 **A.** I could very well have made this statement, yes.

11 **Q.** And you say the statement "Tesco will go if one other
12 major player moves", you say in your witness statement
13 that this statement was based on your speculation, and
14 that is particularly your knowledge of Tesco's price
15 matching policy and commercial strategy. That's right?

16 **A.** Yes --

17 **Q.** That's what you say in your statement?

18 **A.** It's what I say in the statement, but I've got to say,
19 having spent a lot of time looking through all the
20 various documents that I've been reviewing for the case
21 here today, that I didn't notice that in Colin Stump's
22 earlier notes, about two days earlier, that he was
23 saying that the Dairy Farmers of Britain had come on and
24 were saying that -- Dairy Farmers of Britain had been on
25 the phone to him and said that Tesco would go if Asda

1 go.

2 I do wonder in retrospect, a little bit, whether
3 this was something that the farmers were promoting. If
4 the farmers were promoting anything, then I would have
5 certainly been aware and I would have heard of it at the
6 time with our close connections to the farmers.

7 **Q.** Mr Stump records that you, Mr Irvine, had told him that
8 Tesco will go if one other major player moves, and
9 you've got no reason to think that he was wrong when he
10 wrote that note at the time?

11 **A.** No, other than the fact that he'd heard that two days
12 earlier from Dairy Farmers of Britain. Maybe he put it
13 to me, I don't know.

14 **Q.** Well --

15 **LORD CARLILE:** Ms Smith, we'll have to have a break for the
16 LiveNote team, when you're ready.

17 **MS SMITH:** Yes. I've got quite a few more questions on this
18 statement so I don't think we're going to --

19 **LORD CARLILE:** Okay, it's quarter to, we'll resume at 12.00.
20 (11.45 am)

21 (A short break)

22 (12.00 pm)

23 **MS SMITH:** Mr Irvine, can we look at paragraph 8 of your
24 witness statement [Magnum]. You say there:

25 "... Tesco's price matching policy had the effect

1 that if Asda, for example, increased its retail prices,
2 then Tesco would often, but not always, also increase
3 its retail prices."

4 So it wasn't inevitable that Tesco would increase
5 its prices if Asda did so, was it?

6 **A.** It wasn't inevitable but it was probable.

7 **Q.** Tesco's basket policy required that it not be undercut
8 by Asda, so if Asda reduced its prices Tesco would also
9 have to reduce its prices, that's right, isn't it?

10 **A.** It's correct for the goods which were in the basket of
11 goods which it monitors itself against, which were
12 usually the best selling lines.

13 **Q.** Yes, and for those goods, if Asda reduced its prices,
14 Tesco would have to also reduce its prices, that was the
15 basket policy, yes?

16 **A.** Yes. Sorry, the basket policy was to match the --

17 **Q.** No, listen to the question, a simple question: if Asda
18 reduced its prices, Tesco would have to reduce their
19 prices to match them; that was the basket policy, yes?

20 **A.** That was the policy but it didn't always happen that
21 way.

22 **Q.** The basket policy did not require Tesco to increase its
23 prices if Asda increased its prices?

24 **A.** No, it didn't but, again, often it did lead to that.

25 **Q.** In fact, if Tesco could steal a march on Asda by being

1 cheaper than it on particular products, it might very
2 well do so, mightn't it?

3 **A.** Yes. Again, in theory, yes, that would be possible but
4 what in practice happened was that Asda were almost
5 always cheaper than Tesco and Tesco was almost always
6 chasing them. Asda played a much better game of
7 randomly reducing prices on what they call "roll back",
8 and Tesco were constantly chasing these prices.

9 **Q.** Your statement, reported by Mr Stump:

10 "Tesco will go if one other major player moves."

11 Was made in the context, wasn't it, when everyone
12 was seeking price increases?

13 **A.** At the time -- with the 2p rise, yes, you would assume
14 that the prices would be going up rather than down.

15 **Q.** So the statement that "Tesco will go if one other major
16 player moves" is not a statement of the obvious, it's
17 not what it was required to do as a result of its basket
18 policy, it was quite significant information. Tesco had
19 indicated, you were reporting, that it would not steal
20 a march on Asda on this occasion, it would not seek to
21 undercut it, but it would increase its prices if Asda
22 also did so.

23 So it was a statement that had some value, it wasn't
24 just a statement of the obvious?

25 **A.** Again, I can't remember the exact details and context of

1 the telephone conversation but, you know, in speculating
2 on it then I assume that around this time there was
3 a lot of chat about it. This would have been sort of
4 like -- quite a conversation topic at the time. I do
5 remember that, you know, the background to this was
6 a Tesco conference, farmers boycotting depots, farmers
7 coming up with statements almost on a weekly basis,
8 meetings between farmers and supermarkets and all this
9 sort of thing. So, you know, the exact origins of this
10 piece of knowledge I really can't tell you.

11 **Q.** Well, that's not what I was asking you. If you could
12 just listen to the question and try to answer the
13 question I'm putting to you.

14 In the context where Tesco's basket policy does not
15 require it to increase prices if Asda increases its
16 prices, the statement that you are reported as making,
17 that Tesco will go, that is put its prices up, if Asda,
18 one other major player, also puts its prices up, I asked
19 you that was not a statement of the obvious, was it, yes
20 or no?

21 **A.** I'm sorry, I need to disagree with you. I think the
22 fact that at this time Asda had been sort of trouncing,
23 certainly from my point of view had been trouncing Tesco
24 on retail prices for six months, we had spent
25 a considerable amount of time trying to persuade Asda to

1 come off "roll back" on our main brand,
2 Seriously Strong, and they wouldn't do it, and that was
3 causing huge pressure, and Tesco were very much hurting
4 from having to match, you know, the Asda prices.

5 So the fact that Tesco would be pleased to go up,
6 I think, was just sort of -- I think everybody would
7 have accepted that at the time.

8 **Q.** That's not actually what --

9 **LORD CARLILE:** It strikes me that the sentence:

10 "He tells me that Tesco will go if one other major
11 player moves."

12 Could be either (a) a statement of the obvious, or
13 (b) a statement of opinion?

14 **A.** Yes.

15 **LORD CARLILE:** Or (c) a statement based on some special
16 knowledge that you've acquired.

17 **A.** Yes.

18 **LORD CARLILE:** Which of those three is it, if any?

19 **A.** I honestly can't say because I can't remember making the
20 statement.

21 We wouldn't be inclined to give our competitors
22 a jump on inside knowledge or try to give them some sort
23 of insight into, you know, some sort of line that Tesco
24 had given to us in confidence, that they would this,
25 that or the other, or otherwise. The last thing I would

1 want would be for my competitors to have good market
2 knowledge, you know, so I can only assume that it was
3 either everybody was talking about it, it was
4 practically public knowledge or -- I think the first
5 one. I think the first one. You know, that --

6 **LORD CARLILE:** The obvious?

7 **A.** Yes.

8 **LORD CARLILE:** Thank you.

9 **MS SMITH:** Now, your evidence is that Tesco would often, but
10 not always, increase its retail prices if Asda did so,
11 and your evidence is that it was not an inevitable
12 result of Asda putting its prices up that Tesco would
13 put its prices up.

14 I have to go with what you have sworn in your
15 witness statement at paragraph 8 [Magnum]. Are you now
16 changing that statement?

17 **A.** I think it's degrees of, isn't it? I think it's
18 probable, and I think particularly under -- at this time
19 in the market, I think it's probable that Tesco would
20 have been pleased to get more margin into their
21 business. They were losing ground to Asda at the time.

22 **Q.** Well, you say Tesco, or you are reported as saying
23 "Tesco will go if one other major player moves". That's
24 not a statement of speculation, is it? It's an
25 unequivocal statement of what will happen: Tesco will go

1 if one other player moves. So you are not just
2 speculating there, you were stating to Colin Stump
3 a specific --

4 **LORD CARLILE:** Ms Smith, how long are we going to spend on
5 this one sentence? You've asked a lot of questions
6 about it. He's answered on several occasions. I feel
7 we might be moving on to something else now.

8 **MS SMITH:** Sir, I'll move on.

9 Just if I may ask two questions about the source of
10 this statement.

11 You say in your statement that Tesco had recently
12 made public statements about supporting the 2p per litre
13 increase in the farm gate price for milk, you recall
14 that?

15 **A.** Sorry, could you ask that question again?

16 **Q.** You say in your statement that Tesco had recently made
17 public statements about supporting the 2p per litre
18 increase in the farm gate price for milk?

19 **A.** Yes.

20 **Q.** And you also agreed your managers had been at the Dairy
21 Supply Group meeting, and I suggest that they reported
22 back to you after that meeting that Tesco had said at
23 the meeting that it would increase its prices if other
24 retailers, including Asda, did so?

25 **A.** It's possible. It's possible.

1 Q. That was the source of the statement you made to
2 Colin Stump on 27 September, "Tesco will go if one other
3 major player moves"?

4 A. That's possible too.

5 Q. Go back to -- excuse me.

6 Can I also -- you say in your witness statement at
7 paragraph 8 [Magnum] that you have:

8 "... no recollection of having received any
9 information from Tesco to this effect and I would not
10 usually have done so."

11 Now, if we can look back at the Glanbia memo, it
12 says, after the reference to Tesco moving -- sorry,
13 document 33 [Magnum], the document, not the witness
14 statement.

15 After the statement "Tesco will go if one other
16 major player moves", Mr Stump records:

17 "He [Alastair Irvine] also told me that DC
18 [Dairy Crest] are seeing Asda this afternoon."

19 So at this point you were also speaking to
20 Dairy Crest as well as to Glanbia, is that the case?

21 A. No, we didn't speak to Dairy Crest, but this information
22 could have come from a myriad of sources. Our sales rep
23 might have been waiting in reception and the other sales
24 rep said "I'm over at Dairy Crest tomorrow". There's
25 all sorts of ways we could have found that information

1 out.

2 I suspect I was probably spiking Glanbia at the
3 time, if I said that, because Glanbia controlled almost
4 all the cheese sales into Asda, and Dairy Crest were
5 always desperate to try and push them out.

6 **Q.** We do know that Dairy Crest met with Asda -- in fact did
7 meet with Asda on the afternoon of 27 September, and
8 there's a memo of that at tab 32 [Magnum], document 32.

9 You must have -- so the information that you gave to
10 Mr Irvine (sic) was correct, Dairy Crest did see Asda
11 that afternoon?

12 **A.** To Mr Stump.

13 **Q.** Mr Stump. And you must have obtained that information
14 either from Dairy Crest or from Asda.

15 **A.** Or we were -- possibly, possibly. I'm not sure if we
16 received that information to be honest.

17 **Q.** But you gave him information that you see is absolutely
18 correct, dairy Crest was seeing Asda that afternoon?

19 **A.** Yes, it sounds like it.

20 **Q.** You'll see in tab 32, the Dairy Crest/Asda meeting note,
21 towards the bottom of the page above the heading
22 "Payments Mechanics/Thoughts", it is recorded:

23 "Latest position is that JS [Sainsbury's]/Tesco have
24 agreed to move all sectors."

25 Do you see that?

1 **A.** Yes.

2 **Q.** So you accept, I think, that you were either told by
3 Dairy Crest or Asda that they were having a meeting on
4 27 September. You were also told by them that Tesco had
5 agreed to move all sectors, that is, Tesco had agreed to
6 move prices in line with the industry move to increase
7 the raw milk price by 2p per litre?

8 **A.** Sorry, I haven't read this whole thing, but if they're
9 talking about moving milk price, I did know that Tesco
10 at this time had, you know, made an announcement.

11 What's the date of this?

12 **LORD CARLILE:** 27 --

13 **A.** 27 September. Yes, I would have known by that. And
14 "latest position is that JS/Tesco have agreed to move
15 all sectors", yes, I may well have known that at the
16 time, too.

17 **MS SMITH:** That's under the heading "Mechanics Cheese", you
18 will see:

19 "It is proposed that the cheese sector moves on the
20 20th October."

21 Then it sets out the various mechanics of the cheese
22 price increases, and then at the end it says:

23 "Latest position is that JS/Tesco have agreed to
24 move all sectors."

25 You were told either by Dairy Crest or by Asda that

1 Tesco had agreed to increase their prices on cheese?

2 **A.** Sorry, I don't know how you're making that jump.

3 **Q.** Well, you gave Mr Stump information in this memo, that
4 he records in this memo, you told him that "Dairy Crest
5 are seeing Asda this afternoon". We see that
6 information is correct and I think you've accepted you
7 must have got that information either from Dairy Crest
8 or from Asda. That's right, isn't it?

9 **A.** Or from some random source. You know, some quirk that
10 we tried to make an appointment ourselves and the buyer
11 said, "We've Dairy Crest in this afternoon, you'll need
12 to come tomorrow".

13 **Q.** With respect, Mr Irvine, you're now making that up. The
14 most likely source of your information must have been
15 Dairy Crest or Asda, who you were talking to at the
16 time, both of them?

17 **A.** If that's what you say.

18 **Q.** Well, I'm asking you.

19 **A.** I've said what I thought. You know, if -- let's wind
20 back to what I said or am reported to have said about
21 Asda going in to see Dairy Crest. It's a small market.
22 You're constantly picking up information of who is going
23 in to see who; you're sitting in the same reception, the
24 same few salesmen and, you know, information gets to you
25 in all sorts of different ways.

1 **Q.** So you're constantly picking up information, you're
2 constantly talking to the processors and to the
3 retailers including Dairy Crest, Glanbia, Asda, and from
4 them you got the information that Tesco is prepared to
5 move its prices on cheese. That's the situation, isn't
6 it?

7 **A.** It's probably less likely that Dairy Crest would have
8 phoned us up and said, "Guess what, we're in seeing Asda
9 this afternoon", than we actually picked it up through
10 some other route to be honest.

11 **Q.** Right. If I can ask you to turn to your statement,
12 paragraph 10 [Magnum], you say:

13 "McLelland did send letters to customers in
14 early October. See, for example, a McLelland price
15 increase letter to Sainsbury's."

16 That example of the letter you refer to is found at
17 tab 34 [Magnum] of the bundle, if you can have a look at
18 that. You'll see there it's a letter from Tom Ferguson
19 to Sarah Mackenzie, the cheese buyer at Sainsbury's,
20 dated 1 October. That was sent on your instructions,
21 was it, following the discussion you had with
22 Colin Stump at Glanbia?

23 **A.** This would have been sent with my authority and I would
24 have suggested we send it. Certainly from reading
25 Colin Stump's notes, it appears that we'd already made

1 the decision that we were going to be supporting the 2p
2 rise and putting out letters. Certainly from my reading
3 of Colin Stump's notes, they're more along the lines of
4 me telling Colin Stump, you know, what we're proposing
5 to do and him thinking about it rather than me
6 discussing it with Colin Stump and then making up my
7 mind to go and put it out. I think it's probably the
8 other way round.

9 **Q.** Let's look at the letter. Do you recall McLelland sent
10 letters like this to all of its retailer customers? You
11 were seeking an across the board increase in the cost
12 price for milk of £200 per tonne; it's likely in those
13 circumstances, isn't it, that you sent this letter to
14 all of your retailer customers?

15 **A.** Yes, it's very likely we sent it to all our retail
16 customers and our wholesale customers and the cash and
17 carries and everybody who we felt might or should
18 support it.

19 **Q.** Yes. Let's look at the attachments to that letter,
20 there's a table in landscape (sic) which goes over two
21 pages and it sets out the products that McLelland supply
22 to Sainsbury's in this case. You'll see there's
23 a column entitled "Current Retail" and there are a small
24 number of current retail prices put in there. Then over
25 the page, the last column "Proposed Retail". The

1 current retail against the proposed retail, can you
2 agree that in each case that goes up by 20p per kilo?
3 Can you see that?

4 **A.** Yes, it looks as though it goes up 20p per kilo.

5 **Q.** So the proposal in this McLelland letter was for a 20p
6 per kilo increase in retail prices, that is cash margin
7 maintenance, is that what's being proposed?

8 **A.** Yes, that's cash margin maintenance.

9 **Q.** Usually, would you agree that in the normal course of
10 events retailers would want to maintain percentage
11 margin?

12 **A.** Yes. Normally, the retailers would like to keep their
13 percentage margin which gives them extra money.

14 **Q.** But in the particular circumstances of what was going on
15 in September 2002, cash margin maintenance had two
16 advantages, see if you agree with me. First, an
17 increase in the retail prices by supermarkets would show
18 farmers that there had been a cost price increase by the
19 processors, so they would know the processors had put up
20 their prices and they were likely to get their
21 2p per litre increase in the farm gate price of milk,
22 they could see that?

23 **A.** Yes, that is exactly correct. The retail prices were an
24 indicator of support from the supermarkets and
25 remembering that the farmers were wanting to boycott

1 Sunday(?), you know, so the supermarkets were very keen
2 to be seen to be supporting it publicly.

3 Q. They could be seen to be supporting it publicly by
4 putting up their retail prices, is what you're saying?

5 A. Yes, that's correct.

6 Q. But if they put up their retail prices just by cash
7 margin percentage, 20p per kilo, they would also get the
8 advantage of avoiding accusations of profiteering? They
9 were only putting up their prices by 20p per kilo, that
10 was passed through to an increase in the cost price by
11 the processors which was then passed through to the
12 farmers, and they were not profiteering by adding on any
13 more increase?

14 A. Yes, that would be fair to say.

15 Q. So two days after Mr Ferguson sent that letter to
16 Sainsbury's of 1 October, if I can then ask you to turn
17 to tab 39 [Magnum], he follows it up with an email.
18 This is 3 October. He says:

19 "Good morning Sarah

20 "Please find enclosed the details which will cover
21 off the proposed £200 per tonne movement across the
22 cheese range we supply. Our target date is the 20th
23 of October and we can work together to achieve this.
24 With regard to new retail levels I have left this open
25 for discussion and we can agree on this position as time

1 develops, a movement of £200 per tonne on retail will
2 protect your cash margin although % margin will probably
3 drop slightly."

4 So he appears again to be proposing cash margin
5 maintenance, although he says that can be agreed as time
6 develops?

7 **A.** Yes, that appears to be the case.

8 **Q.** Did you also instruct Mr Ferguson to follow up his
9 letter with this one-to-one contact with the retailers?
10 That appears to be what was discussed in the note with
11 Colin Stump?

12 **A.** Yes. Generally, we'd send a notification to a customer
13 to set the scene and that gives us a chance to give our
14 arguments for the price rise and then we would follow it
15 up with discussions to see if there's -- what sort of
16 degree of support there might be.

17 **Q.** Let's quickly look back at a different part of the
18 Glanbia memo at 33 [Magnum], paragraph 4 of that memo.
19 As you said, under paragraph 2, he records what you said
20 you're doing, "Send a letter indicating there would be
21 an increase and follow up with detailed one-to-one
22 sessions with each customer in turn".

23 Then in paragraph 4 he says:

24 "... I believe we should press ahead [that's
25 Glanbia] with a letter to our customer base outlining

1 the fact that we are intending to increase cheese prices
2 by £200 per tonne... We should indicate in the letter
3 that this is a move which we hope will help farmers
4 out..."

5 The second paragraph under number 4:

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

10 So he's essentially proposing the same approach that
11 you have discussed with him, is that right?

12 **A.** Yes, I think that's fair to say.

13 **Q.** Then he says, the third paragraph under number 4:

14 "This letter should be checked legally as discussed
15 already (Jim Cooney to deal with his competition law
16 contact at Pinsent Curtis)..."

17 If you look back at tab 31 [Magnum], you'll see
18 another document produced by Glanbia. Under
19 "Considerations", there's a table and you see the third
20 entry in the table:

21 "Positive PR potential.

22 "Negative. Orchestrating a retail increase could be
23 seen as collaboration. Potential competition law
24 infringement."

25 So it would appear that Colin Stump was concerned

1 that the action he was proposing to take in his internal
2 memos of encouraging retail price increases would be
3 contrary to competition law. Did he raise those
4 concerns with you when you spoke to him on 27 September?

5 **A.** No, that never came up in our discussion at all, in the
6 conversation, or I assume it didn't come up because, if
7 he had, I certainly would have checked at the time.

8 **Q.** Did you ever have competition compliance training,
9 training in your company as to what was --

10 **A.** We did have a small amount of it, you know, from our
11 lawyers in Glasgow. I also studied business and there
12 was a small section of that on competition law but --

13 **Q.** When did you study business?

14 **A.** When or where?

15 **Q.** When?

16 **A.** When? When I was 22 so a long time ago. I'm sure it's
17 out of date now.

18 **Q.** Can I then take you to another example of the letters
19 sent by McLelland in early October, as mentioned in
20 paragraph 10 of your statement, if we could look at the
21 letters that are at tab 42 [Magnum] and 44 [Magnum].

22 These are letters, if you just flick between them,
23 they're in identical terms, letters from Jim McGregor,
24 now the group sales director, so we've gone up from --

25 **A.** Sorry, what number are we on?

1 **Q.** 42 and 44, they're in exactly the same terms. The
2 letter at 42 is to Somerfield from Jim McGregor, the
3 letter at 44 is to Asda from Jim McGregor. So he is
4 more senior than Tom Ferguson who had sent the letters
5 the previous week. Do you remember seeing these letters
6 at the time?

7 (Pause)

8 **A.** Yes. I'm happy with -- that this letter, I would have
9 been pleased with at the time.

10 **Q.** Let's look at tab 44 [Magnum], they're in the same terms
11 but let's look at the one at tab 44. The first
12 paragraph says:

13 "I am writing in light of a press release issued
14 last week by the Scottish NFU (attached) with regards to
15 milk and cheese pricing.

16 "At McLelland's, we have been aware of the
17 difficulties many dairy farmers have been experiencing
18 and the potentially grim outlook if the situation on
19 milk pricing remained unchanged."

20 The "situation on milk pricing" there must be
21 a reference to raw milk pricing because that would be
22 the price of milk that would affect dairy farmers?

23 **A.** Yes, that's the way I read it.

24 **Q.** Then it says:

25 "We therefore welcome the recent market moves that

1 have occurred in an attempt to address this."

2 What was meant by "recent market moves", can you
3 recall?

4 **A.** I would have taken that to mean the market moves by
5 Tesco to encourage the 2p initiative to the farmers,
6 that Tesco would pay more for the products they were
7 buying if the processors in turn pass that on to the
8 farmers.

9 **Q.** It could also have meant the increased retail prices of
10 fresh liquid milk, is that right?

11 **A.** I would have read it more that we were talking about the
12 Tesco initiative, to be honest. But it could have done.

13 **Q.** The Tesco initiative to increase the farm gate price of
14 raw milk would cover both retail sales of fresh milk and
15 also all other dairy products including cheese. That's
16 correct, isn't it?

17 **A.** I specifically think -- you know, my opinion of what we
18 were talking about there was that Tesco had announced
19 that they were going to be supporting the farmers by an
20 extra 2p and I think this is what we were referring to,
21 in general terms, rather than specifically anything like
22 liquid or this or that.

23 **Q.** Because of course McLelland were only cheese producers,
24 you didn't produce fresh liquid milk, did you, at the
25 time?

1 **A.** No, we didn't and never did produce fresh liquid milk.
2 We produced cheese, butter and a very big export on
3 powder as well.

4 **Q.** So when Tesco made its statements of support for the
5 2p per litre increase in the farm gate price for milk
6 and called upon processors to achieve this, as McLelland
7 you would have to achieve this through increases in the
8 price of cheese?

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

10 **Q.** So the third paragraph:

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

16 Then fourth paragraph:

17 "It would seem that the current market conditions
18 are that over the next few weeks there will be an across
19 the board increase on all cheddar (from mild to extra
20 mature)."

21 So when you're talking about an "across the board
22 increase on all cheddar" in the market, I assume you
23 mean there all cheddar produced by all processors?

24 **A.** Yes. What we're referring to there is that we're trying
25 to give Asda reassurance, but our reading of the market

1 is that everybody will be doing -- everybody is doing
2 the same thing, not just us.

3 **Q.** You're reading of the market, McLelland's reading of the
4 market was based on the discussions you had been having
5 with other processors, Dairy Crest and Glanbia, for
6 example?

7 **A.** I'm not so sure that we'd have known from Dairy Crest
8 but I think we'd have had an inkling from Glanbia on
9 whether they were going to support it or not. But there
10 was at the time -- you know, at the time everything was
11 conducted very much in the public eye. There was a lot
12 of press releases and press articles going round. I'm
13 sure you'll have them buried deep within these books
14 somewhere. So a lot of the information that was, you
15 know, getting transmitted around the market was through
16 sort of trade press and trade magazines. But we would
17 have some sort of reasonable indication from somewhere
18 that the other processors would be considering
19 supporting this too.

20 **Q.** We also know from the memos made by Colin Stump that
21 you, McLelland -- not you as in Mr Irvine -- were
22 talking to Glanbia and to Dairy Crest and it's
23 inevitable, isn't it, that in those discussions with
24 Glanbia and Dairy Crest you would also have been
25 discussing this initiative to raise cheese prices?

1 **A.** I'm not sure with Dairy Crest. As I say, our
2 relationship with Dairy Crest was a bit of a strange
3 one. But certainly with regard to Glanbia, you can see
4 we're talking about the milk price rise there. By
5 saying we were supporting the milk price rise, assuming
6 that these notes were right, and I've no reason to doubt
7 them, then we're basically saying that that would mean
8 our cheese prices would have to go up.

9 But I also know at the time that we did some press
10 ourselves because we were under pressure from the
11 farmers in Scotland to make announcements early, you
12 know, because we were sort of linked in with the
13 farmers. They were encouraging us to make press
14 announcements that we would support it as quickly as we
15 could, so we would have been making announcements early.

16 So at what point the conversation with Colin
17 happened versus the conversation -- you know, our press
18 release, I don't know. Maybe our press release led to
19 a phone call from Colin Stump, I'm just not sure.

20 **LORD CARLILE:** Did you have a media officer or a media
21 department or something?

22 **A.** No. No, we had a marketing person.

23 **LORD CARLILE:** Did press releases?

24 **A.** Yes, so we would draft it up and we'd just sort of like
25 email it round. The most active press within our

1 industry and the most, you know, read was the Dairy
2 Industry News which was literally a weekly bible that
3 everybody read. They were very good at sort of like
4 ferreting out stories and, you know, that was -- we all
5 relied upon that quite heavily.

6 **MS SMITH:** Let's go back to the letter at tab 44. It says:

7 "Current market indications are that over the next
8 few weeks there will be an across the board increase on
9 all cheddar..."

10 When it says "across the board", it also means an
11 across the board increase by all retailers on that
12 cheddar? You're telling Asda and Somerfield in these
13 letters, "Other retailers will be increasing prices so
14 it's safe for you to do so as well"?

15 **A.** We're maybe inferring that but what we're saying is
16 that -- we're talking about the price of cheddar cheese
17 going up, mild, medium, mature. What we're trying to do
18 here is create an environment where there's a sort of
19 like -- there's a sort of general consensus that this is
20 a market move, on the back of the 2p. So it's slightly
21 unusual in that way.

22 **Q.** Right. So just looking at the general approach of
23 McLelland in 2002, you've confirmed that throughout
24 October 2002 McLelland was seeking a cost price increase
25 from their retailers of £200 per tonne for your cheese,

1 including Tesco, that's right?

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

3 **Q.** In paragraph 12 of your third statement you say:

4 "At Tesco there was a tension between the public
5 support that Tesco management had announced for the
6 2p per litre farm gate milk price in early
7 September 2002 and Lisa's position vis-a-vis McLelland.
8 We found it difficult to get Lisa to commit to the
9 timing for Tesco to accept our cost price increase
10 during October 2002."

11 You say you found it difficult to get Lisa to commit
12 to the timing of the cost price increase, but given the
13 public support that Tesco had announced for the
14 2p per litre farm gate milk price, the 2p per litre rise
15 in the farm gate milk price, it was inevitable that they
16 would eventually agree to an increase in cost price?

17 **A.** I think that what I was trying to say or what I'm saying
18 here is that the tension between the management and the
19 buying was that, if you like, as a global generic press
20 release, that was one thing. "Yes, we'll support the
21 farmers, 2p, it's easy". But then when it came down to
22 how to operationally put that into place, that was
23 a whole different matter. So although the overall
24 general support in the press and public was that 2p
25 would go up, when it came down to actually negotiating

1 specifically how and when and by how much, that was
2 a whole different story.

3 We had quite a difficult time and Lisa, I know, had
4 a difficult time, you know, because she had certain
5 targets and goals that she had to hit and this was going
6 to mess them up big time. She was wanting reassurances
7 internally that, if she supported this and there was
8 a negative impact, then it wouldn't be reflected upon
9 her. So it was quite difficult. She was very jittery
10 about the best way to approach this. With regards to
11 timings it was certainly on/off, on/off, on/off.

12 **Q.** There was -- as you say, she'd been placed into a
13 position by a statement by her managers that Tesco would
14 support the 2p per litre increase in the farm gate price
15 for milk, and that put her in the position that,
16 eventually, she would have to agree a 2p per litre or
17 £200 per tonne increase in the cost price of cheese?

18 **A.** Yes.

19 **Q.** It was just a question of timing, and you said that she
20 resisted agreeing and she delayed because, you say in
21 paragraph 12 [Magnum]:

22 "She was keen to ensure that her retail margin did
23 not suffer as a result of her accepting a cost price
24 increase in circumstances where she could not be
25 confident of being able to increase her retail prices

1 for cheese."

2 What you're saying is that she didn't want to agree
3 an increase in her cost price and then not be able to
4 increase her retail prices because she might be undercut
5 by her competitors?

6 **A.** Yes, in essence, I think that she was just uncomfortable
7 with the impact it would have on her targets for margins
8 internally. You know, they're very much targeted on
9 achieving certain margins, you know, and she was very
10 target driven. She was feeling very uncomfortable that
11 she was going to miss her targets or have problems with
12 her targets by supporting this overall commercial
13 strategy.

14 **Q.** As you say, she was keen to ensure her retail margin did
15 not suffer. So in order to ensure that her retail
16 margin did not suffer, in response to accepting a cost
17 price increase from McLelland, she would have to be able
18 to increase her retail prices?

19 **A.** If she was to hit her -- if she was to avoid retail
20 margin deterioration, yes, she would have to get her
21 retails up.

22 **Q.** Now, you, McLelland, needed to persuade her to accept
23 your increased cost prices, didn't you, at this time?

24 **A.** To be honest, it was their idea to increase the cost so
25 we didn't so much need to persuade her that the costs

1 were going up or persuade her to accept a cost rise. It
2 was more that we needed to try and persuade her that she
3 should do it now. What we were worried about and
4 terrified was that we were going to start paying extra
5 money to the farmers and not recover it from her. And
6 as time goes on, a grand statement becomes watered down,
7 so we were quite keen that she tried to move as quickly
8 as possible.

9 **Q.** She was delaying -- you wanted her to move as quickly as
10 possible. She was delaying because she didn't want her
11 retail margin to suffer where she couldn't be confident
12 of being able to increase her retail prices. So in
13 order to stop her delaying, you had to give her
14 confidence that she could increase her retail prices for
15 cheese without being undercut?

16 **A.** Yes, our objective fell into our normal sales objective
17 which was try to make people feel that it was safe to
18 accept a rise. If they felt they were going to be
19 commercially disadvantaged by accepting a rise in price
20 or a rise in cost then we wouldn't ultimately get our
21 cost increases up and it wouldn't be smooth. So we were
22 trying to create the environment whereby she would feel
23 comfortable to do it.

24 **Q.** She would be comfortable to do it. That is she'd be
25 comfortable to accept the cost price and protect her

1 retail margin by increasing her retail prices?

2 **A.** Yes, we didn't really care about a retail margin, we
3 wanted the costs up, but we understand there was
4 a factor that had to be taken into account which was her
5 retail margin.

6 **Q.** One way you could give her the confidence to put her
7 cost prices up and protect her retail margin was by
8 letting her know that the market generally was moving,
9 that other retailers would also be increasing their
10 retail prices?

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

19 **LORD CARLILE:** What do you mean by "visibility of their
20 prices in the market"?

21 **A.** Sorry, so visibility of prices in the market would be
22 prices in store, if you like. So we employed a guy
23 called Eric Dixon(?), who we basically sent out in this
24 full-time job -- and we're only a small business -- and
25 his full-time job was collecting prices from stores. It

1 was horrendously difficult to know, with all the
2 different cheese lines, who was moving what where; Asda
3 were rolling back all the time, there's different prices
4 happening, there's promotions going on all over the
5 place.

6 So what we did, particularly for Scotland, we sent
7 Eric Dixon out and he just basically spent a week
8 compiling prices around supermarkets and reported them
9 each Friday. Then we used these to, you know,
10 understand where the market was going or what was
11 happening. For that reason, we were seen as a good
12 source for information, within Scotland particularly, on
13 what was happening there.

14 **MS SMITH:** Now, it wasn't just giving information about what
15 was happening in store but it was also giving
16 information about what people were going to be doing
17 because, as you say, your concern here was about Lisa
18 delaying. If she was going to wait until people had
19 moved their prices, which would take some time on
20 cheese, to get those new prices into store, she needed
21 that reassurance earlier than that so she wouldn't delay
22 on putting up the prices?

23 **A.** Yes. A couple of things, one is it doesn't take long to
24 get prices into store, that process is pretty quick.
25 I think the second thing is that Lisa delaying wasn't in

1 itself unexpected. You know, Tesco, Asda, they very
2 much sort of were very, very jittery at this time about
3 who was ahead or who was behind. The basket of goods
4 concept was really becoming a sort of stopping point.
5 We hadn't managed to get a price rise for five years
6 previous to this and we were constantly running into
7 problems with supermarkets.

8 **Q.** Can I just pick you up on one point there. You say:

9 "It doesn't take long to get prices into store."

10 Can we just see what McLelland's submissions were to
11 the OFT during the investigation, your submissions or
12 McLelland's submissions, as to how long it would take.
13 Could you just take out the pink-spined bundle 5, tab W
14 [Magnum]. This is a submission on factual inaccuracies
15 in the statement of objections relating to the dairy
16 products price initiative submitted by Lactalis
17 McLelland.

18 If you could look at page 4, paragraph 10 [Magnum]:

19 "In normal circumstances, the packing and labelling
20 process takes two weeks. The date on which price
21 changes are to be implemented thus gives the processor
22 the target date to work towards. This date also tells
23 the processor when it has to have new labels ready and
24 when it must take the cheese from the maturing
25 warehouse --"

1 **MISS ROSE:** I'm sorry to interrupt, but it was put to the
2 witness that this was his submission, I think it ought
3 in fairness --

4 **MS SMITH:** No, I didn't say that, I said McLelland's
5 submission.

6 **MISS ROSE:** -- to be pointed out that this was made in 2008,
7 which was a number of years after he left the company.

8 **LORD CARLILE:** Ms Smith put it as "McLelland's submission".

9 **MISS ROSE:** Then she said "your submission".

10 **MS SMITH:** Not the individual obviously.

11 **MISS ROSE:** Sir, I may have misunderstood, but she ought to
12 have shown the date --

13 **LORD CARLILE:** "Can we just see what McLelland's submissions
14 were to the OFT ..."

15 That's [draft] lines 15 and 16 of page 83 of
16 LiveNote.

17 Anyway, let's get on with it.

18 **MS SMITH:** Paragraph 10 [Magnum], I'll say again:

19 "In normal circumstances, the packing and labelling
20 process takes two weeks. The date on which price
21 changes are to be implemented thus gives the processor
22 the target date to work towards. This date also tells
23 the processor when it has to have new labels ready and
24 when it must take the cheese from the maturing
25 warehouse. The date of the price change implementation

1 also tells the processor which block of cheese to use as
2 it gives the processor an indication as to the necessary
3 sell by date."

4 So the information given by McLelland to the OFT is
5 that in normal circumstances the packing and labelling
6 process takes two weeks, and that's about normally how
7 long it would take.

8 **A.** Sorry, what was the question?

9 **Q.** In normal circumstances, the packing and labelling
10 process takes two weeks, do you agree?

11 **A.** In normal circumstances, it could take up to two weeks.

12 **Q.** In normal circumstances it takes about two weeks is what
13 is stated here, you agree with that, do you, or not?

14 **A.** I wouldn't say these were normal circumstances, you
15 know, but when you know there's a price rise coming you
16 anticipate that, what you don't do is you don't hold
17 a large stock knowing that the price is just about to
18 change.

19 **Q.** This was a question asked, as you see at the top of the
20 page, about the 2002 cheese initiative, and then they
21 were asked about the cheese-making process?

22 **A.** Okay, well, in which case I would disagree with that
23 statement, I think it was done much, much quicker than
24 that.

25 **Q.** It takes about two weeks --

1 **LORD CARLILE:** Sorry, I have a question.

2 Were you involved in the preparation of this
3 document or had you left -- you'd left McLelland by
4 then?

5 **A.** Yes, we left -- we sold the business in 2004 and
6 I immediately left --

7 **LORD CARLILE:** Did you participate in the preparation of
8 this document?

9 **A.** No, I didn't participate in it at all. In fact, quite
10 the opposite. There is a warranty claim against us on
11 this OFT enquiry and so Lactalis, who prepared this, and
12 ourselves were at loggerheads over whether that warranty
13 claim was fair. Our big gripe with Lactalis was that
14 they wouldn't allow us to help draw up the defences,
15 despite the fact that we were in charge of the business
16 at the time.

17 So I'm seeing this sort of stuff for the first time.
18 Certainly, you know, we claimed that we shouldn't be
19 liable for the warranty because they didn't consult us.

20 **MS SMITH:** Right. I will just put this to you again.

21 The statement is that the packing and labelling
22 process takes two weeks. Mr Reeves from Dairy Crest
23 gave evidence to this Tribunal, Day 5 in the transcript.
24 He also said that the packing and labelling process
25 would take two weeks. In her witness statement to this

1 Tribunal in this case, Mrs Oldershaw of Tesco says it
2 takes between one to three weeks, but you disagree with
3 all that evidence, do you? You say now, in your oral
4 evidence, that it's completely different?

5 **A.** I guess so.

6 **Q.** I think we can make it clear that the evidence that
7 you're now giving is not correct, it is evidence that
8 you have given having realised that actually you need to
9 give this evidence in order to -- well, it's not
10 correct, it's contrary to what everyone else has said,
11 it's evidence you're giving with hindsight and it's not
12 correct?

13 **MISS ROSE:** Sir, I must object because that evidence is not
14 contrary to what everyone has said. The Tribunal heard
15 extensive evidence on this from Mr Ferguson of McLelland
16 yesterday and it knows that what has been said is not
17 contrary --

18 **MS SMITH:** I have put the point --

19 **LORD CARLILE:** I think what is being put to you, and correct
20 me if I'm wrong, Ms Smith, is that what you've just
21 said: it's not correct, it's not truthful and in effect
22 you're tailoring your evidence to suit the position you
23 wish to take. I think that's what's being put, isn't
24 it?

25 **MS SMITH:** Sir, essentially. I've put the point to the

1 witness, he can respond.

2 **LORD CARLILE:** So can you answer that?

3 **A.** Yes, of course. The time it takes to pack cheese is
4 incredibly quick. You know, if you go back to earlier
5 on when I was talking about going from a situation
6 whereby there were stocks everywhere of cheese, to the
7 situation where there wasn't stocks of cheese and we
8 were having to pack almost live to get to customers,
9 then the process changed enormously from being a process
10 that would take up to two weeks to something that really
11 had to be done an awful lot quicker. We were literally
12 packing almost live. So we'd have our lines running all
13 the time, packing cheese, and there was a massive
14 exercise on our part to try and make sure that what we
15 were packing was the right quantity of stocks.

16 Now, there were times in the year when we did have
17 stock, you know, built up, but that was at Christmas and
18 that was because orders were extremely big and so we did
19 build up stock. We quite often had large discussions
20 with supermarkets on extending shelf quote(?) and
21 product so that we could build up stock.

22 You know, what I said there was that in normal
23 circumstances, yes, we would be running along with maybe
24 ten days' stock or eight days' stock or something like
25 that, but if we saw a price rise coming and we knew

1 things were going to change, we'd tighten that right
2 down to a minimum in anticipation that we didn't want to
3 be left holding stock that we would have to repack.
4 Because repacking stock would be very, very costly and
5 practically impossible, you have to literally cut open
6 every little pack and by hand put it in the packing
7 machine which slows it down.

8 So we would have -- and that's why I said at the
9 start, when I was asked the question, in normal
10 circumstances, yes, but the circumstances of leading
11 into a price rise, we would have that right down as far
12 as we could. It's not to say we would be perfect but
13 we'd try to get the stock as low as we possibly could.
14 What that would mean is that there would be much less
15 time between orders and stock going out. That's really
16 what I was trying to say.

17 **MS SMITH:** In normal circumstances, you would be running
18 along with maybe ten days' stock. If you were
19 anticipating an imminent price increase, you might run
20 the stocks down to hold only a week's stock. That's the
21 sort of minimum level that you would hold?

22 **A.** It depends on the line and it depends when the price
23 rise is coming, you know, because you're packing on
24 a sort of sensible rota and you might go down to -- you
25 see, normally what you'd do is you'd sort of start with

1 maybe seven or eight or nine or ten days and then you'd
2 go down to maybe two or three days or maybe two days
3 worth of stock and then you'd have another production
4 come in and you'd go back up. So to say it's a sort of
5 fixed two weeks on the button just is unrealistic.
6 Stock is a moving thing all the time.

7 Particularly if you knew that a certain customer was
8 going to be changing prices over the next few weeks,
9 you'd try and run that as tight as possible. What you'd
10 do is you'd put on more production runs so you had to
11 keep less stock. That's the way we did it, that's the
12 way we ran our business.

13 Q. Can I go to your first witness statement which is at
14 tab K, it's just before that statement we've been
15 looking at. Tab K, your first witness statement,
16 paragraph 22 [Magnum]. You talk here generally about
17 cost price negotiations and you say in paragraph 22:

18 "As a general negotiating tactic there was a lot of
19 'positioning' in the industry."

20 Suppliers would often tell retailers when they were
21 seeking a cost price increase that everyone is on board.

22 "[You] would represent these points as cast iron,
23 although such comments were, in reality, commercial
24 positioning, not a matter of fact.

25 However, you then go on to say in paragraph 23:

1 "It was clear that information from retailers was to
2 be treated confidentiality."

3 If you go back in that witness statement, you also
4 make a lot of play of the confidentiality of your
5 customers' information, at paragraph 19.

6 The problem with your evidence here is there's
7 a real tension here, isn't there? You say the
8 information was incredibly confidential. If that's so,
9 what is the point of speculating, engaging in commercial
10 positioning? If the evidence was so confidential and
11 all the retailers knew it was confidential and there was
12 never a doubt that Tesco regarded its information as
13 confidential, there would be absolutely no point in
14 speculating because the retailer wouldn't believe what
15 you were saying was true because they knew the
16 information was confidential?

17 **A.** Sorry. Can I just ask what the question was there?

18 **Q.** There's a real -- this evidence cannot be correct. On
19 the one hand you're saying, "The information is
20 confidential and everyone knew it to be confidential and
21 we would never give away confidential information about
22 retailer A to retailer B, and all the retailers knew
23 that"; but on the other hand, "We were saying to
24 retailer B, 'Oh, everyone is going to move'". That
25 can't be right, can it, because no one would ever

1 believe what you were saying in your speculation,
2 everyone is going to be able to move, because everyone
3 knew their information was confidential? So the
4 evidence you give here must be wrong one way or the
5 other?

6 **A.** Yes, I think to sort of answer this question, there's
7 degrees of passing on sort of information. On one hand,
8 you're being very positive and very bullish and, "Yes,
9 the whole market is going to go up, everybody is on
10 board, retails, RSPs, you know, everything is in place,
11 it's got to go up, milk price is one way, it's one-way
12 traffic", sort of like you're talking it up and I think
13 everybody that we dealt with treated it in that way.

14 I think the second thing is passing on actual prices
15 of pre-packs prior to coming into the market for
16 instance. That would be seen as a massive breach of
17 confidentiality. So, you know, on this sort of -- and
18 I think it's -- in paragraph 23 [Magnum], I think it
19 was -- we're transmitting future price information.
20 I meant specific future price information, you know,
21 that this pack is going to cost that or that pack is
22 going to be this or whatever. That was very much
23 regarded as confidential.

24 What was, you know, at the other end was this sort
25 of commercial positioning, if you like, was we'd never

1 managed to persuade anyone to get their prices up if
2 they felt that really they were on their own and
3 isolated and that we were only speaking to them. So we
4 tried to make it that this was such an obvious, big move
5 in the market for such obvious commercial market reasons
6 that everybody inevitably was going to go up. That was
7 really how we tried to paint this rise and, to be
8 honest, other rises too.

9 **Q.** What you say in paragraph 22 [Magnum] is that you were
10 seeking to persuade your customers to agree to increase
11 the cost price by giving them confidence that they were
12 not alone in agreeing to accept the cost price increase.
13 That's what you say, isn't it?

14 **A.** Yes.

15 **Q.** In order to give a customer confidence that they were
16 not alone in agreeing to accept a cost price increase,
17 they would only get that confidence if you gave them
18 some specific information, wouldn't they?

19 **A.** Not generally. Generally, in this sort of level, people
20 didn't expect specific information. You were just
21 saying, "Yes, everybody is on board". It was more just
22 bravado, if you like, of the position.

23 **Q.** There are a number of instances in this case where
24 McLelland did give retailers specific information as to
25 what their competitors would be doing on retail prices.

1 Branded pre-pack will be in place Tuesday this week."

2 Which is the following day. Now, this is the sort
3 of statement, is it, that McLelland would have made to
4 give Tesco confidence that they were not alone in
5 agreeing to accept cost price increases so to persuade
6 them to agree also to increase the cost price?

7 **A.** Yes. I wouldn't expect any of our team to go or to give
8 indications specifically on price unless they were
9 actually already in the system. I'm looking at this,
10 trying to sort of gauge where we're at. It was
11 21 October at 5 o'clock and we're sending an email to
12 Tesco and saying that the next day new retail brands
13 will be in place, which is Tuesday I believe. So I can
14 only assume that we're doing this on the basis that
15 we've already put out packs on the Monday and we have
16 got a fairly good idea that they would have filtered
17 into the system for the Tuesday.

18 **Q.** There's also a statement in that email:

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

22 Do you think that is commercial positioning
23 speculation or is it a breach of confidence?

24 **A.** I'm not sure. It could be that we were trying to alert
25 Tesco to the fact that there's going to be, on this --

1 these brands coming out on Tuesday, that there's going
2 to be -- you know, they were going to be protecting cash
3 margin rather than percentage margin. It could be that
4 we were giving Lisa a heads-up. I presume they'll be
5 referring to the packs that were going to be in shops on
6 Tuesday.

7 **Q.** Are you making assumptions or do you know what this
8 statement was about?

9 **A.** I'm making assumptions.

10 **Q.** This sort of statement that you say in your witness
11 statement you would engage in commercial positioning and
12 you would:

13 "... represent points as cast iron although such
14 comments were in reality commercial positioning not
15 a matter of fact."

16 I'm putting points to you, examples of the sort of
17 statements that McLelland made. If a statement, for
18 example "Sainsbury's are going to put their prices up
19 tomorrow", is intended to make Tesco also increase their
20 cost prices -- let's just break that down and see
21 whether it could realistically be commercial
22 positioning, whether it's the sort of speculation that
23 McLelland might realistically engage in.

24 So this statement is intended to make Tesco increase
25 their cost price, everyone else is doing it, Sainsbury's

1 are going to put their prices up tomorrow, and therefore
2 in line with McLelland's intention, Tesco puts its cost
3 price up by £200 per tonne, you achieve your objective,
4 and Tesco then also increases its retail price. So we
5 are in that situation, do you understand?

6 **A.** I understand what you're saying, yes.

7 **Q.** But then, because this is speculation, not a statement
8 of actual fact, Sainsbury's doesn't put up its retail
9 price because McLelland was just speculating, if
10 Sainsbury's doesn't put up its retail price, Tesco then
11 doesn't want to be undercut so they move back down their
12 retail price to match Sainsbury's. That would be the
13 normal situation.

14 **A.** I don't think I've ever been in that situation where the
15 price has gone up and then bounced back down, but yes in
16 theory.

17 **Q.** In theory. If it was speculating and Sainsbury's didn't
18 put their prices up, but Tesco had increased their
19 retail price on the back of that statement, because
20 that's what you were intending them to do in light of
21 that, Tesco's have by that time accepted your cost price
22 increase of £200 per tonne but because they've had to
23 put their retail prices back down, because what you were
24 saying about what the others would do, what Sainsbury's
25 would do, was speculation, their retail margin is

1 reduced by £200 per tonne, Tesco's retail margin is
2 reduced by £200 per tonne?

3 **A.** Sorry, are we still talking theoretically?

4 **LORD CARLILE:** I think we are.

5 **MS SMITH:** Yes. This is to test whether what you're saying
6 about speculation is actually real, actually true.

7 If you're speculating, Tesco act on that speculative
8 information, Sainsbury's doesn't put its prices up
9 because you were just speculating, Tesco has to put its
10 prices back down, it has lost £200 per tonne on its
11 retail margin and they potentially lose thousands,
12 perhaps millions of pounds. They wouldn't, in that
13 situation, be pleased with what McLelland had told them
14 because McLelland would have misled them, and led as
15 a result to them losing thousands, perhaps millions, of
16 pounds. But McLelland has to have an ongoing
17 relationship with Tesco and, as a result of your
18 speculation, they would have lost money.

19 What I'm putting to you is that it's just not
20 realistic that McLelland would have speculated in these
21 sort of terms, passed this information to Tesco if it
22 were just speculation, because that was too risky
23 a strategy to take. Would you agree?

24 **A.** I think in this particular instance I'm not actually
25 thinking this is speculation. I'm thinking that

1 Sainsbury's are confirming that the new retails on
2 branded pre-packs "will be in place on Tuesday this
3 week". This is sent through last thing on Monday night.
4 I'm thinking that we've already put into the system
5 packs at this new price and this isn't actually
6 a speculation, as far as I can --

7 **Q.** What do you mean about putting in the system? We're
8 talking --

9 **A.** What I'm saying is-

10 **Q.** We're talking about branded pre-pack here, which are
11 fixed weight, fixed weight pre-pack.

12 **LORD CARLILE:** Sorry, can I just try -- forgive me,
13 Ms Smith.

14 Branded pre-packs are packs that are not priced at
15 Mauchline; branded pre-packs are priced by the
16 supermarket company, aren't they?

17 **A.** No, it's actually I think the other way around.

18 **MS SMITH:** In this case, it's perhaps, sir, by reference to
19 the document at 47 [Magnum], it's Seriously Strong
20 pre-packed we're talking about.

21 **A.** Yes, seriously Strong pre-packed didn't have a price on
22 it.

23 **LORD CARLILE:** Right. If we look at tab 52 [Magnum], the
24 second sentence, that looks like a piece of information,
25 firm information, yes?

1 **A.** The second paragraph?

2 **LORD CARLILE:** "Sainsbury's are confirming that the new
3 retails on Branded pre-pack will be in place Tuesday
4 this week."

5 What that means is that tomorrow branded pre-pack
6 will be in Sainsbury's at a higher price?

7 **A.** Yes.

8 **LORD CARLILE:** If that proved to be wrong, what do you think
9 Tesco would have had to say about it?

10 **A.** I don't think they'd have been particularly pleased if
11 we'd said that to them. I'm not sure that it would have
12 ruined our relationship on that sort of level --

13 **LORD CARLILE:** No, but it looks like a fairly concrete piece
14 of information --

15 **A.** Yes.

16 **LORD CARLILE:** That's what you're saying, isn't it?

17 **A.** I'm thinking we wouldn't have said that unless we knew
18 something.

19 **LORD CARLILE:** Yes. And what about the "As we discussed"
20 sentence in the first paragraph? Does that fall into
21 the same category of something you wouldn't have said
22 unless you knew something, or is that just speculation?

23 **A.** No, I think again we wouldn't have discussed that if we
24 didn't know something. I think that would have been our
25 experience in the market --

1 **LORD CARLILE:** Having seen those documents, if those
2 documents represent information rather than speculation,
3 is that the sort of information which McLelland should
4 have been passing on, normally, to one of their
5 customers when it contains information about another?

6 **A.** I think if we take them one at a time, please, the first
7 one about the general margins in the market, whether
8 they're going to be cash or percentage, I'm not
9 surprised at that. I'm thinking that's the sort of
10 thing that we probably shouldn't have been passing on
11 but might well have.

12 I think the second one, I can only assume that this
13 has been timed to the point whereby we're trying to get
14 the information through to Tesco as soon as we felt we
15 were okay to, to try and encourage them to, you know,
16 support the £200 per tonne cost rise. It's notable to
17 me that it's right at the end of close of play they sent
18 this through, to try and get information that's live, if
19 you like, that it's something that's currently
20 happening, as opposed to something that's going to
21 happen, you know, ten days later or a week later.

22 **LORD CARLILE:** Thank you.

23 **MS SMITH:** Can you go back to your statement, first
24 statement at paragraph 19 [Magnum]. You say at the
25 beginning of that paragraph 19:

1 "McLelland would from time to time receive future
2 retail price information from Tesco for the purpose of
3 printing price labels for random weight packs of cheese.
4 This information from Tesco was provided in confidence
5 and treated on this basis."

6 Then you go on to explain that retail prices were
7 a closely guarded secret. And at the top of the
8 following page:

9 "It was not our practice at McLelland to pass on
10 retailers' future pricing intentions to competing
11 retailers. Aside from any other issues, we could not
12 afford to take the risk of losing customers' business".

13 Then at paragraph 21 [Magnum] you say:

14 "On occasions McLelland sales representatives might
15 have sent a retailer a copy of a price label that
16 McLelland had printed for a competing retailer which
17 they knew was already in the distribution system or in
18 store, rather than going to the store to verify that
19 product with the new price labels that were actually
20 available in store."

21 **A.** Yes.

22 **Q.** By "in the distribution system", what you mean is they
23 were being printed by McLelland and stuck on the packets
24 of cheese in the McLelland processing plant but hadn't
25 yet got into the supermarket store itself, is that

1 right?

2 **A.** No. What I was referring to there was that "in the
3 distribution system" would be within the depots waiting
4 to deliver to supermarket stores.

5 **Q.** Can we move on to the situation in 2003. In 2003
6 McLelland were trying to get a cost price increase
7 across all their lines, as before, of £200 per tonne,
8 that's right, isn't it?

9 **A.** In 2003 we were trying to get a cost price increase of
10 £200.

11 **Q.** The other issue that McLelland had with Tesco, in
12 particular in 2003, was that Tesco was unhappy about its
13 margins on Seriously Strong?

14 **A.** That's correct.

15 **Q.** But the main issue, and the issue that McLelland had
16 with all its retailer customers, was to get this cost
17 price increase across all of its lines, and the cost
18 price increase was to restore McLelland's margins. At
19 that time, in 2003, it wasn't about increasing the
20 farm gate price for milk, is that right?

21 **A.** That's correct. We'd gone through the price rise for
22 the farmers the year before and we wanted -- actually,
23 before the price rise to the farmers took place, we were
24 already trying to get a price rise through just for
25 ourselves. Then the price rise -- the farmers started

1 boycotting depots and it became clear that any efforts
2 that we had were going to be overshadowed by that.

3 So once that had gone through, we had in mind all
4 the way through that we need to actually try and -- when
5 the market circumstances are right, try and get a price
6 rise for ourselves.

7 **Q.** In 2003, let's focus on that, can you have a look at
8 what you say in your third witness statement, which is
9 at tab M of the bundle, towards the very end of that
10 statement, paragraph 17 [Magnum].

11 At paragraph 17, you say:

12 "This cost price increase in 2003 was not
13 a market-wide initiative. Instead it reflected our wish
14 at McLelland to restore our margins. As a strategy, to
15 convince the retailers to accept increased cost prices,
16 we presented a generalised market increase to give the
17 impression that the rest of the market, meaning other
18 processors and other retailers, would inevitably follow
19 due to upward price pressure in the market."

20 So you were presenting it, as you say, as
21 a generalised market increase, is that right?

22 **A.** Yes, that's the way we were presenting it to our
23 customers.

24 **Q.** And that -- to give the impression that the rest of the
25 market, which you explain means other processors and

1 other retailers, would also move up?

2 **A.** Yes. The way that we presented this price rise was that
3 the market had moved in an unusual way in that normally
4 what you would have -- you would have a whole range of
5 different prices that you sold your production at. For
6 us at the bottom was commodity trading, as we called it,
7 mostly export, and in that would be curd cheese, which
8 is just cheddar cheese very young, powder, which was
9 dried milk, and butter. These elements normally formed
10 the sump. So whatever milk you couldn't use for normal
11 production, you'd throw into that and you'd export it at
12 a cheap price.

13 At this time there was an unusual scenario happened
14 whereby the commodity prices moved above the prices that
15 we were selling to supermarkets at, particularly the
16 mild cheddar cheese, which was a big part of our
17 business at that time. So we were going for a price
18 rise on the basis of this market fact, and what we were
19 trying to demonstrate to our customers at the time was
20 that this was unsustainable, that the mild cheddar was
21 actually returning poorer prices than trading commodity.
22 It had to come up here like this (indicating).

23 So we were presenting this as very much -- this is
24 just like an interest rates move or a stocks and shares
25 move, this was a fact. This was a fact that these

1 prices were trading here.

2 The difference between the two was at least £200 per
3 tonne. So what we presented when we met with our
4 customers was an explanation, evidence of this scenario.
5 What we were telling our customers at the time, and it
6 was a fact, was that there's a lot of people putting
7 milk into these traded commodities and not putting it
8 down as stock for mild cheese, and if this didn't change
9 there was going to be later on a shortage of mild
10 cheese, so they really needed to recognise the price
11 movement.

12 **Q.** Can we look at a document that you comment on in
13 paragraph 18 of your witness statement [Magnum].

14 If you get out the second document bundle, just to
15 your left, the yellow-spined document bundle 2.

16 **A.** Shall I put this one away?

17 **Q.** I think you can put away number 1, yes. If you could
18 turn in that document bundle 2 to tab 101 [Magnum], this
19 is an email from Calum Morrison, 5 September 2003, to
20 Sarah Mackenzie of Sainsbury's. It says:

21 "Please find attached our rationale for moving
22 prices in October, I will give you a call this afternoon
23 to discuss."

24 Then you see attached to that email some slides.
25 And the first slide under the heading "Price Increases",

1 the fourth bullet point, it says:

2 "This will be a total market move.

3 "All major suppliers.

4 "All major retailers.

5 "All RSPs will move.

6 "Contract and brand".

7 So what Mr Morrison is doing here is exactly what
8 you say in paragraph 17 of your statement, isn't he? He
9 is presenting this as a generalised market increase,
10 "This will be a total market move", it's a generalised
11 market increase?

12 **A.** Yes. What we were saying here was that although we were
13 presenting -- although we were presenting this as
14 a potentially total market move, that was in economic
15 market factors. So we're saying, for all these reasons,
16 everything has to move. But despite that, you know, we
17 were operating in isolation. We had really no general
18 feeling whether anyone else at that moment in time was
19 looking for a price rise, you know, or whether -- what
20 I'm trying to say here was that it wasn't Tesco's who
21 came out and said "Everybody is going to go", and
22 everyone is running around and there's stuff in the
23 press, this was just us going for a price rise.

24 But what we were saying to our customers was that
25 the impact of these factors on the market meant that,

1 inevitably, all these things would happen. You know, in
2 many ways we're sort of speculating, but with a high
3 degree of certainty, that because of the price situation
4 things had to give.

5 **Q.** You're not answering my question. My question was, what
6 Mr Morrison is doing here is he is presenting a total
7 market move, which is exactly what you say in
8 paragraph 17 [Magnum] of your witness statement:

9 "We presented a generalised market increase."

10 He's doing exactly what you say in paragraph 17 of
11 your statement, isn't he?

12 **A.** Yes. One, as far as I can see, is referring to us
13 operating in isolation two market factors, the second is
14 predicting what is going to happen in the future which
15 is that we believe that everyone is going to follow us.

16 **Q.** Try and listen to the --

17 **LORD CARLILE:** Is this right, from what you said about
18 commodity prices there must have been a shortage of
19 materials for delivery and you had to make it up on the
20 spot market, yes, the daily price, and you would be
21 losing money on that daily price?

22 **A.** It's not quite how we traded. Because we were sort of
23 integrated with the farmers, for all the big contracts
24 that we supplied, like say Tesco mild or Value, then we
25 would agree a volume of milk for that contract in

1 advance with our milk suppliers. So we didn't really go
2 on to the spot market to buy milk.

3 But what was happening was other manufacturers, not
4 ourselves, at that time were putting -- diverting an
5 awful lot of milk that would have otherwise gone into
6 mild cheese into powder and curd and export cheese
7 because those markets were so buoyant at that point in
8 time.

9 **LORD CARLILE:** So everybody was in the same boat, that was
10 the point I was getting at?

11 **A.** Yes, everybody was in the same boat from that point of
12 view.

13 **LORD CARLILE:** So there's a general problem because of
14 commodity prices.

15 **A.** Yes, the market was a fact -- the fact that we'd gone
16 out and gone for an increase, we just did it, we just
17 felt it was the right thing to do.

18 **MS SMITH:** Actually I think the point is made on the third
19 slide attached to Calum Morrison's email under the
20 heading "Price Increase Market", the third bullet says:
21 "Current currency situation makes export attractive.
22 Curd, powder, provides better, more immediate return
23 than cheddar."

24 That's what you're saying?

25 **A.** Yes.

1 **LORD CARLILE:** That's the same point.

2 **MS SMITH:** The question I asked you was this, and listen to
3 the question and see if you can answer the question. On
4 the first slide Calum Morrison says to Sainsbury's:

5 "This will be a total market move.

6 "All major suppliers.

7 "All major retailers.

8 "All RSP's will move..."

9 This is entirely consistent with what you are saying
10 in paragraph 17 [Magnum] of your statement:

11 "... we presented a generalised market increase [a
12 total market move] to give the impression that the rest
13 of the market (meaning other processors and other
14 retailers) ..."

15 He says all major retailers, all major suppliers
16 will move. He's doing exactly what you say the strategy
17 was in paragraph 17 of your witness statement.

18 **A.** Yes.

19 **Q.** This was the strategy that you, McLelland, were
20 employing in 2003 with all your retailers, as you say in
21 paragraph 17, a strategy to convince the retailers to
22 accept increased cost prices, is that correct?

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

24 **Q.** Can I ask you to turn to tab 112 in that bundle of
25 documents [Magnum]. This is a document that you may

1 have also seen either in preparation for this hearing or
2 before.

3 It's a Tesco briefing prepared by Stuart Meikle at
4 the beginning of October 2003. It was circulated within
5 McLelland, Mr Ferguson yesterday said he thinks he saw
6 it at the time. Do you recall seeing it at the time?

7 **A.** Not specifically but I may well have.

8 **Q.** Now, if we can just look on this point at what Mr Meikle
9 says at the top of the page:

10 "I had a meeting with Lisa on 4th September at which
11 we discussed the £200 increase. We ran through all the
12 arguments as to why we were looking for an increase at
13 that time. Lisa requested a further explanation as to
14 why we arrived at the figure of £200 and I subsequently
15 e-mailed this to her... At the close of the meeting my
16 understanding was that Lisa had accepted the cost
17 increase on the basis that we would work to increase
18 retail prices across the market to maintain retailer
19 margin."

20 So what is reported here by Mr Meikle is that
21 McLelland is working to increase retail prices across
22 the market to maintain retailer margin. That also is
23 consistent with what you were saying to all retailers at
24 the time, that this would be a generalised market
25 increase with an increase by other processors and other

1 retailers who would also follow the market up.

2 Would you agree?

3 **A.** Yes, I mean, this is us positioning that this is a safe
4 rise, everybody is going up, all the processors, all the
5 retailers, all the prices, this is safe, you know, don't
6 be alarmed about it. So we're trying to create a safe
7 scenario for everybody to put their prices up.

8 **Q.** It would appear that Mr Meikle prepared this briefing,
9 as for you and for senior McLelland colleagues, for
10 a meeting with Tesco on 6 October. If you look halfway
11 down the document, in between the two bullet points, you
12 can see:

13 "This morning Lisa has scheduled a meeting with her
14 and John Scouler for next Monday [which we think is
15 6 October] to discuss the cost increase and the
16 rationale behind £200."

17 The meeting on 6 October with Tesco, Lisa Oldershaw
18 and John Scouler, you attended that meeting?

19 **A.** Yes.

20 **Q.** And it does appear, would you agree, that this document,
21 if you can recall, this document was prepared by
22 Stuart Meikle for you and I think for Mr McGregor as
23 preparation for that meeting. Is that right?

24 **A.** I'm not sure. It could well have been.

25 **Q.** Could well have been. If it was, he would have been

1 very careful to ensure that the information he was
2 giving to you and Mr McGregor, his boss, and his boss'
3 boss, the MD of the company, he would have been careful
4 to ensure that the information he was giving was
5 correct?

6 **A.** Yes. I would assume that the pecking order, if you
7 like, would have been that Stuart would have produced
8 this, probably having been asked to by Jim. And then
9 Jim, you know, if I (sic) saw this, would have brought
10 it into me and said, "Look, we really need to go and see
11 Tesco next week". It wouldn't have come direct to me
12 from Stuart.

13 **Q.** I'll ask the question again.

14 This is a document produced by Stuart Meikle who,
15 you've already explained to us, is a top class sales
16 manager who you'd got -- I think his background was with
17 Mars. He's preparing a briefing note for his boss and
18 for the MD of the company he works for, in those
19 circumstances you would expect him to ensure that the
20 information in that meeting note was correct, wouldn't
21 you?

22 **A.** Sorry, the point that I'm -- counsel keeps saying that
23 it was prepared for me. I'm not so sure it would be
24 prepared for me. It would be prepared for the sales
25 director who then, if he felt that this was the best way

1 of briefing me, would have brought it to me, or he might
2 just have come and talked me through the scenario.

3 **Q.** Right.

4 This meeting note that was prepared for the sales
5 director, who then came to talk it through with you,
6 prepared by Stuart Meikle, you would expect the
7 information contained in it to be correct, wouldn't you?

8 **A.** Yes, I would.

9 **Q.** Let's move on then to the meeting between Tesco and you
10 on 6 October. You address that in your first witness
11 statement, which is at tab K, from paragraph 8 onwards
12 [Magnum].

13 You say in paragraph 8:

14 "On 6 October I attended a meeting at the Tesco
15 offices in Cheshunt. The other attendees were John
16 Scouler and Lisa Rowbottom of Tesco and my colleagues
17 James McGregor, who was McLelland's group sales director
18 at the time, and Tom Ferguson who was McLelland's
19 national account manager at the time. The meeting took
20 place in John Scouler's office. We travelled down to
21 Cheshunt specifically for the meeting and returned to
22 Scotland immediately afterwards."

23 But you corrected that part of your statement in
24 your second statement because you now think that
25 Tom Ferguson didn't attend the meeting?

1 **A.** Yes, as I understand, Tom Ferguson didn't attend the
2 meeting. He normally would have attended the meeting
3 but I understand he didn't on this occasion.

4 **Q.** You went down to Cheshunt for the meeting from Glasgow,
5 is that right?

6 **A.** Yes, that would have been right.

7 **Q.** And you went back to Scotland immediately afterwards?

8 **A.** Yes.

9 **Q.** In paragraph 13 of your statement, you say -- you're
10 explaining what was discussed in the meeting, and
11 perhaps fairly I should set the background, in
12 paragraph 11 [Magnum] you say you'd made requests for
13 cost price increases on all your cheese lines generally
14 some time before the meeting and you discussed that at
15 the meeting.

16 Then you say at paragraph 13 [Magnum]:

17 "In developing the case for such cost price
18 increases across the board, we also discussed the future
19 developments on the retail market in general terms and
20 explained that we expected that other processors in the
21 market would be in the same position as McLelland and
22 were also likely to request a cost price increase from
23 retailers."

24 So there you're saying, in line with the strategy
25 that we've already discussed, you're saying to Tesco:

1 everyone is likely to be in the same position, other
2 processors are also likely to be in this position.

3 That's right, isn't it?

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

5 **Q.** Then you also say:

6 "I stated that in McLelland's view this cost price
7 increase would, in turn, result in an increase in the
8 retail price of cheese by all grocery retailers."

9 So again you're saying you expect this to be an
10 across the board increase -- for this to result in an
11 across the board increase of retail prices, again
12 consistent with what you've been saying before --

13 **A.** Yes, normally when you put the cost price up you'd
14 expect to see the retails rising as well.

15 **Q.** So you were presenting this proposal to Tesco as one in
16 which, first of all, all processors would be looking for
17 a cost price increase, is that correct?

18 **A.** Yes.

19 **Q.** And you were also presenting it as one which would
20 result in turn in an increase in the retail price of
21 cheese by all retailers, is that correct?

22 **A.** That's correct.

23 **Q.** That's exactly what Calum Morrison, Stuart Meikle we see
24 had been presenting to retailers the previous month.

25 It's entirely consistent with their proposal for a total

1 market move, isn't it?

2 **A.** Yes, it's the same stance.

3 **Q.** But when you said this in the meeting, you explain in
4 paragraph 14 [Magnum] that this discussion was cut short
5 by John Scouler:

6 "He intervened very firmly stating that Tesco would
7 not discuss the future retail pricing intentions of
8 other retailers. The manner in which Mr Scouler made
9 this point indicated that he was communicating a general
10 Tesco policy that was not specific to McLelland or to
11 the discussion I had just started."

12 Then you explain your reaction to that in
13 paragraph 15 [Magnum]:

14 "Given the importance of Tesco's business to
15 McLelland, there was no question of debating what the
16 appropriate line on such issues as discussions of future
17 retail prices might be, we simply accepted Tesco's
18 policy position."

19 So, as you say, given the importance of Tesco's
20 business to McLelland, you accepted what Mr Scouler said
21 without protest?

22 **A.** Yes.

23 **Q.** And that was indicative of the relationship between
24 McLelland and Tesco at the time. Tesco was and still is
25 a very powerful retailer, would you agree with that?

1 **A.** Yes, I would agree that they're a powerful retailer.

2 **Q.** The power in this relationship was with Tesco rather
3 than with McLelland, you weren't going to argue about
4 this with Mr Scouler given the importance of Tesco's
5 business to McLelland, you just accepted his policy
6 position?

7 **A.** I don't recall feeling that I particularly wanted to
8 argue the point with Tesco at the time. I wasn't
9 wanting to argue but just decided not to.

10 **Q.** You say that:

11 "Given the importance of Tesco's business to
12 McLelland there was no question of debating what the
13 appropriate line was, we simply accepted Tesco's policy
14 position", but you thought John Scouler was being too
15 cautious, didn't you? In your opinion there was nothing
16 wrong with what you were saying, they were just general
17 statements about how the market would move?

18 **A.** I can't recall what I felt at the time, to be honest.

19 **Q.** You say in paragraph 13 of your statement that you were
20 just making statements about future developments in the
21 market, in general terms?

22 **A.** Yes.

23 **Q.** And you say in paragraph 13 of your statement that, as
24 long as you weren't giving details of retailers' future
25 pricing intentions, you suggest that that would have

1 been okay. You say:

2 "I gave no details, I revealed no further other
3 retailers' future pricing intentions."

4 In your view, you weren't saying anything wrong?

5 **A.** At the time, when John interjected with his statement,
6 I didn't feel as though -- I remember being quite
7 surprised at the time because it seemed to be quite
8 a sort of strong stance very early in the conversation
9 and, yes, you know, I didn't -- the reason I remember
10 it, it was a little bit of sort of like -- it was a very
11 cordial meeting and then suddenly bang, and I went "Oh,"
12 and then we just moved on. I didn't want to dwell on
13 that point.

14 **Q.** As you explain in paragraph 13, in your view it's fine
15 to discuss future developments on the retail market in
16 general terms as long as you give no details about
17 retailers' future pricing intentions.

18 That was your view at the time, wasn't it?

19 **A.** Sorry, where are you reading from?

20 **Q.** Paragraph 13.

21 **A.** Yes.

22 **Q.** I'm asking you a question --

23 **A.** Oh, sorry.

24 **Q.** Your view at the time was that, as long as you were not
25 giving details of retailers' future pricing intentions,

1 it was fine to discuss future developments on the retail
2 market in general terms?

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

4 **Q.** You then appear to have been shown two documents which
5 were exhibited to your statement at paragraph 18
6 [Magnum]. You say:

7 "The meeting ended on a cordial note."

8 And then:

9 "I cannot now recollect whether Lisa Rowbottom
10 raised the specific issue of any emails or faxes from
11 Stuart Meikle, attached as exhibits JAI1 and JAI2. In
12 reviewing these now, they look like reports from our
13 price checks. It's the only way we would know what the
14 products are priced out on the deli counter."

15 Those exhibits, exhibit 1 to your statement, we'll
16 look at it in the documents bundle because that will be
17 easier for everyone who has been working from the
18 documents bundle. That's documents bundle 2, 110
19 [Magnum] and exhibit 2 from your statement is documents
20 bundle 2, 115 [Magnum].

21 Can we look first in documents bundle 2/110. Do you
22 have that?

23 **A.** It's the 110 --

24 **Q.** 110.

25 **A.** The first document.

1 **Q.** Yes, it's an email from Stuart Meikle to Lisa Rowbottom
2 of 30 September?

3 **A.** Yes.

4 **Q.** It says:

5 "Lisa,

6 "Copy of e-mail as requested.

7 "I have faxed copies of the Safeway & JS labels to
8 you...

9 "Safeway Savers mild has increased in price by
10 26p/kilo and JS Isle of Bute has increased by 20p/kilo."

11 In your witness statement you say:

12 "They look like reports from our price checks.
13 That's the only way we would know what the products are
14 priced at on the deli counter."

15 But that email is about labels, isn't it, it's not
16 about deli prices?

17 **A.** Yes, this isn't about a price check.

18 **Q.** And it's not about deli prices, is it?

19 **A.** No, it's not.

20 **Q.** As we've discussed, in paragraph 21 of your first
21 statement [Magnum], you say:

22 "On occasion McLelland sales representatives might
23 have sent a retailer a copy of a price label that
24 McLelland had printed for a competing retailer which
25 they knew was already in the distribution system."

1 This email on 30 September 2003 is an example of
2 that, isn't it?

3 **A.** To be honest, I'm not sure. I would hope that we would
4 have sent out labels, other than if they were already,
5 in our opinion, for sale. Now, you know, whether that
6 line gets a little bit fine between they've been sent to
7 the distribution depot but we haven't seen them in store
8 yet, I suspect it probably did happen. But it was very
9 much not our policy to send out labels a week or ten
10 days in advance or anything like this.

11 So, again, I'm looking at the times on this. It
12 says 5.20 on the 30th, I can only assume that, you know,
13 these had already been sort of printed. We couldn't
14 have sent labels unless we'd actually printed and packed
15 them, so I can only assume that these were on their way
16 to depot or maybe even in store.

17 **Q.** That's your assumption but you have no basis for that
18 assumption at the moment?

19 **A.** Well, the only basis of that assumption is that I do
20 know that we're trying to get the prices up for
21 1 October. This is on 30 September at 5 o'clock and we
22 would have already been supplying products for price
23 increases at this point.

24 **Q.** Ms Oldershaw's evidence on this, I'll take you to it if
25 you want, but it's paragraph 153 of her second witness

1 statement [Magnum], is that the labels that were faxed
2 to her pursuant to this email were -- she describes them
3 as "pristine" and she believed they had come from
4 McLelland's packing units and that the products they
5 related to might not yet have been available in store.
6 In light of that, it's most likely that this was an
7 example of your sales representatives sending a copy of
8 a price label that had been printed for a competing
9 retailer which they knew was already in the distribution
10 system but not yet in store, as you say in paragraph 21
11 of your first statement. That's what this was an
12 example of, wasn't it?

13 **A.** Yes, I think I said it was in the distribution system or
14 in store and, you know, I can only assume that these
15 must have been in the distribution or in store otherwise
16 we wouldn't have just sent them out.

17 Excuse me, Ms Oldershaw?

18 **MS SMITH:** Sorry, it's Ms Rowbottom, Lisa Rowbottom. Same
19 person.

20 Let's look at the second email that you referred to
21 in paragraph 18 of your first witness statement
22 [Magnum]. This is at tab 115 of the bundle of documents
23 [Magnum]. This is an email from Stuart Meikle to
24 Lisa Rowbottom of 2 October 2003. It says:

25 "Hi Lisa,

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

7 So he talks here about "old/current" on the one hand
8 and "new" on the other hand. Do you see that?

9 **A.** I see that.

10 **Q.** On the spreadsheet that's attached to the email we have
11 columns for Sainsbury's, "Old Retail" on the one hand
12 which equates to the "old/current" in his email. Do you
13 see that?

14 **A.** I see "Old Retail".

15 **Q.** And "New Retail", a column for the new retail as well?

16 **A.** I see that too.

17 **Q.** And the prices to which he referred to in the email.

18 Now the OFT's case is the prices that are set out here
19 for Galloway, McLelland mature, Orkney white, Arran
20 coloured, Arran white, Isle of Bute and Mull of Kintyre,
21 the OFT's case, you may be aware, is that these new
22 retail prices are future retail prices. Are you aware
23 of that? Not yet in store?

24 **A.** This is for Sainsbury's, Safeway and Co-op?

25 **Q.** Just for Sainsbury's. I'm just telling you, the OFT's

1 case is that the prices listed for the random weight
2 products in this column for Sainsbury's, the new retail
3 prices are future prices that are not yet in store.

4 That's the OFT's case.

5 **A.** Okay.

6 **Q.** These were random weight pre-pack lines, as you can see
7 from the "RW", the key is random weight, they were not
8 deli lines, were they?

9 **A.** I don't want to sort of pick holes with the first two,
10 Seriously Strong would be fixed weight pre-packs --

11 **Q.** I'm talking about, as I said, the Galloway, McLelland
12 Orkney --

13 **A.** Yes, yes.

14 **Q.** -- the random weight lines?

15 **A.** Yes, exactly.

16 **Q.** They're not deli lines, the deli lines are listed in
17 a separate table below?

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

19 **Q.** And no new retails are given for the deli lines for
20 Sainsbury's?

21 **A.** No, or anyone else.

22 **Q.** Or anyone else.

23 So paragraph 18 of your statement [Magnum] rather
24 misses the point, doesn't it? The point is that for the
25 random weight cheeses, McLelland could have known what

1 the future retail prices for Sainsbury's were because
2 McLelland packed those random weight cheeses for
3 Sainsbury's?

4 **A.** Yes, we must have known what the packs were because we
5 packed them, but I do know that this email was sent out
6 on 2nd of the 10th, after the price rise.

7 **Q.** So McLelland would have known of the retail prices for
8 those types of cheese, random weight pre-packed, before
9 they went into store, wouldn't you?

10 **A.** Yes, we would have known that.

11 **MS SMITH:** Thank you, Mr Irvine, those are all the questions
12 I have.

13 **LORD CARLILE:** Don't go yet.

14 Miss Rose.

15 Re-examination by MISS ROSE

16 **MISS ROSE:** Mr Irvine, can we just go back to tab 110
17 [Magnum]. The first email on that page that you were
18 shown, the 30 September 2003 at 17.20, in relation to
19 Sainsbury's, says:

20 "... JS Isle of Bute has increased by 20p/kilo."

21 It was put to you that it was likely that this was
22 a price rise that was in the distribution system but not
23 yet in store, do you recall that?

24 **A.** Yes.

25 **Q.** Can you please go back one tab to tab 109 [Magnum], you

1 see this is an email from Calum Morrison,

2 "Subject: Sainsbury's Prices":

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

5 What do you understand to be meant by "effective"?

6 **A.** I would understand that to mean the prices were -- that
7 the new prices would be on the counter as of today.

8 **Q.** If you go over the page, you see a spreadsheet headed
9 "Sainsbury's Price Increase Details", do you see that?

10 **A.** Yes.

11 **Q.** If you count down ten lines, do you see the two
12 Isle of Bute, 500 grammes and 300 grammes, JS
13 Isle of Bute?

14 **A.** Yes.

15 **Q.** If you go along to the end, do you see the old price and
16 the new price?

17 **A.** I do.

18 **Q.** With the 20p differential between the old price and the
19 new price in both cases?

20 **A.** Yes.

21 **Q.** Does that alter your comment in relation to the email of
22 30 September, sent later that day to Lisa Rowbottom, in
23 relation to the Sainsbury's price?

24 **A.** Was that 111?

25 **Q.** 110:

1 "Isle of Bute has increased by 20p/kilo."

2 **A.** Yes. Yes, it's evidence, or it looks like evidence to
3 say that the price change was already in store when that
4 label was sent out.

5 **Q.** Tab 115 you were shown [Magnum]:

6 "The attached is a matrix of our pre-pack and deli
7 brands showing the prices across the multiples."

8 You weren't shown the email to which this was
9 a response. If you go back one tab [Magnum] you can see
10 an email from Lisa Rowbottom to Stuart Meikle,
11 2 October, 11.39 am:

12 "Stuart, can you please produce me a matrix of all
13 your lines, who stocks what and what retail they are
14 currently at."

15 If you look at his email, he says:

16 "I have included the old/current retail and the new
17 retail price where relevant. I will keep this updated
18 as changes become visible..."

19 What do you understand him to mean by "visible"?

20 **A.** I would understand it to mean when they're in store.

21 **MISS ROSE:** I have no further questions.

22 **LORD CARLILE:** Bear with me for a moment, please.

23 Thank you very much indeed, Mr Irvine. You can go
24 back to sunnier climes if you wish. You are released.
25 I notice you live abroad.

1 **LORD CARLILE:** Yes, that's right, that's definite. I have
2 a long-standing other public duty commitment which
3 involves a great number of other people on Tuesday
4 afternoon.

5 **MR MORRIS:** Yes, I just wanted to check my understanding.

6 **LORD CARLILE:** Yes, that's always been the case.

7 Is all the LiveNote equipment going to be
8 transferred down to Fleet Street? Yes.

9 Right, then we shall adjourn until tomorrow morning
10 at 7 o'clock.

11 (2.52 pm)

12 (The hearing adjourned until
13 Friday, 18 May 2012 at 7.00 am)

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1	INDEX	
2	MR ALASTAIR IRVINE (sworn)	1
3		
4	Examination-in-chief by MISS ROSE	1
5		
6	Cross-examination by MS SMITH	3
7		
8	Re-examination by MISS ROSE	128
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		