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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

21 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 ;)

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 Monday, 21 May 2012

2 (7.00 am)

3 MS LISA OLDERSHAW (continued)

4 Cross-examination by MR MORRIS (continued)

5 **LORD CARLILE:** Good morning. I hope everybody had

6 a reasonable weekend. Good morning, Ms Oldershaw.

7 **A.** Good morning, good evening.

8 **LORD CARLILE:** I hope you had a reasonable weekend and that

9 you're ready for action.

10 **A.** Yes.

11 **LORD CARLILE:** We're back to where we were. You're about to

12 see Mr Morris again.

13 **A.** Okay, thank you.

14 **MR MORRIS:** Good evening, Ms Oldershaw.

15 **A.** Good evening.

16 **Q.** Can I take you back to the period of autumn 2002,

17 September and October. During that period, your

18 discussions with the processors were unusually frequent,

19 weren't they?

20 **A.** Yes.

21 **Q.** And the discussions were intense --

22 **A.** Sorry, can I -- I just need the volume turned up

23 a little, sorry.

24 Okay, that's fine.

25 **Q.** The reason those discussions were unusually frequent was

1 because you knew that there was an attempt for an
2 across-the-board price increase of £200 per tonne,
3 that's right, isn't it?

4 **A.** Yes.

5 **Q.** And you knew that other retailers would also be having
6 similar discussions with the processors?

7 **A.** Yes.

8 **Q.** In your conversations with the processors, in relation
9 to the £200 per tonne increase, you told them about
10 your, Tesco's, plans, didn't you?

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

12 **Q.** We'll come to that later on, but on 30 October or around
13 that date you gave to the processors your waves of
14 increases?

15 **A.** Dates when I proposed groups of cheeses would -- yes,
16 the cost price would move, yes.

17 **Q.** It's right, isn't it, that in that way the processors
18 had genuine information from you about your intentions
19 at that time?

20 **A.** Yes. However, I think some dates did change eventually,
21 but at that point in time, yes, they did.

22 **Q.** Yes, and at the time that you told them, you were
23 telling them what you intended to do?

24 **A.** Yes.

25 **Q.** Now, the processors could then have passed this

1 information on to the other retailers, couldn't they?

2 **A.** They could have done, but I didn't intend them to. That
3 wasn't why I gave them the information but, yes, they
4 could have done, yes.

5 **Q.** And they could have done so in general terms, such as
6 they could have said, "Tesco is going to go up for
7 branded cheese on such and such a date"? That's one way
8 they could have passed it on? That's right, isn't it?

9 **A.** Well, they had my information, yes.

10 **Q.** You've also just agreed that you knew at the time that
11 the processors were having conversations with the other
12 retailers, and it's likely, isn't it, that they were
13 having conversations along the same lines as you were
14 having conversations with the processors?

15 **A.** I would think they were discussing similar issues as it
16 was a market-wide cost price increase they were
17 requesting for the farmers.

18 **Q.** Just as you, for example, had given information about
19 your waves, you would have realised that they might well
20 have been giving information to the processors about
21 their waves?

22 **A.** To be honest, I didn't think too much about what other
23 retailers were doing at the time. I was concentrating
24 on the job of work I had too, my cheese lines.

25 **Q.** So, for example, you would have realised that in those

1 conversations processors would have been told, for
2 example, about Sainsbury's intentions?

3 **A.** I wouldn't have realised because I wasn't focused on
4 other retailers.

5 **Q.** It was obvious that just as you were telling -- I'll
6 rephrase the question.

7 You have just said that you would have realised they
8 were speaking, you have just said that you were giving
9 information about Tesco's plans for the cost price
10 increase. It was obvious, wasn't it, in the
11 conversations between the processors and the other
12 retailers that the other retailers would have been
13 giving similar information?

14 **A.** As we sit here now and reflect back, then I would say
15 yes, but at the time I was so busy I did not pay
16 attention or think about what other retailers would have
17 been doing with their suppliers. I had enough to do
18 with Tesco and Tesco's cheese prices.

19 **Q.** Now, in relation to what the other retailers were
20 telling the processors, their intentions, just like
21 yours, might change over time, that's right, isn't it?

22 **A.** What do you mean by "intentions"? Can you clarify,
23 please?

24 **Q.** You said in an answer a few moments ago that when you
25 told the processors what your intentions about your

1 price rises were, it was true at the time but it might
2 change subsequently, that's right, isn't it?

3 **LORD CARLILE:** I think he's stating the obvious,
4 Ms Oldershaw.

5 **A.** Okay, then I'll confirm the obvious.

6 **MR MORRIS:** But when you spoke to the processors, what you
7 told them was the truth?

8 **A.** At that point in time, yes.

9 **Q.** You had no reason to suppose, did you, that when talking
10 to the processors the other retailers would be actively
11 lying to the processors about what they intended to do?

12 **A.** I really did not concern myself with other suppliers'
13 relationships with the other retailers. I was focused
14 on my relationships with my suppliers for Tesco
15 products.

16 **Q.** The reason I'm asking you this is because of your belief
17 that everything you heard from the other retailers was
18 pure speculation, and I'm exploring the question about
19 what you -- whether you considered at the time that the
20 information coming from the other processors was not
21 true, that's why I'm asking these questions. I'm
22 suggesting -- I'll let you answer that now. Go ahead.

23 **A.** As I said last time, I took a blanket approach that any
24 information I received from suppliers referring to any
25 other retailers was false. That was the blanket

1 approach I took. It was the safest approach, and it was
2 my approach all the way through my buying career.

3 Q. At the time, the issue for Tesco was as to when to
4 implement the cost price increase, wasn't it?

5 A. It was something we were looking at, yes.

6 Q. I think your evidence is that, for you, it was the key
7 issue, wasn't it?

8 A. Well, it was an issue. I had to balance the cost price
9 increase with margin and various other things that ...

10 Q. But you accepted that you recognised early on that the
11 cost price increase would have to come?

12 A. Yes.

13 Q. And your evidence throughout your witness statement is
14 that you were persistently delaying the evil day,
15 putting off the evil day? You were delaying accepting
16 the cost price increase; that's right, isn't it?

17 A. Yes.

18 Q. So the issue was when to implement the cost price rise,
19 wasn't it?

20 A. I suppose, yes.

21 Q. Realistically, the issue would have been the same for
22 the other retailers, wouldn't it?

23 A. I can't comment on how they were thinking at the time.

24 Q. I suggest to you that you would have realised that at
25 that time that was the issue, not just for you but for

1 the other retailers?

2 **A.** I had enough issues of my own rather than having to
3 think about other retailers' issues.

4 **Q.** So your evidence is, is it, that what the other
5 retailers were going to do and when was completely
6 irrelevant to your considerations?

7 **A.** Yes, for my action points, yes.

8 **Q.** Very well. Now, can I bring you back to the -- so if
9 McLelland came to you, for example, and said,
10 "Sainsbury's will move on 11 November", you would know
11 that that was potentially true information from
12 Sainsbury's, wouldn't you?

13 **A.** As I said, I treated all information like that from
14 suppliers as false.

15 **Q.** It could have been speculation but, equally, it could
16 have been a true repetition of what Sainsbury's had told
17 McLelland, couldn't it?

18 **A.** However, as I viewed it, I viewed it as false, as with
19 everything else of that vein.

20 **Q.** But you could not know for certain, could you, that it
21 was just speculation? You didn't know for certain?

22 **A.** I couldn't, and that's why I took the approach to treat
23 everything as false.

24 **Q.** Yes, but that's the point I'm -- I'm not asking you
25 about how you treated it, I'm asking you whether you

1 accept that the information was potentially true.

2 **A.** Well, any information can be true or false so, yes,
3 probably potentially it could have been.

4 **Q.** On Friday, I asked you about whether you thought
5 Mr Ferguson would go out of his way to make something up
6 and lie to you, didn't I? Do you remember that?

7 **A.** Vaguely, yes.

8 **Q.** And your answer was that the retailers might have told
9 you one thing and then changed their minds; that's
10 right, isn't it?

11 **A.** Yes, they could have done.

12 **Q.** That's Day 8 at page 177, line 5.

13 The point you made there was that the other
14 supermarkets might change their mind after Mr Ferguson
15 had told you what the position was. If that happened,
16 what Mr Ferguson had previously told you would then turn
17 out not to be an accurate prediction of what in fact
18 happened; that's right, isn't it?

19 **A.** In your scenario there, yes, that would be factually
20 right, yes.

21 **Q.** But you agree, don't you, that Mr Ferguson would not
22 consciously tell you an untruth based on the knowledge
23 that he had at the time that he gave you the
24 information?

25 **A.** I could never -- you can never be sure what people tell

1 you.

2 **Q.** From everything you knew about Mr Ferguson, you would
3 not believe that it was likely that he would be telling
4 you an untruth, would you?

5 **A.** I would hope he would never tell me an untruth but, you
6 know, still my blanket statement and approach stood for
7 Tom Ferguson and for people that I respected and for
8 people that I didn't respect as much. It was one size
9 fits all.

10 **Q.** What I'm suggesting to you is that you must have
11 realised at the time that you were in receipt of
12 information that it was at least potentially accurate
13 information which had come from, in my example,
14 Sainsbury's?

15 **A.** As I keep telling you, any information I received in
16 that vein I treated as false, from any supplier.

17 **Q.** So you got the information and you said, "I'm not
18 looking at that, I'm going to take no notice of it
19 whatsoever because it's false"?

20 **A.** I didn't even register it, I just move on, because you
21 get so much of that information I just move on and --
22 take out the important bits of the email and move on.

23 **Q.** And what are the important bits?

24 **A.** The important bits, I can't remember the email --

25 **Q.** We'll go back to document 52 in a moment.

1 So you keep getting this information and you ignore
2 it; that's right, is it?

3 **A.** Yes.

4 **Q.** You don't go back to Tom Ferguson and say, "Tom, will
5 you stop bothering me with all this information"?

6 **A.** No.

7 **Q.** As you've just said, and as you told the Tribunal on
8 Friday, you didn't rely on any of this information;
9 that's right, isn't it?

10 **A.** Yes.

11 **Q.** But it's correct, isn't it, that at no time did you ask
12 any of the processors to stop telling you these things?

13 **A.** Because I didn't view them as important. They had no
14 importance, no significance. They were speculation,
15 somebody's views, so I didn't think -- think or need to
16 reject them.

17 **Q.** Let me ask you another question about this. Let's
18 assume that the processors had told you that none of the
19 other retailers were going to comply with the
20 initiative. You would have told your bosses about that,
21 wouldn't you?

22 **A.** Not necessarily, no.

23 **Q.** Would you or would you not have told them?

24 **A.** Because there wouldn't have -- if nobody had been asked
25 for the cost price increase, there wouldn't have been

1 the pressure for Tesco -- from the farmers for Tesco to
2 accept it, so they wouldn't --

3 **Q.** No, let's go back a stage. Sorry, finish your answer,
4 please.

5 **A.** I've finished.

6 **Q.** It's not a question of whether anybody had been asked.
7 Everybody has been asked, assume that. We know the
8 initiative is going on. But instead of you receiving
9 information that other retailers were going to go along
10 with the initiative, what in fact -- in my hypothetical
11 scenario, what in fact happens is that Mr Ferguson and
12 Mr Arthey ring you up and say, "I can tell you that
13 Sainsbury's are not going to move and that Asda are not
14 going to move"; are you seriously suggesting that when
15 you get an email to that effect you would have ignored
16 it as being false?

17 **A.** Yes.

18 **Q.** So you would have been quite happy, would you, to not to
19 have told your bosses about this, to press on with your
20 increase, to increase your cost and retail prices across
21 the board and then find out that nobody else moved?

22 **A.** If you recall, I didn't press on with any increase.
23 I delayed and delayed and delayed until pressure mounted
24 from above and I was told to take the increase.

25 **Q.** Yes, but what I'm suggesting to you is that it is not

1 credible, Ms Oldershaw, that had you been getting
2 information that the other retailers were not in the end
3 going to participate, you would not have passed that
4 information on to your bosses? It was highly relevant,
5 wasn't it?

6 I'll rephrase the question. That sort of
7 information would have been highly relevant, wouldn't
8 it?

9 **A.** No.

10 **Q.** Very well.

11 Now, on Friday you said that you thought the
12 processors were providing this sort of comment because
13 they thought it would sway you to get what they wanted.
14 That's right, isn't it? I asked you about why --

15 **A.** Probably.

16 **Q.** Yes. You also said that perhaps the provision of that
17 sort of information worked with other retailers?

18 **A.** That was one explanation as to why they kept doing it.

19 **Q.** So it was obvious to you at the time that the processors
20 were providing this sort of information about other
21 retailers' intentions because, at the very least, it
22 worked with other retailers?

23 **A.** I trusted my suppliers to keep my information
24 confidential.

25 **Q.** Yes, but I was asking you about why they were giving the

1 information to you about other retailers' intentions.

2 The question is, it would have been obvious to you that
3 they were doing this because at least it worked with the
4 other retailers?

5 **A.** Surely this the a question for the suppliers?

6 **Q.** I'm asking what your thinking was at the time about why
7 you were receiving this information?

8 **A.** Because, for me, it was just sales hustle from
9 suppliers.

10 **Q.** Yes, that was how you treated it. I was asking you
11 about what -- about why you believed they were supplying
12 it to you?

13 **A.** As I said on Friday, the only reason I can think of is
14 that they believed that it would sway me and make me put
15 their cost prices through.

16 **Q.** Yes, and the reason you believed that is because they
17 believed it would work with the other retailers?

18 **A.** No, I said perhaps it worked with other retailers,
19 perhaps that's why they did it. I can't be sure.

20 **Q.** So it must have been equally obvious to you that
21 McLelland or Dairy Crest might tell the other retailers
22 about Tesco's intentions?

23 **A.** To be honest, at the time that did not cross my mind.
24 You know, I trusted my suppliers to keep my information
25 to themselves and just do what they had to do for Tesco.

1 **Q.** Can we perhaps go back to document 52 now, would you
2 like to open document bundle 1 [Magnum].

3 I think it's an understatement to say we've seen
4 this document before. As you will recall, the email was
5 sent to you and it has a number of elements. The first
6 element is the spreadsheet that he sends to you, and
7 then we have, from "As we discussed", the rest of the
8 email.

9 Now you read that document, that email at the time,
10 didn't you, when you received it?

11 **A.** Yes, I will have done, yes.

12 **Q.** It is correct, isn't it, that when you read that
13 document at that time you would have understood
14 Tom Ferguson to be saying to you that he had been told
15 by other retailers that they were confirming they would
16 protect cash margin? That's the sentence:

17 "As we discussed last week, other parties are
18 confirming ..."

19 So my question --

20 **A.** No, I would(?) have read that -- that's Tom's
21 speculation.

22 **Q.** I'm asking you about your understanding of the document
23 as you read it at the time. When you read that document
24 at the time, you would have understood him to be telling
25 you that he had been told by other retailers?

1 **A.** No, I would have read it as Tom thinks, or his belief is
2 Sainsbury's or whoever.

3 **Q.** "... other parties are confirming..."

4 The words are "other parties are confirming", the
5 words are not "I believe".

6 **A.** Sorry, the question is?

7 **Q.** The question is -- I'll put the question again. You
8 must have realised, when you read that document, that
9 Tom Ferguson had been told by those other parties that
10 they were going to protect the cash margin?

11 **A.** No, I didn't.

12 **Q.** So you don't accept that reading of the email?

13 **A.** No.

14 **Q.** I put to you further, you would also have realised when
15 you read that email that Tom Ferguson had been told by
16 Sainsbury's that its new retails on branded pre-pack
17 would be in place on the Tuesday?

18 **A.** No, I would not have read it that way. I've read
19 that -- to me, this is Tom's sales hustle, this is Tom's
20 speculation.

21 **Q.** So it follows, doesn't it, that the words "Sainsbury's
22 are confirming..." are a lie, and you thought that at
23 the time?

24 **A.** A blatant lie sounds a bit harsh. I probably thought it
25 was just Tom just speculating rather than blatantly

1 lying.

2 But, whatever, I didn't view it as the truth and
3 I didn't view it as it had come from Sainsbury's.

4 Q. At the very least, it must have occurred to you, when
5 you read this email, that Tom Ferguson had actually
6 received the information from Sainsbury's and the other
7 retailers?

8 A. No, it didn't.

9 Q. It never occurred to you?

10 A. No.

11 Q. Would you agree with this, that you must have realised
12 that there was a risk that this information had come
13 from Sainsbury's and the other retailers?

14 A. No, not at the time, no.

15 Q. Not even a risk?

16 A. No.

17 Q. When you read this email you say it did not occur to you
18 to reject this information; that's right, isn't it?

19 A. Yes, because I didn't put any store in it. You know, it
20 wasn't -- I wasn't thinking, as you seem to suggest,
21 that, oh, perhaps it's come from Sainsbury's. I didn't
22 have that dilemma because I didn't think it was anything
23 but speculation, anything but sales hustle, so I didn't
24 have this dilemma in my head because I didn't think
25 anything of the email.

1 **Q.** You did nothing in response; I think you agreed that you
2 did nothing in response?

3 **A.** Yes, I agree. I did nothing in response.

4 **Q.** The reason you didn't reject this information was
5 because at the time it was useful and important
6 information for you, wasn't it?

7 **A.** The reason I rejected it is because I didn't treat it as
8 anything but false information, as I keep saying.

9 **Q.** So your answer to my question is, no, that it wasn't
10 useful and important information?

11 **A.** It wasn't valid information, no, it was false -- no, it
12 wasn't useful. It was not useful information.

13 **Q.** I'm suggesting to you that the information about
14 Sainsbury's was important because Sainsbury's were going
15 to be the first of the retailers to raise their prices
16 on or around 21 October. That's why it was important,
17 isn't it?

18 **A.** It wasn't important to me.

19 **Q.** Okay. At the time you were still considering the issue
20 of whether to raise your retail prices so as to maintain
21 percentage margin or rather only so as to maintain cash
22 margin, that's right? That issue was an issue for you
23 at the time, wasn't it?

24 **A.** I was looking at all my pricing options, yes, my retail
25 pricing options.

1 Q. Yes, but your retail pricing options is a general
2 answer, Ms Oldershaw. The question I'm asking you is,
3 at the time one important issue for you was whether to
4 go cash margin or percentage margin, that's right, isn't
5 it?

6 A. I think we talked through this on Friday and I said
7 there wouldn't -- we wouldn't ever pick one. So you
8 would never say, everything is going to be cash,
9 everything is going to be percentage. You would need to
10 see what the market was doing, where price points
11 sensibly fell, where the hierarchy fitted in.

12 Q. Because I think you agreed with me that, in normal
13 circumstances, you would be generally raising your
14 prices by percentage margin; that's right, isn't it?

15 A. That would always be my aim, yes.

16 Q. One of the big issues that the Dairy Crest proposal
17 raised was the suggestion that, in this instance, the
18 raise should be by cash margin only; that's right, isn't
19 it?

20 A. That was the suggestion by Dairy Crest, yes.

21 Q. That was a big issue for you at the time, wasn't it?

22 A. Not really, no.

23 Q. No, and when Mr Arthey sends you his spreadsheets of
24 suggested prices, he sends you them in two alternative
25 forms, doesn't he?

-
- 1 **A.** Calculating cash margin and calculating percentage
2 margin, yes, he did.
- 3 **Q.** Yes, and that was a central issue at the time as to
4 whether, in respect of all lines or particular lines,
5 you were going to go by cash margin as recommended by
6 Dairy Crest or you were going to stick by your normal
7 practice?
- 8 **A.** No. That was me asking Dairy Crest, and other suppliers
9 did it as well, to do a formulaic calculation of what
10 the situation would look like if I moved my retails up
11 by cash or percentage. This then enabled me to
12 calculate what the impact on my percentage margin would
13 be to report back to people like Rob Hirst and
14 John Scouler, so I could get a feel for how much money
15 I would need to make up my percentage margin if one or
16 the other scenario happened.
- 17 **Q.** Is it your evidence that, before the events of autumn
18 2002, Mr Arthey or Mr Ferguson sent to you suggested
19 retail prices on the basis of a cash margin increase
20 alone?
- 21 **A.** Before what time period, sorry?
- 22 **Q.** Before this initiative, before autumn 2002, did
23 Mr Arthey or Mr Ferguson send you spreadsheets proposing
24 that you should raise by cash margin only?
- 25 **A.** For a normal cost price increase?

1 Q. Yes, on any --

2 A. I can't recall specifically but, typically, suppliers
3 would always send you a cash one and a percentage one.

4 Q. The information in this email about cash margin, not
5 percentage margin, far from being important -- sorry,
6 far from being unimportant, would have been of
7 considerable significance to you at the time, wouldn't
8 it?

9 A. No.

10 Q. It would have been of considerable importance to you
11 personally because of your KPIs for margin and the
12 basket policy?

13 A. No, not from this email, no. I was already doing the
14 calculations on cash margin and percentage margin and
15 anywhere in between.

16 Q. If you had information that every other retailer was
17 going to raise its prices across the board only by cash
18 margin, that would have influenced your decision as to
19 whether or not you could go by percentage margin,
20 wouldn't it?

21 A. No, it wouldn't, no.

22 Q. Not at all?

23 A. No, I would have waited to see what happened in stores,
24 and I was allowed, or I wasn't pulled up if I was out of
25 the basket policy at a higher price for two weeks, so

1 why wouldn't I chance what I wanted? Why wouldn't I put
2 percentage margin through?

3 **Q.** Because if you put percentage margin through across the
4 board, you would be likely to be in breach of the basket
5 policy in respect of those products within the basket?

6 **A.** I've just told you, I wouldn't have been in breach
7 unless I'd been out of line for more than two weeks.

8 **Q.** So you would have quite happily gone ahead and raised by
9 percentage margin across all lines and hoped for the
10 best, is that right?

11 **A.** Yes.

12 **Q.** It's right?

13 **A.** Yes.

14 **Q.** So why then were you spending all this time working out
15 whether you should go by cash or percentage? Why didn't
16 you just go by percentage straight off?

17 **A.** Because you have to -- as you know the basket policy
18 quite well now, you do have to react to other retailers'
19 prices in the market. So if Asda had gone percentage,
20 and in store the price check -- sorry, if Asda had gone
21 cash and the price check in store showed that, then
22 after the two weeks I would have had to reduce my price
23 to the lower Asda price, which would be cash
24 maintenance. So I needed to know what the impact of
25 that would be, hence the spreadsheets.

1 **Q.** Yes, but if this information about what others were
2 going to do was entirely irrelevant, then surely, in
3 order to maintain your KPIs for margin, you would have
4 just said "We're going to move but we're going to go
5 across the board by percentage margin, we'll take
6 a chance and we'll see what happens when it all comes
7 out in store", wouldn't you?

8 **A.** It would have been nice if the cheese market is that
9 simple.

10 **Q.** But that's right, isn't it? If it was irrelevant you
11 would have gone by percentage margin as you always did?

12 **A.** I didn't always go by percentage margin.

13 **Q.** Why were you even considering the possibility of raising
14 only by cash margin?

15 **A.** Because that is the reality of the situation. If you're
16 matching somebody else -- if retailers are watching each
17 other in the market place, I may have gone out at
18 percentage and ended up at cash margin. I needed to
19 know the impact of that.

20 **Q.** I'm suggesting to you that this information about
21 everybody else going on cash margin across all products
22 was of considerable significance to you?

23 **A.** And I'm saying it wasn't.

24 **Q.** It wasn't, very well.

25 Now, as regards the sentence -- can we go back to

1 document 52 [Magnum]. As regards the sentence in the
2 middle:

3 "The timescales are as we proposed.

4 "... 4th of November for Pre-pack and the 11th
5 of November for Deli."

6 You will be familiar with that sentence by now?

7 **A.** I'm very familiar with that now, thank you.

8 **Q.** Your recollection now is that those timescales of 4 and
9 11 November, when repeated in that email, were
10 timescales for moves by Tesco, that's right, isn't it?

11 **A.** They could have been, yes.

12 **Q.** Sorry, your evidence was that they were, that's your
13 recollection now; what is your evidence, that they were
14 Tesco or they weren't Tesco?

15 **A.** I thought they were. You've since shown me the email
16 from Sainsbury's, haven't you?

17 **Q.** So what now do you think they refer to?

18 **A.** I'm unsure now.

19 **Q.** Unsure. What I suggest to you is that, when you read
20 that email of 21 October, you must have realised at that
21 time and in the light of the discussions you'd been
22 having with Mr Ferguson the previous week that those
23 were Sainsbury's timescales; do you agree with that?

24 **A.** I don't -- I can't comment. I don't recall.

25 **Q.** You don't recall. At the very least, it must have

1 crossed your mind at the time that they were Sainsbury's
2 timescales?

3 **A.** As I keep saying, I didn't take any notice of pieces of
4 information like this from other retailers. Everything
5 I read like this I viewed as false.

6 **Q.** Right, so you just ignored it?

7 **A.** Yes.

8 **Q.** Perhaps you didn't even read it? Sorry, that was an
9 unfair -- I'll put it another way.

10 You obviously did read it, and what I'm asking you
11 is, when you read it, you must have realised that they
12 were Sainsbury's timescales, and I think your answer is
13 you don't know?

14 **LORD CARLILE:** You may have asked her this five times now,
15 Mr Morris.

16 **MR MORRIS:** I'm very grateful.

17 In your evidence on Friday, you said that what you
18 had told Mr Ferguson about deli moving -- your evidence
19 was that you had told Mr Ferguson that deli was going to
20 move on the 11th, that's right, isn't it?

21 **A.** Can you refer me to a document of that?

22 **Q.** Well, I think -- I'm talking about your evidence on
23 Friday, and it may be in the light of the answer you
24 gave a few moments ago that you weren't now sure that it
25 related to Tesco's timescales for deli. I don't need to

1 press you on it.

2 What I'm referring to is at Day 8 on page 142. You
3 said that what you had told Mr Ferguson about Tesco's
4 deli pricing moving on the 11th related to cost prices
5 only.

6 **A.** It would have been, yes.

7 **Q.** And you said that he would have needed to change the
8 cost prices on his system, didn't you?

9 **A.** He would have done, yes.

10 **Q.** What I'd like to put to you is this, he didn't need to
11 update his deli cost prices on 21 October for a cost
12 price movement due to take place three weeks later on
13 11 November, did he?

14 **A.** Well, he could have done it at any time. There wasn't
15 a -- you know, there was no fixed rules, you could put
16 things in the system for a future date.

17 **Q.** But there was no point -- there was no need to tell that
18 information three weeks in advance, was there?

19 **A.** There was no need not to.

20 **Q.** Very well.

21 **A.** There was a lot of lines to manage by suppliers and
22 Tesco. It was a lot of work for both sides to do in
23 terms of admin.

24 **Q.** But you didn't tell the processors generally about your
25 changes that were due to take place on Sunday,

1 3 November, until 29 October. We'll come to that
2 shortly but I'll put it this way, when you came to
3 notify all the processors of your cost price changes,
4 you gave them about three or four days' notice?

5 That's right, isn't it?

6 **A.** I can't recall the notice I gave them.

7 **Q.** We'll come to that shortly, when we get to 29 October.

8 **A.** Okay.

9 **Q.** In your witness statement, you claim that it did not
10 occur to you that Sainsbury's might have intended that
11 you should have the information which is contained in
12 document 52. That's your evidence, isn't it, that it
13 didn't occur to you that they might have intended it to
14 be passed on?

15 **A.** No, as I would not want my information passed on to
16 anybody.

17 **Q.** But the information which Sainsbury's had in fact passed
18 on included products for which McLelland didn't put the
19 price on the label, that's right, isn't it?

20 **A.** I'm not sure.

21 **Q.** Well, the information refers to, for example, branded
22 pre-pack is fixed weight branded pre-pack, and that is
23 something for which McLelland did not need to put the
24 label on?

25 **A.** That is correct, yes.

1 Q. So there was no legitimate reason for Sainsbury's, or no
2 packing or labelling reason for Sainsbury's to have
3 given that information to McLelland, was there?

4 A. Not that I can see.

5 Q. You knew full well that in the context of this
6 across-the-board increase, Sainsbury's was more than
7 happy for its information to be passed on in this way?

8 A. I knew nothing of the sort, no.

9 Q. You must have realised that that was the case?

10 A. I didn't pay any attention to this kind of information
11 so I didn't go into the detailed thought process you're
12 outlining.

13 Q. You then say that the information came too late to be of
14 any use, that's right, isn't it? Because the
15 information about branded pre-pack in the last sentence
16 came too late to be of any use?

17 A. Can you refer me to that bit in my statement because I
18 don't think that's actually what I said.

19 Q. Paragraph 94 of your witness statement [Magnum].

20 Just give me a moment.

21 **LORD CARLILE:** Second statement.

22 A. Sorry, can you state the paragraph again?

23 **MR MORRIS:** Just give me a moment. It's your second
24 statement and it is in fact paragraph 95 [Magnum], over
25 the page. It's the sentence on the fifth line:

1 "In this case, I received this information after
2 5.00 pm and it concerned a change that was said to be
3 happening the next day."

4 You remember the point now?

5 **A.** Yes.

6 **Q.** If the information came too late, how can you say it was
7 sales hustle on the part of Tom Ferguson?

8 **A.** I wasn't saying -- I would not act on speculative
9 information such as this. So I'm not saying that
10 I would have acted on it, I'm just saying, in any case,
11 if it was important -- which it wasn't to me -- it came
12 at 5 o'clock on one evening referring to something the
13 next day. So I'm not acknowledging it was useful
14 information, I'm just saying, if it was, then it came
15 very late anyway to act upon it.

16 **Q.** But Tom Ferguson would have known that, if that's right,
17 wouldn't he?

18 **A.** I think that's a question for Tom.

19 **Q.** If you say it was sales hustle, what was he trying to
20 persuade you to do? What was he hustling you about?

21 **A.** I didn't look into it that deeply because, as I say,
22 I just gloss over them, treat them as nothing.

23 **Q.** The truth is that Tom Ferguson was telling you this
24 information to show you that Sainsbury's was and would
25 be acting in compliance with the overall scheme. That's

1 the true position, isn't it?

2 **A.** Again, I don't know why Tom did it. That's a question
3 for Tom, not me.

4 **Q.** And you understood at the time from receiving that
5 information that McLelland was willing to provide you
6 with information about your competitors?

7 **A.** No, I did not.

8 **Q.** And you also would have found out, by the very next day,
9 that that information that Tom Ferguson was providing to
10 you was in fact accurate?

11 **MISS ROSE:** Sir, with respect, that's a false premise. As
12 we well know, Sainsbury's the next day did not increase
13 prices to maintain cash margin but maintained percentage
14 margin on one line. So that question is being put on
15 a false premise. This information was not accurate and
16 was shown to be inaccurate the following morning.

17 **MR MORRIS:** The question is not based on a false premise
18 because I'm referring to the new retails on branded
19 pre-pack being in place the next day. I am not
20 referring to the information about cash margin.

21 **MISS ROSE:** Sir, that again is an unfair way to put the
22 question. It's being put that the whole of this email
23 was advance, price sensitive confidential information
24 which was known to the witness to have come from
25 competitors, and what's being put is that that must have

1 been accurate and was known to have been accurate at the
2 time and, in fact, as we all know, it wasn't accurate.

3 **MR MORRIS:** Shall I rephrase the question?

4 **LORD CARLILE:** Yes, please do.

5 **MR MORRIS:** You understood by the next day that the
6 information in the email -- that branded pre-packs will
7 be in place next Tuesday -- was in fact accurate?

8 **A.** If I had bothered to check, which I don't know if I did
9 or not because Sainsbury's is not -- was not top on my
10 priority list for price checks, then I would have seen
11 what had happened. But I can't even confirm if I
12 bothered to go to Sainsbury's.

13 **Q.** More generally, the information given to you in this
14 email reduced your uncertainty as to how other
15 supermarkets were going to act in this initiative?

16 **A.** I had my agenda. I wasn't bothered about speculative
17 information on other retailers.

18 **Q.** The information about cash margin gave you confidence
19 that others were going to raise the price by cash margin
20 in accordance with the scheme proposed by Dairy Crest,
21 didn't it?

22 **A.** No, it didn't.

23 **Q.** Thank you.

24 Can I just ask you some questions about a discussion
25 with Dairy Crest at this time.

1 **LORD CARLILE:** Does that mean we're moving off document 52?

2 **MR MORRIS:** It does.

3 **LORD CARLILE:** I thought we might at some time. Right,
4 thank you.

5 **MR MORRIS:** If you go to document 51 [Magnum], this is an
6 email from Neil Arthey to you on 18 November and I may
7 have taken it to you before. This is the email where he
8 sends you the spreadsheets with the alternatives of cash
9 margin maintenance and percentage margin maintenance.

10 **MISS ROSE:** I think Mr Morris meant October, sir.

11 **MR MORRIS:** I'm grateful, what did I say?

12 **MISS ROSE:** November.

13 **MR MORRIS:** It's 18 October 2002. The simple question I'm
14 going to ask you is that this is the Friday of that
15 week, and I'm going to suggest to you that, prior to
16 that Friday, you would have been in similar discussions
17 with Dairy Crest as you were with McLelland? This
18 didn't come out of the blue, did it?

19 **A.** What, the spreadsheet?

20 **Q.** Yes, this email. The question is, having looked at this
21 email, do you agree that prior to 18 October you were
22 having discussions with Neil Arthey about the £200 per
23 tonne cost price increase?

24 **A.** Yes, he just wouldn't have sent this, so yes.

25 **Q.** What I'm going to suggest to you is that, in those

1 conversations, he too told you about the proposed waves
2 of increases on different dates and about cash margin
3 maintenance?

4 **A.** I decided when I was going to wave, as you call it, my
5 products, when I was going to stagger my product cost
6 price increases.

7 **LORD CARLILE:** I think you had better put the question
8 again.

9 **A.** And the second part of your question?

10 **MR MORRIS:** The question was, in the conversations you had
11 with Neil Arthey, he told you about the proposal for
12 waves of increases and the proposal for cash margin
13 maintenance?

14 **A.** No. I told my suppliers about the waves I was going to
15 move in for my products.

16 **Q.** Very well.

17 We know from document 1/48 which I will take you to
18 now, if you go back. It's the same bundle.

19 **LORD CARLILE:** Ignore the 1, it's document 48.

20 **MR MORRIS:** I apologise, it's document 48 in the same
21 bundle [Magnum].

22 **A.** Yes.

23 **Q.** You may not have seen this before but this is an
24 internal Dairy Crest email and I will read it to you:

25 "Following my meeting with Sainsbury's yesterday and

1 subsequent conversations this morning, I can confirm
2 Sainsbury's will move their Cheese prices in 3 waves, as
3 follows."

4 Okay?

5 Then you have:

6 "Wave 1

7 "Branded Cheese - Cathedral City/

8 Seriously Strong/Pilgrims Choice (pre-pack).

9 "Level - £200 ... [equals] 20p per kg. Timings [21
10 October].

11 "Wave 2

12 "Standard English Lines ..."

13 And you'll see the date -- I'm not going to read it
14 all, Ms Oldershaw -- 4 November.

15 "Wave 3"

16 And then some further --

17 **MISS ROSE:** I thought these dates were in blue boxes, sir.

18 **MS SMITH:** Not anymore.

19 **MR MORRIS:** Wave 3, you will see the timing, 11 November,
20 and over the page you will see a discussion about cash
21 versus percentage margin.

22 This was an email that was sent to Neil Arthey on
23 16 October, which was the Wednesday.

24 I perfectly understand that you did not see that
25 email, but what I'm going to suggest to you is that, at

1 the time you were speaking to Neil Arthey, in the
2 conversations which you've accepted took place, he knew
3 what Sainsbury's were going to do and were proposing.
4 I'm suggesting to you that, in your discussions with
5 Neil Arthey, he told you what Sainsbury's position was
6 going to be?

7 **A.** No, he didn't.

8 **Q.** You recall that, do you, specifically?

9 **A.** I would have remembered if he was -- if he had told me
10 Sainsbury's information, yes, I would have remembered
11 that.

12 **Q.** Can we move on now to document 58 [Magnum]. We've moved
13 ahead now to 23 October which is the Wednesday of the
14 following week, I believe. This is an internal email
15 from within Dairy Crest, it's David Wagstaff to
16 a variety of people. The first paragraph is -- I'll
17 read it to you:

18 "Guys actions as follows please.

19 "WWFH."

20 That's WeightWatchers from Heinz, isn't it?

21 **A.** Probably, yes.

22 **Q.** It says as follows:

23 "Asda.

24 "Safeway.

25 "JS/Tesco. All costs & rsp's to move on the

1 11th November [plus] 20p kilo."

2 That product is the same product as what you, in
3 other spreadsheets, refer to as Heinz WeightWatchers
4 mature, that's right, isn't it? WWFH?

5 **A.** I believe -- there was only one WeightWatchers line
6 I believe, yes.

7 **Q.** If you turn back to document 55 [Magnum], this is an
8 email that you received the day before, on 22 October,
9 around midday, if you look at the email cover -- you've
10 gone to the spreadsheet, you've got ahead of me. If you
11 go to the spreadsheet on the second page of document 55
12 [Magnum], at the bottom of the first spreadsheet, which
13 is entitled "Cash Margin Maintain", you see, penultimate
14 line, "HWWMAW 3 per cent fat". That's the
15 WeightWatchers mature product, isn't it?

16 **A.** Yes, that is the WeightWatchers mature, yes.

17 **Q.** If you read across that line to the sixth column, you
18 will see the figure 7.99, "RSP Kilo".

19 **A.** Yes.

20 **Q.** If you then go over the page, if you follow the same
21 line -- I'm sure you see it clearer than I do, but
22 basically the first two pages are the same spreadsheet
23 but just printed over two pages -- exactly. If you go
24 across the line, you will see that the figure for the
25 new RSP per kilo, recommended under "Cash Margin

1 Maintain", was £8.19 per kilo. You saw that?

2 A. Yes.

3 Q. There you see that's the cash margin, 20p per kilo.

4 Then if you go to the third spreadsheet, that's the
5 percentage margin?

6 A. I can't -- yes. I'm struggling to read that page.

7 Q. You don't need to. I am too, but it's just to
8 highlight, perhaps for the Tribunal's benefit, that
9 that's the alternative percentage option.

10 Now, if you keep your finger there and then go back
11 to 58 [Magnum], the information in the spreadsheet that
12 I just showed you, the £7.99 to £8.19 information for
13 Heinz WeightWatchers, is precisely the information
14 contained in Mr Wagstaff's email of the following day
15 about WeightWatchers from Heinz, because that
16 information in the "Cash Margin Maintain" is:

17 "... Tesco. All costs & rsp's to move... [by] 20p
18 kilo."

19 A. That's what it says there, yes.

20 Q. So what I'm suggesting to you is Mr Wagstaff must have
21 obtained that information in his email from Tesco?

22 A. WeightWatchers is a difficult one because that was a
23 brand actually owned by Dairy Crest.

24 Q. Yes, but --

25 A. So there could be a scenario, if they didn't agree with

1 the RSP that they wanted to set, then they may not
2 supply.

3 Q. Yes, but I'm suggesting to you that it was you who had
4 told Neil Arthey about the increase in relation to
5 WeightWatchers, and that is where --

6 A. And I'm saying not necessarily on that line. Because
7 Dairy Crest owned WeightWatchers, the cheese line, they
8 may have said to me that, "We're packing it at 20p per
9 kilo retail. It's your choice whether you stock it or
10 not". They could have said that to me. They were
11 very --

12 Q. It's not likely that they --

13 A. On one line I would probably just let it go, to be
14 honest, it wasn't a huge line.

15 Q. But you would have had a discussion about it?

16 A. I would have had a discussion but I wouldn't have lost
17 any sleep over this small line, no.

18 Q. No, but you would have had a discussion, and if it was
19 their suggestion you would have said, "Fine, okay"?

20 A. Maybe on one small line like that, yes.

21 Q. In fact, if you just go ahead to document 63 [Magnum],
22 I'm going to suggest to you that that's not what
23 happened, but it was you telling them that
24 WeightWatchers would go at 8.19. If you go to document
25 63, this is the email that Neil Arthey sends internally

1 to the rest of Dairy Crest on the 30th, and in the fifth
2 line Neil Arthey is saying:

3 "They [that's Tesco] have confirmed the price for
4 WeightWatchers... at £8.19... targeted to move [on the
5 11th]."

6 So I'm suggesting to you that actually what happened
7 is that it was you who decided --

8 **A.** We would still have to confirm that we were going to
9 take it at the price, yes, but as that's the only one on
10 there it would seem to me that Dairy Crest probably
11 pushed on that one because they'd run out of stock at
12 the old price. They'd knowingly run the stocks down.

13 **Q.** We'll come back, if we may, to the reason why you
14 mentioned WeightWatchers specifically on the 30th in
15 a moment, but what I'm asking you is that the
16 information at document -- back to 58 [Magnum] -- about
17 Tesco going to move on the 11th on WeightWatchers was
18 information obtained from you?

19 **A.** Ultimately, I would have had to confirm that I was happy
20 with that, yes.

21 **Q.** And this is by 23 October?

22 **A.** On that line, yes.

23 **Q.** Can we then go to document 54, this is -- actually it's
24 not 54, it's document 60 [Magnum]. We'll go back to 54
25 in a moment.

1 This is another internal Dairy Crest email of the
2 next day and it says:

3 "After raising RSPs on [Cathedral City], SSL have
4 now stated that they want to wait to raise prices on own
5 label products until they have evidence that Asda and
6 Tesco are moving. Arthur Reeves is in [Sainsbury's]
7 tomorrow and will push for them to continue on track
8 rather than wait based on intelligence that he has on
9 Tesco and Asda.

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

15 Before I ask you a specific question, just on the
16 words there, just to establish where everybody is on the
17 24th. By that time Sainsbury's prices on branded
18 cheddar, like Seriously Strong and Cathedral City, had,
19 in fact, gone up. That was on the 22nd. You accept
20 that that's the background -- you accept now that that
21 was the case, presumably?

22 If you go to document 54 [Magnum], for example, you
23 see from document 4 (sic), this is from Mr Ferguson to
24 Sainsbury's:

25 "I can confirm your retail movement on

1 Seriously Strong today..."

2 **A.** Yes.

3 **Q.** Yes, and we know -- I don't want to take you back --
4 that you had been told that this would happen. You
5 thought it was speculation, but you've been told in that
6 email that that would happen?

7 We disagree about what you took from the email, but
8 the email says -- of this document 52 (sic), that it
9 would happen on the 22nd and it did; that's right, isn't
10 it?

11 **A.** Can I go back to that email, just to check? If I don't
12 need to check, that's fine.

13 **Q.** No, you don't. I'm going to suggest it to you this way,
14 I'm going to suggest to you that, in your discussions
15 that you were having on a daily basis with Neil Arthey,
16 they would have told you that Sainsbury's had in fact
17 moved even if you hadn't done an in-store price check?

18 **A.** Yes, they would have done an in-store price check some
19 time during that week, yes.

20 **Q.** If we go back to the email at 60 [Magnum], the first
21 paragraph, can I summarise what that email says and see
22 if you can agree. The first thing it says is that
23 Sainsbury's have moved on fixed weight branded; that's
24 right, isn't it?

25 **A.** On two brands, yes.

1 Q. The second thing it says is, effectively, that
2 Sainsbury's are getting nervous about moving on their
3 own label products:

4 "... now stated that they want to wait to raise
5 prices on own label products until they have
6 evidence..."

7 A. That's what it says, yes.

8 Q. Yes, so -- well, the question was they were getting
9 nervous about the subsequent moves on own label, that's
10 right, isn't it?

11 A. I don't know if they were nervous but they wanted to
12 wait to raise prices.

13 Q. Yes, and they wanted reassurance that Tesco and the
14 other retailers would be following?

15 **MISS ROSE:** Sir, there's no real purpose to be served in
16 paraphrasing this email. Surely it says what it says.

17 **LORD CARLILE:** I was wondering about that too. It's pretty
18 short. She's got it in front of her.

19 **MR MORRIS:** Very well.

20 The email then goes on to say that Arthur Reeves by
21 then had intelligence on what Tesco was going to do?

22 A. It does say that, yes.

23 Q. I suggest to you that you were one of the sources of
24 Dairy Crest's intelligence, do you agree?

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

1 **A.** I can't agree or disagree, I'm sorry.

2 **LORD CARLILE:** Just a moment. Yes, Miss Rose.

3 **MISS ROSE:** That is an impossible question for this witness
4 to answer because we do not know what is the nature of
5 the intelligence that's referred to here, and the reason
6 we don't know is because the OFT never interviewed
7 anybody from Dairy Crest who would have been able to
8 answer that question.

9 But to ask this witness whether an email that she's
10 never seen before, written by a person referring to
11 somebody else having intelligence which is unspecified,
12 whether that came from her, is an impossible question.

13 **LORD CARLILE:** Mr Morris?

14 **MR MORRIS:** Well, the question is whether -- what I will do
15 is I will put to the witness what Mr Reeves said about
16 this email, if I may.

17 **LORD CARLILE:** I must say, I was troubled by the use of the
18 word "intelligence" in the email as opposed to
19 "information". "Intelligence" suggests a different form
20 of enquiry.

21 **MR MORRIS:** Perhaps, but if I can put to the witness the
22 transcript --

23 **LORD CARLILE:** Yes, try again.

24 **MR MORRIS:** Do you have the transcript of Day 5? What I'm
25 going to do, Ms Oldershaw, Mr Reeves was asked about

1 this email and I'm going to tell you what he said and
2 ask you whether you agree that what he said is likely to
3 be the correct position.

4 **LORD CARLILE:** Where on Day 5?

5 **MR MORRIS:** Day 5, page 140, I hope.

6 I don't know whether you have a transcript as well?

7 Does the witness ...?

8 **LORD CARLILE:** You don't have a transcript there, do you?

9 **MR MORRIS:** Fine. Then I will read it if I may and I'll
10 read it slowly. What happened was that Mr Arthey was
11 asked about -- sorry, Mr Reeves was asked about this
12 email and that sentence in particular, and the question
13 then -- he dealt with this in his witness statement and,
14 in his witness statement [Magnum], he said:

15 "Finally, I do not believe that I would have
16 received any Tesco-related intelligence direct from
17 Tesco."

18 That was what he had said in his witness statement.

19 The question from Ms Smith to Mr Reeves when he gave
20 evidence was:

21 "So the information may not have come to you
22 directly from Tesco, it would have come to you via the
23 Dairy Crest sales team?"

24 His answer was:

25 "Yes, Colin and Neil, yes."

1 Pausing there for a moment, Colin and Neil are
2 a reference to Colin Beaumont and Neil Arthey. I assume
3 you would agree with that?

4 **A.** Those people, yes.

5 **Q.** The next question was, and I'm paraphrasing here
6 slightly to make the question easier, "Colin and Neil
7 would presumably have obtained that information from
8 their contacts with Tesco?"

9 And he said:

10 "Yes."

11 My question for you is, you were Neil's contact at
12 Tesco, weren't you?

13 **A.** I was, yes.

14 **Q.** Therefore, I'm asking whether you agree that the
15 information that Mr Reeves had would have come from you?

16 **MISS ROSE:** Sir, I'm sorry, again this is, with respect,
17 a false premise, because if you look on the same day at
18 page 138, the evidence of Mr Reeves in fact was that he
19 could not recall whether he had specific intelligence at
20 the time from Tesco, and the questions that were put to
21 him by Ms Smith were all on the hypothetical basis that
22 he had specific information from Tesco. His evidence
23 was that he could not recall whether he had such
24 specific information.

25 **LORD CARLILE:** Can you just draw our attention to --

1 **MR MORRIS:** If we go to page 139.

2 **MISS ROSE:** Yes, sir, it's page 138. His witness statement
3 is quoted to him at paragraph 10 [Magnum]:

4 "Question: 'I do not recall having had specific
5 intelligence at the time from either Tesco or Asda that
6 Tesco/Asda would increase the retail price ... or on
7 what date, as seemed to be suggested by the email.'

8 So you accept, I think, that the email suggests that
9 you did have intelligence ...

10 "Answer: Yes.

11 "Question: But you cannot recall?

12 "Answer: I can't recall, no."

13 So the subsequent questions were, if you had
14 intelligence, where might it have come from?

15 **MR MORRIS:** That's not right. If you read on to 139, line
16 22, sir:

17 "Question: So you say the intelligence referred to
18 is 'my knowledge that they', Tesco and Asda, 'had
19 accepted our price increases' at paragraph 80?"

20 **MISS ROSE:** Yes, and if you look at his answer, you will see
21 that his answer relates to Asda --

22 **MR MORRIS:** May I --

23 **LORD CARLILE:** Just a moment, it's impossible for the
24 LiveNote transcriber to take you both down at once.

25 Mr Morris?

1 **MR MORRIS:** May I? Thank you.

2 I'm just giving you the full picture and then we can
3 go where we wish to go to. We have the bit about
4 "I can't recall", then we have the reading of the
5 witness statement of 139, and then the question at 22:

6 "Question: So you say the intelligence referred to
7 is 'my knowledge that they', Tesco and Asda, 'had
8 accepted our price increases' ..."

9 The answer in the first instance is, "Yes".

10 Then he goes on:

11 "I think it specifically relates back to Richard's
12 email where he talks about Asda packing blank labels."

13 If you then read on, he is talking then about the
14 blank labels which is an Asda-related issue.

15 Then at line 11 on page 140:

16 "You also say in the email that intelligence was
17 about Asda and Tesco accepting increases, and you say in
18 paragraph 80 your 'knowledge that they had accepted our
19 price increases'. You talk about both Tesco and Asda in
20 paragraph 79, so it wasn't just Asda, it was about Tesco
21 as well, wasn't it?"

22 Then he said:

23 "Richard's email is about Tesco. I don't mean to be
24 difficult but this was such a long time ago. If Richard
25 put that in an email, I guess that's what he meant, but

1 it's ten years ago."

2 Then we have the, you say, "continuing on track"
3 question. Then you have the question to which
4 I referred:

5 "So the information may not have come to you
6 directly from Tesco, it would have come to you via the
7 Dairy Crest sales team?"

8 "Answer: Yes, Colin and Neil, yes."

9 In my submission, sir, it is plain that he first
10 talks about Asda and then he talks about Tesco, and he
11 says that the information that he had received from
12 Tesco would have come from those contacts.

13 **MISS ROSE:** Sir, in my submission, it is clear from that
14 evidence that he is maintaining the position that he
15 cannot recall whether he had any information about Tesco
16 and that's why he says that's what Richard's email says.

17 "... but this was such a long time ago. If Richard
18 put that in an email, I guess that's what he meant, but
19 it's ten years ago. "

20 His position consistently was that he couldn't
21 recall whether he had any intelligence about Tesco, but
22 he thought there was intelligence about Asda because
23 they were packing blank labels.

24 **LORD CARLILE:** Can we turn to this witness, Ms Oldershaw,
25 now. You're entitled to put to her what you say she

1 revealed to others, and she is entitled to answer those
2 questions. So let's get back to the witness.

3 **MR MORRIS:** My question for you is that, at that time, by
4 that time, you had told Mr Arthey that Tesco was likely
5 to accept the price increase?

6 **A.** We were getting nearer to a conclusion of giving them
7 the dates for the price increase, which I believe was on
8 29th and 30th, but I can't confirm whether by the 24th
9 I had or not.

10 **Q.** You would have told Mr Arthey -- you would have told him
11 that in your conversations?

12 **LORD CARLILE:** Told him what?

13 **MR MORRIS:** Even that you were getting nearer --

14 **LORD CARLILE:** Wait a moment, Ms Oldershaw.

15 **MR MORRIS:** The answer you gave is:

16 "We were getting nearer to a conclusion ..."

17 I'm suggesting to you that by that date, the 24th,
18 you would, in your conversations with Mr Arthey, have
19 told him that fact, "We are getting nearer, Neil"?

20 **A.** No, not necessarily, no. I actually told them,
21 I believe it was 29/30 October when I shared my wavered
22 plan with them.

23 **Q.** Very well.

24 Shall we now go to the week commencing 28 October.

25 Sir, I don't know what the timing for a break --

1 **LORD CARLILE:** We'll have a break in about ten minutes for
2 25 minutes or so. We'll have our long break then.

3 **MR MORRIS:** Very well, thank you.

4 I'm now moving to the week beginning 28 October,
5 which was a Monday. It was in that week that you told
6 your processor suppliers that you were going to accept
7 the £200 per tonne cost price increase, that's right,
8 isn't it?

9 **A.** Yes.

10 **Q.** That was the £200 per tonne cost price increase across
11 all your products?

12 **A.** All our English products, yes.

13 **Q.** You had also decided by that time, decided by that time,
14 that Tesco would increase its retail prices across all
15 your products?

16 **A.** Yes, but not -- I didn't have specific retails. I knew
17 I would be increasing my retails.

18 **Q.** I'm not talking about specific prices for specific
19 lines, but the decision in principle to increase across
20 the board on retail had also been taken by that time?

21 **A.** Yes.

22 **Q.** Now, if I may, I'm just going to summarise because I'm
23 going to go into it in a little more detail. What
24 happened on the next two days, on those two days of 29th
25 and 30th, was as follows. By the 29th and 30th you had

1 prepared your own detailed spreadsheet of prices which
2 you referred to as "Cheese price £200 per tonne", that's
3 right, isn't it?

4 **LORD CARLILE:** Document 64 [Magnum].

5 **MR MORRIS:** It's the spreadsheet in document 64, yes. Well,
6 it may not be that version, but you had prepared --

7 **A.** A document, yes. I'd prepared a document.

8 **Q.** That is in fact document 64.

9 Then on Tuesday, 29 October, you sent a round-robin
10 email to six of your processors telling them of your
11 decision, at least as regards the first set of changes
12 on 3 November; that's right, isn't it?

13 **A.** Yes.

14 **Q.** In that email, you told all of them that you would call
15 each of them on the next day, the 30th?

16 **A.** Yes.

17 **Q.** Then on the next day you did call each of them and you
18 told them of Tesco's plans for all three waves of price
19 increase?

20 **A.** I believe so, yes.

21 **Q.** Those three waves were effectively -- let's not
22 distinguish between the Sunday and the Monday for the
23 time being -- 4 November, 11 November and 18 November?

24 **A.** Yes.

25 **Q.** Thank you. I'm going to in a moment take you to

1 document 65. We're going to go to document 64 now. If
2 you go to document 64 [Magnum], some of these questions
3 I think probably came out of our discussion about what
4 was what the other day, but let me just confirm what's
5 going on.

6 The first document of 64 is an email which you
7 effectively send to yourself, "Just in case". Can you
8 remember why you put "Just in case"?

9 **A.** So I could do -- I think it was so I could do work in
10 the evenings. You couldn't use a memory stick in Tesco
11 computers at that time so I had to email it.

12 **Q.** Not because you were worried you might lose your copy,
13 it was having another copy sort of safely tucked away
14 somewhere and the computer crashed?

15 **A.** I can't remember. I think it was just a working copy.

16 **Q.** The only reason I say that is because it's certainly
17 something I do myself, one sends emails to oneself to
18 make sure one doesn't lose the document.

19 Attached to this, as we've seen before, are two
20 documents. The first document [Magnum] is the first two
21 pages and that is the Word document which is entitled
22 "£200 [per tonne] plan", and we'll come back to that.
23 Then there is a detailed spreadsheet which we've gone
24 through -- well, we've referred to before, and again I'm
25 going to come back into the detail.

1 Can I just ask you one question. In the bundle, you
2 will see the blue divider-tab which are the
3 spreadsheets, so that everybody knows, that I'm going to
4 refer to in a moment. Before the blue divider-tab are
5 15 pages of a different version of it -- is everybody
6 following me?

7 **A.** Yes.

8 **Q.** Can I just ask you to clarify, do you know whether those
9 15 pages [Magnum], that's between the Word document and
10 the blue tab, perhaps you would just like to look at
11 them. Can you clarify whether that is a copy of a hard
12 form document that existed on 29 or 30 October, or
13 rather is it a document that was printed off by you or
14 by Tesco's solicitors at the time you prepared your
15 witness statement?

16 **A.** I can't clarify, sorry.

17 **Q.** If you go to the third page -- sorry, it's not the third
18 page. If you go -- the first set of pages are landscape
19 and the next set of pages are portrait. Just to make
20 life easier, of course, that's reversed when we get to
21 the documents behind the blue tab.

22 **LORD CARLILE:** They're numbered.

23 **MR MORRIS:** We've now numbered them, yes.

24 If you go to the third page of the portrait
25 [Magnum] -- are you with me?

1 **A.** I think so, yes.

2 **Q.** You will see a manuscript mark at the top, won't you,
3 "20p equals £200 --"

4 **A.** 20p, yes.

5 **Q.** If you go two more pages [Magnum], you will see an arrow
6 about two thirds of the way down against Heinz
7 WeightWatchers.

8 I don't know if everybody is with me?

9 **A.** Yes.

10 **LORD CARLILE:** No, I'm not.

11 **MR MORRIS:** If you go before the blue, sir, I'm in the 15 --
12 yes, between there and the blue. If you go to the
13 portrait version. I think you don't have it still, keep
14 going.

15 **LORD CARLILE:** Yes, I'm with you now.

16 **MR MORRIS:** Yes, if you go to the third page [Magnum].

17 Ms Oldershaw, I'm just waiting for the Tribunal to
18 catch up.

19 **MISS ROSE:** Can I just say that I'm getting instructions
20 that these are Freshfields' paralegal markings, they are
21 not markings made by the witness.

22 **MR MORRIS:** Well, just ...

23 If you go then -- those two marks ...

24 Perhaps I could have asked the question before that
25 was interjected to see what Ms ...

1 **A.** Perfectly, yes.

2 **Q.** If we go to document 64, and I was going to ask you some
3 questions about it.

4 **LORD CARLILE:** Before the blue or after the blue?

5 **MR MORRIS:** I'm going to go to -- I don't have it open so if
6 you would bear with me.

7 If you just go to the first page of the whole
8 document [Magnum], which is the email, the spreadsheet
9 is entitled -- presumably that's your title, "Cheese
10 price o200T.xls".

11 **A.** Yes.

12 **Q.** I imagine you use the "o", I've seen this a few times,
13 instead of a pound sign?

14 **A.** Yes, it must have been, yes.

15 **Q.** The spreadsheet, we're now going I think to the blue,
16 the various spreadsheets were documents you prepared;
17 that's right, isn't it?

18 **A.** Yes.

19 **Q.** The version of the spreadsheet that we have here is what
20 you describe as a working draft?

21 **A.** Yes.

22 **Q.** I would suggest that you obviously took an enormous or
23 a very substantial amount of time to put this document
24 together?

25 **A.** I didn't have to type it line by line, if that's what

1 you mean, it was a dump from one of our Tesco systems in
2 terms of getting all the lines there, and the supplier,
3 yes.

4 **Q.** But it was an awful lot of work going through it line --
5 and never mind the typing, it contains information about
6 hundreds of lines of cheese?

7 **A.** Yes, it does, yes.

8 **Q.** I would suggest that it went through a number of changes
9 as your thinking developed?

10 **A.** Yes.

11 **Q.** Dates changed, prices changed and the like?

12 **A.** I would think so, yes.

13 **Q.** The draft we have appears to be dated 30 October. I say
14 that because of the -- well, it's the version that was
15 attached to the email of 30 October.

16 **LORD CARLILE:** Could you just pause for a moment.

17 (Pause)

18 Carry on.

19 **MR MORRIS:** Thank you.

20 It's likely, isn't it, that there were earlier
21 versions of this spreadsheet as time developed?

22 **A.** I'm not sure.

23 **Q.** This, I would suggest --

24 **A.** There would be later versions but I'm not sure about
25 earlier versions.

1 Q. Okay. As we have seen, in the period leading up to the
2 29th and 30th, you were receiving spreadsheets from at
3 least Neil Arthey and Tom Ferguson with information
4 about their particular cheese lines, that's right, isn't
5 it?

6 A. Yes.

7 Q. And you were receiving spreadsheets which indicated each
8 line, what the current cost was, current retail, and how
9 it would change if you went up by cash margin and how it
10 would change if you went up by percentage margin?

11 A. That's correct, yes.

12 Q. I don't know whether this is right, but is it the case
13 that other processors were also giving you similar
14 information at that time, other than McLelland and
15 Dairy Crest?

16 A. Yes, it was normal practice for price checks so I may
17 have asked Kerrygold and Arla for similar things.

18 Q. Yes, it's not a price check, is it, here? We're not
19 talking about price check, we're talking about suggested
20 price increases?

21 A. Yes, I may have asked other suppliers for the same
22 information.

23 Q. What I imagine is that you were using all this data to
24 feed in to produce your composite document?

25 A. Yes.

-
- 1 Q. I would suggest that you had started preparing this
2 document some time before 29 October?
- 3 A. The costs I would have done. I can't confirm I would
4 have done on the retails.
- 5 Q. Right. So your suggestion is that you did all the
6 retail work on it between the 29th and the 30th, is it?
- 7 A. I can't recall.
- 8 Q. Can we turn to the spreadsheet itself. If we go to the
9 blue divider now, and we all work behind the blue
10 divider, what we see as follows is we see four different
11 spreadsheets behind the blue divider which are separated
12 by three pink pages.
- 13 A. Yes, that's what I've got, yes.
- 14 Q. The first tab is pages 1 to 4 [Magnum], and that's in
15 portrait now, and it lists all or most of your cheese
16 lines by reference to the processor supplier in
17 alphabetical order?
- 18 A. Yes.
- 19 Q. Starting with Arla and finishing with YDC, which is
20 Yoplait Dairy Crest, I think?
- 21 A. Yes, it is.
- 22 Q. A joint venture. Then the following three spreadsheets
23 are in landscape, and if you go to page 5 [Magnum], they
24 set -- these pages are different because they're in
25 grids, I've described the lines that are drawn in as

1 grids. If we go to page 5 itself, if I can just take
2 you across the columns on page 5, what we have in the
3 first column is the name of the particular cheese line
4 and the Tesco TPNB number, that's right, isn't it?

5 **A.** TPNB, yes.

6 **Q.** Then the next column you have the name of the processor?

7 **A.** Supplier, yes.

8 **Q.** And the next column is entitled "New Case Cost", and
9 that shows the cost price with the cost price increase
10 of £200 per tonne included?

11 **A.** Yes, I presume so, yes.

12 **Q.** Then "Current RSP", which is now conveniently in green,
13 that is the then current retail price and I believe that
14 is per kilo. Then the next column, you have "£200 Per
15 Tonne" is the title, and that is what the increased
16 retail price would be or will be if you maintain cash
17 margin?

18 **A.** Yes, can I just go back. The "Current RSP" is not per
19 kilo on all of them.

20 **Q.** Okay. Some of them, because they're fixed weight --

21 **A.** Are pack price.

22 **Q.** Yes, per pack. Thank you. Then the column marked "£200
23 Per Tonne" is the cash margin maintenance option, and
24 you can see that because -- yes, you're right, you can
25 tell they're per kilo. The first eight or so are 20p

1 increase, and then in fact when you get down to Butlers,
2 which is a fixed weight branded, the increase is less
3 because that's presumably a pack increase?

4 **A.** Yes.

5 **Q.** Then the next column is "Percentage Maintained", and
6 that is the alternative option for a proposed retail
7 price but, in that event, on the basis of percentage
8 margin maintained, and you see there that the first
9 line, the figure for the proposed retail price is 10p
10 higher than in the previous column in the first line?

11 That's right, isn't it?

12 **A.** Yes.

13 **Q.** Then you have a column, a blank column, and then you
14 have a column marked "RSP". That column -- this
15 document is 30 October -- shows your actual decision as
16 to the retail price that you have chosen for that
17 particular line?

18 **A.** At that point in time, yes.

19 **Q.** In some cases you will see that it is percentage margin,
20 for example the first line, 7.79, which matches £7.79 in
21 "Percentage Maintained", and if you then go down to
22 Galloway Scottish medium coloured small, which is -- my
23 counting isn't so good, I think it's the eighth or the
24 seventh -- £6.79, you'll see that that is in fact £200
25 per tonne cash margin maintained.

1 **A.** Yes.

2 **Q.** In fact, and I won't take you through them, some of them
3 are neither one nor the other but somewhere in between.
4 But, essentially, that is the decision you've taken as
5 at that time?

6 **A.** Yes.

7 **Q.** Then we have the "Date" column, and the "Date" column is
8 the date for the proposed change of retail price by
9 Tesco?

10 **A.** Cost price and probably retail.

11 **Q.** I would suggest that it is both, not least because your
12 covering document says cost and retail plan.

13 I'm just talking at the moment about what was
14 happening internally, what you were doing at the time.

15 **A.** Yes.

16 **Q.** Then we have a column marked "JS", and that column is
17 a reference to Sainsbury's, isn't it?

18 **A.** Yes.

19 **Q.** What that column does is it records a limited number of
20 actual in-store moves which have by then been made by
21 Sainsbury's?

22 **A.** Yes.

23 **Q.** There are in fact five of them, and the five are, as you
24 will see, three Cathedral Citys and two McLelland
25 Seriously Strong?

1 **A.** Yes.

2 **Q.** Can we then go back to the Word document on page 2 of
3 tab 64 [Magnum], which is the second page. This is
4 another internal document of yours and -- that's right,
5 isn't it?

6 **LORD CARLILE:** Can you check we're looking at the same
7 document?

8 **MR MORRIS:** I'm on the portrait document which says "Cheese
9 £200 [per tonne] plan".

10 **A.** Yes, that's my document, yes.

11 **Q.** The title, as we see, is "£200 [per tonne] plan"?

12 **A.** Yes.

13 **Q.** And the title is "Cost and Retail Moves", isn't it?

14 **A.** It is, yes.

15 **Q.** It sets out three dates, they're all Sundays, the 3rd,
16 10th and 17th November, and under each it sets out
17 a list of categories of cheese lines?

18 **A.** Yes.

19 **Q.** What you see is, on the 3rd, you see "Standard
20 Regionals, Brands [and] Stilton". On the 10th, "Cheese
21 with bits, All finest/Butlers Regionals, All British
22 speciality, Cottage Cheese". On the 17th, Tesco mild
23 medium, mature, extra mature, farmhouse. They are all
24 the standard own label products, aren't they?

25 **A.** Yes.

1 Q. Yes, and then "H/E" is healthy eating?

2 A. Sorry, there would be Value as well.

3 Q. We'll come back to that in a moment. I would suggest
4 actually that they're just own label because I think you
5 will find that the Value products in the spreadsheet
6 don't have a date on them by then?

7 A. Okay.

8 Q. So it's possible that they're just the standard own
9 label, isn't it?

10 A. Yes.

11 Q. Then "H/E" is healthy eating, and then sliced and
12 grated, organics and deli.

13 Then over the page, the sentence:

14 "... any lines currently on promotion will not move
15 until the promotion has finished."

16 Can I just clarify with you the meaning of some of
17 those terms. You don't need to turn over.

18 "Brands" were the big independent processors brands
19 like Cathedral City, Seriously Strong and
20 Pilgrims Choice, weren't they?

21 A. Yes, among others. They were the main ones.

22 Q. "Regionals", when you use the phrase "regionals", and
23 we'll see that in a moment, are cheeses like
24 Red Leicester, Double Gloucester, Wensleydale and
25 Lancashire?

1 **A.** Yes, and also like McLelland's Orkneys, I think, may
2 have been in there.

3 **Q.** We'll come back to that. I would suggest that actually
4 what you're referring to, when you use the word
5 "regionals", is the English regionals. The Scottish --
6 they're McLelland branded, random weight, but we'll come
7 back to the particular issue of the Scottish ones.

8 In general, regionals are the standard English
9 cheeses other than cheddar?

10 **A.** Yes, basically, yes.

11 **Q.** Yes, and would you agree that what this Word document
12 does is to summarise what is contained in greater detail
13 in the spreadsheets attached?

14 **A.** Yes.

15 **Q.** It records the particular week in which the particular
16 categories of cheese would move on cost and retail?

17 **A.** Definitely on cost.

18 **Q.** Well, Ms Oldershaw, the document says --

19 **A.** Not definitely on retail.

20 **Q.** The document says "Cost and Retail Moves".

21 **A.** Yes, but what you have --

22 **Q.** What I'm suggesting --

23 **LORD CARLILE:** Please answer.

24 **A.** What you have to bear in mind is on variable weight
25 product there's stock in the system, so it may not

1 actually be possible to move on the retail on that day
2 if there's a lot of stock at the old price still in the
3 system.

4 **MR MORRIS:** Yes, I see that point, but what I'm putting to
5 you is that what you have behind in the spreadsheet is
6 a detailed line-by-line analysis with your then current
7 decision, then current decision, about what you were
8 going to do about retail as well -- the cost is obvious,
9 because it's £200 per tonne, but the spreadsheet records
10 your then current decision about retail prices, doesn't
11 it?

12 **A.** It's what I wanted to do, yes, but I would also have to
13 speak to the supplier about stocks on certain lines.

14 **Q.** Yes, I can see that. But all I'm suggesting is that the
15 Word document records your then current thinking as to
16 the particular week in which each of those particular
17 categories were going to move on cost and retail?

18 **A.** In general, yes.

19 **Q.** Can I just also point out to you that if you go now back
20 to the -- I'm just trying to find the best example.
21 Yes, if you go back to page 5 of the spreadsheet
22 [Magnum] and at the same time -- I don't know if
23 everybody can do this -- keep your finger in the Word
24 document on the second page [Magnum], so we have the
25 summary list and then we have the -- we can see how they

1 marry up.

2 So if you look at, for example, on the Word
3 document, "Sunday, 3rd November, Brands". If you then
4 go to page 5, that marries with -- if you miss out
5 the -- all the 3rd November line down the right-hand
6 side is a list of brands on 3 November, and I'm
7 referring in particular to Wilson's, Cathedral City,
8 Pilgrims Choice, McLelland's Seriously Strong.

9 That's right, isn't it?

10 **A.** Yes.

11 **Q.** If you then go back to the Word document and you look at
12 "Standard Regionals", if you go over the page on page 6
13 [Magnum] and you go seven and eight lines down, starting
14 from Tesco Value Red Leicester and then Tesco white
15 Cheshire, and then you have a whole list of Tesco: White
16 Cheshire, Red Leicester, Wensleydale, Caerphilly, Double
17 Gloucester, Lancashire, that shows 3 November, and those
18 are the standard regionals that are going to move on the
19 3rd. That's right?

20 **A.** Yes.

21 **Q.** Then if you go just by way -- to illustrate, if you then
22 go back a page and you go to the top of page 5 [Magnum],
23 you will see six products listed under "Butlers" and
24 they show 10 November, and they are the Butlers
25 regionals that you refer to on the Word document.

1 That's right, isn't it?

2 **A.** They would be Finest, yes, Finest Butlers regionals,
3 yes.

4 **Q.** So the documents at 64 are your detailed implementation
5 plan to enable Tesco to participate in the £200 per
6 tonne across-the-board increase?

7 **A.** At that point in time, yes.

8 **Q.** And it sets out the waves or the three time periods in
9 which Tesco is going to implement that across-the-board
10 increase?

11 **A.** At that point in time, yes.

12 **Q.** The position is this, isn't it, that you chose those
13 waves with an eye on the waves that you knew other
14 retailers were going to be following, didn't you?

15 **A.** No, I chose my waves on workload for Tesco.

16 **Q.** So you had no knowledge of the waves of other parties at
17 the time?

18 **A.** Not that I can recall, no.

19 **Q.** So are you saying it is pure coincidence that Tesco was
20 going to increase its prices on dates that were similar
21 in time to the other major supermarkets like Asda and
22 Safeway?

23 **A.** Yes.

24 **Q.** By this time you had been aware, since the 16th, the
25 21st, of Sainsbury's waves, hadn't you?

1 **A.** Not that I'm aware of, no.

2 **Q.** You weren't aware at the time?

3 **A.** No. I don't believe so, no.

4 **Q.** Is that your recollection now?

5 **A.** I set the plan based on workload within Tesco and
6 leaving the most expensive, costly ones until the end,
7 it would seem.

8 **Q.** What I -- document 64 shows that you had taken
9 a decision to change your retail prices across all these
10 lines on those dates?

11 **A.** Yes.

12 **Q.** Before -- and that was before you had evidence of
13 in-store prices from other retailers on those lines?

14 **A.** Apart from the five lines of Sainsbury's, yes.

15 **Q.** Can we now go to document 62 [Magnum]. What you have
16 there is two emails in reverse order, and I'm wanting to
17 look at the first in time, which is at the bottom half
18 of the page. Perhaps you just want to read it to
19 yourself for a moment?

20 **A.** Okay.

21 **Q.** So what happened was that in the afternoon of 29 October
22 you sent a single email to six of your main processors,
23 including Dairy Crest and McLelland; that's right, isn't
24 it?

25 **A.** Yes.

1 Q. Because it was a circular email, each processor could
2 see that you were telling the others the same thing?

3 A. Yes.

4 Q. I would suggest to you that at the time you sent that
5 email you would have had close at hand your internal
6 cheese plan document, document 64?

7 A. Probably, yes.

8 Q. If I ask you just to keep your finger in 62 [Magnum] and
9 then go back to 64 on the second page [Magnum], you will
10 see that the wording on 62, under "3rd November, Brands,
11 Regionals, Stilton", is very similar to the wording
12 under 64:

13 "Standard Regionals, Brands, Stilton."

14 A. Yes, it is, yes.

15 Q. The difference is that, in document 64, you use
16 "Standard Regionals" to distinguish them from "Butlers
17 regionals", don't you?

18 A. Yes, and they're a different order, yes.

19 Q. So by the time you sent this email, you had made your
20 decision about brands, regionals and stilton going up
21 the next week, commencing 4 November?

22 A. Yes.

23 Q. That's why you write to them, to tell them?

24 A. Yes.

25 Q. Now, in that email, as you accepted before, you told the

1 six processors that you would call each of them on the
2 30th and, as you agreed with me earlier, that's what you
3 did, isn't it? You called each of them on the 30th?

4 **A.** Probably. I can't confirm if I could reach all of them,
5 but probably.

6 **Q.** In your witness statement at 103(d) [Magnum] you said:

7 "I had a series of discussions with my cheese
8 suppliers on the 30th."

9 **A.** Yes.

10 **Q.** When making each of those calls, you used your cheese
11 plan document and the spreadsheets at document 64 as
12 a prompt?

13 **A.** I would have done, yes.

14 **Q.** Document 64, I think you would agree, contains a very
15 precise summary on page -- on the Word document
16 [Magnum], that's right, isn't it? Would you describe
17 that as a precise summary?

18 **A.** Yes.

19 **Q.** Then, behind it, a set of very carefully prepared and
20 detailed spreadsheets?

21 **A.** My working document, yes.

22 **Q.** And you would have given each of the processors you
23 spoke to broadly the same information?

24 **A.** From the Word document.

25 **Q.** Yes. Sorry, I'll ask --

-
- 1 **A.** Well, yes, I would have given the suppliers the
2 information relevant to them.
- 3 **Q.** The processors were expecting your call, each of them?
- 4 **A.** Yes.
- 5 **Q.** When you did call, no processor questioned you as to why
6 you were calling or as to what you were telling them?
- 7 **A.** I can't recall the detailed conversations.
- 8 **Q.** But you don't have any recollection of any processor
9 saying, "Why are you telling me this, Lisa"?
- 10 **A.** No.
- 11 **Q.** And you spoke to Neil Arthey, as you say in your witness
12 statement?
- 13 **A.** Yes.
- 14 **Q.** We'll come to that in a moment. One of the other people
15 you spoke to would have been Tom Ferguson at McLelland?
- 16 **A.** Yes.
- 17 **Q.** It's very likely that you would have given him the same
18 information as you gave to Neil Arthey?
- 19 **A.** There would have been a lot of the same information
20 because they do a lot of the same lines, for example
21 brands.
- 22 **Q.** Yes, but the information --
- 23 **A.** Yes, and the -- yes.
- 24 **Q.** The information on the Word document, assuming that
25 that's the information you're giving, it would have been

1 broadly the same?

2 **A.** Well, I would have given McLelland information about
3 categories that -- sorry, they supplied, excuse me. So
4 I wouldn't have read the whole document out to McLelland
5 or to Dairy Crest.

6 **Q.** Right, we'll come to that in a moment.

7 Now, the OFT's case is that, in your conversation
8 with Neil Arthey, you told him of Tesco's decision that
9 Tesco would be moving both cost and retail prices for
10 all products falling within the three waves on 4, 11 and
11 18 October (sic) and I suggest to you that that's what
12 happened, isn't it?

13 **A.** Subject to stocks, yes.

14 **MISS ROSE:** I think that must mean November.

15 **MR MORRIS:** November.

16 **A.** Sorry, yes, November.

17 **Q.** The contents of your conversation with him are recorded
18 in an email which he wrote on the same date. If we now
19 go to document 63 [Magnum], which we've had a look at
20 briefly, you might want to cast your eye over that
21 again.

22 **A.** Okay.

23 **Q.** What I'm suggesting to you is that that email records
24 the contents of your conversation with him on the 30th?

25 **A.** Okay.

1 Q. That's a "yes", I presume?

2 A. Yes.

3 Q. Your evidence in your witness statement is that all the
4 price increase or moves mentioned in this email refer to
5 cost price increases only with the exception of
6 WeightWatchers, which we'll come to in a moment?

7 A. Yes.

8 Q. So it's still your evidence, is it, that you mentioned
9 only cost price increases to him?

10 A. I believe so, yes.

11 Q. And that this email only refers to cost prices?

12 A. I believe so, yes, apart from WeightWatchers. He would
13 have asked me probably about retails for things he
14 needed to pack, for example, random weight cheeses.

15 Q. Now, are you saying that you would have then told him
16 those retails?

17 A. The actual retails?

18 Q. That you would have said -- when you said he would have
19 asked you about random weight --

20 A. Well, he probably would have enquired, you know, did I
21 want to change the retail price on the random weight
22 products and when did I want to do those?

23 Q. In your evidence, you say you were telling Dairy Crest
24 this information so they could run down stocks?

25 A. Yes.

1 Q. But you didn't need to tell them cost price for that
2 purpose, did you?

3 A. No, they needed cost prices to do their own admin --

4 Q. Okay, but running down stocks --

5 A. -- for the Menmer(?) system.

6 Q. Would you agree that running down stocks is only
7 a relevant consideration for the processor where there
8 is going to be a retail price increase?

9 A. Yes, I would agree.

10 Q. If you were --

11 A. A price change, not necessarily a price change (sic),
12 yes.

13 Q. Yes. If you were telling Mr Arthey, in respect of all
14 these categories, only that a cost price increase was on
15 the way, you would not need to tell him that he needed
16 to run down stocks, would you?

17 **MISS ROSE:** Sir, again, I'm sorry, this question has been
18 put on a false premise. The evidence of the witness was
19 not that she gave retail price information so they could
20 run down stocks, what it says is:

21 "I had a series of discussions with..."

22 The problem is that questions are put without the
23 witness being shown her evidence. What she actually
24 says, it's her second witness statement, and it's
25 paragraph 103(d) [Magnum], she says:

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

6 So she actually gave two reasons which were, first,
7 running down stocks and, secondly, administrative
8 changes. To seek to put it to her on that basis, with
9 respect, is wholly misleading.

10 **LORD CARLILE:** I think Mr Morris is entitled to put
11 a different basis from that set out in the witness
12 statement, isn't he --

13 **MISS ROSE:** Yes, he is, sir.

14 **LORD CARLILE:** -- as part of his case?

15 **MISS ROSE:** Of course he is, sir, but what he put to her
16 was: in your witness statement you said that you shared
17 this information so they could run down stocks but you
18 didn't need to share it for that reason.

19 And in fact she'd given two reasons in her witness
20 statement.

21 **LORD CARLILE:** Can I put a question that I'm interested in,
22 if I may, just for a moment, to the witness, to
23 Ms Oldershaw. I'm looking once again at document 63
24 [Magnum].

25 The question is, if the information provided by

1 Tesco related only to cost price increases, why would
2 all the detail be required that is set out in this email
3 which, at first blush at least, appears to relate to
4 retail price increases?

5 **A.** Do you mean date detail, sir?

6 **LORD CARLILE:** Date detail, category detail. For example,
7 if the information was provided by Tesco, by you, "They
8 have now informed me that they intend to move all the
9 other own label lines on 18 November 2002", why is that
10 information needed if the information that was provided
11 related only to cost price increases?

12 **A.** Because I needed to change their cost prices in the
13 system on that date, the lines they provided to us.
14 Tesco's systems had to change cost prices on a specific
15 day of the week.

16 **LORD CARLILE:** Which was a Sunday?

17 **A.** Yes, which is the dates I've outlined or would have
18 outlined in that call.

19 **MR MORRIS:** Can I take you to paragraph 102 of your witness
20 statement, Ms Oldershaw [Magnum]. Can I read to you
21 line 4:

22 "I told Dairy Crest that a cost price increase was
23 on the way so that they could get ready for a wave of
24 system changes and start to run down their stocks in
25 preparation to make the process more commercially

1 efficient. This meant that once I had determined the
2 new retail price points there would be less stock to
3 sell through before the new retail prices arrived in
4 store."

5 It is your evidence there that you told Dairy Crest
6 only about cost price increases at that point in time,
7 and that you did so because it was relevant to running
8 down stocks?

9 **A.** I did so, so they -- I did so, so they could make their
10 system changes and prepare for a retail price change by
11 running down their stocks.

12 **Q.** But why would they need to do that if you were not also
13 telling them that a retail price increase was on the
14 way?

15 **A.** There would have been a retail price change on the way.

16 **Q.** Yes, and you were telling them that, weren't you?

17 **A.** I wasn't telling them the price, I was telling them to
18 run down their stocks to prepare for any changes in
19 retail price.

20 **Q.** I would suggest to you that you were telling them, as
21 reflected in this email, that cost and retail prices
22 would be moving on the date specified?

23 **A.** They would infer that because that's usually what
24 happened.

25 **Q.** In fact, you have already told the Tribunal that you had

1 made your decisions on retail price increases by that
2 time; that's right, isn't it?

3 **A.** I had made -- this is a working document, I had put some
4 retail prices in, but I had not confirmed those retail
5 prices to suppliers at that time.

6 **Q.** No, but you had made your decision that you were going
7 to move cost on the 4th, 11th and 18th for those
8 categories, and you were going to move retail on the
9 same dates, hadn't you?

10 **A.** I'd move them as near as possible depending on stocks,
11 et cetera.

12 **Q.** No, I'm not asking you about what you would have done
13 afterwards. I'm asking you what you had decided in your
14 mind at the point in time when you spoke to Neil Arthey,
15 Tom Ferguson and everyone else. The question is, at
16 that time you had decided the dates of your retail price
17 increases?

18 **A.** I had decided that we would take the £200 per tonne cost
19 price increase and it would be from that date that
20 I specified.

21 **Q.** And you had decided that retails were going to move on
22 those dates too?

23 **A.** I would have made some decisions on my working document
24 about my retails.

25 **Q.** There was no -- the reason you refer to running down

1 stocks in preparation as the reason for your giving the
2 information was because you were telling them
3 information about your intentions not only as to cost
4 but also as to retail. That's right, isn't it?

5 **A.** They were to expect some retail price changes.

6 **Q.** So that was a "yes", was it? You were telling them that
7 they were to expect retail price changes?

8 **A.** Most probably, yes.

9 **Q.** Can we just have a look in a little more detail at
10 Mr Arthey's email.

11 **LORD CARLILE:** If it's possible to look at it in more
12 detail.

13 **MR MORRIS:** Oh, it is, it is.

14 **LORD CARLILE:** I may have to have a second copy in due
15 course as I have so much marking on it.

16 **MR MORRIS:** Can I just ask this general question, and you
17 effectively said so earlier. If you were telling
18 Mr Arthey only about cost price changes, the only
19 information you would need to give to Mr Arthey would be
20 information about cheeses which Dairy Crest itself
21 supplied to Tesco. That's right, isn't it?

22 **A.** That's what I should have done. What I did, I obviously
23 read the category groupings.

24 **Q.** Yes. There would be no reason to tell Mr Arthey about
25 a cost price increase on a range of cheeses that

1 Dairy Crest did not supply to Tesco?

2 **A.** In hindsight, no, but at the time I just read out the
3 groupings and I trusted Neil just to take the
4 information he needed from that. It was an error, in
5 hindsight.

6 **Q.** Let's run through them, shall we, just to check? If you
7 look at the email, you told him about stilton, that's in
8 line 4, isn't it?

9 **A.** Yes.

10 **Q.** Dairy Crest didn't supply stilton to Tesco at the time?

11 **A.** No, but they did supply brands, and it was in that
12 grouping that I probably read out under 3 November,
13 which I accept was an error.

14 **Q.** Okay, that was an error. Then you tell Mr Arthey about
15 Finest, Tesco didn't supply Finest -- Dairy Crest didn't
16 supply Finest, did they?

17 **A.** No, but they did supply cheese with bits and cottage
18 cheese, so, again, I read the whole section and that was
19 an error.

20 **Q.** Okay. Same for Speciality, that was another error?

21 **A.** It's in the same grouping as cheese with bits and
22 cottage cheese.

23 I can see what I've done, I've read the whole --
24 under the date, I've just read out the list which, yes,
25 isn't -- in hindsight now, and knowing what's happened,

1 is an error and is not great practice, but at the time
2 I never thought that Neil Arthey would do anything with
3 information that didn't relate to him. I trusted my
4 supplier on that level. He was a business unit partner.

5 Q. So, in summary, it's right, isn't it, that of the
6 categories you told Mr Arthey about, and listed in that
7 email, the following were categories supplied wholly by
8 processors other than Dairy Crest? I'll just give you
9 the list so we can check: regional, stilton, Finest,
10 Speciality, cottage cheese, Tesco own label --

11 A. Not cottage cheese. Cottage cheese was Dairy Crest.

12 Q. Was it, or was it Yoplait Dairy Crest?

13 A. It's the same company.

14 Q. Tesco own label farmhouse, supplied by --

15 A. Not Dairy Crest.

16 Q. Sorry?

17 A. North Downs.

18 Q. And sliced and grated, apart from one category of
19 Cathedral City sliced and grated, all the rest of the
20 sliced and grated were supplied by somebody else?

21 A. No, I believe they had some sliced lines, Cathedral City
22 sliced.

23 Q. Yes, if you would just go to document 64, perhaps we can
24 just clarify that. If you go to page 23 of the... yes,
25 if you go to pages 23 and 24 [Magnum] of the -- behind

1 the blue tab, you'll see a heading "Sliced and Grated"?

2 **A.** Yes.

3 **Q.** You'll see quite a lot of products there, and there is
4 one Dairy Crest, okay, Cathedral City, but that's got
5 a move date of 3 December, yes?

6 **A.** Yes.

7 **Q.** So when you go back to the email where it says, about
8 three quarters of the way down, it's the sentence:

9 "They have informed me they intend to move all other
10 own label brands on the 18th, ie [blah, blah, blah],
11 sliced and grated and healthy eating."

12 The sliced and grated move on the 18th was not to do
13 with anything supplied by Dairy Crest, was it?

14 **A.** No, I decided to put a date alongside that with the
15 brands. I regrouped that in brands for the price
16 purpose.

17 **Q.** Yes. So of the categories of cheese you mentioned to
18 Mr Arthey, seven of them are, or perhaps six -- seven
19 are categories that Dairy Crest did not supply at all,
20 and you made seven mistakes?

21 **A.** I accept that, yes. But at the time -- yes, I trusted
22 my supplier to just take the information that related to
23 him and Tesco.

24 **Q.** In addition, you also told him that there would be moves
25 on all branded pre-pack, that's line 1 of the email, and

1 all other Tesco own label lines? All of those lines
2 included lines not supplied by Dairy Crest, didn't they?

3 **A.** Branded pre-pack included various suppliers.

4 **Q.** Yes, so it included the branded pre-pack supplied by
5 Dairy Crest, which was Cathedral City; that's right,
6 isn't it?

7 **A.** Yes.

8 **Q.** It also included Seriously Strong supplied not by
9 Dairy Crest but by McLelland?

10 **A.** Yes, it would have done, yes.

11 **Q.** Now, you say that this was all an error; I would suggest
12 to you --

13 **A.** In hindsight it's an error, at the time I didn't feel it
14 was an error. But in hindsight, knowing the case and
15 everything else, yes, it was an error because of what
16 suppliers did with the information.

17 **Q.** That's a different question about whether you should
18 have done it. The question is, when you did it -- is
19 your evidence that when you did it you made a mistake
20 then?

21 **LORD CARLILE:** It's a bit of a difficult question --

22 **A.** The information I had at the time --

23 **LORD CARLILE:** Stop, stop.

24 I don't think that's a very clear question or
25 probably not very fair either.

1 Don't answer that one, Ms Oldershaw.

2 A. Thank you, sir.

3 MR MORRIS: If you go to paragraph 103(e) of your witness
4 statement [Magnum], this is about halfway down the page,
5 you say:

6 "I inadvertently provided the dates of cost price
7 changes to Neil Arthey for some lines that Dairy Crest
8 did not supply, for example stilton."

9 So I think you're saying there that you made
10 a mistake at the time?

11 A. No, I'm saying, when I've reviewed the evidence, I can
12 see now that it was a mistake, when I was writing this
13 witness statement.

14 Q. You see, I would suggest to you that at the time you
15 were well on top of everything. You knew all the
16 detail, didn't you?

17 A. If I was well on top of everything, I think that
18 spreadsheet might have been completed.

19 Q. Well, you were sufficiently on top of things, weren't
20 you, to remember to pick out and mention to Neil Arthey
21 one specific line, WeightWatchers? That's right, isn't
22 it?

23 A. That would have been from Dairy Crest. They would have
24 needed that information.

25 Q. Are you suggesting that you forgot momentarily, when you

1 had this conversation, that Dairy Crest didn't supply
2 the vast majority of the categories which are in that
3 email?

4 **A.** I didn't forget, I just read out each date and the list
5 under it.

6 **Q.** So if they were cost prices, why were you telling
7 Dairy Crest?

8 **A.** I wasn't intentionally telling them, I was reading them
9 a list under a date which I now accept was not a good
10 thing to do. But it happened and we'd no intent for
11 them to use that information. I was making a number of
12 phone calls on that day. It was for speed.

13 **Q.** You see, what I'm putting to you is that, in reality, if
14 all you had been telling Mr Arthey was about cost price
15 increases, you would not, over the phone, have reeled
16 off a whole list of cheese categories which had nothing
17 to do with Dairy Crest at all?

18 **A.** I maintain I read that list out to him under a date, and
19 then the list under each date.

20 **Q.** The reason you read off the whole list, including in
21 large part for cheese categories not supplied by
22 Dairy Crest, is that you were telling him about retail
23 price moves?

24 **A.** The reason I did it was because I wasn't on top of
25 things. I had a lot of work to do, I had a lot of calls

1 to make, and I just -- for speed, I just read my Word
2 document out.

3 Q. When you did so and, on your hypothesis, on the basis of
4 cost price only, surely Mr Arthey would have asked you,
5 "Why are you telling me about these cost price increases
6 for all these cheeses we don't supply"?

7 A. He had a great amount of workload as well to put all
8 those price changes in the system.

9 Q. But he didn't say anything, did he?

10 A. No, not that I can recall.

11 Q. Now, can I ask you some questions on the hypothesis that
12 you told him about retail prices as well as cost. So
13 let's assume that the information you gave him was about
14 retail prices. In that event, for the vast majority of
15 the cheese lines listed, cheese categories listed in
16 that email, there was no reason for you to be telling
17 him of those increases, was there?

18 A. The vast majority, apart from brands, were variable
19 weight products, so he would have needed to know to
20 change the price on the pack.

21 Q. Right, shall we just look at that again? I think I've
22 counted 50 --

23 A. Apart from the cheeses he didn't supply, which I've told
24 you the reason why.

25 Q. Exactly.

1 **A.** Yes.

2 **Q.** Well, exactly. First of all, the cheeses not supplied
3 by Dairy Crest at all would obviously not be labelled by
4 Dairy Crest, that's right, isn't it?

5 **A.** Obviously, yes.

6 **Q.** So there's no price labelling reason there. The branded
7 pre-pack, which is in the first line, supplied by
8 Dairy Crest to Tesco, namely the Cathedral City, was all
9 fixed weight; that's right, isn't it?

10 **A.** Yes.

11 **Q.** So for those products Dairy Crest didn't need to label
12 with the price?

13 **A.** No.

14 **Q.** Then if we look at deli at the bottom of the page, due
15 to move on 18 November, that would never require any
16 price labelling by Dairy Crest, would it?

17 **A.** No.

18 **Q.** In fact, of the list in the email of categories, the
19 only products which required labelling by Dairy Crest
20 were, first of all, WeightWatchers mature, would you
21 agree with that?

22 **A.** Yes.

23 **Q.** And, secondly, the Tesco own label cheddars which were
24 supplied by Dairy Crest, and that is in the line:

25 "They have now informed me that they intend to move

1 all the other own label lines on the 18[th], ie mild,
2 medium, mature, extra mature and farmhouse..."

3 **A.** Yes.

4 **Q.** In the case of those Tesco own label cheddars supplied
5 by Dairy Crest -- can I just ask you one previous
6 question. It is the case that, where it refers to all
7 the other own label lines in that sentence, that
8 includes own label lines supplied by Dairy Crest and own
9 label lines supplied by other processors?

10 **A.** Because various suppliers sat under each sub-group, yes,
11 and this is how I split it, by sub-group.

12 **Q.** Yes. But in the case of -- let's take the case of the
13 Tesco own label cheddars which were supplied by
14 Dairy Crest, they were not going to move until
15 18 November, that's right, isn't it?

16 **A.** Yes.

17 **Q.** And that was nearly three weeks away, just under three
18 weeks. There was still time for the new labels to be
19 affixed?

20 **A.** What new labels?

21 **Q.** If there's going to be a retail price increase for
22 those, as you say, Dairy Crest would need to know?

23 **A.** Yes.

24 **Q.** What I'm suggesting to you is that, in the case of that
25 category, there was still some time before the new

1 labels would need to be printed?

2 **A.** It depended how much stock they had. Three weeks wasn't
3 a huge amount of stock for them to carry.

4 **Q.** If we go to the spreadsheet, and here I'm going to have
5 to perhaps -- it may take a moment.

6 Let me put the proposition to you and I'll take you
7 to the spreadsheet. By that time, 30 October, you had
8 decided the date upon which you would raise those retail
9 prices for own label, the 17th; that's right, isn't it?
10 17th or 18th? If you go --

11 **A.** What number is it, please?

12 **Q.** Sorry, if you go to the email that we've been looking
13 at, just stay on that document, the Neil Arthey email at
14 tab 63 [Magnum]. If you look at it, you had decided by
15 then the date of the increase for Tesco own label
16 cheddars?

17 **A.** Cost price, yes.

18 **Q.** But you hadn't decided on the specific retail price
19 point by that stage?

20 **A.** Probably not, no.

21 **Q.** In fact, although I'm slightly struggling to find the
22 precise point in the spreadsheet, I think you will find
23 when you go to the spreadsheet that in respect of those
24 Tesco own labels -- and I'd like somebody to my left or
25 right just to help me for a moment -- you will see that

1 in respect of those Tesco own label cheddars that the
2 column for the date is filled in but the column for the
3 specific price, the RSP, is not filled in.

4 At the moment I'm struggling to find an example, for
5 which I apologise.

6 **LORD CARLILE:** You're getting help from your left.

7 **MR MORRIS:** Yes, thank you very much. Page 26 [Magnum].

8 **A.** Can you tell me the tab number again, sorry?

9 **Q.** Yes, tab 64.

10 **LORD CARLILE:** Manuscript page number 26 at the bottom.

11 **A.** Yes, thank you.

12 **MR MORRIS:** So at the top of the page, and I'm sure there
13 are lots of other examples -- actually at the top of
14 page 26 you see Tesco mild white cheddar, Tesco mild
15 coloured cheddar, that is a standard own label. And you
16 have the date of 17 November but you have no other
17 specific price point information.

18 **A.** Yes, so that would have been the cost price change.

19 **Q.** Yes, but what I'm saying is that, of the two categories
20 of cheese on Mr Arthey's email for which Dairy Crest
21 would have needed price labelling information, in
22 respect of Tesco own label, you have not made any
23 decision at that time?

24 **A.** Not that I recorded, no.

25 **Q.** So you couldn't tell them anything anyway. You needed

1 the specific price in order to do the labelling, didn't
2 you?

3 **A.** Sorry, I missed the end of that.

4 **Q.** In order to give an instruction to the processor to pack
5 on a random weight, they would need the specific price
6 per kilo that you had decided upon?

7 **A.** Yes, but that's not something I would give them over the
8 phone because there's too many.

9 **Q.** In fact, as at 30 October, the only random weight
10 product in the whole spreadsheet, supplied by
11 Dairy Crest to Tesco, and for which you had then decided
12 a specific retail price was WeightWatchers mature, would
13 you agree?

14 **A.** Without looking through, I'll take your word for it.

15 **Q.** Yes. I think that is demonstrably true. That is the
16 reason why, in the course of your conversation, you gave
17 Mr Arthey a specific retail price for that
18 WeightWatchers mature line only and not for any other
19 cheese line?

20 **A.** Because I believe that because of stocks, and it was
21 Dairy Crest brand, that I needed to give them a price on
22 that because there was no -- he'd stopped packing at the
23 old price, so it was either take the new price or don't
24 have any stock.

25 **Q.** Yes. I think, again I'm slightly -- in your witness

1 statement you say that you gave him that information
2 because Dairy Crest were due to pack imminently on that
3 product?

4 **A.** Yes.

5 **Q.** Can I ask you another point of detail about the email.

6 It may be, and I hope, one of the last ones. Go back to
7 document 63 [Magnum].

8 **A.** Yes.

9 **Q.** In that email, there's one additional piece of
10 information which Mr Arthey records, which is:

11 "This is a 1 week delay on mild & medium."

12 What I'm suggesting is that your original plan had
13 been for Tesco own label mild and medium to move in the
14 second week, in the week commencing 11 November, do you
15 recall that?

16 **A.** I don't recall.

17 **Q.** If you go to document 62A [Magnum], this is a McLelland
18 price move matrix document which I think you have seen
19 and looked at before.

20 Are you with me?

21 **A.** I don't think I've seen it before.

22 **Q.** Ms Oldershaw, you say you haven't seen it before, but in
23 a witness summary that you have provided you refer
24 expressly to it?

25 **A.** Well, then I must have seen it.

1 **Q.** You'll see in the Tesco line -- you'll see the dates
2 going across and what I describe as waves, 4th, 11th,
3 18th, and you will see in the middle of the 11th, it
4 says mild and medium on the 11th.

5 **A.** It does, yes.

6 **Q.** What I'm suggesting to you is that at some time -- your
7 original plan was to have them on the 11th, but at some
8 time, perhaps just before the 29th or the 30th, you
9 moved back in time those strengths of standard own label
10 into the wave of the 18th?

11 **A.** It would seem so, yes.

12 **Q.** That's why you had told Neil Arthey that the plans had
13 been changed in relation to those particular lines?

14 **A.** I don't know if I told him they'd been changed, I just
15 read the list out.

16 **Q.** But you told him it was a one week delay?

17 **A.** Did I tell him that? I don't know.

18 **Q.** Well, why would he think it was a delay?

19 **A.** I don't know. I don't know, I can't recall.

20 **Q.** I would suggest to you that you must have told him it
21 was going back because he must have had previous
22 information that it was going to happen earlier. Well,
23 either he'd had previous information or you'd told him
24 your original plan and that it had been moved back.

25 Can I just raise something that my learned junior

1 raises. I suggested a moment ago that you had mentioned
2 document 62A in your witness summary. That is not the
3 case and I apologise for that. I was thinking of
4 document 51A.

5 So, Ms Oldershaw, you were right that you may not
6 have seen that document before. You certainly didn't
7 refer to it in your witness summary, that was my error.

8 If you would just give me a moment.

9 **LORD CARLILE:** Yes.

10 (Pause)

11 Mr Morris, Ms Potter would like to ask a couple of
12 questions.

13 **MR MORRIS:** Yes, I'll sit down.

14 **MS POTTER:** Ms Oldershaw, just a couple of questions, one on
15 the spreadsheet and one first on the email, the
16 Neil Arthey email which is tab 63, isn't it [Magnum]?

17 **A.** Yes.

18 **MS POTTER:** At the beginning of that, near the top, it talks
19 about Cathedral City being on promotion and therefore
20 this line will move on 15 December. If there was
21 a promotion, would the cost price increase be delayed or
22 is this clearly referring to retail price?

23 **A.** No, it would be both. So the cost price would be
24 delayed because, if the price went up, we wouldn't be
25 able to run the promotion, and our promotions had to be

1 loaded approximately six months in advance so it was too
2 late to change it in the system. So they honoured the
3 promotional cost price which would be a lot lower, yes.

4 **MS POTTER:** Thank you, that's lovely. The other thing is,
5 on the spreadsheet itself, pages 26 and 27, which we
6 were looking at a few minutes ago, about halfway down 26
7 [Magnum] there's a couple of Cathedral City lines, and
8 a little bit further on, some Seriously Strong. They
9 all seem to have the date 17 November. Are those
10 different from the branded pre-pack we were talking
11 about?

12 **A.** Yes, they are. They're deli lines, so they would have
13 come in big blocks for the delicatessen.

14 **MS POTTER:** Super. Thank you very much.

15 **LORD CARLILE:** Thank you.

16 Back to you, Mr Morris.

17 **MR MORRIS:** Ms Oldershaw, back in December 2007, Tesco gave
18 an explanation of Mr Arthey's email of 30 October which
19 you confirmed at the time as being the true position.
20 That's right, isn't it?

21 **A.** Yes.

22 **Q.** That explanation was not the explanation that you now
23 give, was it? I'll take you to it in a moment.

24 **MISS ROSE:** Sir, I'm not comfortable with it being put in
25 that way. She needs to be shown the explanation and

1 then asked if it --

2 **LORD CARLILE:** I agree and I was about to intervene to that
3 effect. You had better show her the premise and then --

4 **MR MORRIS:** I will. We are looking at notice of appeal
5 bundle 4, it's tab T, page 111 [Magnum].

6 **LORD CARLILE:** Do you have that, Ms Oldershaw?

7 **A.** I believe so, yes. 101 or 111?

8 **LORD CARLILE:** 111, a nelson in cricket terms.

9 **MR MORRIS:** What is said there at 5.26(a) is as follows:

10 "It is unclear from Neil Arthey's email (other than
11 in respect of WeightWatchers) whether the comments which
12 he attributes to Tesco relate to cost or retail prices.
13 This ambiguity does not appear to have escaped the OFT
14 which has chosen to allege that the information relates
15 to both.

16 "In fact Tesco's analysis of what actually happened
17 to retail and cost prices on Dairy Crest lines shows
18 that at the time Neil Arthey sent the email to his
19 colleagues ... not only was Tesco running a promotion on
20 a significant number of cheese lines ... but this was
21 being funded through cost price reductions ... This
22 promotion ran from 16 October to 12 November 2002, and
23 funding from the processors was in place between 13[th]
24 and 16[th]."

25 Then in (d):

1 "Although Lisa Rowbottom has no recollection of the
2 conversation with Neil Arthey which allegedly preceded
3 this email, at the date of writing Neil Arthey knew that
4 a number of own label pre-pack lines were on promotion
5 and that Dairy Crest's funding of this would end on
6 16 November. As a result cost prices on these lines,
7 which include mild, medium and mature variants, would
8 increase to the prepromotional level on 17 November.
9 This is the day before the 18 November quoted in the
10 email as that on which own label lines would move."

11 Then it says:

12 "Insofar as the document does predict that retail
13 prices of the own label cheddar category would move on
14 18 November, whether off promotion or not, retail prices
15 on those lines in fact moved on a range of dates between
16 28 November and 24 January."

17 Then it has a paragraph about WeightWatchers, and
18 then it has a paragraph (g):

19 "Regional cheeses, Finest and Stilton were not
20 supplied or packed by Dairy Crest at the time, and the
21 comment in the email that these are 'also due to
22 increase at the same time', is so vague that it is
23 unclear that Dairy Crest had any information about these
24 lines from Tesco."

25 Just pausing there for a moment, that's not what

1 you're saying now, is it? You're saying that you gave
2 the information about regional, Finest and stilton,
3 didn't you?

4 **A.** Well, re-reading it and seeing it in light with my plan,
5 I've assumed that I just read out the list.

6 **Q.** Yes.

7 "Deli lines, speciality and cottage cheese were
8 supplied by Dairy Crest, but are neither PMPs or random
9 weight. Insofar as these sub-categories are concerned,
10 either Dairy Crest deduced, or Lisa Rowbottom
11 commented -- which is unclear -- as part of her general
12 description of her plans for the category as a whole,
13 what would happen.

14 "To the extent that Lisa Rowbottom said something
15 which allowed them to deduce this, it was not best
16 practice. However, to the extent the information was
17 inappropriately communicated, this was not done with the
18 intention or foresight that it would be passed on."

19 So having read it to you, what is said there is that
20 it was unclear whether Mr Arthey's email referred to
21 cost or retail prices, that's right, isn't it?

22 **A.** Yes, it says there, yes.

23 **Q.** There is no suggestion in that paragraph at all that all
24 the information, apart from WeightWatchers, was cost
25 price only?

1 **LORD CARLILE:** We've been looking at paragraph 5.28, later
2 on. There's a strong element of "if which is denied" or
3 "if which is not admitted" about this section.

4 **MR MORRIS:** Yes, it's the point my learned junior has just
5 highlighted so you're obviously all on the same wave
6 length.

7 Can I read 5.28 to you:

8 "Even if the OFT's interpretation of the email as
9 referring to retail price moves were to be correct
10 (which Tesco refutes) an analysis of [the] actual retail
11 price moves shows [as follows]."

12 So the simple proposition is that it is not in that
13 document denied that retail prices were mentioned? I'll
14 put it another way, that the email refers to retail
15 prices?

16 **LORD CARLILE:** It is neither denied nor admitted, as far as
17 I can see. It is a little opaque, this paragraph, no
18 doubt deliberately.

19 **MR MORRIS:** Yes, but put it the other way, you do not say,
20 or Tesco does not say in this document that the
21 information relates only to cost prices, does it?

22 **A.** Well, it can't be because there's the WeightWatchers
23 retail price in the middle.

24 **Q.** I'll put the question I put a moment ago.

25 There is no suggestion that, apart from

1 WeightWatchers, all the remaining information was cost
2 price only?

3 **A.** Can you just repeat that question, sorry? There is
4 no...?

5 **Q.** In these passages that I have just referred you to, and
6 in paragraph 5.28 as well, there is no suggestion that,
7 apart from WeightWatchers, all the information in the
8 email related to cost price only?

9 **A.** No.

10 **LORD CARLILE:** Before you answer that question, if you
11 answer it at all.

12 Mr Morris, I have a feeling that the Tribunal is
13 going to derive more benefit from an analysis of the
14 source document, document 63, than for asking a witness
15 who plainly didn't write it herself, although she's seen
16 it, to parse the meaning of paragraph 103.

17 **MR MORRIS:** Paragraph 5.26, you mean?

18 **LORD CARLILE:** Sorry, of pages 111 to 112.

19 **MR MORRIS:** I see the point. The point I'm going to put
20 more generally -- I should point out that this is
21 a paragraph that not only did Ms Oldershaw see but she
22 verified as being true, and to that extent that is
23 relevant. What I'm suggesting to you is that you are
24 now giving a different explanation of that email than
25 you gave back in 2007, would you agree with that?

1 That's what you say there?

2 **A.** Yes.

3 **Q.** My question to you is this, there was no need, was
4 there, for the processor to know on 30 October about
5 a cost price movement on 18 November for system reasons?

6 **A.** There was no reason for them not to know.

7 **Q.** But you did not need to tell them on that day, on the
8 30th, did you?

9 **A.** Presumably not.

10 **Q.** What I'm going to suggest to you is that, insofar as
11 they needed to make a system change, you could give them
12 much less notice, for example, about three days or four
13 days?

14 **A.** There was a large number of lines and I didn't know what
15 were their resources(?). I can't really comment further
16 on that.

17 **Q.** Would you go to document 62 [Magnum], this is you
18 telling the six processors about cost price changes, and
19 you're telling them only about the 3 November cost price
20 changes and you're telling them on the 29th. That,
21 I think, is five days before.

22 **A.** Yes.

23 **Q.** You didn't then at that point tell them about the later
24 cost price changes, did you?

25 **A.** Not in this email, no.

1 **Q.** Can I just summarise where we are in the light of
2 Mr Arthey's email and your conversations on the 30th
3 with the processors, see if you agree with these
4 propositions.

5 By the end of October, you told your processor
6 suppliers that you would accept the £200 per tonne cost
7 price increase across the broad range of all cheese
8 lines; that's right, isn't it?

9 **A.** All British cheese lines, yes.

10 **Q.** And you would not have done this unless, by that time,
11 you had decided in principle that you were going to
12 raise your retail prices for those products?

13 **A.** In principle, yes.

14 **Q.** And you would not have taken that decision unless you
15 were confident that your competitor retailers were going
16 to raise their retail prices?

17 **A.** That's not true.

18 **Q.** I'm going to suggest to you that you did have that
19 confidence despite the fact that your competitors'
20 prices were not in store by that time?

21 **A.** I had a strong feeling that they would change their
22 retails because a £200 per tonne cost price would be
23 hard for any retailer to take without a retail price
24 increase.

25 **Q.** Where did you get that strong feeling from?

1 **A.** From being a buyer for 12 years.

2 **Q.** How did you know they were even going to accept the cost
3 price increase?

4 **A.** Because it was likely as it was a nationwide call.

5 **Q.** Just so we can be clear, by 30 October none of Asda,
6 Safeway or Sainsbury's had increased their prices for
7 standard own label products, had they?

8 **A.** I can't recall, but from the spreadsheet it would say
9 no.

10 **Q.** But you had taken your decision in principle to raise
11 those prices, your standard label prices?

12 **A.** Tesco as a company had made a commitment to take the
13 £200 per tonne cost price increase. To keep my KPIs in
14 line, me as a buyer would have to increase my retails.

15 **Q.** What we then see is that Mr Arthey passed the
16 information that you'd told him on 30 October, first of
17 all he passed that information within Dairy Crest
18 itself, didn't he? If you look at document 63 itself
19 [Magnum].

20 **A.** Yes.

21 **Q.** Then what we see is -- and I'm now at document 67
22 [Magnum] -- we see that Mr Feery, who was the
23 Dairy Crest Sainsbury's man, passed on that information
24 to Sarah Mackenzie at Sainsbury's; that's right, isn't
25 it, on the 31st?

1 **A.** Yes.

2 **Q.** It's likely, isn't it, that the other account managers
3 at Dairy Crest passed the same information on to the
4 other retailers?

5 **MISS ROSE:** Sir, I'm sorry, that is not a question that this
6 witness is able to answer.

7 **LORD CARLILE:** I think you're entitled to ask her if she had
8 any expectation of that occurring, if you want to.

9 **MR MORRIS:** Yes.

10 Did you have any expectation that Mr Feery -- sorry,
11 that other account managers -- I'll put it another way.

12 At the time, you would have expected that other
13 account managers would have passed that information on
14 to other retailers, other than Sainsbury's?

15 **A.** I would not, no. I expect any information I give to
16 Neil -- or gave to Neil Arthey regarding Tesco products
17 would be kept between myself and Neil Arthey, or the
18 people within Dairy Crest who were acting on behalf of
19 Tesco, not to go to other retailers, or even to go to
20 Neil's colleagues out of the Tesco team.

21 **Q.** Even though you knew at the time that you were -- well,
22 even though at the time the processors were purporting
23 to tell you what the other retailers were doing?

24 **A.** In my view, they were just giving me opinions of the
25 market.

1 Q. And it never occurred to you to say to Mr Arthey and
2 Mr Ferguson, "Whatever you do, don't tell the other
3 retailers what I'm telling you"?

4 A. No, because I took that as a given. I took it as
5 a given that our working relationship, they would keep
6 confidential any information I shared with them about
7 Tesco. We had to have a trusting relationship,
8 I trusted them with strategies for my category and
9 various other things.

10 LORD CARLILE: But I thought you said earlier that you were
11 used to sales hustle from them and you really didn't pay
12 any attention to what they told you at all?

13 A. No, I didn't in regard to information they sent through
14 of that nature, but you've got to have -- you've got to
15 trust them in some areas.

16 MR MORRIS: If they were sales hustlers --

17 A. I trust them to keep my information confidential.

18 Q. These are people who you, on your own evidence, suggest
19 to the Tribunal were salesmen, sales -- they carried out
20 sales hustles?

21 A. They weren't salesmen, they were account managers.

22 Q. Well, salesmen in terms of selling -- they were giving
23 you information about what other retailers were telling
24 you, which you didn't believe, and I suggest to you that
25 given the fact that they were doing that, it must have

1 occurred to you that they would take what you had told
2 them and use it as part of the sales hustle they were
3 giving to others?

4 **A.** It didn't, no, at the time.

5 **Q.** And you couldn't be sure that they wouldn't do that,
6 could you?

7 **A.** Well, no, obviously not.

8 **Q.** You knew that they were talking to the other retailers,
9 didn't you?

10 **A.** These were Tesco national account managers, they worked
11 on the Tesco account. I shared information with them
12 for the Tesco account.

13 **Q.** Tom Ferguson worked on other accounts, didn't he?

14 **A.** Yes, I know that now. But you still expect them to keep
15 your information confidential.

16 **Q.** Why did you expect that when you knew that they weren't
17 keeping your competitors' information confidential?

18 **A.** I didn't know they weren't keeping my competitors'
19 information confidential.

20 **LORD CARLILE:** This horse may be alive but I feel we're
21 flogging it.

22 **MR MORRIS:** Okay, very well.

23 **LORD CARLILE:** That was not, by the way, a reference to you.
24 I apologise if you thought it was, Ms Oldershaw. It was
25 a reference to the question that was being asked

1 repeatedly.

2 **A.** Thank you.

3 **MR MORRIS:** In fact, given the context of everything in this
4 nationwide initiative to which you've just referred, and
5 I'm not quoting you verbatim, but national initiative,
6 you knew that the information you gave to Mr Arthey
7 would be passed on, didn't you?

8 **A.** No, I did not.

9 **Q.** Given everything that was happening, given the fact that
10 you had received from them information about what other
11 retailers were planning, you must have realised that
12 this was going to happen?

13 **A.** No, I did not.

14 **Q.** You say that you were shocked or surprised when you
15 found out that Mr Feery had communicated the information
16 to Sainsbury's; that's your evidence, isn't it?

17 **A.** Yes.

18 **Q.** But you expressed no shock when you received similar
19 information coming the other way from Sainsbury's on
20 21 October, did you?

21 **A.** Because I know what's in Paul Feery's email is my
22 information. I know that that is factually correct.
23 I didn't know that about anything I received from any
24 other retailers -- not any other retailers, any retail
25 information from any other suppliers because I viewed

1 that as false.

2 **MISS ROSE:** Can I just clarify, it's being put that given
3 the fact that she'd received from them information about
4 what other retailers were planning, she must have
5 realised this was going to happen; in fact there isn't
6 any evidence that at this date Ms Oldershaw had received
7 any information from Dairy Crest about what other
8 retailers were doing.

9 The document over which we have spent so many hours,
10 document 52, is of course a document that comes from
11 McLelland, and there is no document in this bundle that
12 shows that Dairy Crest had passed any information to
13 Tesco about other retailers at this date.

14 **MR MORRIS:** The question I -- it was a general question
15 about processors generally. I was, of course, referring
16 specifically to the McLelland position, but I did put to
17 Ms Oldershaw earlier this morning the proposition that,
18 in conversations with Dairy Crest, she had also been
19 receiving the information about the waves and cash
20 margin, and it was in that context that I asked the
21 question. The witness may have not accepted that, but
22 I'm just putting what I had already put.

23 **LORD CARLILE:** Right.

24 **MR MORRIS:** I'm going to move on now beyond 30 October and
25 I'm going to look at the events after 30 October. If I

1 may, again, Ms Oldershaw, I'm going to summarise what
2 happened and see if you agree broadly with what
3 happened.

4 After 30 October, you continued to have dialogue
5 with your processors, in particular Dairy Crest and
6 McLelland. That's right, isn't it?

7 **A.** Probably, yes.

8 **Q.** The first wave of price increases for the week
9 commencing 4 November took place as envisaged?

10 **A.** From recollection, yes, but is there a document I can
11 refer to?

12 **Q.** Well, perhaps we'll come to the documents in a moment,
13 but the proposition is that the branded pre-pack -- your
14 branded pre-pack went up on those dates. I'll come to
15 the document in a moment, I think it's easier than
16 jumping about.

17 The next proposition is that the next two waves,
18 which had originally been planned for 11 and
19 18 November, fell back in time because there was
20 uncertainty as to whether everyone was complying. Do
21 you recall that?

22 **A.** If they fell back in time, it would have been for admin
23 reasons, not because others weren't complying.

24 **Q.** I'll put to you a gloss on that just so I'm clear on
25 what I'm putting.

1 As far as McLelland random weight was concerned,
2 they did in fact go ahead on 11 November, I'm just
3 putting that to you. You'll probably say "I can't
4 immediately recall", but I want to make sure --

5 **A.** I need the document to able to recall, sorry. There's
6 so many lines.

7 **Q.** Yes, I'll go to the document in a moment.

8 As a result of the uncertainty, you were checking
9 in-store prices to see if the other retailers were
10 moving in line with the planned waves?

11 **A.** We always check in-store prices. There was no planned
12 waves. I had my planned waves.

13 **Q.** Eventually those waves of increase took place in the
14 weeks commencing 25 November and 1 December?

15 **A.** Again, I need to refer to the document for actual dates.

16 **Q.** What I'm going to suggest to you is this: when you did
17 raise your prices, in some cases retail prices were
18 raised so as to maintain percentage margin, that's
19 right, isn't it?

20 **A.** Can I see the document, please?

21 **Q.** The answer is you can't recall?

22 **A.** I will have done a variety of different price points.

23 **Q.** Yes, and I'm going to put to you, in a similar number of
24 cases, the retail prices were raised to maintain cash
25 margin only?

1 **A.** Probably.

2 **LORD CARLILE:** Mr Morris, I can understand completely why
3 you're putting general propositions but, given the
4 passage of time, it might be fairer to do it by the
5 documents. I'm slightly troubled by this --

6 **MR MORRIS:** I understand that but, otherwise, we don't get
7 a picture of what's going on.

8 Let's move to the week commencing 4 November. If
9 you go to document 63 again, you thought you'd finished
10 with it but you haven't --

11 **MISS ROSE:** I'm sorry, before we go back to this document,
12 can I just flag up a general concern I have which is
13 about the amount of time. Obviously, the number of days
14 that remain in this hearing are somewhat limited. I've
15 made it clear that I will need two full days for my
16 closing submissions. Now, my understanding is that the
17 Tribunal has some limitations on the hours it can sit
18 this week and I just want to be clear from the OFT,
19 first of all, how long does it anticipate this
20 cross-examination will continue to take and, secondly,
21 how long does it intend to take with Mr Scouler?
22 Because with great respect to Mr Morris, there have been
23 times when this cross-examination has not proceeded
24 quite as rapidly as it perhaps might have done, and
25 I will be very concerned if my time for closing

1 submissions is squeezed as a result of that.

2 **LORD CARLILE:** Miss Rose, I've been assuming that we're
3 keeping to time and that I can rely on most experienced
4 leading counsel, both of you, and your juniors to ensure
5 that we do keep to the timetable until I'm told to the
6 contrary.

7 **MISS ROSE:** My ability to do that is somewhat constrained.

8 **LORD CARLILE:** We have availability tomorrow to continue
9 with this witness, as you know.

10 **MISS ROSE:** Yes.

11 **LORD CARLILE:** For a certain time anyway. For the witness
12 to go beyond tomorrow we might be in some difficulties,
13 but I think the Tribunal is entitled to assume that
14 everyone is keeping to the timetable and things will
15 speed up.

16 **MR MORRIS:** Sir, this is an issue that I was intending to
17 address and would be more than happy to address but I'd
18 prefer to do it not in the middle of the
19 cross-examination.

20 **LORD CARLILE:** Well, let's deal with it at the end of the
21 day.

22 **MR MORRIS:** I am aware of the issue and I will tell you
23 where I am when we've concluded. It will take me five
24 minutes.

25 **LORD CARLILE:** Okay.

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

2 Document 1/63 [Magnum], the date of the first Tesco
3 wave was 4 November. You see that in the first line,
4 don't you?

5 **A.** Yes.

6 **Q.** That includes all branded pre-pack, and that would have
7 included -- the two main products there were
8 Seriously Strong and Cathedral City, that's right, isn't
9 it?

10 **A.** Yes.

11 **Q.** If you go to document 1/70 [Magnum].

12 **A.** You mean 70?

13 **Q.** I do. This is an email on 4 November from Stuart Meikle
14 of McLelland to Mr Owen of the Co-op, he says:

15 "As per our conversation, I have detailed below what
16 I believe is happening with retail prices over the next
17 2 weeks. Seriously Strong retails have already moved in
18 some cases."

19 Then if you go down the page, when you get to the --
20 after the first two paragraphs, you will see a paragraph
21 which begins:

22 "Seriously Strong prices checked today..."

23 Are you with me?

24 **A.** Yes.

25 **Q.** Then it says:

1 "Asda, Tesco and JS have all moved their retails on
2 S.Strong as of today."

3 **A.** Yes.

4 **Q.** So that confirms that the first wave of Tesco moves
5 happened on that date?

6 **A.** Certainly for Seriously Strong, yes.

7 **Q.** If we stay with document 70, if we go back and read it,
8 the first sentence says:

9 "... I have detailed below what I believe is
10 happening..."

11 Seriously Strong has already moved.

12 Then it says:

13 "I would like to raise your costs from ... and have
14 attached a file detailing the new cost by line."

15 This is Mr Meikle speaking to the Co-op.

16 "We will be raising the retail prices on the
17 McLelland random weight brands by 20p per kilo to allow
18 for cash margin to be maintained."

19 Then it gives you the information about
20 Seriously Strong having moved, as to Tesco and JS. Then
21 he says:

22 "What I believe will happen elsewhere is

23 "Asda."

24 Then he gives the 4th and 11th. And then Tesco,
25 11 November, "random weight McLelland retails", and

1 18 November 2002, "all own label lines". Yes?

2 **A.** Yes, I can read that, yes.

3 **Q.** So what Mr Meikle is telling Mr Owen is, first of all,
4 he's telling him about the retail price increases which
5 have by then taken place, yes?

6 **A.** Yes.

7 **Q.** He's then telling them what he believes will happen in
8 the next waves. That's the "What I believe will happen
9 elsewhere".

10 **A.** Over the next weeks, yes.

11 **Q.** And he believes that Tesco will raise its prices for
12 McLelland random weight products on 11 November and for
13 all own label lines on 18 November, that's right, isn't
14 it?

15 **A.** That's what it says there, yes.

16 **Q.** Now, the date of 11 November for McLelland random weight
17 lines, if you go back to document 62 [Magnum], I perhaps
18 should have taken you to this earlier. You've seen this
19 email before, the bottom of the page, haven't you?

20 **A.** Yes.

21 **Q.** Which is your email to all six of them. Then at the top
22 of the page, on the same day, the 29th, Tom Ferguson
23 replies to you as follows. He says he'll be out of the
24 office, and then in the second paragraph:

25 "I will be able to change all the relevant costs on

1 pre-pack and deli from... the 3rd but on the Scottish
2 branded pre-packs ie Galloway, McLelland mature...
3 I propose that we go from the 10th... with the retails
4 that you can confirm from the spreadsheet I sent on to
5 you. The reason I suggest that we move the branded
6 pre-pack from the 10th is that we obviously have stocks
7 of our... retails that we would prefer to supply until
8 the 9th..."

9 So his response to you at that time is, "Let's move
10 the McLelland random weight lines on 11 November",
11 that's what he says there, isn't it? He says the 10th
12 which is the Sunday?

13 **A.** Yes.

14 **Q.** So 11 November which, in document 70 [Magnum], random
15 weight McLelland retails, is consistent with what
16 Tom Ferguson has told you on the 29th?

17 **A.** It is, yes.

18 **Q.** Now, you give evidence about this email at
19 paragraphs 116 and following of your witness statement
20 [Magnum]. If I can just direct your attention, in the
21 second sentence of 116:

22 "The email contains both current and future retail
23 pricing information for a number of retailers including
24 Tesco."

25 Then you go on at 117:

1 "It provides confirmation that Tesco has all moved
2 on Seriously Strong."

3 Then in the middle sentence:

4 "The email also sets out Stuart Meikle's
5 understanding that Tesco would move retail prices on
6 random weight McLelland products on the 11th and on own
7 label products on the 18th."

8 Then at 118 you say:

9 "I needed to inform McLelland of any changes to our
10 retail prices on the random weight products they
11 supplied to Tesco, both in terms of amount and timing,
12 so that McLelland could label the packs with the correct
13 retail price when they packed the cheese."

14 Then at 120, you say:

15 "I regarded the effective dates of new cost and
16 retail prices as confidential to Tesco. I had no reason
17 to suspect that McLelland had passed this information to
18 the other retailers and I certainly had no intention or
19 foresight that McLelland would do so. Had I been aware
20 of this email [ie the Mr Meikle email] at the time, it
21 would have seriously affected my working relationship
22 with McLelland."

23 So if I can try to do one of my summaries, having
24 read the evidence. In those passages, first of all, you
25 accept that Mr Meikle's email at document 70 contains

1 future retail pricing information of retailers including
2 Tesco?

3 **A.** Yes.

4 **Q.** In your witness statement you give evidence about how
5 Mr Meikle came to have that information concerning
6 Tesco's future retail pricing?

7 **A.** At which paragraph, just to refresh, please?

8 **Q.** 118.

9 **A.** Well, that's how Tom Ferguson would have had the
10 information.

11 **Q.** Yes, that's a fair comment. But you accept that you had
12 given that information to Tom Ferguson because you
13 needed to inform him if there were any changes to your
14 retail prices?

15 **A.** Yes.

16 **Q.** To summarise 118 and 120, you said McLelland needed that
17 information for labelling purposes and that you regarded
18 the information as confidential?

19 **A.** Yes.

20 **Q.** So you accept at the very least that you had told
21 Tom Ferguson of the dates of those moves?

22 **A.** We'd negotiated the dates based on what stocks he has,
23 yes.

24 **Q.** I would suggest to you that it's very likely that you
25 had done this in your phone call with Mr Ferguson on the

1 previous Wednesday, 30 October, on the same day that you
2 spoke to Mr Arthey?

3 **A.** Maybe.

4 **Q.** Now, you said earlier that you would have only told
5 Mr Ferguson about the products that he supplied --
6 I think you said that early on this morning?

7 **A.** In terms of specific retails, yes.

8 **Q.** But talking more generally, it is the case as regards
9 Mr Arthey you -- never mind about specific products
10 but -- specific prices, you went through each of the
11 cheese categories, didn't you, regardless of whether or
12 not they were cheese categories supplied by Dairy Crest?

13 **A.** I certainly did with Neil Arthey because the resultant
14 email confirms that, but I can't confirm with any other
15 supplier.

16 **Q.** But it's likely, isn't it, that you would have done the
17 same thing? You had the Word document in front of you
18 and you would have run through the list, as you did with
19 Mr Arthey?

20 **A.** I can't confirm that, or deny it.

21 **Q.** I would suggest to you it's likely?

22 **A.** I'll remain on "I can't confirm".

23 **Q.** What do you mean "I'll remain on"?

24 **A.** Well, I'm not going to say it's likely --

25 **LORD CARLILE:** Wait a moment, stop.

1 It's because she gave that answer when you asked the
2 question the previous time.

3 **MR MORRIS:** In the conversation with Mr Ferguson on the
4 30th, you told him future retail pricing information,
5 didn't you?

6 **A.** Can you just repeat that, sorry?

7 **Q.** We're discussing paragraph 118 of your witness statement
8 where you I think corrected me to say that actually you
9 would have had that conversation with Mr Ferguson?

10 **A.** Yes, I would have given retail pricing on McLelland's
11 lines, McLelland's regionals, yes. I probably wouldn't
12 have done that over the phone, I would have probably
13 sent a spreadsheet because it's too many lines.

14 **Q.** You said that when you spoke to Mr Arthey that you went
15 through all the categories because you were under
16 pressure, didn't you?

17 **A.** Yes, that's ...

18 **Q.** Is it not likely that you were under the same pressure
19 with Mr Ferguson and would have gone through the same
20 categories in the same way?

21 **MISS ROSE:** Sir, I think that's the third time now that
22 question has been asked. It's the same question to
23 which she replied before that she could neither confirm
24 nor deny it, twice.

25 **LORD CARLILE:** That might be a fair comment.

1 **MR MORRIS:** I was just trying to explore why there would be
2 a difference between the two conversations.

3 **MISS ROSE:** In that case, sir, that is a submission.

4 **LORD CARLILE:** Yes, I agree.

5 **MR MORRIS:** Mr Meikle's information in this email at
6 document 70 [Magnum] is not speculation, is it, about
7 Tesco? The information, "What I believe will happen
8 elsewhere", is Tesco 11 November, 18 November?

9 **A.** I don't believe so if it's in line with my Word
10 document. I can't remember the number.

11 **Q.** Are you looking at the Word document again?

12 **A.** Yes.

13 **Q.** 64 [Magnum].

14 **A.** No, it's not speculation, unless he's had a good guess.

15 **Q.** Yes.

16 Now, at paragraph 118 of your witness statement, to
17 which I've just taken you, you said it was legitimate
18 for you to have told McLelland the future prices on
19 random weight for labelling reasons?

20 **A.** Yes.

21 **Q.** But you had also told him in the conversation, I'm
22 suggesting to you, your branded pre-pack fixed weight
23 moves for 4 November?

24 **A.** He's done an in-store price check of the branded
25 pre-pack.

1 **Q.** I'm going back to the conversation that you had with
2 Mr Ferguson in which you said you gave him -- which you
3 thought would probably have taken place on the 30th --
4 you gave him Tesco's pricing intentions in relation to
5 McLelland random weight? That's right, isn't it? I'm
6 talking about that conversation, paragraph --

7 **A.** Can you refer me back to the email, please?

8 **Q.** If you go back to paragraph 118 of your witness
9 statement, you say there that you needed to inform
10 McLelland of any changes to your retail prices on the
11 random weight products?

12 **A.** Yes.

13 **Q.** You say that you told Tom Ferguson your changes to the
14 random weight products. What I'm suggesting to you --
15 leave to one side the question of other people's
16 products -- I'm suggesting to you that when you spoke to
17 Tom Ferguson on the 4th -- on or around 30 October, you
18 also told him you were going to move Seriously Strong on
19 the 4th? You must have done?

20 **A.** Yes, I probably would. Yes, brands on the 4th. Yes,
21 here's a brand, yes.

22 **Q.** Well, that is a fixed weight product?

23 **A.** Yes.

24 **Q.** And, therefore, there was no need for him to have that
25 information for labelling purposes, was there?

1 **A.** No, but he needed to know the cost price change on the
2 4th.

3 **Q.** Well, we've already explored whether you were telling
4 people cost and retail prices. I suggest to you that
5 you were telling him that you were moving cost and
6 retail on the 4th for Seriously Strong, and that there
7 was no labelling reason for you to do so?

8 **A.** I think in one of my emails I refer to retails where
9 relevant. Retails wouldn't have been relevant on the
10 Seriously Strong fixed weight lines but they would have
11 been relevant on the McLelland's random weight regional
12 cheeses.

13 **Q.** If you go back to document 70 [Magnum], you see in the
14 line which refers to Tesco random weight McLellands on
15 the 11th, you see that three quarters of the way down?

16 **A.** Yes.

17 **Q.** This email also refers to the 18th, "all own label
18 lines", doesn't it?

19 **A.** Yes.

20 **Q.** I'm going to suggest to you that that information was
21 information that you had given to Mr Ferguson on
22 30 October?

23 **A.** I would have probably given cost prices for those lines
24 on 30 October but probably not retails at that stage.

25 **Q.** So why were you telling Mr Ferguson even about cost

1 prices in respect of all own label lines and not
2 McLelland own label lines?

3 **A.** It's just a category, own label lines is a category.
4 Tesco operated in sub-groups, suppliers were very well
5 aware of that, and many suppliers could sit within
6 a sub-group.

7 **Q.** There was no labelling reason for you to have told
8 Mr Ferguson that prices, even cost prices, would be
9 moving on own label lines not supplied by McLelland, was
10 there?

11 **A.** I didn't specifically tell him that.

12 **Q.** You say in your witness statement that you regarded the
13 information you had given to McLelland, or to
14 Mr Ferguson as you have now explained, as confidential
15 and you had no intention or foresight that McLelland
16 would pass it on?

17 **A.** Correct.

18 **Q.** But you knew at that time that Mr Ferguson was speaking
19 to the other retailers, didn't you?

20 **A.** I presume McLellands would be speaking to other
21 retailers, as we've established.

22 **Q.** When you gave the information to Mr Ferguson, you didn't
23 expressly tell him that it was confidential?

24 **A.** No. No, I didn't expressly tell him, I just took it as
25 a given.

1 **Q.** I suggest to you that you knew at the time that that
2 information that you gave to Mr Ferguson was going to be
3 used by Mr Ferguson to maintain the belief on the part
4 of the other retailers that Tesco was playing its part
5 in the initiative?

6 **A.** That is absolutely not the case.

7 **Q.** Indeed, in this email, we see McLelland use that
8 information precisely for that purpose, by passing it on
9 to the Co-op. He did pass it on, well, Mr Meikle passed
10 it --

11 **A.** Yes, he did, yes.

12 **Q.** Can I put this question to you. You can see now, can't
13 you, why Mr Ferguson would have wanted to pass this
14 information on to Mr Owen at the Co-op and other
15 retailers?

16 **A.** Would you like to elaborate?

17 **Q.** Given everything that you know about what was going
18 on -- you knew about what was going on at the time, and
19 what you now know was going on, you can see now why
20 Mr Ferguson would have wanted to pass this information
21 on to other retailers, the information that you had
22 given --

23 **LORD CARLILE:** Aren't we moving into submission territory?

24 **MR MORRIS:** Well --

25 **LORD CARLILE:** I think we are, Mr Morris.

1 **MR MORRIS:** Very well.

2 **LORD CARLILE:** Are you all right there, Ms Oldershaw?

3 **A.** Yes. It's just past my bedtime.

4 **LORD CARLILE:** We will have another break in a few minutes'
5 time.

6 **MR MORRIS:** Can I ask you, put it this way, you must have
7 suspected at the time that that would have happened,
8 that he would pass it on?

9 **A.** No, I didn't.

10 **Q.** It never crossed your mind?

11 **A.** No, it didn't.

12 **Q.** Very well. Let's go to document 73, we're now in the
13 second bundle [Magnum]. I may have to come back to the
14 first bundle because there are overlap points where you
15 have to jump between the two so don't put it away
16 completely.

17 **LORD CARLILE:** We're quite near the Tower of London, Mr
18 Morris.

19 **MR MORRIS:** I never knew it was a capital offence!

20 Perhaps let me explain what this document is. It's
21 an email, an internal Safeway email. Have you looked at
22 this document before, document --

23 **A.** Sorry, I missed the number.

24 **Q.** Sorry, 73. It's at the beginning of volume 2.

25 **A.** Okay.

1 Q. This is an internal email from Russell White to
2 Tim Lawrence and Matthew Jipps:
3 "Tim/Matthew
4 "Need your advice - we are about to execute a market
5 wide RSP [retail price] increase on the full range of
6 [English] cheeses. This is linked to supporting farmers
7 to the tune of [that should be] 2p per litre ... or £200
8 per tonne.
9 "We will be having to make changes to the range on
10 the 11th and 18th of November of an average of 10p per
11 500g piece and 5p per 250g [piece], to show our support.
12 "Can you let me know what impacts this will have on
13 our legality on Commando and what options..."
14 We don't need to read the rest of that paragraph.
15 The next paragraph:
16 "Our indices will remain the same, as all players
17 will be moving by the same amount on the same day but
18 prices will go up from current levels in Commando and
19 I don't want to be the 1st challenge."
20 So this is an email where, an internal email in
21 which Safeway have knowledge that all players will be
22 moving by the same amount on the same day, and you will
23 see the reference there to the initiative, and to the
24 wave dates of the 11th and the 18th, and to the 20p per
25 kilo.

1 For Safeway, you would agree I'm sure that at the
2 time Tesco was a key competitor?

3 **A.** Tesco was everybody's key competitor.

4 **Q.** Yes. In his words, "all players will be moving",
5 Mr White of Safeway would definitely have been including
6 Tesco, wouldn't he?

7 **A.** I don't know what Mr White meant by that.

8 **Q.** Well, given that you are everybody's key competitor, it
9 would be a bit odd if he wasn't including Tesco,
10 wouldn't it? "All players"?

11 **A.** Probably, but I can't answer for him.

12 **Q.** Very well. We can see from this document, I would
13 suggest, that Tesco's plan -- your plan for your moves
14 on 11 and 18 November had been passed on to Safeway,
15 would you agree?

16 **MISS ROSE:** Sir, that is really not a possible statement for
17 the witness to agree or disagree with.

18 **LORD CARLILE:** We can read the document.

19 **MR MORRIS:** I wanted to make sure that it was put to the
20 witness that the OFT's case is that this document
21 indicates that Safeway had been told of Tesco's price
22 moves. The witness may say, "I've no idea", but
23 I wanted to make sure the point was put.

24 **LORD CARLILE:** It's an inference you ask the Tribunal to
25 draw.

1 **MR MORRIS:** Yes, but I'm conscious that, if I don't put the
2 point, there may be complaints later on.

3 **LORD CARLILE:** Well, I think you'll get complaints either
4 way, Mr Morris.

5 **MR MORRIS:** I think that's true.

6 What I'm suggesting to you is that here, this is the
7 information here that you gave to Dairy Crest and to
8 McLelland on 30 October, that you were going to move on
9 the 11th and the 18th. Would you agree with that?

10 **A.** I don't know where their information came from.

11 **Q.** You're not suggesting that Tesco told Safeway directly,
12 are you?

13 **A.** I didn't converse with any retailers.

14 **Q.** No, of course. Okay, let's move on a document. When
15 I was asking you about document 64 -- and I'm not going
16 to take you back to it unless I'm required to -- you
17 mentioned Tesco own label, do you remember? You said
18 that that included Value products, do you remember?
19 I said I'm not sure it did. What I'm going to suggest
20 to you is that, as at 30 October, when you did your
21 cheese plan documents, you had not decided what to do as
22 regards the proposed cost and retail prices in respect
23 of Tesco Value products?

24 **A.** I didn't need to do anything on the cost price of Value
25 products except for some lines that sat with McLellands.

1 Q. I would prefer not to take you back to the document,
2 I will if I have to. If you go to document 64 [Magnum],
3 you can see nine Value products supplied by Kerrygold?

4 A. Yes.

5 Q. And there's no date and no price mentioned in respect of
6 those? Actually, I think the easy way to find it is the
7 first portrait bit of the document. Yes.

8 A. Yes.

9 Q. It comes most easily -- I'm pleased to say -- on the
10 first page after the blue tab, document 64 [Magnum].
11 You see Tesco Value, Kerrygold products, it's about
12 three quarters of the way down, I don't know if
13 everybody is following me. It's the first seven or
14 eight Kerrygold products, mild white -- are you with me,
15 Ms Oldershaw?

16 A. Yes, I am, yes.

17 Q. I'm not sure I'm looking at exactly the same document as
18 you are but I think you're probably going to -- maybe
19 you are. It's the first page, the portrait page, tabbed
20 by supplier, you'll see that there's nothing there
21 filled in at all, no date and no price?

22 A. Yes.

23 Q. What I'm suggesting is that, at the 30th, the Value
24 products had not been -- you'd not made any decision on
25 those?

1 **A.** I didn't have to change cost prices on Value lines
2 because I bought them under the bulk system. So a lot
3 of that cheese wasn't even British and I bought that
4 under tender which was already agreed. So there would
5 be no £200 per tonne increase on the Value line or
6 Irish.

7 **Q.** Now, the equivalent range of products sold by Asda were
8 Asda's Smart Price products; that's right, isn't it?

9 **A.** Yes.

10 **Q.** Yes, and competition between Tesco and Asda on those
11 prices was intense and important, would you agree with
12 that?

13 **A.** Yes.

14 **Q.** If you go to document 1/69, this was the capital offence
15 that the ... Tab 69, back in volume 1 [Magnum]. This
16 is what I said I might have to do under pain of
17 incarceration as I remember -- I jumped back. This is
18 an email from Neil Arthey to yourself on 4 November.
19 There are three paragraphs, I believe, I would describe
20 it as three paragraphs, the first and second of which
21 I will read to you:

22 "I have attached a spreadsheet which shows the
23 suggested rsp's of cheese lines that we supply Asda
24 following the price increase."

25 That's the first bit. The second bit is:

1 "My understanding is that Asda will be applying £200
2 per tonne ie 20p per kilo to rsps of Smart Price mild
3 and mature."

4 Then he says:

5 "Please could you confirm the rsp's that you wish me
6 to pack Tesco lines..."

7 If you go over the page, I think mine is on the
8 reverse and perhaps yours is too, you will see
9 a spreadsheet of prices. What I'm suggesting to you is
10 that spreadsheet is the spreadsheet referred to in the
11 first sentence of the email?

12 **A.** Okay.

13 **Q.** Yes, and the second sentence relating to Smart Price is
14 something different because there's nothing about
15 Smart Price in that list on the reverse. Would you
16 agree with that?

17 **A.** Yes.

18 **Q.** Thank you.

19 **A.** There's no Smart Price on that list.

20 **Q.** Yes, so in that email, he is telling you two distinct
21 things about Asda in those first four lines. He's
22 telling you something about Asda's non-Smart Price
23 prices and he is giving you suggested RSPs. Then he is
24 telling you something specific in relation to
25 Smart Price mild and mature; that's right, isn't it?

1 **A.** Yes.

2 **Q.** Both those pieces of information relate to the future.
3 These are future Asda prices, not prices in store?

4 **A.** No, they're his formulaic calculations of what retail
5 prices might look like.

6 **Q.** Yes, they are in respect of the spreadsheet or you say
7 they are.

8 **A.** Yes.

9 **Q.** But that can only be true -- I'm not sure I'm accepting
10 it but that is true, his formula relates to the
11 spreadsheet.

12 **A.** Yes.

13 **Q.** The formulaic suggestion doesn't relate to the
14 Smart Price.

15 What I want to do is deal with the second line which
16 is the Smart Price line. I can take you to it if need
17 be but I'm going to suggest to you that, in your witness
18 statement, you do not deal with the sentence:

19 "My understanding is that Asda will be applying £200
20 per tonne in respect of rsps for Smart Price."

21 Paragraph 113 of your witness statement [Magnum],
22 perhaps you can have that open anyway. If you read
23 paragraph 113 and 114 to yourself, you're dealing with,
24 in 113 and 114, the Dairy Crest suggestions as to what
25 the new retail prices would be in Asda if a £200 per

1 tonne increase were applied to the current retail price.
2 That is a reference to the first sentence in the
3 attached spreadsheet.

4 **LORD CARLILE:** Have I got this right, Ms Oldershaw, that you
5 took the spreadsheet to be an arithmetical calculation
6 of the cost margin increase that Asda would have to
7 apply to their existing in-store prices?

8 **A.** Yes, I took it very much as the spreadsheets we've seen
9 that I asked suppliers to do for me, so it's taking the
10 current price in store and applying a formula to apply
11 20p per kilo to the retail.

12 **LORD CARLILE:** Whereas with Smart Price you would have had
13 to know what the actual prices were in store or
14 Mr Arthey would have had to know the actual prices in
15 store in order to apply any increase and, of course,
16 a special price promotion would have had time to run
17 anyway. Is that wrong?

18 **MR MORRIS:** I don't think there's any --

19 **LORD CARLILE:** Forget about that second question.

20 **MR MORRIS:** My suggestion is that my understanding is that
21 the witness statement doesn't actually address the
22 Smart Price situation at all.

23 **LORD CARLILE:** No. It's the arithmetical point she
24 addresses.

25 **MR MORRIS:** Yes, exactly.

1 In your witness statement you say -- I'll put it
2 this way. In the second sentence, whilst the first
3 sentence might be a suggestion as to what would happen
4 if Asda raised its prices, the second sentence,
5 Mr Arthey is telling you what Asda is going to do, isn't
6 he? He's saying:

7 "My understanding is that Asda will be applying £200
8 per tonne for Smart Price."

9 **A.** It's his understanding, it's his speculation. Again,
10 I would have viewed it with the blanket falseness
11 I applied to everything else.

12 **Q.** I'm going to suggest to you that the reference to the
13 word "understanding" is a reference to something he had
14 been told and you would have understood that to be the
15 case from reading that email?

16 **A.** I would have treated it like everything else.

17 **Q.** I'm going to suggest to you that that information must
18 have been obtained by -- the information about
19 Smart Price must have been obtained by Dairy Crest from
20 Asda?

21 **A.** I can't confirm that. I don't know where that came
22 from.

23 **Q.** I'm going to suggest to you that you would have realised
24 that that was the case when you read that email?

25 **A.** No, I didn't.

1 **MISS ROSE:** Sir, again, I don't believe there is actually
2 any evidence that this information did come from Asda.

3 **LORD CARLILE:** She's answered the question.

4 **MISS ROSE:** But just to make it clear.

5 **LORD CARLILE:** I understand.

6 **MR MORRIS:** Can I ask you this question, do you recall
7 whether at that time Dairy Crest supplied Smart Price
8 mild lines to Asda?

9 **A.** I can't recall but, as the spreadsheet -- as he refers
10 to a spreadsheet of lines he does supply Asda, I presume
11 he wasn't supplying them at the time. I was under no
12 margin pressure for Value lines.

13 **Q.** The purpose of the information, of Mr Arthey telling you
14 this, was to tell you that Asda were going to increase
15 by cash margin only and not as to maintain percentage
16 margin? That's why he mentions the 20p, isn't it?

17 **A.** I don't know Neil Arthey's intent.

18 **Q.** The fact that Asda were only going to go by cash margin
19 was important information for you at the time?

20 **A.** It was irrelevant information for me on Value lines.

21 **Q.** Irrelevant? So you're suggesting, are you, that this
22 product, perhaps the most important -- Value being the
23 most important product for your entire business, that
24 the prices of -- information about the proposed prices
25 of your main competitor was irrelevant?

1 **A.** Yes, because I was under -- especially on Value lines,
2 I was under no margin pressure because I did not have to
3 take a £200 per tonne increase on Value lines because
4 I bought them in a different way, under a six-monthly
5 tender, and most of the product was not from the UK.

6 **Q.** But if you were contemplating raising your Value line
7 retail prices, which I suggest you were at the time, the
8 fact that -- information that Asda on its equivalent
9 product was going to raise but raise only by cash margin
10 would have been relevant to your decision?

11 **A.** No, it wouldn't have bothered me. On Value lines,
12 I would have just -- well, I did just uphold the basket
13 policy.

14 **Q.** Yes. So --

15 **A.** Or increase, you know -- if it increased in Asda, then
16 I would increase my retails accordingly and still be in
17 line with the basket policy.

18 **Q.** Well, you weren't required to go up if Asda went up,
19 were you?

20 **A.** I wasn't required to but, you know, as you pointed out,
21 this is quite a costly exercise so I would have been
22 stupid not to take an opportunity to increase my retails
23 to be competitive in the market.

24 **Q.** At the time, you were competing with Asda, weren't you?

25 **A.** Yes.

1 Q. They were your most important competitor, weren't they?

2 A. For Tesco, yes.

3 Q. If Asda had gone -- I'll put it ... If you were
4 contemplating a price increase for Value lines, the fact
5 that Asda were going to increase but only by cash margin
6 would have been highly relevant material, highly
7 relevant information for your decision as to whether and
8 where to move your Value product prices?

9 A. As I keep telling you, I wasn't contemplating a price --
10 retail price increase on Value lines because I had not
11 had to take a cost price increase on the Value lines
12 because I bought them in a different way and they were
13 from outside the UK, a lot of them.

14 Q. I put to you that Mr Arthey was passing on to you what
15 Asda was going to do on Smart Price as part of a desire
16 to encourage you to stick with the initiative?

17 A. I just ignored it as I did with all the other
18 information of this type.

19 Q. You must have suspected that this information had been
20 passed on to Dairy Crest with Asda's agreement?

21 A. No, I did not.

22 Q. If, as you have indicated a few moments ago, Dairy Crest
23 were not supplying Smart Price to Asda at the time,
24 there was no labelling reason for Asda to have told
25 Dairy Crest this information about Smart Prices?

1 **A.** No, there wouldn't have been, if indeed they did.

2 **Q.** I would also ask you this question. Asda would have
3 been well aware that, if they let Dairy Crest know or
4 understand that their Smart Prices would move, that
5 would circulate amongst all the other retailers?

6 **A.** I can't comment on that.

7 **Q.** You would have known that too at the time?

8 **A.** Known what?

9 **Q.** You would have known that Asda were aware that, if they
10 told Dairy Crest this, it would circulate amongst the
11 others?

12 **A.** I was aware of no such thing.

13 **Q.** Now, can I just ask you some very brief questions about
14 the first part of that email, if I may [Magnum]. This
15 is the spreadsheet and your evidence is that these are
16 merely suggestions as to RSPs if the £200 per tonne
17 increase were to apply; that's right, isn't it?

18 **A.** I believe so, yes.

19 **Q.** But, in fact, Mr Arthey was clearly saying in the email
20 that Asda had in fact made its decision to raise prices
21 because of the words:

22 "I have attached a spreadsheet which shows the
23 suggested rsp's of cheese lines that we supply Asda
24 following the price increase."

25 What I put to you is that that suggests that Asda

1 have accepted that there is going to be a price
2 increase?

3 **A.** That's not how I read it.

4 **Q.** The reason that the retail prices are no more than
5 suggested is because, at that point, he didn't know --
6 this is Neil Arthey -- whether Asda would be increasing
7 on a percentage margin or a cash margin basis. Would
8 you agree with that? On the lines. He didn't know at
9 that time -- he knew Asda were going to go up but he
10 didn't know whether they were going to go percentage or
11 cash?

12 **MISS ROSE:** Sir, again, this witness cannot give evidence
13 about what Mr Arthey knew.

14 **LORD CARLILE:** There must be some substance in that,
15 Mr Morris.

16 **MR MORRIS:** I'm just trying to make sure that -- again, the
17 point about putting. I'm suggesting to the witness --
18 I think, to be fair, actually, Ms Oldershaw's evidence
19 is itself speculating as to what Mr Arthey was doing.
20 She says how she reads this document as being
21 suggesting -- about him suggesting, and I'm testing
22 that.

23 **LORD CARLILE:** I think you can be comfortable that, if
24 anybody does choose to criticise you for not putting
25 something about what was in somebody else's mind, it

1 won't cut a great deal of ice for the Tribunal.

2 **MR MORRIS:** Very well, but a lot of the evidence that
3 Ms Oldershaw gives in her witness statement is itself
4 doing that very thing.

5 **LORD CARLILE:** Of course the nature of the witness statement
6 is in reply, plainly, to questions that were put.

7 **MR MORRIS:** Yes, commentary.

8 **LORD CARLILE:** Commentary.

9 **MR MORRIS:** Commentary, and I'm testing the commentary. But
10 I'm very conscious of the indication you're giving me,
11 sir.

12 **LORD CARLILE:** Thank you.

13 Ms Oldershaw, if we may, we're going to do one more
14 session but I'm proposing to give you a little bit of
15 a break in about five minutes. There are matters I want
16 to raise with counsel. So when I let you have a break,
17 would you mind just leaving the room for about a quarter
18 of an hour, whatever room you're in, and we will deal
19 with other matters, we'll do a bit of housekeeping.

20 **A.** Okay, thank you.

21 **LORD CARLILE:** Carry on.

22 **MR MORRIS:** Can I ask you this question. Leaving to one
23 side what was going on in autumn 2002, I would suggest
24 to you that you did not normally receive this level of
25 detail about what a competitor like Asda was likely to

1 be doing with its future retail prices, did you?

2 **A.** No, but this was a unique situation.

3 **Q.** Yes. Of course I quite understand what you said about
4 the spreadsheets that you're receiving from your
5 processors about your cheeses, that may or may not have
6 been normal; but, obviously, it was a matter of interest
7 to you about what you were going to do with your
8 cheeses. What I'm suggesting to you is it was
9 completely out of the ordinary for you to be receiving
10 a detailed spreadsheet of even suggestive retail prices
11 of one of your competitors?

12 **A.** It was unusual, yes.

13 **Q.** Mr Reeves, in his interview notes, considered that
14 Mr Arthey was telling you an inappropriate level of
15 detail here. Would you agree?

16 **A.** I viewed it as, as I said, a formulaic calculation
17 applied to publicly available information, so I didn't
18 view it as anything more than that, so I didn't feel it
19 was inappropriate because I could have done that myself.

20 **Q.** Now then, we go back to -- or in fact we carry on with
21 the story about Value and Smart Price at document 71
22 [Magnum]. I'm now back in bundle 2 and I hope I may not
23 commit further offences.

24 **LORD CARLILE:** Right. I think we'll give Ms Oldershaw
25 a break now, if we may.

1 Ms Oldershaw, you can have a break for quarter of
2 an hour, all right?

3 **A.** Thank you.

4 **LORD CARLILE:** So would you mind just leaving the room, if
5 that's possible?

6 **A.** Yes.

7 (In the absence of the witness)

8 **LORD CARLILE:** Right, housekeeping time. How are we doing
9 on timetabling, please?

10 **MR MORRIS:** Can I tell you where I am. I'm making good
11 progress. I had envisaged before the end of the day
12 that I might not even get to cheese 2003, and I might
13 get to the beginnings of cheese 2003.

14 The likelihood is that I will -- well, not the
15 likelihood, I will wish to carry on with Ms Oldershaw
16 tomorrow here.

17 **LORD CARLILE:** We have tomorrow morning.

18 **MR MORRIS:** I understand, between 10.00 and 1 o'clock.

19 **LORD CARLILE:** That's right, 10.00 and 1.30.

20 **MR MORRIS:** The position then is that I would wish to
21 cross-examine Mr Scouler on Wednesday, and I would hope,
22 and will strain, to finish him within the day with
23 appropriate indications from the Tribunal as to
24 a willingness or a request on my part that perhaps we
25 start at 10.00 if we can, or even -- and subject to

1 other people's arrangements, carry on a little bit
2 later.

3 **LORD CARLILE:** We can't start at 10.00 on Wednesday, we have
4 to start at 10.30 because one of my colleagues has
5 a long-standing commitment elsewhere.

6 **MR MORRIS:** In the light of that, are you able to give an
7 indication as to the ability of the Tribunal to sit
8 slightly longer on Wednesday?

9 **LORD CARLILE:** Yes, we can't.

10 **MR MORRIS:** Right. In those circumstances, it is possible
11 that I may wish to continue with Mr Scouler for a very
12 limited time on Thursday, and before --

13 **LORD CARLILE:** He can't be here on Thursday.

14 **MR MORRIS:** Well, can I make this point. The timetable for
15 these witnesses, and for these two witnesses, was always
16 going to be four days on the basis that we were --
17 I couldn't tell, but I thought four days would do it, on
18 the basis I was much likely to be much longer with
19 Ms Oldershaw.

20 I will be about two and a half days with
21 Ms Oldershaw but that leaves --

22 **LORD CARLILE:** Just bear with me.

23 We could sit for an extra half hour on Wednesday
24 afternoon, if that helps?

25 **MR MORRIS:** If certainly does help, and I'm very grateful

1 for that indication. But what I am wishing to give
2 advance notification of is that I would -- and it may be
3 that I will not have finished with Mr Scouler on
4 Wednesday, and if we had to run over, and we have to
5 consider his availability, obviously. But what I would
6 say is that the fact that the Wednesday -- sorry,
7 Tuesday is a half day has effectively shortened the time
8 to three and a half rather than four.

9 Obviously, sir, I will do everything I can. I would
10 imagine that some of the time that has been spent so far
11 has been partly a function of the link, the link has
12 been excellent, but there are issues about going to
13 documents.

14 **LORD CARLILE:** Yes, I understand.

15 **MR MORRIS:** So that's my position, and will I do everything
16 I can to finish in that way but would, if need be, ask
17 for some indulgence beyond that.

18 **LORD CARLILE:** Do you have anything to say to that?

19 **MISS ROSE:** I do, sir, yes. This is going to put me in very
20 significant difficulty. As the Tribunal knows, the
21 Tribunal cannot sit a whole day on Friday, it can only
22 sit in the afternoon on Friday, so my day is going to be
23 truncated on Friday.

24 **LORD CARLILE:** Is that right?

25 **MISS ROSE:** My understanding was the Tribunal could not sit

1 a full day on Friday but could only start at lunchtime
2 on Friday. That's what we were told.

3 **LORD CARLILE:** In fact we can -- we would have to check
4 because I obviously don't have a diary.

5 **MISS ROSE:** That's what we were told.

6 **LORD CARLILE:** We need to check that but I think that may be
7 information that has ceased to be relevant, if you see
8 what I mean.

9 **MISS ROSE:** I've made it clear -- you'll recall way back,
10 many weeks ago, that there was an issue about length of
11 openings because there was a day that the Tribunal
12 couldn't sit, and I had originally wanted to open the
13 case for two days. The Tribunal requested that we
14 should shorten the time period to one and a half days.

15 The point that I made then was that I would leave
16 the bulk of the law to my closing submissions and that,
17 on that basis, I'd take two days to close the case and
18 a day and a half to open the case. That's the basis on
19 which I've been proceeding.

20 **LORD CARLILE:** You'll have your time to close the case,
21 Miss Rose.

22 **MISS ROSE:** Sir, what is troubling me is this: we've just
23 been told, on the basis that the Tribunal couldn't sit
24 late on Wednesday, Mr Morris said he might need to go
25 over for a very limited time on Thursday. Then he's

1 been told the Tribunal can sit late on Wednesday and yet
2 he says he still wants time on Thursday.

3 Now, that prejudices me in two ways. First of all,
4 it may make it impossible for me to finish my closing
5 submissions on the Thursday and Friday. Secondly, it
6 means that I have to start my closing submissions in
7 a situation where evidence is still being given
8 immediately before them rather than the day before.

9 Now, sir, in my submission, it's simply unfair for
10 us to proceed in this way. It was always on the basis
11 that there would be a seven-day period for evidence that
12 would finish on the Wednesday and that the closing
13 submissions would start on the Thursday morning.

14 Mr Morris has, with respect to him, not stinted in
15 asking his questions, he's asked some questions about
16 five or six times of this witness and got the same
17 answer every time. He has not put himself under any
18 time discipline at all and, in my submission, it's
19 simply not fair for him to be entitled to continue to
20 take as much time as he pleases with the result that
21 I am prejudiced in the delivery of my closing
22 submissions.

23 **LORD CARLILE:** If we were able to sit on Friday morning --

24 **MISS ROSE:** That would mean I would get the full two days.

25 **LORD CARLILE:** -- would counsel be available?

1 **MISS ROSE:** Sir, I am available.

2 **MR MORRIS:** I was assuming that Friday was going to happen
3 anyway.

4 **LORD CARLILE:** You would be available?

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

6 **LORD CARLILE:** We'll need to look at our diaries outside.
7 I have a feeling that originally Friday morning was
8 a date I was not available but I'm almost certain that
9 that problem has evaporated.

10 **MISS ROSE:** Sir, I'm very happy to hear it because it was
11 causing me concern.

12 **LORD CARLILE:** We will check in a minute.

13 **MISS ROSE:** That would still then leave me with the two days
14 that I asked for and that I was told I would be
15 allocated.

16 **MR MORRIS:** Sir, may I make an observation?

17 **LORD CARLILE:** Yes, please do.

18 **MR MORRIS:** There has been and had to be a deal of
19 flexibility in this matter, not least because of all
20 this, and everybody has been endeavouring to be
21 flexible. The basic position has always been
22 essentially four days allocated for these witnesses.
23 I will do my best to squeeze it into three and a half.
24 If I run over into the Thursday for an hour, I would
25 suggest that Miss Rose's time can be adequately

1 compensated for, if need be, in some other way by, if
2 need be, letting her finish her closing on the following
3 Monday for an hour or whatever.

4 I would suggest -- I wanted to inform you about the
5 position and what I'm doing -- that we can and we should
6 see how we go. I am not going to object when Miss Rose
7 gets to the end of Friday and she hasn't had her full
8 number of hours and say, no, she can't carry on.

9 **LORD CARLILE:** If I may say so, I think compared with other
10 jurisdictions I'm familiar with, we've kept so close to
11 timetable that people elsewhere would be scratching
12 their heads in disbelief. So I think, although counsel
13 inevitably ask the same question on more than one
14 occasion, wherever we are, we have actually done quite
15 well on timetable.

16 We'll go out now, we'll resume at about noon, and
17 we'll just have a glance at our diaries to deal with
18 Friday.

19 You will have your two days, don't worry, Miss Rose.

20 **MISS ROSE:** Sir, there is also the problem of being required
21 to start the closing submissions immediately upon the
22 finishing of the evidence without any time to consider
23 the implications.

24 **LORD CARLILE:** But if we have a bit of Mr Scouler left over,
25 I can't imagine that's going to disadvantage you unduly.

1 Q. Yes.

2 A. Yes.

3 Q. To the extent that McLelland were supplying Tesco own
4 label lines, they are included in the sentence below,
5 "all own label lines"? I'm distinguishing between --

6 A. Yes, an example would be Tesco Scottish Caledonian.

7 Q. Yes, thank you. If you go to paragraph 119 of your
8 witness statement [Magnum], this is dealing with that
9 email and I believe that sentence. What you say at
10 paragraph 119, and I'll just wait for the Tribunal to
11 catch up.

12 **LORD CARLILE:** We have.

13 **MR MORRIS:** I'm grateful. You say:

14 "As can be seen from exhibit LO/1, tab 30 [and I'm
15 going to take you to that in a moment] the information
16 on Tesco's system indicates that the retail prices of
17 some but not all Tesco random weight products supplied
18 by McLelland did change between 9 and 16 October."

19 That's what you say there. You say that because of
20 what is said in the email to which I've taken you about
21 random weight McLelland lines, because you're explaining
22 that those McLelland random weight lines that are
23 referred to in the email did move between 9 and
24 16 November, that's right, isn't it?

25 A. Can I go to tab 30, please, to refresh?

1 Q. Well, more than refresh, that's why -- it's a very short
2 question really. If you look at tab 30 within that
3 bundle, within your witness statement bundle [Magnum].
4 I believe, I may be wrong, that this document is not
5 actually in the document bundle. So if you go to the
6 witness statement bundle, 2A, and you go to
7 Ms Oldershaw's statement, pink 2A.

8 **LORD CARLILE:** Section?

9 **MR MORRIS:** It's section J, this is Ms Oldershaw's
10 statement, and then we have all these tabs which are all
11 the documents. It's tab 30 behind the witness
12 statement. You should see a landscape table. Yes,
13 I think the Tribunal -- do you have that table now?

14 **A.** Yes, sorry, yes, I have.

15 **Q.** Ms Oldershaw, I'm just waiting for the Tribunal to get
16 it -- I think they've got the table now.

17 **LORD CARLILE:** We will have in a moment.

18 **MR MORRIS:** My question for you, have a look at that table,
19 is this. That table of products has nothing to do with
20 McLelland branded random weight lines supplied by
21 McLelland to Tesco, that's right, isn't it?

22 **A.** Yes, there's none of those lines on there.

23 **Q.** All these products are products -- these are all Tesco
24 Value lines packed by Kerrygold?

25 **A.** Yes.

1 Q. Packed by Kerrygold? I can establish that if I go to
2 document 64, I'd rather not but I will if need be.

3 A. McLelland did pack some Value lines but I can't recall
4 the exact date.

5 Q. Yes, they may have supplied the cheese, but I'm
6 suggesting to you that these Value lines were packed by
7 Kerrygold and that they were -- well, first of all, they
8 were plainly not McLelland branded lines, that you
9 accept?

10 A. Yes.

11 Q. And I'm suggesting to you that, in fact, there may have
12 been -- these are Kerrygold lines as can be established
13 by document 64. Now, my question for you is this, if
14 you go back -- are you going to document 64,
15 Ms Oldershaw?

16 A. I am, yes.

17 Q. Let's all do that very quickly, shall we? If you go to
18 page 17 after the blue divider, I haven't got the number
19 but I'm sure we can match the numbers. They do match
20 actually. If you go to page 17 [Magnum], past the blue
21 divider, the heading is "SGF51KA pre-pack cheddar mild",
22 are you with me?

23 A. Yes, I am, yes.

24 Q. You'll see the first six lines, I think the numbers
25 match and those are Tesco Value mild white, Tesco Value

1 mild coloured, and I think those are the lines which are
2 in tab 30, they are all supplied by Kerrygold?

3 **A.** Yes, I'm just double-checking because at a point, and
4 I can't recall what point, McLelland did pack some Value
5 cheddar that they supplied but obviously not at this
6 point.

7 **Q.** Thank you.

8 **A.** That's why I'm checking.

9 **Q.** If you then go back to your witness statement, and this
10 is, I hope, the end of the question, or the last bit of
11 the question, then back into the main bit of tab J, and
12 just to remind you, at paragraph 119 [Magnum]. My
13 proposition is this, that the information at tab 30 that
14 we've just seen had nothing to do with Tesco branded
15 random weight products, did it? I'm looking at 119.

16 **A.** Not branded, no.

17 **Q.** Can I ask you this, can you explain why in paragraph 119
18 you were referring to the information in tab 30 at all?

19 **A.** Because I've clearly got mistaken of when McLelland did
20 pack Value lines.

21 **Q.** Can I now ask you to put volume 1 away, document
22 bundle 1 away, and go to document bundle 2, and the
23 first document, document 71 [Magnum]. You will probably
24 need your witness statement open as well which I'll take
25 you to in a moment.

1 If we go to this, this is an email from Tom Ferguson
2 on 5 November to Sarah Mackenzie:

3 "Hi Sarah

4 "Completed details for period seven..."

5 Then the next bit below what looks like the
6 spreadsheet attachment:

7 "A quick update on the generic cheddar area, Asda
8 have moved all [lines] of Smart Price mild cheddar to
9 £2.69 per kilo and Smart Price mature cheddar to £3.69
10 per kilo. This will be matched by Tesco."

11 **LORD CARLILE:** Sorry, I'm on the wrong document, I do
12 apologise. 71, I was on 71A.

13 Okay, thank you, I'm there.

14 **MR MORRIS:** If you then also perhaps would go to
15 paragraph 124 of your witness statement [Magnum], you
16 say:

17 "I'm not sure whether I had told McLelland the new
18 retail prices for these random weight products by
19 5 November. If Tom Ferguson had received this
20 information from me by the 5th it was certainly not with
21 the intention that he should pass this information to
22 Sainsbury's or with any foresight that he would do so.
23 Even if he had not received this information, he was
24 familiar with the principles of Tesco's price basket
25 policy and would have known that I would have to lower

1 my retail prices to match Asda's for products where they
2 were cheaper, so he could easily have made this
3 observation based on knowledge of the market."

4 The first proposition I'm going to put to you is
5 that you there accept that it is quite possible that it
6 was you who had told Mr Ferguson about Tesco's decision
7 to match its prices for Value with Asda's prices for
8 Smart Price, that's right, isn't it?

9 **A.** It says random weight product, it doesn't say Value.

10 **Q.** Sorry, if I may go back. This section is dealing
11 with -- if you go back to 121 [Magnum], we are talking
12 about that very email, or you are talking about that
13 very email. As I understand what you're saying, in 124,
14 you are referring to -- when you say "these random
15 weight products", you're talking about the Tesco Value
16 products?

17 You may want to take a moment just to read 121 to
18 124 through to yourself, just to make sure that we're
19 speaking on the same -- I was going to say wavelength
20 but page perhaps.

21 **A.** Well, I wouldn't have told McLelland the new retail
22 prices of Tesco Value if they weren't packing it.

23 **Q.** Right, you're saying "I'm not sure whether I had. If
24 this information -- if they had received this
25 information from me, it was certainly not the

1 intention". What I'm putting to you is that you
2 recognise your evidence at the time you drafted this
3 witness statement was that you recognised that one
4 possible source for this information that Tom Ferguson
5 had about Value would have been you?

6 **A.** Tom will have seen, from how I reacted to retail price
7 increases in the past, that I would most probably --
8 well, certainly in this situation I would definitely
9 match the Asda retail price in store.

10 **Q.** So your evidence now is that you didn't tell him this
11 information?

12 **A.** My evidence is the same. I'm not sure but I believe
13 I didn't, no, because he didn't pack Value lines.

14 **Q.** Well, with respect, that's a different explanation, but
15 we have your answer. I'm putting to you that you
16 accepted there that it was possible that it had been you
17 but now you're saying that it's not possible?

18 **A.** It wouldn't have been possible, I would not -- if he
19 didn't pack the line, I would not have given him the
20 retail for that line.

21 **Q.** Fine. The other possible explanation that you put
22 forward in your witness statement is that Mr Ferguson is
23 making his observation about Tesco matching on the basis
24 of Tesco's basket policy, that's right, isn't it?
25 That's what you say?

1 **A.** Yes.

2 **Q.** But that explanation doesn't stand up, and I'll put it
3 to you this way. The basket policy did not require
4 Tesco to increase its prices in order to match Asda's
5 prices, did it?

6 **A.** No, it didn't.

7 **Q.** When you were matching Asda's prices, in respect of some
8 of the lines you did increase your prices? Large mild
9 Value cheddar, you increased your prices, didn't you?

10 **A.** To match the Asda in-store price, yes. I also decreased
11 some and realigned other pack sizes.

12 **Q.** Yes, that's true, that in some cases you decreased to
13 match and in some cases you increased to match?

14 **A.** This was not out of line with the basket policy. It
15 wasn't specified in the basket policy, I wasn't breaking
16 any policy guidelines by matching the price.

17 **Q.** Ms Oldershaw, I wasn't remotely suggesting that you were
18 breaking any guidelines. What I was suggesting --

19 **A.** I'm talking about Tesco guidelines.

20 **Q.** What I was suggesting to you is that knowledge of your
21 basket policy would not inform the person with that
22 knowledge of what you would do if Asda raised its
23 prices?

24 **A.** Tom would know from his dealings with Tesco and other
25 retailers that, as you pointed out before, Value is or

1 Smart Price is a line that everybody watches each other
2 for. Everybody will be at the same price for that line
3 so I just realigned my prices to match the Asda in-store
4 price, and Tom would have known that would have
5 happened.

6 **Q.** I would suggest to you that because Value is such an
7 important product, that in certain circumstances it
8 would be in Tesco's interest to stay lower than
9 Smart Price?

10 **A.** But that wouldn't happen because Asda would lower their
11 price to match the lower price in the market, and
12 I would miss an opportunity to make more margin.

13 **Q.** I would suggest to you that, in fact, it was common for
14 retailers to undercut each other or seek to undercut
15 each other on these economy lines.

16 **A.** And the undercutting would last for perhaps a day or
17 two. Those lines were realigned pretty quickly.

18 **Q.** Realigned downwards?

19 **A.** Any way. Everyone had to be competitive.

20 **Q.** Yes, but if you stayed lower to seek to gain advantage,
21 you wouldn't then, once you got your two days' benefit,
22 suddenly decide "Oh, I had better go up". What would
23 happen is that Asda would come back down.

24 **A.** They would, Asda would come back down, yes.

25 **Q.** Exactly, and the point I'm making to you is I'm asking

1 you the question about whether it would be obvious that,
2 in that situation whereas Asda turned out to be higher,
3 you would go up, and I'm suggesting to you that it was
4 anything but obvious?

5 **A.** It would have been obvious. Why would I have turned
6 down the opportunity, the percentage margin hungry
7 buyer, why would I have declined an opportunity to make
8 more margin when by simply matching an Asda price on
9 a competitive line, I could achieve that?

10 **Q.** I don't wish to engage in debate with you, but I would
11 suggest to you that you would do that because it was
12 20 per cent of your business and it would be an
13 opportunity, given that Asda and Tesco were so fiercely
14 competitive, it gave you a volume benefit. And
15 indeed -- well, I'll let you answer that question.
16 I would suggest that you would do that because it would
17 give you a volume benefit?

18 **A.** It would not.

19 **Q.** In this email that we're looking at, I hope not for much
20 longer, Mr Ferguson says "This will be matched by
21 Tesco", doesn't he?

22 **A.** Yes, it does.

23 **Q.** I would suggest to you that he's not speculating?

24 **A.** He was speculating, but he was doing it with knowledge
25 that I would never turn down a margin opportunity if it

1 was handed to me so clearly.

2 Q. I suggest that the definitive manner in which he states
3 this indicates that he had got this information from
4 you?

5 A. He had not.

6 Q. As you accepted a few moments ago, Tesco didn't pack --
7 sorry, McLelland didn't supply Tesco Value cheeses at
8 the time; that's right, isn't it? We've established
9 that?

10 A. As a packed product. As a packed product, yes.

11 Q. So there was no need for you to tell Mr Ferguson of your
12 future retail prices for labelling purposes?

13 A. No, and therefore he would not have them.

14 Q. Yes, and I might suggest that that is why what you're
15 now saying, because you've seen what there is, is
16 different from what you say in paragraph 124 of your
17 witness statement [Magnum]?

18 A. I don't believe it's different.

19 Q. Well, now you're saying you didn't give this
20 information, and at paragraph 124 you're saying, "I'm
21 not sure whether I did or not".

22 A. In my witness statement, I think we've established that
23 I was confused about the packing date of McLelland's
24 packing Value lines, and it's clearly shown from my
25 spreadsheet of cost prices and retail £200 per tonne

1 that, at that time, they clearly didn't supply Value
2 cheeses. Therefore, they would not have -- I would not
3 have given them the retail price of cheese as I went off
4 the spreadsheet.

5 **LORD CARLILE:** I'm getting a strong feeling we're about to
6 move to the next document.

7 **MR MORRIS:** I'm getting that strong feeling as well.

8 I do have to ask a couple more questions -- to put
9 to the witness on this.

10 I suggest to you that in this email -- this email
11 evidences that you were giving more information to
12 Mr Ferguson about Tesco's pricing intentions at a time
13 when you knew Mr Ferguson was acting as a middleman for
14 the passing of information to and fro between retailers?

15 **A.** That is not true.

16 **Q.** You had also received concrete information from
17 Mr Arthey about Asda's Smart Price, hadn't you?

18 **A.** That is not true either.

19 **Q.** The information that you received about Asda and Asda's
20 Smart Price was useful information for you to know what
21 you were going to do with your Value lines?

22 **A.** It wasn't. As I've told you before, I was not under
23 pressure for Value lines. I simply saw what was
24 happening in Asda stores and matched the prices
25 accordingly.

1 Q. I suggest that you knew or must have suspected that
2 Mr Ferguson would pass on what you had said about
3 Tesco Value lines?

4 A. I didn't, no.

5 Q. Can we move now to the period after 8 November, and can
6 I just seek to establish this. You will recall from
7 document 62 [Magnum], and I really would prefer not to
8 go back there, but I'm reminded that the email from
9 Mr Ferguson on 29 October tells you that he would prefer
10 to go with McLelland branded random weight in the week
11 beginning 11 November, you remember that?

12 A. Yes.

13 Q. What I'm going to suggest to you is that the planned
14 moves for 11 November took place -- your planned moves,
15 I'm not talking about anybody else, but you had planned
16 moves for 11 November. I'm going to show it to you in
17 a moment, that those planned moves, particularly in
18 relation to McLelland random weight, took place.

19 If you go to tab 82 [Magnum], you will see an email
20 there from Stuart Meikle to David Storey on the 13th.
21 It's within the week of the 11th, which is your second
22 wave, and you'll see a sentence there, I hope you're
23 with me, Ms Oldershaw:

24 "Please find attached updated retail price check.

25 "All McLelland random weight brands have moved to

1 increased retail prices in Tesco & Safeway..."

2 So we can see there that that happened?

3 **A.** Yes.

4 **Q.** If you then perhaps go back to document 78 [Magnum],
5 this is an email on 7 November from Tom Ferguson to you:

6 "Hi Lisa

7 "Time marches on. Guess who goes on holiday now
8 until Tuesday next week. I will be out of the office
9 now until Tuesday and we need to confirm the new retails
10 for packing on Monday the 11th for supply [on] the
11 17th."

12 Now, that request relates to your precise RSPs for
13 the 17 November deadline for Tesco own label that
14 McLelland was supplying. So we've moved now from
15 McLelland branded random weight to McLelland Tesco own
16 label random weight; that's right, isn't it? So he's
17 pressing you for the wave of the 17th for the prices for
18 packing.

19 **A.** Yes.

20 **Q.** If we then go to document 79 [Magnum], which is the next
21 day, and let me read it. This is an email from
22 Jim McGregor to Alastair Irvine and Tom Ferguson
23 recording a phone call you had had with Jim:

24 "Lisa called to state Tesco will not commit to
25 moving own brand..."

1 Can I pause there. The "own brand" there is
2 a reference to what I call own label. That's
3 McLelland-supplied Tesco own label.

4 "... until they see that Asda have moved and
5 therefore will not give us their rsps. While they are
6 relatively confident that everything is in place with
7 Asda, they are taking a 'we won't believe it until we
8 see it' stance."

9 It appears from that email that in your conversation
10 you told Jim McGregor that you weren't going to commit
11 on Tesco own label until you could see that Asda had
12 moved?

13 **A.** I probably wanted to hold off changing my retails until
14 I saw what was out there in the Asda store. It didn't
15 change the fact that they had their cost price increase.

16 **Q.** Can I ask the question again, do you agree that in your
17 conversation with Mr McGregor, you told Mr McGregor that
18 you were not going to commit on Tesco own label until
19 you could see that Asda had moved?

20 **A.** I believe I told him I would wait to see what was in
21 Asda stores before deciding where I would set my
22 retails.

23 **Q.** Then you also said that you were relatively confident
24 that everything was in place but you were taking a "we
25 won't believe it until we see it" stance? Do you agree

1 with that statement, that you said that?

2 **A.** Confident -- no, I didn't say that.

3 **Q.** Well, you, I think, accept that you have no recollection
4 of that conversation?

5 **A.** It's something I would never have said.

6 **Q.** Which bit? The "relatively confident" or the "we
7 won't --"

8 **A.** "I'm confident that" -- I would never say "I'm confident
9 that everything is in place with Asda"; confident of
10 what?

11 **Q.** I think it's the case --

12 **A.** "We won't believe it until we see it", you know, he may
13 have been referring to I often asked suppliers to
14 provide me till receipts for in-store prices of Asda and
15 JS. So I would wait for a till receipt on the price and
16 then I would decide on my retail price.

17 **Q.** So you're saying that Mr McGregor's account of your
18 conversation in this email, recorded presumably on the
19 day, was not what -- is not an accurate record of what
20 you had said?

21 **A.** Yes.

22 **Q.** What I'm suggesting is that you would have said
23 something like the following, "It looks like Asda is
24 complying with the initiative but we need to be sure"?

25 **A.** Well, I didn't.

1 Q. In this conversation, I'm suggesting to you that he,
2 Mr McGregor, told you what he knew about Asda. It's
3 likely, isn't it?

4 A. I don't recall. I don't recall talking to Jim McGregor
5 about any other retailers.

6 Q. So now you're saying that Asda wasn't even mentioned in
7 this conversation, are you?

8 A. I can't recall.

9 Q. If you look at this rogue document, 70 [Magnum], if you
10 go back to document 70, which is in bundle 1 -- I keep
11 saying it's the last time but I'm completely unreliable
12 in this regard. I just want to explore, Ms Oldershaw,
13 what Mr McGregor knew at the time of your conversation
14 with him on the 8th.

15 If you go down to 70, this is a bit we haven't
16 looked at before so at least I can say that, if you go
17 three quarters of the way down, Stuart Meikle is writing
18 to the Co-op saying:

19 "What I believe will happen elsewhere is -"

20 And then we look at the Asda line, not the Tesco
21 line, we've looked at the Tesco line before but let's
22 look at the Asda line. He says:

23 "What I believe will happen elsewhere is -"

24 "Asda"

25 "4/11/02 moved on Seriously Strong, McLelland random"

1 weight[s] ...

2 "11/11/02 will move all deli lines and pre-pack own
3 label."

4 We can see from that piece of paper that that
5 information was forwarded to Mr McGregor on the next
6 day. Do you see that?

7 **A.** Yes.

8 **Q.** So what I'm suggesting to you is that, at the time that
9 you spoke to Mr McGregor, Mr McGregor had information
10 about Asda and its pre-pack own label lines, that they'd
11 move on the 11th?

12 **A.** And the question is?

13 **Q.** The question is, given that he knew what Asda were
14 doing, he would have -- he gave you that information in
15 the course of that conversation you had on 8 November?

16 **A.** If he had I would have treated it, like anything else,
17 as the blanket falseness, especially coming from
18 Jim McGregor who inspired no confidence in me
19 whatsoever.

20 **Q.** In fact, at paragraph 127 of your witness statement
21 [Magnum], which you probably have open, you say:

22 "I don't recall the conversation in detail [this is
23 line 3, paragraph 127], in particular I don't recall any
24 discussions about Asda. Jim may have said something
25 about Asda being likely to move soon which I would have

1 treated as just more of the usual bluff and bluster."

2 That's your evidence?

3 A. Yes.

4 Q. I suggest to you that when you say he would have said
5 something about Asda, he would have said "Asda are
6 likely to move in accordance with the overall scheme"?

7 A. There wasn't an overall scheme.

8 Q. In line with the nationwide or national 2p per litre
9 initiative that all retailers were going to join in
10 with?

11 A. There wasn't -- yes, for cost price, yes.

12 Q. In that email at tab 79 in volume 2 [Magnum], what you
13 were talking about was Asda's retail prices, wasn't it?
14 If you go back to 79, you were talking there about
15 Asda's retail prices, or he was at least.

16 A. No, I was talking to Jim that I would not commit Tesco's
17 retail prices at that time. I wasn't ready to give him
18 my retail prices.

19 Q. Yes, but when it says:

20 "... until they see that Asda have moved..."

21 And then:

22 "We won't believe it until we see it..."

23 The reference to seeing the move must be a reference
24 to seeing Asda's retail prices? It's not cost prices?

25 A. Yes, I would never be able to see a retailer's cost

1 price and I'd only be able to see their retail once
2 they're out in store.

3 Q. I put to you that this was -- this information about
4 Asda was serious and detailed factual information about
5 Asda, do you agree with that?

6 A. What information about Asda?

7 Q. What he told you that Asda were going to be doing?

8 A. I don't recall he told me that Asda would do anything.

9 Q. You've just accepted that he would have mentioned they
10 were likely to move but you said it was just more of the
11 usual bluff and bluster?

12 A. Yes, so there wasn't any definite information.

13 **MISS ROSE:** Sir, again, that question has been put on
14 a false premise. The witness did not accept that he had
15 said that. She said that, if he had, she would have
16 taken it as more bluff and bluster.

17 **MR MORRIS:** No, that's not quite correct. Paragraph 127
18 [Magnum]:

19 "Jim may have said some something about Asda being
20 likely to move soon."

21 It doesn't say -- didn't say anything, "But if he
22 had it would have been".

23 You accept -- I'm just trying to put to the point
24 about -- your suggestion that it's bluff and bluster,
25 I'm putting to you that it wasn't bluff and bluster,

1 that this was serious information which had been
2 received from Asda and passed on by Stuart Meikle to
3 Jim McGregor and then passed on by Jim McGregor to you?

4 **A.** I don't accept that.

5 **Q.** At the time you were fully aware of the Dairy Crest
6 briefing document, which we looked at, it seems like
7 a long time ago now, but on Friday, won't you?

8 **A.** Yes, as I confirmed, I received that document, yes.

9 **Q.** And the fact that it was an industry-wide proposal?

10 **A.** For cost price increases, yes.

11 **Q.** You were also aware that it would have been sent to
12 Asda?

13 **A.** I suspect it had been sent to the major retailers, yes.

14 **Q.** And I'm suggesting to you that you knew at the time that
15 Asda had consciously let this information about its
16 planned moves out to the processors so that it would be
17 passed on?

18 **A.** I knew nothing of the kind.

19 **Q.** At paragraph 127 of your witness statement, you say,
20 last sentence [Magnum]:

21 "I was still negotiating the timing of the cost
22 price increase for these lines."

23 That's not true, is it? I probably -- I got
24 distracted.

25 You say at paragraph 127, we're now at 8 November:

1 "I was still negotiating the timing of the cost
2 price increase for these lines."

3 That's not true, is it?

4 **A.** I must have been. I can't recall but if it's in my
5 statement I'll stand by that.

6 **Q.** The cost price increase, you have accepted that the
7 timing of the cost price increase, you had decided and
8 you had told all the processors that you were going to
9 move cost price increases on the 18th for own label;
10 that's right, isn't it?

11 **A.** It's right according to my document on the 30th of --
12 I can't remember the month, but you know the document,
13 the £200 per tonne plan, but things may have changed
14 since then.

15 **Q.** Okay. What happened in your call with Jim McGregor was
16 that -- well, let's go back. We've seen that you
17 started to get nervous about Asda going through on
18 7 November -- well, you were holding back giving your
19 prices, your retail prices on the 7th, and what you did
20 in your call on the 8th was indicate that Tesco was
21 willing to move if Asda moved; that's right, isn't it?
22 That's what that is --

23 **A.** No. No, that's not what that is.

24 **Q.** Your statement that Tesco would increase if Asda
25 increased was not a statement of the obvious?

1 **A.** That's not what I said. I didn't say if Asda increase,
2 I'll increase.

3 **Q.** You were indicating to McLelland and to Mr Ferguson that
4 you would move up if Asda moved up?

5 **A.** That's not what I said. I said I wanted to see where
6 the market settled and then I would make my decision
7 from there.

8 **Q.** Well, I would suggest the statement, "We won't believe
9 it until we see it", is an indication that you would
10 move up once you saw it; is that not a fair --

11 **A.** That's Jim's email.

12 **Q.** Okay. Now, the position after 8 November was that the
13 moves planned for 11 November did go ahead but you
14 needed persuading on the moves on Tesco own label
15 scheduled for the 18th.

16 Just give me a moment.

17 Is that right? Do you agree that the position after
18 the 8th was that the moves planned for the 11th did go
19 ahead, but you needed more persuasion on the moves of
20 Tesco own label scheduled for the 18th?

21 **A.** Can you point me in the right direction of the document,
22 please, or a part of my statement?

23 **Q.** Well, I've already dealt with the fact that you went
24 ahead on the 11th. Yes, if you go to document 80
25 [Magnum], we're now on the 12th and I'm beginning to

1 lose -- that's a Tuesday. This is a Tom Ferguson
2 internal email and it is headed "Tesco Own Label
3 Cheddar".

4 Just to remind ourselves, that's what was originally
5 planned to go in your third wave on 18 November. What
6 he says is:

7 "Dialogue is still continuing with Tesco regarding
8 the market movement... As of today, Tesco have not
9 confirmed any movement on retails and the likely outcome
10 of this is that we could have the confirmation by the
11 end of the week."

12 That indicates that you, at that stage, had not
13 confirmed that you were going to go up on Tesco own
14 label?

15 **A.** It confirmed that I hadn't given McLellands the retails
16 for those products, yes.

17 **Q.** I would suggest to you that, by this date, and given the
18 fact that they would only get confirmation by the end of
19 the week, it was now too late to go ahead with the own
20 label moves on 17 November in store?

21 **A.** It depended how much stock they had and, as you
22 confirmed before, I told them quite early on about moves
23 on the 18th so they should have managed their stock
24 quite tightly.

25 **Q.** But you said that you told them nothing about retails

1 early on?

2 **A.** No, I told them about the cost price moves. I didn't
3 give them specific retails but obviously they knew that
4 there would be some changes.

5 **Q.** But it would be fair to say that the position is that,
6 between 8 and 12 November, McLelland were trying to
7 persuade you to move up on your own label products?

8 **A.** They were asking me for new retails for those products.

9 **Q.** Yes, and the fact that the capital letters are "have not
10 confirmed", and the fact that we've seen the problem in
11 document 78 [Magnum] about "Lisa called to state that
12 not moving", indicates, I would suggest, that McLelland
13 were seeking to persuade you, I'll put it, to move up on
14 your own label products. They were concerned that you
15 were not doing so?

16 **LORD CARLILE:** Do you agree with that, Ms Oldershaw?

17 **A.** This email reads that they want to know if there's
18 a retail change so they can manage their stocks. So,
19 yes, their stocks were -- it looks like their stocks
20 were low and they were keen to get a new retail price so
21 they could pack product.

22 **Q.** They weren't just keen for that, they were keen because
23 they wanted the two -- the whole initiative to work and
24 to be completed, didn't they?

25 **A.** They wanted their cost price increase so they could

1 increase their payment on milk to farmers.

2 **Q.** Yes, and we'll see in a moment when we get to the
3 documents, when the process is completed, that
4 essentially Tom Ferguson goes, "Phew, that's now done".
5 He was concerned -- it's an odd question but I'll come
6 to it -- that they wanted to get the whole thing
7 completed so that they could commit to their
8 2p per litre increase on milk to the farmers?

9 **A.** Yes.

10 **Q.** Yes.

11 Now, if you go to document 83 [Magnum], this is an
12 email, internal email of Dairy Crest's of 13 November,
13 and the first piece of information is that -- I'm sorry,
14 Asda, I apologise. Thank you. Everybody chimed at the
15 same time. It confirms -- the second half of this page
16 is from David Storey, 13 November, and you'll see there
17 that, on Smart Price, by that time, Tesco have moved RSP
18 in line with Asda on all packs, so by that time you have
19 moved Value by 11 November, well, in the week
20 commencing --

21 **A.** 13th.

22 **Q.** Well, the 13th, but in the week commencing -- you would
23 agree with that?

24 **A.** Yes, that's what the email says.

25 **Q.** Then on own label:

1 "Tesco have commenced phasing-in. No evidence yet
2 in."

3 Then we look at stilton where it says:

4 "Asda has not yet applied any increase, all have
5 moved except Kwik Save."

6 So I would suggest that "all have moved except
7 Kwik Save" indicates that you have moved on stilton by
8 then, moved up?

9 **A.** Yes, probably.

10 **Q.** And then over the page it says:

11 "NB, others have indicated will move back down
12 unless we [that's Asda] follow due to moving two weeks
13 ago."

14 Given the rest of that email, and the fact that it
15 contains information about Tesco, that email -- the
16 "others" that "have indicated" includes Tesco. It must
17 do?

18 **MISS ROSE:** Sir, again, this witness --

19 **A.** It might do.

20 **MISS ROSE:** This witness cannot give evidence about the
21 meaning of this email written by David Storey of Asda
22 and circulated internally and not seen by her at the
23 time.

24 If Mr Morris wants to make submissions about it, he
25 is of course free to do so, but this witness' opinion of

1 what Mr Storey meant is of no relevance to this
2 Tribunal.

3 **MR MORRIS:** If I may make a submission in return, in
4 response. So that means, does it, that we can ignore
5 completely paragraphs 129 and 130 of Ms Oldershaw's
6 witness statement [Magnum]?

7 **LORD CARLILE:** Well, I think put your proposition as
8 directly as you can, please.

9 **MR MORRIS:** I will, but the proposition that I'm not
10 entitled to cross-examine on matters to which she has
11 given evidence is, with respect, an unsound one.

12 In your witness statement you say that you had no
13 reason to discuss stilton with Dairy Crest or McLelland
14 because neither of them supplied it to you, you say
15 that, don't you?

16 **A.** Correct, yes.

17 **Q.** I'm going to suggest to you that you had every reason to
18 make this sort of comment because, at that point, you
19 were concerned about Asda's compliance with the overall
20 scheme and you wished to put pressure on Asda to
21 participate?

22 **A.** That's not true.

23 **Q.** The reason you gave information about what you would do
24 on stilton was to give confidence to the other players
25 that you would participate?

1 **A.** That's not true, I didn't give any information -- what
2 is actually stated there does outline the Tesco price
3 basket policy of being out of line for two weeks, which
4 we've already established that suppliers were well aware
5 of the price basket policy at Tesco.

6 **Q.** Your evidence is that you gave no such indication?

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

8 **LORD CARLILE:** I think it's about midnight, isn't it, where
9 you are?

10 **A.** It feels it, yes.

11 **LORD CARLILE:** I can see that you're getting tired so
12 I think we'll let Ms Oldershaw go in a moment.

13 **MR MORRIS:** Well, yes, that might be actually -- because
14 I've dealt with the specific -- I've virtually finished
15 cheese 2002 and I think that that may be a convenient
16 moment. There are -- well, I'm in your hands, sir, and
17 your assessment of where we are with the witness.
18 I could go on for another five minutes to complete the
19 document.

20 **LORD CARLILE:** I detect that the witness is quite tired.

21 Could you be back, I think it's at 9 o'clock
22 tomorrow evening your time, which is 10 o'clock our time
23 tomorrow morning?

24 **A.** I can, yes.

25 **LORD CARLILE:** So could you be prepared to go on from

1 9 o'clock tomorrow evening until maybe half past
2 midnight? Have a lie in if your small child will allow
3 you to.

4 **A.** He won't!

5 **LORD CARLILE:** Well, there we are.

6 You can leave now, please, Ms Oldershaw. We may do
7 a little bit of housekeeping yet.

8 Right, so we'll sit at 10 o'clock here tomorrow
9 morning and we'll sit, if we have to, until about 1.30.

10 Anything else anyone wants to raise?

11 **MISS ROSE:** Did you manage to ascertain --

12 **LORD CARLILE:** Friday morning we will sit. We will sit all
13 day Friday.

14 **MR MORRIS:** I'm grateful, sir.

15 **LORD CARLILE:** Thank you for reminding me about that.

16 Good, thank you.

17 (1.00 pm)

18 (The hearing adjourned until
19 Tuesday, 22 May 2012 at 10.00 am)

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