Neutral citation [2004] CAT 16

**IN THE COMPETITION APPEAL TRIBUNAL**

Case: 1008/2/1/02

Victoria House
Bloomsbury Place
London WC1A 2EB

24 September 2004

Before:

Sir Christopher Bellamy (President)
Mr. Peter Clayton
Mr. Peter Grant-Hutchison

BETWEEN:

**(1) CLAYMORE DAIRIES LIMITED**
**(2) ARLA FOODS UK PLC**

Appellants

-v-

**OFFICE OF FAIR TRADING**

Respondent

-supported by-

**(1) ROBERT WISEMAN DAIRIES PLC**
**(2) ROBERT WISEMAN AND SONS LTD**

Interveners

Mr. Nicholas Green QC and, at the hearing of 24 May 2004, Mr. Ben Tidswell and Mr. Euan Burrows (of Ashurst) appeared for the appellants.

Mr. Jon Turner and Mr. George Peretz (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the respondent.

Lord Grabiner QC and Mr. James Goldsmith (instructed by Herbert Smith) appeared for the intervener.

Heard at Victoria House, Bloomsbury Place, London, on 24 May 2004.

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**JUDGMENT (RECOVERY AND INSPECTION)**

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## I BACKGROUND

1. This judgment deals with a request by the applicants ("Claymore") for various information to be disclosed by the respondent ("the OFT") in connection with a witness statement provided by the OFT in elucidation of its decision of 9 August 2002 to the effect that the interveners ("Wiseman") had not infringed the Chapter II prohibition of the Competition Act 1998 ("the Act"). That request takes the form of two letters, dated 19 March 2004 and 16 April 2004. The latter largely expands upon the former, pursuant to a suggestion to that effect made by Counsel for Claymore at a case management conference on 1 April 2004.

2. The background to the proceedings is set out extensively in our judgment on admissibility ([2003] CAT 3). To recap, Claymore made two complaints to the OFT during 1999 about allegedly abusive behaviour by Wiseman in the Scottish milk market. The thrust of Claymore's complaints was that Wiseman reacted to the acquisition by Express Dairies plc ("Express") of a stake in Claymore in December 1998 by a sustained campaign of anti-competitive practices, targeted against Claymore and designed to preserve Wiseman's *de facto* monopoly in the supply of liquid milk in Scotland. According to Claymore, Wiseman's assault was targeted against Claymore's middle-ground customers in northern Scotland. The anti-competitive practices alleged by Claymore were principally:

   (a) the targeting by Wiseman of Claymore's existing middle-ground customers with various deals designed to ensure that those customers would in future deal exclusively with Wiseman;

   (b) the offer by Wiseman of below-cost prices to Claymore's existing middle-ground customers; and, in particular

   (c) the offer by Wiseman of "all of Scotland" deals at low prices to Claymore's principal middle-ground customers such as the Co-operative Wholesale Society Ltd ("CWS"), Alldays, Aberness Foods Ltd (the supplier for the Mace symbol group), Morning Noon and Night Ltd, and C J Lang and Son Ltd (which owns the Spar Scotland brand).

3. Claymore alleged that Wiseman's practices resulted in many of Claymore's middle-ground customers switching to Wiseman. In consequence, Claymore's operations went from being profitable to loss-making.

4. Following those complaints, on 3 February 2000 the OFT made a reference to the Competition Commission ("CC") regarding "the existence or possible existence of a monopoly situation in relation to the supply of fresh processed milk to middle-ground retailers". The CC was requested to confine its investigation to Scotland.

5. In June 2000 the OFT also opened an investigation under the Act into whether price fixing and market sharing had taken place between Wiseman and other dairies situated in the central belt of Scotland contrary to the Chapter I prohibition imposed by section 2 of the Act.[1]

6. On 23 October 2000 the CC published its *Scottish Milk* report (Cm 5002) ("the CC Report"). The CC Report found that a "monopoly situation" existed in Wiseman's favour and (by a majority) that the facts found operated, or may be expected to operate, against the public interest (see para 2.161 of the CC Report). The CC's conclusion was not however reached by the two-thirds majority necessary for any action to be taken on the basis of this Report.

7. On 26 October 2000, the OFT opened an investigation under the Act into Wiseman's allegedly abusive practices contrary to the Chapter II prohibition imposed by section 18 of the Act. The basis of the OFT's "reasonable suspicion" of an infringement, which triggered the opening of an investigation, was the findings in the CC Report.

[1] By letter of 9 October 2002 the OFT informed Claymore that it (the OFT) had decided to close its file on that Chapter I investigation. That decision to close the file, together with the subsequent decision not to withdraw or vary the file closure decision, were appealed by Claymore by a notice of appeal dated 6 February 2003 ("the Chapter I appeal"). Following the receipt by the OFT of new information, the OFT reopened its investigation into alleged infringements of the Chapter I prohibition on 25 July 2003. By way of Order made on 2 September 2003 the Tribunal stayed the Chapter I appeal until further order.

8. On 30 March 2001 Claymore made a detailed application to the OFT to adopt an interim measures direction under section 35 of the Act pending completion of the Chapter II investigation. On 25 June 2001 the OFT announced in a press release that it proposed to give an interim measures direction adverse to Wiseman. Subsequently, Wiseman offered, and the OFT accepted, informal interim assurances under which Wiseman agreed to cover its cost of supply to each middle ground customer in the Highlands of Scotland.

9. On 9 August 2002, more than 21 months after commencing its Chapter II investigation, the OFT informed Claymore that it was closing its file on the matter having, in broad terms, failed to find sufficiently persuasive evidence of the allegedly abusive behaviour. By a notice of appeal dated 6 November 2002 Claymore appealed that decision ("the Decision") to the Tribunal, contending that it was an appealable decision within the meaning of section 46(3) of the Act.

10. The OFT argued that the appeal was inadmissible, in that the OFT had not taken an "appealable decision" within the meaning of section 47 of the Act. The Tribunal, sitting as a tribunal in Scotland, held in its judgment of 18 March 2003 that the OFT had indeed taken an appealable decision (see *Claymore Dairies Ltd v Director General of Fair Trading* [2003] CAT 3).

11. As a result, by order dated 27 March 2003 the Tribunal directed the OFT to file a witness statement explaining in more detail the reasons for the Decision. The Tribunal's order required the OFT to exhibit to that witness statement such voluntary disclosure from its file as it may be advised to make, explaining the reasons for its decision.

12. On 16 May 2003 the OFT filed a witness statement produced by one of its officials, Mr. Robert Lawrie, who was involved in the investigation as a principal case handler ("the OFT Witness Statement"). This explained in some detail the investigation of the complaint and the reasons for the OFT arriving at the conclusion that the evidence to prove an infringement of the Chapter II prohibition was insufficient.

13. A large number of exhibits are appended to the OFT Witness Statement, including various documents supplied to the OFT during the investigation. These exhibits include documents originating from Wiseman, as well as various compilations by way of graphs, maps and tables of the results that the OFT arrived at in the investigation.

14. A section of the OFT Witness Statement, together with various pages of the annexes to it, was redacted on the grounds of commercial confidentiality. By a judgment dated 9 June 2003, the Tribunal ordered disclosure, within a confidentiality ring comprising Claymore and Wiseman's named external advisers, of the redacted passages of the OFT Witness Statement and of the exhibits to it: see *Claymore: Confidentiality* [2003] CAT 12.

15. At a case management conference dated 2 September 2003, Claymore made a request for recovery and inspection of further material, much of which relates to sets of raw data used by the OFT to come to its conclusions. After hearing argument, the Tribunal directed Claymore to serve upon the OFT such requests for further and better particulars as Claymore might be advised to make, the OFT having made it clear through Counsel that it was open to such requests and that it would be happy to try to answer any questions that sought to clarify the witness statement. The Tribunal left open the possibility that a discovery exercise might still be necessary if the request and reply proved fruitless.

16. Under cover of a letter dated 14 October 2003 Claymore made their request for further and better particulars. Under cover of a letter dated 26 November 2003 the OFT gave its reply. No renewed application for recovery and inspection was made by Claymore after receipt of that reply.

17. On 16 February 2004 Claymore filed their revised notice of application ("RNA"), together with a report prepared by accountants under the supervision of Mr. Haberman of Ernst & Young LLP ("the Haberman report").

18. On 19 March 2004 Claymore made a renewed application for further recovery and inspection, based largely along the same lines as their earlier request.

19. On 29 March 2004 the OFT filed its defence.

20. On 30 March 2004 Claymore requested that the Tribunal consider their application for further recovery and inspection at the case management conference fixed for 1 April 2004.

21. On 1 April 2004 a case management conference was held *inter alia* to discuss the main issues arising in the appeal, issues of confidentiality and/or recovery and inspection, and the future conduct of the appeal. At that case management conference it became clear that the OFT, understandably, had not had a chance to digest the request for further recovery and inspection and, consequently, was not in a position to make submissions on it at that stage. The same was true for Wiseman. Counsel for Claymore agreed that Claymore would send to the OFT a more detailed letter particularising their request for further recovery and inspection. That letter was sent on 16 April 2004.

22. On 7 May 2004 Wiseman filed their Statement of Intervention, together with a report prepared by accountants under the supervision of Mr. Bezant of Deloitte & Touche LLP ("the Bezant report").

23. On 11 May 2004 the OFT filed its skeleton argument addressing Claymore's request for recovery and inspection.

24. On 18 May 2004 Wiseman filed their submissions on that request.

25. On 19 May 2004 Claymore filed their response to the submissions of the OFT. The solicitors acting for Claymore also noted that Claymore proposed to rely on their letters of 19 March 2004 and 16 April 2004 and on the skeleton argument prepared for the case management conference of 2 September 2003. The matter was argued at a case management conference on 24 May 2004.

## II SUMMARY OF PARTIES' ARGUMENTS ON THE SUBSTANCE

26. Before examining the issues before us in the present application for disclosure, it is necessary to set out in summary form the arguments of the parties on the substance of the appeal. It is only against the background of the substance of the case that requests for recovery and inspection can properly be considered. This summary should not, however, be taken to set out all of the arguments. The pleadings are long and detailed. Furthermore, we stress that we need not, and do not, express any view on the merits of the respective positions.

*Claymore's arguments*

27. In the RNA Claymore contends that the OFT erred in its consideration of whether Wiseman had engaged in

    (a) predatory pricing;
    (b) targeted discriminatory pricing; and
    (c) exclusionary exclusive pricing.

28. In relation to alleged predation, Claymore argue that the OFT failed correctly to identify (i) Wiseman's average variable cost ("AVC"), by not taking steps to identify the relevant time period of the abuse, and (ii) Wiseman's average total cost ("ATC"), by producing simply a "working proxy" under which it aggregated estimates of activity costs calculated by Wiseman and added an arbitrary figure of 3 per cent to represent centralised administration costs. This so-called "bottom up" approach contrasts with the "top down" analysis favoured by the CC and Claymore, which would have involved obtaining a complete set of Wiseman's costs from its accounts and attributing them across Wiseman's business, thus identifying the costs of the business as a whole as a starting point. Further, no reconciliation was carried out with reference to Wiseman's actual costs to check that relevant costs had been captured. In an industry where margins are tight (6% or less), it is all the more important to make sure the costs data is accurate.

29. According to Claymore, the OFT also misdirected itself in rejecting relevant evidence of intent on the part of Wiseman to eliminate Claymore as a

competitive force. Having obtained adequate evidence of intent during its on-site visit, including a "hit list" targeting Claymore's accounts, the OFT erred in coming to the conclusion that there was not clear and compelling direct evidence of intent. The OFT's application of the test established by the Tribunal in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CompAR 13 ("*Napp*"), was erroneous, in that it put the standard of proof at too high a level and in any event applied it at a premature stage.

30. In relation to alleged targeted discriminatory pricing, Claymore contend that the OFT found distinct evidence of price discrimination, and that the OFT erred in its appraisal of that evidence. The OFT failed in its consideration of whether evidence of discriminatory pricing amounted to an abuse when assessed in the round. Furthermore, the OFT's basis for rejecting the price discrimination issue, *viz.* that its analysis of price patterning did not reveal clear and compelling evidence of a targeting strategy to eliminate Claymore, was flawed, in that there is a very real risk that distortions occurred as a result of, *inter alia*, the original sampling methodology and the scope afforded to Wiseman to allocate cost items when calculating costs on behalf of the OFT. Furthermore, the OFT erred in investigating whether the discrimination it had found was abusive by searching for evidence of targeting: it failed to consider whether the discriminatory conduct was abusive either by itself or when considered in the circumstances of the case as a whole.

31. In relation to alleged exclusionary exclusive pricing, Claymore argue that the OFT erred in concluding that Wiseman's single price "all of Scotland" arrangements would not infringe the Chapter II prohibition absent clear and compelling evidence that Wiseman had made supply in any area or to any outlet expressly conditional upon supply on an all of Scotland or regional basis. The OFT failed to conduct an adequate investigation in respect of such arrangements.

32. More generally, Claymore also criticise the OFT's methodology governing data collection and analysis and, particularly, the OFT's general failure to respect minimum standards:

(i) the data collection process was more akin to an initial inquiry;

(ii) the OFT failed properly to understand the nature of Wiseman's business, particularly the costs drivers. Wiseman's management accounts were not checked;

(iii) the sample taken of Wiseman's middle ground outlets was unrepresentative in that it was heavily skewed towards multi-outlet accounts;

(iv) too much latitude was given to Wiseman to estimate, calculate and allocate its own operational activity costs;

(v) the OFT failed to take reasonable steps to verify the data provided;

(vi) the OFT wrongly attributed costs to outlets within each run by volume (rather than using causational costing principles). The OFT failed to check for the presence of high-volume non-middle ground outlets on those runs, (i.e. supermarkets);

(vii) the reasoning relating to the analysis it did perform is inadequate and/or indicative of a flawed approach.

33. It should be noted that Claymore's grounds of appeal are supported by the Haberman report. That report is a lengthy document, running to some 88 pages, not including those documents exhibited to it. Whilst there are occasional references to the incompleteness of the information to which Mr. Haberman had access, any gaps in the information at his disposal have not prevented him from setting out in a detailed manner the errors he states that the OFT made (see for example sections 4 and 5 of the Haberman report, especially paragraphs 5.62, 5.68, 5.80, 5.93, 5.98, 5.100, 5.141, 5.147 and 5.149). At paragraph 6.3 Mr. Haberman says:

"In my opinion, the OFT's investigation of Wiseman's behaviour in relation to the supply of fresh milk in the middle market in Scotland was fundamentally flawed:

(a) The investigation of predatory pricing required detailed analysis of the cost structure of Wiseman's business, and how those costs applied to various customers. The OFT's work on costs was based on insufficient data, involved insufficient and inappropriate analysis, and produced results which were not properly considered.

(b) The investigation of discriminatory pricing required the analysis of price patterns over the different customers acquired from Claymore, and the comparison of the results with the rest of Wiseman's middle ground customers. The price analyses carried out were insufficiently detailed and failed to take account of all the factors likely to influence prices.

(c) The investigation of exclusionary contracts failed to consider Claymore's business at all, so could never have identified whether the effect of certain of Wiseman's contracts was exclusionary."

*OFT's arguments*

34. In essence the OFT's arguments, contained in the Defence, are as follows. The investigation carried out by the OFT was thorough, involving *inter alia* consideration of the CC Report and of submissions from, and discussions with, various parties; an on-site visit under section 28 of the Act; multiple requests for information under section 26 of the Act; consideration of interim measures; and analysis of large quantities of data using specialist software.

35. The OFT contends that it did seek to address all of the alleged heads of abuse. Its conclusion was that there was insufficient evidence of an infringement by Wiseman of the Chapter II prohibition.

36. More specifically, the OFT submits that, under section 25 of the Act, it has a discretionary power to investigate suspected infringements of the Act. There is no duty on the OFT to conduct a detailed investigation of every complaint before forming the view that it lacks merit. There is no obligation, once an investigation is under way, to continue to a point where there is in its possession compelling

evidence either way. It will always be possible to identify more and different work the OFT could have done.

37. As to the general heads of allegation levelled at its conduct, the OFT argues that:

(a) it is not an error of law to carry out a particular type of analysis where others could have equally been carried out and where the one selected by the OFT fell within the range of reasonable decisions;

(b) while the Tribunal may review the OFT's decision for errors of primary fact, the choice of analysis used could not amount to such an error;

(c) as to allegations of errors in the inferences drawn by the OFT from the facts before it, the Tribunal may review these and, if they are so significant as to undermine the decision, may quash or remit. But, almost always (as here), the nature of the information before the OFT may mean that there is a range of analyses that could legitimately be carried out. So long as the OFT's analysis fell within that range, there would be no ground for quashing/remitting;

(d) it did provide full reasons for the Decision, but fuller reasons may be required where the OFT has come to an infringement decision.

38. As to whether the OFT should have had reference to a particular timeframe over which to assess costs as variable or fixed, the OFT contends that:

(a) to avoid the circularity inherent in any reliance on the alleged duration of the predation, it took different measures of AVC instead – one high ("the most variable") and one low ("the least variable"). Such an approach is appropriate so as to test the robustness of the analysis at any stage of an investigation;

(b) there is no duty on the OFT (i) to start an investigation by defining a timeframe or (ii) having conducted an investigation without defining a

timeframe, to carry out enquiries by reference to such a timeframe before taking a decision that it does not have sufficient evidence of infringement;

(c) it is in any event unclear over what period the RNA alleges that the OFT should have assessed the variability of costs.

39. As to the fact that the OFT used "proxies" of AVC, the OFT contends that:

(a) it is unclear whether the Applicants allege it was unlawful for the OFT to use different estimates of AVC in coming to their conclusions;

(b) if so, it is unrealistic and betrays a misunderstanding of the way in which allegations of breaches are investigated. The process is not single-stage but is usually layered: where initial indications clearly point to an infringement, further steps may be taken to gather additional information and undertake different analyses to corroborate those concerns;

(c) the fact that this may be a low-margin market is irrelevant.

40. As to other AVC issues, the OFT argues that:

(a) there is no basis for alleging, as do Claymore, that the data supplied by Wiseman was unreliable;

(b) nowhere is it set out on what basis the OFT was under a duty to obtain raw data;

(c) whilst it is true that even the high measure of AVC is in certain respects necessarily only an approximation, the OFT had to take into account the potential size of any costs not included and the difficulties in calculating them. Moreover, the OFT was keen not to overestimate variable cost, principally because it was important to have robust initial results; and

(d) the various cost headings which Claymore say should have been taken into account (depot, trunking, central/administrative/financial and vehicle-related) were, in the main, fixed and would only have formed a very small part of total costs.

41. As to the criticisms of its assessment of ATC, the OFT submits *inter alia* that:

(a) whilst it may often be appropriate to adopt a "top down" approach to calculating ATC, that is not so when seeking to estimate the ATC of a particular part of the business or the ATC of supply to a particular customer. A "top down" approach is, moreover, at least as complicated a "bottom up" analysis;

(b) the use of working proxies was justified. Whilst the OFT accepts that further and more intrusive scrutiny of cost components could have been undertaken, it would have entailed a significant further commitment of resources by the OFT and Wiseman. The OFT felt that, in the circumstances, the likelihood of "infringement" results being yielded was insufficiently high; it would have been disproportionate, therefore, to commit those extra resources;

(c) it was appropriate for the OFT to rely on data provided by Wiseman. There was no evidence of "systematic distortions";

(d) The comparison of cost calculation with the CC's findings showed a difference of 5 per cent. This was in the OFT's view not such as to cause concern that the OFT's methodology was so unreliable that it could not be used.

42. As to the claim that the OFT wrongly rejected evidence of intent to eliminate Claymore as a competitive force, the OFT submits that:

(a) it did not apply the wrong legal test;

(b) it did not set the standard of proof too high: it looked for direct evidence of intent to eliminate a competitor or facts from which an inference of such intent could be drawn directly. The *Napp* test was applied correctly;

(c) in reaching its conclusions on exclusionary intent, it considered all of the evidence in the round;

(d) the fact that Wiseman categorised Claymore differently from other competitors was insufficient. It is hardly surprising that Wiseman would view the entry of Britain's largest dairy as a competitive challenge which no other incumbent dairy posed.

43. As to Claymore's criticisms of the OFT's appraisal of targeted discrimination:

(a) the OFT does not admit that there were anomalies in the Decision;

(b) the OFT did find that price discrimination was common, but the issue was whether the discriminatory pricing was targeted at particular customers;

(c) the OFT identified neither targeted nor predatory pricing nor excessive pricing. In focusing its search on these heads, it acted consistently with its own guidelines. In the circumstances, there was no strong and compelling evidence of an infringement of the Chapter II prohibition.

44. As to the alleged exclusive contracting, the OFT submits that it did, contrary to Claymore's assertions, examine both the operation and the terms of the agreements under consideration. It distinguished between exclusive contracts and contracts for the supply to any outlet of a retail customer at a uniform price. It did not conclude that single price arrangements could not infringe the Chapter II prohibition as a matter of principle. Having considered the evidence, principally the CC Report, documentation from Wiseman and consultation with third parties, it decided that there was not strong and compelling evidence that Wiseman was operating exclusionary contracting arrangements contrary to the Chapter II prohibition.

45. As to Claymore's more general criticisms of the OFT's methodology, the OFT contends that Claymore have neither set out what particular alternative steps the OFT should have taken nor specified the legal basis upon which the OFT is obliged to take such other steps. According to the OFT, the essence of Claymore's case is that it wishes the Tribunal to direct the manner in which the OFT should carry out its investigations. This ignores the broad discretion enjoyed by the OFT in carrying out investigations, closing files and allocating resources.

46. The OFT accepts that further investigative work may potentially have yielded further information relevant to the investigations into the allegations of infringement. The OFT must, however, balance the commitment of further resources with the prospect of an infringement decision being made.

47. The OFT contends that its costs allocation methodology was lawful and appropriate. Wiseman were asked to provide run costs for the relevant runs. The information provided by Wiseman did not relate to outlets. It was therefore necessary for the OFT to allocate those run costs between outlets. It did so on the basis of the volumes of sales of milk supplied to each outlet on each respective run. The OFT considered that volumes of sales of milk was the main driver of business decisions by Wiseman and was therefore an appropriate method of calculation. In any event, Claymore do not specify what they consider to be the proper approach to cost allocation.

*Wiseman's arguments*

48. In its statement of intervention Wiseman agree with the OFT's position. First, Wiseman note that Claymore do not now contend that there is sufficient evidence on which the OFT could have come to an infringement decision. The challenge goes simply to the approach adopted by the OFT, yet Claymore do not provide an alternative approach as to the method the OFT should have adopted. In any event, the fact that there are alternative approaches which might have led to different outcomes does not mean that the OFT's approach was flawed.

49. Secondly, the OFT had considerable experience of the dairy industry, and of Wiseman's business in particular, as a result of the various enquiries involving Wiseman, including Wiseman's quarterly reporting of price information and the data supplied by it pursuant to the OFT's section 26 requests. In light of this considerable knowledge, it would not have been a reasonable use of the OFT's resources to gather the levels of data and perform the necessary analyses that Claymore appear to consider necessary.

50. Thirdly, Wiseman submit that the Haberman report does nothing to establish a case for remittal, showing at most only that there is more than one conceivable approach to matters which the OFT sought to investigate.

51. Fourthly, as to the specific aspects of Claymore's challenge to the Decision, Wiseman submit that the OFT's choice of time period was appropriate due to natural constraints on the availability of data, the low level of incremental costs of serving ex-Claymore customers and the fact that, despite Claymore's assertion to the contrary, there was no distortion in the data supplied by Wiseman to the OFT due to the decrease in raw milk prices. Moreover, the OFT's use of high and low proxies of variable cost as a substitute for looking at costs over a long period of time was a sensible approach in the circumstances.

52. Wiseman also contend that Claymore's allegation that the OFT should have relied on "raw data" rather than "estimates" is misleading. The data which the OFT requested simply did not exist. Wiseman had to create the data, as would any dairy firm being asked to supply such information. The compilation of data was a time-consuming process and involved no "manipulation", as Claymore allege.

53. The OFT's use of a sample was, in Wiseman's view, a pragmatic approach which properly balanced the need for a large amount of data with a desire not to place a prohibitive burden on Wiseman. That sample, consisting of 1,150 outlets representing 809 middle ground customers, covered 35% of the middle ground by volume. It was significantly larger than that used by the CC. The sample

rightly focussed on the Highlands area, given that that was the geographical region in respect of which Claymore complained of predation. It was also right to focus on multi-outlet retailers, given that almost all of Wiseman's Highlands runs would have a multi-outlet drop.

54. Furthermore, Wiseman take issue with Claymore's criticism of the OFT's "bottom up", as opposed to "top-down", analysis of costs, stating that a top-down approach may be at least as complex and similarly subject to a significant number of assumptions. The fact that the CC used a top-down approach does not undermine the OFT's approach: the CC was looking at issues of supplying Scotland as a whole, whilst the OFT was investigating a small subset of Scottish milk sales.

55. The fact that the CC's costs figures for servicing the CWS account differ by 5% from those of the OFT is not, according to Wiseman, indicative of a flaw in the OFT's investigation. The discrepancy arises not because the OFT omitted categories of operating costs but because the OFT took a different approach to the allocation of costs to customers from that adopted by the CC in its top-down analysis.

56. As to Claymore's criticisms of the OFT's classification of ATC and AVC costs, Wiseman make the following arguments:

    (a) the criticism that the OFT did not refer to Wiseman's management accounts to verify its classification is misplaced: Wiseman, as with other dairies, do not distinguish between fixed and variable costs in their management accounts;

    (b) the attack on the OFT's methodology, based on comparisons with the CC's classification, is selective. For example, the Haberman report does not draw attention to the fact that processing costs – far more significant than trunking costs – were considered to be maximum 65% variable in the CC Report but were treated as 100% variable by the OFT in its high measure of variable costs;

(c) the use of high and low measures of AVC was entirely reasonable. It was a practical means of establishing whether there was likely to have been below cost pricing and whether further investigation was warranted;

(d) volume was the most sensible choice of cost driver, given that most of Wiseman's operating costs vary by volume and that Wiseman do not maintain detailed run costs information relating to driver's time, unloading time etc. Volume is also the most realistic, workable and economically meaningful tool to use for calculating costs.

57. As to the allegations of targeted price discrimination, Wiseman submit that the OFT was right to conclude that there was no evidence of any pattern to exclude Claymore by targeting its customers. As to the allegations of exclusionary contracting, Wiseman state that they do not insist on such "all of Scotland" contracts but where a multi-outlet prefers such an arrangement, Wiseman seek to accommodate that preference.

58. Generally, Wiseman state that it would have been superfluous and wasteful of resources for the OFT to have carried out further checks on the "anomalies" pointed out by the Haberman report, which are explicable by reference to the realities of the dairy industry and the limitations of the cost allocation exercise.

## III THE RECOVERY AND INSPECTION REQUESTED

59. The five categories of documents requested by Claymore are as follows.

(a) certain passages of the CC Report in unredacted form, namely paragraphs 2.121, 2.122, 2.125, 2.127, 2.138, 3.74, 3.75, 3.81, 3.83, 3.85, 3.90-3.94, 3.97, 3.98, 3.100-3.103, 3.105-3.111, 3.113, 4.258, 4.267, 4.294, 4.312, 4.313, 4.324-4.328, 4.333, 4.335, 4.340-4.344 and 4.350-4.354. Some of these paragraphs contain data in tabular form;

(b) attachments to Wiseman's letter of 29 November 2001 (which itself responded to the OFT's request for information pursuant to section 26 of

the Act) containing information relating to trunking and dairy costs and pricing material;

(c) the so-called "price-cost matrix", which consists of a database containing raw data and which helped the OFT to calculate whether Wiseman was pricing at below average total cost ("ATC") or average variable cost ("AVC");

(d) information supplied by Wiseman to the OFT to aid the OFT in monitoring Wiseman's voluntary interim assurances; and

(e) a list of all personal notes or records of meetings attended in connection with the investigation, together with confirmation as to whether the OFT's policies in relation to the keeping of records have been complied with in the investigation.

## IV ARGUMENTS OF THE PARTIES ON THE ISSUE OF RECOVERY AND INSPECTION

*Claymore's arguments*

*Principles*

60. Claymore submit that the principles to be applied in applications for recovery and inspection before the Tribunal are to be found in the case-law of the Tribunal and the English courts. The Tribunal observed in *Aquavitae (UK) Ltd v Director General of Water Services* [2003] CAT 17 that, as a general principle, bodies such as the OFT have a duty to assist the Tribunal, making available all facts that were relevant to the decision under review.

61. Claymore also point to the Court of Appeal's decision in *IBA Health v Office of Fair Trading* [2004] EWCA Civ 142, in which Carnwath LJ, quoting from *R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941, opined that where challenges are made to decisions of public authorities, those authorities are under an obligation to put before the Court the material necessary to deal with the relevant issues: "all the cards" should be "face upwards on the table": see para 105.

62. Claymore also draw attention to the Civil Procedure Rules ("CPR"), in particular rule 31.6 on standard disclosure in civil litigation and rule 31.14 on the right of inspection of a document "mentioned" in a statement of case or witness statement.

63. As to the position in Scotland Claymore contend that, although there is no automatic discovery of documents, it is possible to apply for it and that it will be granted, broadly speaking, so long as the documents requested can be shown to be relevant and necessary.

*Redacted passages in the CC Report*

64. Claymore argue that recovery and inspection of the material requested in each of their categories is both relevant and necessary to their appeal. First, as to the redacted passages of the CC Report, Claymore argue that the redactions contain price and cost information upon which the CC relied in that report. That material formed the basis upon which the CC identified Wiseman's AVC and ATC. This goes, in Claymore's view, directly to the assertion that the OFT adopted the wrong approach to AVC and ATC and did not deal with incremental customer movement. Claymore argue that the OFT relies directly on the relevant redactions in the CC Report as a comparison to the OFT's own findings.

65. The redacted material also evidences exclusionary contracting and the impact that had. The OFT Witness Statement refers specifically to the CC Report's discussion of the contracting between Wiseman and Aberness and CWS which gave rise to the OFT's reasonable suspicion of abuse on the basis of "exclusive" dealings. Claymore seek access both to the per litre price offered to CWS by Wiseman to secure its business and to details of the amount of the one-off loyalty payment made by Wiseman to Aberness in connection with an exclusive supply agreement between these parties.

66. Furthermore, Claymore contend that the redacted CC material shows pricing or margin anomalies which suggest targeted and discriminatory pricing. This goes

to the heart of Claymore's case that the OFT failed to take account of available evidence of targeted price discrimination and took the wrong approach to price discrimination generally. The OFT Witness Statement refers to the CC's findings in this respect, noting that they formed the basis of the OFT's reasonable suspicion of infringement but then stating that the OFT's subsequent findings were "more robust" than those of the CC.

67. Claymore argue that the information contained in the redacted passages of the CC Report is necessary. Their arguments are as follows:

(a) a major part of Claymore's case is that the OFT had no real assurance that it had captured all relevant costs, or even that the data provided by Wiseman was reliable. The CC Report is a valuable source of information to cross-check the OFT's findings and the reliability of data obtained form Wiseman by the OFT;

(b) Claymore also criticise the costs classification. Access to the relevant redacted passages would give Claymore the opportunity to see whether the CC used a different classification, and what the consequence of that was. If it turned out that the CC had indeed used a different classification, the OFT's approach would be undermined;

(c) as to Claymore's criticisms of the OFT's handling of the allegation of exclusionary contracting, the relevant redactions of the CC Report are crucial in that they are likely, in Claymore's view, to support their criticisms;

(d) as to the allegations of price discrimination, Claymore contend that the relevant redactions in the CC Report will either support or undermine the conclusions reached by the Haberman report. Given that the OFT initially relied upon the CC Report for its reasonable suspicion in this respect, it is only right that Claymore's expert should be able to consult the material underpinning the CC's analysis to see whether it supports his criticisms or not.

*Attachments to the letter of 29 November 2001*

68. Secondly, Claymore seek recovery and inspection of information contained in the attachments to the letter of 29 November 2001 sent by Wiseman to the OFT pursuant to the OFT's request for information under section 26 of the Act. Such information was used to compile the price-cost matrix, which was used to come to conclusions about predatory pricing and targeted discriminatory pricing. The OFT has already provided Claymore with run and depot cost information (which was also sought in the section 26 notice). There is, in Claymore's view, no good reason of principle why the OFT should distinguish between run and depot cost information (which the OFT has provided) and trunking and dairy costs (which it has not).

69. Such cost and pricing information is relevant, in that it goes to various of Claymore's grounds in the RNA, namely that the OFT has identified the wrong time period for predatory pricing; has failed correctly to assess AVC and ATC and below cost pricing generally; has failed to appreciate the importance of incremental customer accounts; has failed to assess properly the available evidence of targeted price discrimination and has failed in its methodology and data analysis. Claymore's criticisms focus on the manner of obtaining price and cost information from Wiseman and the subsequent analysis of it carried out by the OFT. Essentially, Claymore ague, they need the data so as to be able show errors in the investigation and that those errors had a consequence.

70. The pricing material is relevant in that it is helpful to show the relationship between costs and price. The CC conducted sensitivity analyses to assess the robustness of its approach to the calculation of certain fixed and variable costs, whereas the OFT adopted what Claymore contend is a more crude approach, using high and low proxies of variable costs.

71. As to the necessity of such information, Claymore state that the importance of access to the underlying data is underlined by the fact that Claymore have demonstrated mistakes made by the OFT by relying upon material (relating to

run and depot costs) which had been redacted by the OFT but subsequently released in full following a direction to that effect by the Tribunal. Claymore want all of the costs picture, not just "snippets" relating to run and depot costs. As the OFT has itself stated, a key aspect of Wiseman's incremental costs of serving the Highlands lay in trunking milk to the Keith depot. Claymore say Mr. Haberman should be able to develop and verify his criticisms further.

*The price-cost matrix*

72. Thirdly, Claymore seek recovery and inspection of the price-cost matrix itself. They contend that it is key to the reasoning of the OFT in deciding that there was no infringement of the Chapter II prohibition by way of predatory pricing and/or price discrimination. Many of Claymore's grounds of appeal are based on the premise that the OFT used the wrong data, analysed it incorrectly and drew unjustified conclusions from it. The price-cost matrix is a convenient way of summarising the information that the OFT received from Wiseman. Recovery and inspection of the price-cost matrix is necessary in that Mr. Haberman needs the matrix to demonstrate the actual consequences of the errors his report has identified.

*Monitoring information*

73. Fourthly, recovery and inspection is sought of the information received by the OFT to monitor the voluntary interim assurances given by Wiseman in August or September 2001. Claymore contend that the OFT could and should have used that information to cross-check the validity of the cost information that Wiseman was providing in the course of the investigation. The OFT has admitted that it did not carry out such a systematic cross-check. Claymore argue that its recovery and inspection is necessary in that Claymore directly criticise the OFT for failing to accumulate proper cost data to allow a cross-check of the information provided in response to the investigation.

*OFT Records*

74. Finally, Claymore seek recovery and inspection (or rather production) of a full list of personal records of meetings attended in connection with the investigation. Claymore additionally sought a full list of documents on the OFT's file, but that request was not pursued at the case management conference. Claymore argue that the OFT has failed, contrary to the ordinary standards of good administration, to keep proper records of evidential material gathered or notes of meetings attended. This is evidence, they say, of their criticisms of the conduct of the investigation. It is likely, in Claymore's view, that there exist further documents bearing on the conduct of the investigation by the OFT, especially given that the personal note of Mrs Pope, a case handler at the OFT, of a meeting of 14 March 2002 between the OFT and Wiseman (of which there is no official note, but at which Wiseman apparently convinced the OFT that there were not sufficient grounds for finding an infringement of the Chapter II prohibition) which was voluntarily disclosed by the OFT on 18 September 2003, is not in Claymore's view easily reconcilable with the account in the OFT Witness Statement of that meeting.

75. In summary, therefore, Claymore's general position is that the OFT has consistently failed to provide material that is central to the reasoning contained in the OFT Witness Statement. That is what Claymore seek. They say they do not seek to conduct an audit. They cannot be said to be "fishing" for documents which are referred to in that witness statement and which are *prima facie* central parts of the OFT's reasoning. Where methodology is a central issue, Claymore need the actual data used to show the serious error in that methodology that would justify remittal.

*The OFT's arguments*

76. The OFT resists any further recovery and inspection. Its view, in a nutshell, is that Claymore already have sufficient material with which to appeal the decision. The OFT has given a close and detailed explanation of its decision, and Claymore have been able to plead their case fully, submitting a lengthy RNA and expert report.

*Principles*

77. As to the principles to be applied, the OFT argues first that the OFT's decision must contain the reasons which enable the addressee to know what the OFT in fact did, including what it took into account and which principles it had in mind: see *Freeserve.com plc v Director General of Communications* ("*Freeserve*") [2003] CAT 5 at [118].

78. Secondly, the OFT contends that in a case such as this, where no positive finding of infringement has been made, a complainant should not be able to call for all the underlying material the OFT had available to it so as, in effect, to conduct an audit of the investigation or even a shadow investigation to see if some error or different result may be ascertained.

79. Thirdly, the OFT refers to rule 1 of the CPR. Recovery and inspection should be regulated consistently with the overriding objective of dealing with cases justly. It should be proportionate and restricted to what is necessary to resolve the issues fairly. The OFT submits that recovery and inspection should be dealt with in a manner akin to that adopted in traditional judicial review proceedings: whilst the authority must give a full and frank explanation, should put its cards on the table face upwards and cannot sit on material adverse to it, a court should only go behind the material put forward where there is real doubt as to its accuracy or completeness.

80. The OFT states that the Tribunal must have available to it all the necessary information so as to resolve the issues, namely whether or not the Decision is correct. That does not involve being given all the information necessary to conduct the analysis itself.

81. The OFT stresses that Claymore need not show that any errors of principle on the part of the OFT actually matter. If Claymore are able to show an error of principle, then the OFT is prepared to accept that the error is sufficiently material to undermine the Decision. The OFT, through Counsel at the case management conference of 24 May 2004, contends that "if [Claymore] persuade you that Mr.

Haberman's approach is the right approach, then there was a flaw." During the hearing of this matter the relevant exchange took place as follows at p 62 of the transcript:

> "THE CHAIRMAN: Mr Turner, forgive me for not having it in the forefront of my mind. As regards your defence, on a point like the one that we are on at the moment, presumably it would be open to the OFT to say 'Well, even if you did do it the way that Mr Haberman says you could do it, it would not make any difference'?
>
> MR TURNER: Yes, I understand that.
>
> THE CHAIRMAN: Perhaps it might be a bit difficult for you to advance that case, not having disclosed the figures that one is working on.
>
> MR TURNER: I understand that, Sir. We do not advance that case.
>
> THE CHAIRMAN: You join issue on the principle?
>
> MR TURNER: Yes. If they are right about that and if they persuade you that Mr Haberman's approach is the right approach, then there was a flaw.
>
> THE CHAIRMAN: If Mr Haberman was right on a point like this, we would probably have to assume that it was potentially a material error or it could be a material error unless there were some countervailing evidence the other way?
>
> MR TURNER: Yes. I am not aware that we are advancing that sort of case. If we do, then it would be only fair for us to give them the basis to test our riposte, but we do not do that. Let me make that very clear. We are dealing with this case on a point of principle, which is the reaction to the way in which they advance it."

82. As to the position in Scotland, the OFT contends, without referring to authority, that recovery and inspection is not automatically granted and that the touchstone in such applications is necessity.

83. Fourthly, the OFT argues that "fishing expeditions" should not be permitted. Referring to *R v Secretary of State for Health ex p Hackney LBC* (1994) COD 432 the OFT contends that Claymore are not permitted to make an unsupported allegation and then argue that something may turn up to support it.

*Application of the principles*

84. As to the application of the principles in this case, the OFT submits first that Claymore are "fishing": they are alleging that there are anomalies in the investigation and then seeking access to sensitive data to support that contention. Claymore should not be permitted to conduct a "What if?" analysis, i.e. an exploration of what might happen were a different analysis of the underlying materials to be conducted from the one adopted by the OFT. This is especially so where Claymore are seeking the matter to be remitted to the OFT rather than asking the Tribunal to make a finding of infringement.

85. Secondly, the OFT submits that the Tribunal should bear in mind that this is an appeal brought by a complainant. It is not brought by the addressee of an infringement decision. The respective situations of these two types of applicant are distinct: a complainant has neither a right to be heard nor a right of access to the OFT file. Here, no rights under Article 6 ECHR are engaged. Nor are Claymore's civil rights affected: they are still free to pursue Wiseman in the civil courts, regardless of the Tribunal's judgment in the proceedings before it.

86. Thirdly, the OFT contends that there are private and public interests in avoiding unnecessary recovery and inspection of confidential material. As to the private interest, it is clear that much of the information sought is of the utmost confidential sensitivity. The price/cost matrix in particular provides a detailed picture of Wiseman's middle ground business in Scotland. This is the sort of information that Wiseman would be anxious not to see in the hands of a commercial rival. As to the public interest, there are serious concerns that an order for recovery and inspection on the grounds sought by Claymore would act as a substantial disincentive to cooperation in future. Whilst the OFT does have formal powers at its disposal, in practice it relies to a great extent on voluntary cooperation.

87. Fourthly, the OFT submits that the application for recovery and inspection comes too late: it was made one month after the RNA was filed and four months after the OFT's Reply to Claymore's Request for Further and Better Particulars.

88. Fifthly, it states that the RNA and the Haberman report are both dense documents which fully set out Claymore's case. There are 18 grounds of appeal. At no place in those grounds or in the Haberman report is Claymore's case put tentatively. These documents, says the OFT, respond to a microscopic account of the process leading up to the Decision. It is now time to put the appeal to the test.

*The CC Report*

89. With regard to the requested passages of the CC Report, the OFT argues that the CC's findings as to price and cost information were relied upon only for the OFT's reasonable grounds for suspicion of an infringement, which triggered the commencement of an investigation, and as the main basis for the proposed interim measures. Claymore have already been given the gist of the material comparisons of figures in the OFT Witness Statement. The CC's findings were irrelevant in coming to the Decision, which was based on the OFT's own approach and methodology, and so are irrelevant for the purposes of the appeal.

90. Furthermore, Claymore should be entitled neither to recovery and inspection of the CC Report data simply because they believe it is a valuable source of information to cross-check the OFT's findings and reliability of data supplied by Wiseman to the OFT, nor to assert an inconsistency between the CC and OFT figures: these are examples, in the OFT's view, of an impermissible audit of the investigation or "fishing expedition" for errors. In any event, the CC's approach to the allocation of costs is clear from the public version of the CC Report. The figures do not help to explain the methodology used by the CC. That is set out in the unredacted passages, to which Claymore already have access. In this sense, the figures are irrelevant.

91. The same arguments apply, in the OFT's view, to those parts of the CC Report dealing with the allegations of exclusionary contracting and supposed pricing anomalies evidencing targeting and price discrimination. To take an example, the CC Report refers, at paragraph 4.267, to a "loyalty payment" made by Wiseman to Aberness. Claymore seek disclosure of the amount of that payment. The OFT

submits that Claymore do not need access to the precise figure: it seems clear from the CC Report that a payment was made; and Claymore may make submissions as to how such payment impacts on the correctness of the Decision without needing to know the amount.

92. The OFT have, furthermore, undertaken not to "surprise" Claymore by relying on previously undisclosed information in the CC Report to defeat any of Claymore's arguments.

*The letter of 29 November 2001*

93. With regard, secondly, to the information sought on trunking and dairy cost information contained in the 29 November 2001 letter, the OFT argues that Claymore's expert is not entitled to every last bit of evidence so as to conduct an audit of the investigation. The OFT's methodology is fully set out in the OFT Witness Statement and the OFT's reply to Claymore's request for further and better particulars. It is a matter of pure speculation whether the requested material might give Claymore some further ground of criticism. Furthermore, the fact that some data relating to costs have been disclosed does not mean that other data on a different topic should also be disclosed. In short, Mr. Haberman has not explained why he actually needs this information to make his criticisms. In any case, contends the OFT, trunking costs form a very small part of total costs; Claymore should not be permitted to go behind the OFT's assessment to see whether, indeed, trunking costs do form only a very small part, especially as they have not challenged that fact. Dairy costs, i.e. processing and packaging costs, were treated by the OFT as 100% variable, and so having those figures could not advance Claymore's case.

*The price-cost matrix*

94. With regard to the price-cost matrix, the OFT makes the point that the database is very voluminous and contains a great deal of commercially sensitive information. Claymore's case for needing this database is, in effect, that they wish to audit the OFT's investigation. Mr. Haberman has not, however, stated

that he is unable to express a view without this information. Indeed, according to the OFT, Claymore do not need it to demonstrate, if they are able, that the decision is flawed such as to undermine its essential reasoning.

*Monitoring information*

95. With regard to the information received to monitor the voluntary assurances, the OFT submits that this is another example of Claymore "fishing" for information so as to conduct an audit of the OFT's investigation. If Claymore's case is that the OFT should have carried out a more extensive cross-check of that information, they can make that submission without the need for Claymore to make that cross-check themselves. In any event, the OFT did not rely on the voluntary assurances information to dismiss the complaint.

*OFT records*

96. As to the request for a list of all meeting notes on the OFT's file, the OFT contends that this request does not relate to any part of the RNA. It is not suggested that the OFT's letter of 18 September 2003, under the cover of which Mrs Pope's personal notes were disclosed, is misleading or incorrect. That letter explained why the OFT was, exceptionally, disclosing Mrs Pope's own notes, namely because there was no formal record of the meeting on the file and because the OFT took the discussion at that meeting into account in deciding to close the investigation. Mrs Pope's notes constituted the only record of that meeting.

*Wiseman's arguments*

*Principles*

97. Wiseman's arguments supplement those of the OFT. Drawing attention to rule 17 of the Competition Commission Appeal Tribunal Rules 2000, it argues that the recovery and inspection sought must be both relevant and necessary for fairly disposing of the issues in the case. The power to order recovery and inspection

should be used sparingly, akin to its use in judicial review proceedings. No shadow investigation or fishing expeditions are allowed, nor will the courts grant an order to go behind written evidence unless there is material in that evidence suggesting it is inaccurate. Wiseman draw attention to *R v Secretary of State for Home Affairs ex parte Harrison* (Court of Appeal, 10 December 1987, unrep) in which Glidewell LJ opined that "[j]udicial review is a different sort of process from the fact finding process which is a necessary part of any action begum by writ and the process of applying the law to those facts. Judicial review is notoriously based on the way in which a decision has been made, not whether the decision itself was correct."

*Application of principles in this case*

98. Wiseman contend that recovery and inspection is not necessary in light of five factors: the incidence of disclosure to date; the fullness of Claymore's pleaded case; the disproportionate nature of the request; the delay and costs that would be occasioned; and the commercial sensitivity of the material sought.

99. Wiseman argue, first, that Claymore have already had much more information than complainants are legally entitled to. They have had a detailed witness statement from Mr. Lawrie, voluntary disclosure of numerous underlying documents and the OFT's reply to the request for further and better particulars. The fact Claymore have already had access to a good deal of sensitive information does not entitle them to more. Many of the points raised in Claymore's letter of 16 April 2004 have been met by the disclosure to date.

100. Secondly, Wiseman contend that Claymore have been able to plead their case fully without recourse to the requested material. Essentially, following receipt of the OFT's reply to the request for further and better particulars in November 2003, Claymore had to choose between requesting further disclosure and pleading their case. They chose the latter. Having made that choice, say Wiseman, they should be held to it. Claymore have stated that they understand both the OFT's reasoning and methodology and where and why it went wrong. Claymore's expert believes he has identified mistakes made by the OFT. The

application runs to a total of more than 250 pages. Their case should be put to the test.

101. Thirdly, Wiseman argue that recovery and inspection would be disproportionate. Not only have Claymore pleaded a full case, but also they have abandoned their case of positive infringement. Further, they are not asking the Tribunal to make any finding of fact. The central issue is the robustness of the Decision. There is already ample material, in Wiseman's view, on which to make a fair determination of that issue. Claymore should not be permitted to "fish" to support unsubstantiated allegations.

102. Fourthly, Wiseman contend that an order for further recovery and inspection at this stage will lead to further delay. It is likely that Claymore would seek to amend their pleadings and the Haberman report. The OFT would then need to amend its Defence and Wiseman their Statement of Intervention and the Bezant report. The impact on the timetable would be very serious.

103. Fifthly, Wiseman stress the private interest in protection of confidential information. The material sought is commercially sensitive. It related to a great deal of cost and price data provided by Wiseman to the CC and OFT. It would provide a detailed picture of Wiseman's middle ground business. Although the figures relate to 2000/2001, they are still sensitive according to Wiseman because they will provide a real insight into the current spread of Wiseman's prices. Claymore would have a complete picture of Wiseman's cost base for 2000/1, which would enable them to project the data forward to the present, given their knowledge of the cost increases in the industry over the last three years and the facts that the product is homogeneous and a number of costs will be common to both Claymore and Wiseman. There is, according to Wiseman, a real risk of irreparable harm to Wiseman if this material is disclosed.

104. Wiseman contend that recovery and inspection confined to a confidentiality ring is no panacea. There is always the potential for human error and inadvertent leaks. The more information that Claymore's advisers have from confidential sources, the greater the risk of not disaggregating information learnt from

confidential and non-confidential sources. This is particularly so where Claymore's advisers need to take instructions to understand the disclosed information. Wiseman also draw attention to the practical difficulties involved in holding parts of the hearing in private and in redacting a public decision.

105. As a final point, Wiseman (in common with the OFT) undertake not to surprise Claymore by relying on previously undisclosed raw data to defeat any criticisms made in the RNA or the Haberman report.

## V TRIBUNAL'S ANALYSIS

*Principles*

106. The starting point for analysis of requests for disclosure, or in this case recovery and inspection, in proceedings commenced prior to 20 June 2003 is rule 17 of the Competition Commission Appeal Tribunal Rules 2000 (S.I. 2000 No. 261) ("the Tribunal rules"). Rule 17 provides, in so far as is material:

> "(1) The tribunal may at any time…give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.
>
> (2) The tribunal may give directions—
>
> …
>
> (k) for the disclosure between, or the production by, the parties of documents or classes of documents; or in the case of proceedings taking place in Scotland, for such recovery or inspection of documents as might be ordered by a sheriff;
>
> …"

107. For the purposes of these proceedings the Tribunal is sitting as a Tribunal in Scotland. We have not been referred to any authority by the parties on the relevant principles to be applied in applications for recovery and inspection in Scottish proceedings. We might, for example, have been treated to an analysis of Rules 21.1 and 28.2 of the Ordinary Cause Rules 1993 and a discussion of how far shrieval discretion runs (see *MacQueen v Mackie & Co Distillers* 1920 SC p. 544).

108. Whilst we would ordinarily expect to be addressed on such principles, we are satisfied that the rules are broadly the same as those which apply in England and Wales. It is, moreover, in any event common ground between the parties that any such recovery and inspection as is ordered by the Tribunal must be both relevant and necessary for disposing justly of the proceedings.

109. In our earlier judgment of 9 June 2003 on disclosure in these proceedings ([2003] CAT 12) we made the point that the primary purpose of this case is to identify whether the OFT has made any material error of law, whether it has carried out a proper investigation, whether its reasons are adequate and whether there are material errors in its appreciation: see page 7, lines 20 and following of the transcript of that judgment. See also [2004] Comp AR 63 at [20].

110. The Tribunal has borne this in mind when considering the issue of recovery and inspection. As we made clear on that occasion, it should not, at least ordinarily, be necessary to go in great depth into the underlying documents in order to establish whether the decision under appeal is soundly based. This is not an occasion for Claymore to seek to rework all of the workings that the OFT made on the basis of the raw material supplied to it.

111. The Tribunal's function is different, in the present case, from appeals brought by the subject of an infringement decision. Such appeals are full appeals on the merits, in which the Tribunal usually has to come to a view, on the evidence before it, as to whether an infringement has indeed been made out. A detailed examination of the information used by the OFT in reaching its infringement decision will often be necessary. That is not the case here. The Tribunal is not being asked to take a decision as to whether Wiseman did in fact abuse a dominant position; it must simply decide whether the OFT's approach was in error. We should add, however, that this reflects our current view, based on the facts of the present case: we do not rule out further developments in other cases presenting different circumstances.

112. As we observed in our earlier judgment of 9 June 2003, the Tribunal must balance, on the one hand, the interest Claymore have in accessing the OFT's reasons to the fullest extent possible in order to exercise their right of appeal and, on the other, both the general interest in not burdening the litigation process with recovery and inspection that is unnecessary or unduly burdensome and the interest Wiseman has of preserving business confidentiality: [2003] CAT 12, transcript at page 5, lines 9 and following; [2004] CompAR 63 at [13]-[15].

113. The general approach to discovery before the Tribunal is that it is not automatic. It needs to be ordered by the Tribunal, usually upon a request by a party to the proceedings. The Tribunal must be satisfied that the disclosure sought is necessary, relevant and proportionate to determine the issues before it.

114. The need for the party seeking discovery to show necessity, relevancy and proportionality is all the more acute in cases such as the present, where the information concerned is commercially confidential and belongs to a direct competitor of the party seeking access to it. It is well known that Express, Claymore's parent company, and Wiseman are the two principal competitors on the Scottish milk market. Theirs is by all accounts an intense rivalry. Great care is necessary when the issue concerns the potential disclosure of sensitive business secrets by one competitor to another.

115. Whilst the Tribunal is prepared, in some cases, to order disclosure within a confidentiality ring (as happened earlier in this appeal), such confidentiality rings have disadvantages. There is undoubtedly scope for error. The amount of information disclosed within them should be kept to a minimum necessary to do justice in a case. They should not be overloaded.

*Application of the principles*

*General*

116. In our earlier judgment on disclosure, as noted above, we ordered recovery and inspection within a confidentiality ring (consisting of certain named external

advisors of Claymore and Wiseman) of an unredacted version of the OFT Witness Statement. It was difficult to argue that anything Mr. Lawrie said in that statement was irrelevant to the Decision, given that it is directed towards giving the OFT's reasons for the Decision. We also ordered recovery and inspection within that confidentiality ring of the documents annexed to the OFT Witness Statement, given that they were voluntarily disclosed in elaboration of the reasons for the Decision. Essentially, this material in unredacted (or, to use the correct Scottish expression, unexcerpted) form was necessary for Claymore fully to understand the OFT's reasons for the Decision.

117. The current situation is thus unlike that faced by the Tribunal at the case management conference in June 2003, at which the Tribunal agreed with Claymore that it was extremely difficult for them to plead their case without the material in respect of which the Tribunal subsequently ordered recovery and inspection.

118. What has, in fact, occurred is that on the basis of the existing disclosure, Claymore have been able to advance a detailed pleaded case, supported by an expert witness. Claymore have not had much, if any, difficulty in launching their attack on the Decision. Our overall impression is that Mr. Haberman has prepared an impressively detailed report in support of Claymore's case. For example, section 4, entitled "The OFT investigation", provides an in-depth examination of the OFT's investigation into Claymore's complaints, highlighting what Mr. Haberman considers are various anomalies in the data and the data gathering exercise. Section 5, entitled "Flaws in the OFT investigation", contains a lengthy critique of that investigation. Mr. Haberman's conclusions are clear.

119. The question for us therefore is whether further disclosure would be both proportionate and necessary in light of the current state of affairs.

120. We regard as important the OFT's concession, made by Counsel during the hearing of this matter at the case management conference on 24 May 2004, that if Claymore succeed in showing that the OFT made an error of principle, Claymore do not need to go on to show the difference that error could have

made. The OFT is content to argue the matter on the questions of principle (see above).

121. Many of Claymore's arguments for recovery and inspection are to the effect that they need the various materials so as to "cross-check" their workings or to quantify the difference made by the various alleged errors of principle. These arguments were understandable whilst the OFT maintained its position, which figures prominently in the Defence, that Claymore needed to show that any errors on the part of the OFT actually made a difference. As we understand it the OFT no longer pursues that submission. It now accepts that if, for example, we agree with Claymore's submissions that the OFT erred in principle in its allocation of run costs, that error may be deemed to be of sufficient materiality as to undermine the Decision itself.

122. We consider that concession to have been well made. Clearly, it would be difficult, if not impossible, for Claymore to show that the alleged errors did have a material effect if they are denied access to the very information that they would need in order to show such a material effect. As at present advised, however, it does not seem to us that further disclosure is necessary for that purpose. Nor do we think that the ability to "cross-check" is in itself a sufficient justification for ordering further discovery in the circumstances of this case.

*The CC Report*

123. The redacted passages of the CC Report are requested because, in Claymore's submission, they bear on the criticisms made by Claymore of the OFT's assessment of (i) Wiseman's costs; (ii) the alleged exclusionary contracting; and (iii) the alleged targeted discriminatory pricing.

124. It seems to us difficult to maintain that recovery and inspection of those passages in their unredacted form is necessary.

125. We observe generally that this case concerns the correctness of the OFT's investigation: we are not dealing with the earlier investigation by the CC. While

the CC is, of course, a highly respected body, the fact that the CC may have used a particular approach does not necessarily take one very far in establishing that the OFT's approach was flawed, especially since the CC itself was in this case split on the issue of whether Wiseman had acted in a manner contrary to the public interest. The CC Report is useful background but is not directly relevant to the issues to be determined.

126. The fact that the OFT relied on certain of the redacted passages of the CC Report for its reasonable suspicion of an infringement by Wiseman of the Chapter II prohibition does not mean that the OFT relied on those passages when coming to the Decision. It is clear that the OFT carried out its own investigation into the alleged infringement. It did not use the data in the CC Report during that investigation. It started afresh.

127. In our opinion, the methodology of the CC is set out in the publicly available version of the CC Report. It has not satisfactorily been explained to us why the redacted figures themselves are necessary. They do not appear to us to add anything to Claymore's case. Claymore is able, if it wishes to do so, to compare the respective methodologies adopted by the CC and OFT and make submissions based on that comparison as to why the Decision is flawed in principle.

128. Claymore say they need access to the passages of the CC Report dealing with the identification of Wiseman's AVC and ATC. We do not, however, see that access to the raw figures is necessary for Claymore to advance their case. Claymore have conceded, rightly in our view, that the issue of principle can be tackled without any figures at all. Claymore can, and do, make their arguments as to the correct way in which to build up costs ("bottom up" or "top down") and allocate them (and in particular their criticisms of the OFT's use of volume as a driver of costs) without access to more figures than they already have.

129. We are not persuaded that specific unredacted passages of the CC Report are necessary for Claymore to make their case that the OFT had erred in relation to the understating and assessment of costs. Essentially, we agree with the OFT that Claymore's challenge vis-à-vis the OFT's assessment of Wiseman's AVC and

ATC is one of principle, which they can and do advance on the basis of their own expert evidence.

130. Claymore say they need access to the redacted passages of the CC Report dealing with alleged exclusionary contracting and its impact. This divides into two parts. They seek access to the per litre price offered to CWS by Wiseman to secure its business. However, the price offered to CWS is discussed elsewhere in the CC Report at 4.340 *et seq*. The unredacted version of this part of the CC Report has already been provided to Claymore's advisers pursuant to the Tribunal's Order made on 9 June 2003. There seems to us, therefore, no reason to order further disclosure in this regard.

131. Claymore also seek details of the amount of the one-off "loyalty" payment made by Wiseman to Aberness in connection with an exclusive supply agreement between them. The point taken in the RNA is that the OFT did not pay any or sufficient attention to the fact of this payment.

132. This argument raises the issue of confidentiality not only as regards Wiseman but also as regards Aberness, which is not before the Tribunal. Our view is that this payment was presumptively a material factor in inducing Aberness to place its business with Wiseman on a "loyalty" basis. We also take it that the payment was substantial in relation to the size of the Aberness business. If that is accepted by the parties there would be no need for the Tribunal to know the exact amount. If, however, either of the propositions is in dispute, then in principle the case for disclosure would be made out. We assume, for working purposes, that these two propositions are not in dispute.

133. Claymore also claim that access to certain of the requested passages is necessary to decide whether the OFT's findings on the allegations of targeted discriminatory pricing are sustainable. Looking briefly at the CC Report, it analyses, at paragraphs 4.320 onwards, the issue of price differentials between Wiseman's middle ground and larger supermarket prices. The CC states that there were differentials, and that the differentials were more pronounced at Wiseman's Keith depot, which services customers in the Highlands. In

paragraph 4.329, the CC concludes that "there still appears to have been a substantial reduction in the price charged for milk from the Keith depot between 1998/9 and 1999/2000 for the different middle ground customer groups as compared with the larger supermarkets." In our judgment that sufficiently sets out the factual circumstances in which this issue should be addressed.

134. Claymore's case, in essence, is that the OFT did not even look into the issue of differentials, or give sufficient or any weight to targeting by Wiseman of middle ground customers. They criticise the OFT on this basis in grounds 10 and 11 of the RNA. See also paragraphs 5.101-5.114 of the Haberman report. The main reason we can see for Claymore wanting access to the figures in the passages on targeted discriminatory pricing is so that their expert may "cross-check" his own findings against them. However, in our opinion Claymore are already in a position to make their point that insufficient weight (or none at all) was given to those findings.

135. We bear in mind additionally (a) that the OFT has confirmed in its written submissions on this application that it will not seek to rely on any material in the CC Report which has not been seen by Claymore or their advisers; and (b) that much of the behaviour examined by the CC Report took place before the coming into force of the 1998 Act.

*Attachments to the letter of 29 November 2001*

136. Similarly, we are not convinced that Claymore need any further underlying data to make out their case. Our reasons are similar to those in relation to the requested passages of the CC Report. In our view, the Haberman report has been able to criticise the OFT's approach to cost data gathering, classification and allocation, and the time scale over which the OFT assessed Wiseman's behaviour, without access to the data now requested: see paragraphs 5.20-5.100 of that report. Those criticisms of principle are not advanced in a qualified way. Again, the main reason we can see for Claymore wishing to have access to additional data is that such data might give Mr. Haberman the opportunity to

verify his criticisms. That does not seem to us a sufficient reason for ordering recovery in the particular circumstances of this case.

*The price-cost matrix*

137. Claymore's case for obtaining the price-cost matrix is that it is necessary in order to demonstrate the consequences of the errors outlined by the Haberman report. As we mentioned earlier, the OFT no longer maintains that Claymore would have to show the material consequences of any errors of principle that may be established. As a result, we are not persuaded that it would be proportionate to order disclosure of the price-cost matrix.

*Voluntary Assurances*

138. We are not persuaded that we should accede to Claymore's request for recovery and inspection of the information given by Wiseman to the OFT in connection with the voluntary assurances given by the former in lieu of interim measures. In a nutshell, Claymore's case in this regard is that the OFT should have cross-checked the cost information provided by Wiseman with the 'voluntary assurances' data. In our view, Claymore can make that submission perfectly well without the need for access to the information itself. It is not a function of the Tribunal in this case to verify the detail of the data. We do not regard this request as proportionate or necessary.

*OFT records*

139. We do not at this stage deem it appropriate to order the OFT to submit a list of personal records kept by officials in the course of the investigation. Personal notes are not ordinarily disclosable documents. They do not form part of the OFT's documentation. There is nothing to suggest that the OFT is attempting here to "hide" meeting notes in the form of personal notes, despite the OFT's voluntary disclosure of a personal note of one of its officials, which took place as a result of the fact that no official note of the seemingly important meeting of 14

March 2002 existed. Furthermore, and in any event, such personal notes are not referred to or relied on by the OFT in support of the decision.

140. We are, however, somewhat concerned at the way in which the process of record keeping has taken place in this matter. It is, to say the least, somewhat surprising that the OFT did not make an official record of the meeting of 14 March 2002 between certain of its officials and Wiseman, at which it appears Wiseman managed to convince the OFT to close its file. That, however, is a matter for argument on the substance of the case.

## VI CONCLUSION

141. Our conclusion is that Claymore's application for further recovery and inspection should be refused at this stage. However, if this case develops in some unexpected way, the appellants are free to make a further application to the Tribunal if new circumstances arise.

Christopher Bellamy Peter Clayton Peter Grant-Hutchison

Charles Dhanowa
Registrar 24 September 2004