Neutral citation [2012] CAT 31 Case No: 1188/1/1/11

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

20 December 2012

Before:

LORD CARLILE OF BERRIEW C.B.E., Q.C.
(Chairman)
MARGOT DALY
CLARE POTTER

Sitting as a Tribunal in England and Wales

B E T W E E N :

(1) TESCO STORES LIMITED
(2) TESCO HOLDINGS LIMITED
(3) TESCO PLC

Appellants

- v -

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on
26 and 27 April, 1, 2, 14, 16, 17, 23, 24, 25, 28, 29 and 31 May, and 13 July 2012

and

at the International Dispute Resolution Centre, London, on
18, 21 and 22 May 2012

JUDGMENT (LIABILITY)

APPEARANCES

Ms Dinah Rose Q.C., Ms Maya Lester and Mr Daniel Piccinin (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Appellants.

Mr Stephen Morris Q.C., Ms Kassie Smith, Mr Thomas Raphael and Miss Josephine Davies (instructed by the General Counsel, Office of Fair Trading) appeared for the Respondent.

Note: Excisions in this judgment (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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I. INTRODUCTION

1. In 2002, British dairy farmers were far from content in that they felt they were selling their raw milk too cheaply. They, therefore, started to blockade creameries and other dairy processing plants. In an effort to appease the farmers, certain well-known supermarkets and dairy processing companies determined to increase the retail and cost prices of fresh liquid milk ("FLM") in order to raise the price paid to the farmers for raw milk by 2 pence per litre ("ppl"). However, only a proportion of raw milk is sold as FLM. So, to enable a price increase to be paid across the board to all dairy farmers, the processing companies sought to increase the price they charged to their retailer-customers for other dairy products, including cheese, on the basis that the extra revenue from that increase would be passed back to the farmers. A year later, in the autumn of 2003, one dairy processing company sought to further increase the cost prices it charged the supermarket chains for its cheeses in an effort to increase its profit margins. In both years, the cost price increases sought by the dairy processing companies were allegedly accompanied, or followed, by unlawful exchanges of the supermarkets' confidential future retail pricing information.

2. This judgment relates to the appeal by the Appellants ("Tesco") against a decision of the Office of Fair Trading (the "OFT") pursuant to section 46(1) of the Competition Act 1998 (the "1998 Act") in relation to the events outlined above. That decision, which was taken on 26 July 2011, issued on 10 August 2011, and entitled "*Dairy retail price initiatives*" (Case CE/3094-03) (the "Decision"), found that a number of competing undertakings, including Tesco, had indirectly exchanged their future retail pricing intentions in respect of British-produced cheddar and territorial cheeses, via their common suppliers. The OFT concluded that Tesco had participated in two separate concerted practices (one in 2002 and the other in 2003), which had as their object the restriction of competition in breach of the Chapter I prohibition, contained in section 2(1) of the 1998 Act. The OFT imposed a penalty of £10.4 million on Tesco for committing these infringements.

3. Tesco appeals against both the findings of infringement and the level of penalty imposed on it. This judgment addresses the question of infringement only, in other words whether the OFT was correct to find that Tesco had participated in the two anti-competitive concerted practices referred to as the 2002 Cheese Initiative and the 2003 Cheese Initiative, as defined at paragraph 1.5 of the Decision.

4. This judgment uses a number of terms and abbreviations, which are defined when first used. Attached to this judgment are two appendices: the first is a composite glossary of those defined terms; and the second is a *dramatis personae*.

5. Some of the material considered by the OFT and Tesco's legal advisers, and in turn considered by the Tribunal, including material provided by third parties, is still said to be commercially sensitive and confidential. Disclosure of the more sensitive documents during these proceedings was restricted to identified external legal advisers who gave undertakings not to disclose them or their contents to anyone, including their own clients, and only to use them for the purpose of these proceedings. In preparing this judgment, the Tribunal has had regard to the fact that certain aspects of its decision are only comprehensible if some of the information initially regarded as confidential is set out herein (see paragraph 1(3) of Schedule 4 to the Enterprise Act 2002). We have taken account of the fact that much of this information is now nearly a decade old and that, in a number of instances, a piece of information was marked as highly confidential in one document but left unredacted where replicated in another document. This led us to question the extent to which the confidentiality concerns expressed, it should be said principally by third parties, could really be maintained. This is an edited non-confidential version of our judgment, which is available generally.

6. The Tribunal received lengthy written submissions, supplemented over the course of the 17-day[1] hearing by detailed oral submissions and witness evidence. We have not, in the course of this judgment, attempted to deal with every point raised by the parties and have, instead, addressed only those issues which we considered were necessary to dispose of this phase of the appeal.

[1] Redacted transcripts of the hearing are available on the Tribunal's website: www.catribunal.org.uk.

II. FACTUAL BACKGROUND

7. Before dealing with the substance of Tesco's appeal, it is necessary briefly to set out the factual background, including an overview of the British dairy market, the supply chain, the companies involved and certain aspects of the cheese production process.

8. The Decision, which runs to more than 360 pages plus three annexes, describes the factual and legal background (sections 2 and 3), summarises the industry structure and the relevant market (section 4), sets out the analysis of the concerted practices (section 5), sets out the OFT's legal assessment (section 6), and finally deals with the OFT's action and, in particular, penalties (section 7). What follows is necessarily a summary of that very detailed account.

9. The two infringements relevant to this appeal found by the OFT in the Decision (as set out at paragraphs 33 and 34 below, the "Infringements") concern the supply of British-produced cheddar and territorial (such as Lancashire and Cheshire) cheeses in the UK. In 2002 and 2003, sales of cheddar constituted approximately 50 per cent of total cheese sales in the UK by volume and value, and British territorial cheeses approximately 10 per cent by value. At that time Tesco was the biggest purchaser, and retailer, of cheese in the UK by some margin. According to Mrs Lisa Oldershaw, Tesco's buying manager for British cheese from June 2001 to February 2004, Tesco purchased approximately twice as much cheese as any other major retailer in the UK. It sold 226 unique British cheese lines, supplied by more than 20 different suppliers, with a total sales value of approximately £212 million per annum. An individual cheese line relates not only to the type and brand of cheese, but also the weight of the pack so that, for example, a Seriously Strong white cheddar 250g pre-pack is an individual cheese line.

A. Supply chain

10. The supply chain in the UK dairy market has three levels: dairy farming, processing/supplying and retailing.

11. The first level of the supply chain is the production of "raw milk" by dairy farmers. Raw milk is untreated and unprocessed milk taken directly from the cow (or other dairy animal). In 2002 and 2003, almost all raw milk produced on UK farms was sold to dairy processors, either directly or through selling groups and co-operatives. The price received by the farmers for the raw milk is known as the "farmgate price".

12. The dairy processors and suppliers operate at the intermediate level of the supply chain. These are the companies which purchase the raw milk from the farmers, process it into dairy products, such as FLM, cheese and butter, and supply those finished products to retailers, like Tesco, for sale to consumers. In 2002/2003, about half of all raw milk purchased by the processors was processed into FLM, about a quarter into cheese and the rest was used for milk powder, butter, cream and other dairy products. Whilst in most cases the processors and suppliers were in fact the same companies, there were instances where one company processed raw milk into cheese (or some other dairy product) and sold it to another company, which then packed and supplied it to a retailer. Since the findings of infringement challenged on this appeal are said to be instances of the unlawful communication of future pricing intentions between competing retailers via their common suppliers, this judgment refers to "suppliers" but this should be taken to be a reference to both suppliers and processors.

13. Although this judgment refers to a number of different suppliers, at the material time the three largest suppliers of cheese to the retailers, listed in descending order by size, were:

    (a) Dairy Crest Limited and Dairy Crest Group plc (together, "Dairy Crest");

    (b) The Cheese Company Limited, which was, at the material time, a member of the same corporate group as Waterfood Foods International Limited, Glanbia Investments (UK) Limited and Glanbia (UK) Limited (together, "Glanbia"); and

(c) A McLelland & Son Limited (although the Decision was addressed to Lactalis McLelland Limited, following the acquisition of A McLelland & Son Limited by Groupe Lactalis ("McLelland")).

14. When asked by the OFT during its investigation, each of these three suppliers identified the other two as its closest competitors in the market for the supply of cheddar.

15. The third level of the supply chain comprises the retailers. The suppliers supplied their cheeses to a number of different retail outlets, ranging from non-affiliated, independent shops right through to the large, well-known grocery retailers with multiple stores across Great Britain, the so-called "national multiples", such as Tesco and Asda. References in this judgment to "retailers" are references to those national multiples who were addressees of the Decision (as to which see paragraph 33 below and paragraph 1.2 of the Decision).

16. In 2000, the retailers' combined market share accounted for some 80 per cent of total cheddar sales, and 65 per cent of total FLM sales, in the UK. Tesco was the largest purchaser of cheese for resale, with almost a quarter of the market for retail groceries. In the Decision, the OFT stated that it asked each of Asda, Safeway, Sainsbury's and Tesco who their top three competitors for sales of FLM and cheese were in 2002 and 2003. Each of Asda, Safeway and Sainsbury's identified the other three retailers as their nearest competitors, whilst Tesco identified doorstep sales of FLM at the top of its list, followed by the other three retailers in relation to both FLM and cheese.

B. Cheese products

17. It was common ground that cheese is a more complex product than FLM for three principal reasons. The first is the sheer number of different cheese lines that are produced and sold in the UK, compared to the relatively limited number of types of FLM. Secondly, processing raw milk into cheese is, of course, more complex than processing it into FLM, the former requiring as it does differing processes and varying maturing periods for different types of cheese.

18. Thirdly, the packing and pricing of cheese, which are of central importance to this appeal, add a further layer of complexity to the cheese market. The cheddar and British territorial cheeses supplied to the retailers may be broken down in a number of ways: (a) by branding; (b) by weight and packing; and (c) by quality.[2] These sub-divisions overlap to a certain extent:

(a) Branding: Cheese can first be sub-divided into branded and own-label cheeses. Branded cheeses are those cheeses bearing a supplier's name or chosen brand. Well-known branded cheeses include Cathedral City, which is a Dairy Crest brand, and Seriously Strong, which is a McLelland brand. In contrast, own-label cheeses simply bear the relevant retailer's own branding or name (for example, Tesco Finest).

(b) Weight and packing: The second sub-division relates to the manner in which an individual piece of cheese is packed and priced.

The first distinction in this regard is between 'pre-packed' and 'deli' cheeses. Pre-packed cheeses are just that: cheese cut into individual pieces (typically between 200g and 500g in weight) and packed by the suppliers before being distributed to the retailers. Deli cheeses, on the other hand, are supplied in large blocks (typically weighing several kilos), which are cut, wrapped and priced at the retailers' in-store deli counters.

Within the pre-packed category, there are a number of further sub-divisions. Branded cheeses are generally packed in 'fixed-weight' pieces. McLelland's Seriously Strong, for example, appears to have been available in 250g and 500g packs at the time of the Infringements. Fixed-weight packs of cheese do not typically have prices printed on them.[3] Rather, the retailers place the packs on shelves in their stores with price labels affixed to the shelf edges.

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2 Transcript, Day 8, pp. 10 *ff*.

3 It is to be noted that, by way of exception to this, certain branded cheeses are, on occasion, packed in what are called 'price-marked packs' or 'PMPs'. PMPs have the retail price printed on them and are typically, although not always, produced for the purposes of promotions.

Own-label cheeses are packed in 'random-weight' blocks. As the name suggests, these are pieces of cheese of a random weight within a certain weight range, so that individual pieces may vary in weight by a few grams. Unlike fixed-weight packs, random-weight packs have the price of each individual piece of cheese printed on them by the supplier, determined by reference to the per-kilo price set by the retailer. This means that, for cheeses sold in random-weight packs, retailers need to provide their future retail prices to their suppliers in order for that cheese to be packed and priced, prior to delivery to the retailers' stores or depots. Another feature of random-weight packs is that, because the retail price is printed on the pack, the price cannot be changed in-store until old stocks have been exhausted or withdrawn. Mrs Oldershaw, in her written evidence, suggested a time frame of one to three weeks for this to happen, depending how much packed and priced stock was held by the suppliers. Mr Arthur Reeves, of Dairy Crest, thought that, on average, this process would take two weeks.[4]

(c) Quality: Finally, among the own-label cheeses, there was a range of qualities. At the bottom end of the range were the basic cheeses, such as Tesco Value or Asda Smart Price. Above these were the 'standard' cheeses and, at the top of the range, the 'luxury' lines such as Tesco Finest or Sainsbury's Taste the Difference. As Mrs Oldershaw explained, Tesco considered it necessary for an appropriate pricing hierarchy, which made sense to consumers, to be maintained among the varying qualities of cheese.[5]

C. Margin maintenance

19. When determining at what retail price to sell a product, a retailer must consider what profit margin it wishes to make above the cost it has incurred purchasing the product. There are, very broadly speaking, two methods of determining a new retail price following a cost price increase. First, the retailer may decide to increase the retail price to maintain cash margin. In other words, if the cost price of a widget increases by 2p, the retail price will increase by 2p. Secondly, the retailer may elect

[4] Transcript, Day 5, pp. 37 and 38.
[5] Transcript, Day 8, p. 12.

to maintain its percentage margin. If a 2p rise in the cost price of a widget represents an increase of 10 per cent in the cost price, then the retailer would increase its retail price for widgets by 10 per cent to maintain its percentage margin. Percentage margin maintenance will typically lead to greater retail price increases than cash margin maintenance. Of course, in practice, the retailer's choice is not a simple binary choice between those two alternatives. It may elect to set its retail prices at a level somewhere between the two, or indeed at a level below cash margin maintenance, if it wishes to absorb some of the increase in its costs and keep prices low, or above percentage margin if it wishes to make an extra profit.

D. Overview of Tesco's cheese business in 2002 and 2003

Tesco's general negotiations with its suppliers

20. As noted above, Tesco was the largest retailer of cheese on the UK market at the time of the Infringements found by the OFT. Mrs Oldershaw explained that Tesco bought cheese in two ways: in bulk and in individualised negotiations on a line, or lines, of a particular cheese. In the case of bulk-cheese purchases, suppliers would be invited to put in tenders at regular intervals to supply Tesco with a particular volume of cheese over a particular period of time. That cheese would then be packed as, for example, Tesco Value Mild Cheese. In the case of non-bulk cheese, Tesco negotiated with a particular supplier in what Mrs Oldershaw described as a "*more traditional ongoing relationship*". It is with cheese supplied through these non-bulk negotiations that the Decision is concerned.

Tesco's KPIs and so-called 'basket policy'

21. It is necessary to understand a little about Tesco's retail pricing policy for cheese. In the relevant period of 2002 to 2003, Mrs Oldershaw was the person at Tesco responsible for negotiating the cost prices at which Tesco purchased British cheeses from its suppliers. These cost prices naturally fed through into the retail price that Tesco charged its customers. Mrs Oldershaw was also responsible for determining Tesco's retail prices for British cheeses.

22. Mrs Oldershaw explained in her written evidence that, in her role as a buyer for Tesco, she "*lived and died*" by her key performance indicators ("KPIs"). Mrs Oldershaw explained that KPIs were a means of measuring an individual employee's performance and that the percentage margin KPI was very important to her, because maintaining a certain margin on cheese was one of her performance targets. An increase in the cost price of a line of cheese would naturally have some effect on the percentage margin KPI, unless accompanied by an appropriate increase in the retail price.[6] Mrs Oldershaw accepted, however, that, where it came to a conflict between matching a competitor's lower retail price under Tesco's basket policy (described in the next paragraph) and maintaining margin, then the former had to take priority.[7]

23. In addition to taking account of the cost price paid for the cheeses, Mrs Oldershaw also had to comply with Tesco's so-called "basket policy" in setting her retail prices. As Mrs Oldershaw explained in her written evidence, throughout her time as Tesco's buying manager for cheese, Tesco operated a pricing policy whereby it would be no more expensive than the cheapest of its leading competitors (which Mrs Oldershaw identified as Asda and Sainsbury's at the relevant time) on a notional 'basket' of specified products. This meant that if a competing retailer reduced its price on a product which was included in the basket, Tesco's policy required it to match that lower retail price. In 2002 and 2003, the notional basket included all Tesco Value cheese lines and a mixture of Tesco own-label, and popular branded cheeses. It is to be noted that Tesco's basket policy only required it to match price *reductions*, not price increases. Whether Tesco would, *in practice*, always match its competitors' price increases was contested before the Tribunal.

24. The relevance of Mrs Oldershaw's KPIs to the events of 2002 and 2003, in the OFT's submission, was that there was an inherent tension between her margin KPI and Tesco's basket policy. The former required a certain profit margin to be achieved on retail prices across the cheese category as a whole (the KPI was not measured on individual cheese lines but across cheese as a category). The latter required retail prices to be reduced to match a cheaper competitor. As will be seen

6 Transcript, Day 8, p. 35.
7 Transcript, Day 8, p. 47.

when we turn to the events of 2002 in detail, if Tesco were to accept a significant cost price increase across most of its lines of cheese but its competitors declined to raise their retail prices, Tesco's basket policy would prevent it from increasing its retail prices on those products in the 'basket'. This could have had a significant impact on Mrs Oldershaw's percentage margin KPI.

E. The British dairy sector in the run-up to 2002

25. Following the de-regulation of farmgate prices in 1994, the price paid by suppliers to dairy farmers for raw milk declined steadily from an average of 24.50 ppl in 1995 to 18.03 ppl in 2003, with a brief dip below 15 ppl in early 2000. In the Decision, the OFT found that, over the same period, there was a modest rise in suppliers' margins, whilst retailers' margins leapt from 3.1 per cent in 1995 to nearly 28 per cent in 2003.

26. The decline in farmgate prices was said to have put dairy farmers in financial difficulties and undermined the long-term viability of British dairy farming. In March 2000, in an attempt to improve their situation, dairy farmers began blockading suppliers' and retailers' depots, and lobbied Parliament. One farmers' organisation, Farmers for Action, tried to co-ordinate a retail price rise for FLM, so that the proceeds could then be passed back up the supply chain to increase farmgate prices. Waitrose wrote to the farmers' representatives stating that it:

> "would have no problem in agreeing to a price increase ... IF this could a) be passed back through the supply chain to producers and b) ensured that [it] would not be uncompetitive in the market place as a whole" (emphasis as it appears in original).

27. Safeway wrote to similar effect, expressing its support for a significant price increase "***provided*** *that* [it] *... did not thereby disadvantage* [itself] *in what is a very price sensitive product market*" (emphasis as it appears in original) and noting that "*unilateral action by any major retailer to increase prices would be of no use to anyone*".

28. It appears that Tesco refused to make such a commitment and, on 10 April 2000, wrote to the OFT, enclosing copies of the letters written by Waitrose and Safeway, seeking the OFT's advice as to whether such an initiative would raise competition

law concerns. The OFT replied that the letters written by Waitrose and Safeway amounted to indications of action that they would:

> "be willing to take on the basis that others (ie [their] competitors) followed suit. This sort of concerted arrangement whereby the parties indicate their willingness to follow a particular course of action would appear to fall within what we would regard as an agreement or concerted practice within the meaning of the Chapter I prohibition".

29. At the same time, the OFT wrote to each of Waitrose and Safeway warning them as to how it would likely regard their letters.

III. THE OFT'S INVESTIGATION AND DECISION

A. The Investigation

30. The Infringements came to light as a result of an OFT investigation, which was commenced when Arla Foods Limited and Arla Foods UK Holding Limited (together "Arla"), a dairy processor, applied to the OFT for leniency in July 2003 in respect of a retail pricing initiative relating to FLM.

31. Arla's leniency application gave the OFT reasonable grounds for suspecting that (i) Arla, (ii) Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited and Broadstreet Great Wilson Europe Limited (together, "Asda"), (iii) Dairy Crest, (iv) Tesco and (v) Robert Wiseman & Sons Limited and Robert Wiseman Dairies plc (together, "Wiseman"), either were, or had been, involved in an agreement and/or concerted practice to fix prices for the supply of FLM during 2002 and 2003. The OFT opened a formal investigation, under section 25 of the 1998 Act, in relation to FLM in January 2004. Thereafter the course of the investigation up to the time of the Decision can be summarised as follows:

(a) In June 2004, the OFT sent notices to each of Asda, Dairy Crest, Tesco and Wiseman under section 26 of the 1998 Act requesting the provision of relevant documents and information. The same month, [a retailer] [✂] made an application for leniency in respect of vertical price-fixing arrangements relating to FLM. In July 2004 that leniency application was extended to include vertical price-fixing arrangements relating to cheese (although leniency was ultimately refused on the basis that the information

supplied had not substantially contributed to the investigation). This in turn led, in January 2005, to an extension of the OFT's investigation to include dairy products other than FLM. At that time, the investigation was also extended to include: (i) Sainsbury's Supermarkets Limited and J Sainsbury plc (together, "Sainsbury's"); and (ii) Safeway Stores Limited, Stores Group Limited and Safeway Limited (together, "Safeway"). The remit of the investigation was subsequently extended again, so as to include Glanbia and McLelland in April 2005.

(b) The Statement of Objections (the "SO") was issued on 20 September 2007 to the following addressees: (i) Arla; (ii) Asda; (iii) Dairy Crest; (iv) Glanbia; (v) McLelland; (vi) WM Morrison Supermarkets plc ("Morrisons", now Safeway's ultimate parent company); (vii) Safeway; (viii) Sainsbury's; (ix) Tesco; and (x) Wiseman. The SO set out five separate alleged infringements: the 2002 FLM Initiative; the 2002 Cheese Initiative; the 2003 FLM Initiative; the 2003 Cheese Initiative; and the 2003 Butter Initiative. Each initiative was said to be a "*single overall concerted practice which had as its object the prevention, restriction or distortion of competition in the supply of*" the relevant dairy product in the UK. It is to be noted that not all addressees were implicated in all of the alleged infringements. Indeed, Tesco was the only addressee alleged to have been involved in all five suspected infringements. When the SO was issued, each addressee was invited to consider whether it wished to enter into a so-called early resolution agreement ("ERA") with the OFT, whereby the company might receive a reduction to its financial penalty in exchange for an admission of liability in the alleged infringements and for providing the OFT with ongoing assistance.

(c) Between December 2007 and February 2008, the OFT entered into ERAs with each of Asda, Dairy Crest, Glanbia, McLelland, Safeway, Sainsbury's and Wiseman (each, an "ERA party" or "admitting party"). Tesco and Morrisons each submitted written representations to the OFT disputing their respective involvement with the alleged infringements and Morrisons also

made oral submissions. In addition, six of the seven ERA parties submitted memoranda on what they considered to be factual inaccuracies in the SO.

(d) Between April and August 2008, the OFT conducted interviews with 12 individuals employed by one or other of the addressees of the SO (although none from Tesco). In addition, Asda, Dairy Crest, Glanbia and Wiseman, in accordance with their respective ERAs, each provided the OFT with notes of interviews conducted by the relevant ERA party's legal advisors with individuals employed by that party at the time of the alleged infringements.

(e) On 23 July 2009, the OFT issued a Supplementary Statement of Objections (the "SSO"), to supplement and revise the SO, including by adducing further evidence of the alleged infringements. Following the issuance of the SSO, further written representations were made by Morrisons, Tesco and two of the ERA parties. Tesco limited its representations to the 2002 and 2003 FLM Initiatives, and did not address the 2002 and 2003 Cheese Initiatives that are the subject of this appeal.

(f) Following a review of the various representations it received, the OFT determined that it did not have sufficient evidence to prove its case in respect of the 2002 FLM Initiative, the 2003 Butter Initiative or Tesco's involvement in the 2003 FLM Initiative. This led to an amendment, by way of variation agreements, of various of the ERAs, during the early part of 2010, so as to remove admissions made in respect of alleged infringements, which the OFT had decided it would no longer pursue.[8]

(g) Despite an initial indication from Tesco that it would not contest the OFT's allegations in relation to the 2002 and 2003 Cheese Initiatives, the two sides could not agree on the correct approach to calculating Tesco's penalty and, ultimately, Tesco decided to contest those allegations and brought this appeal.

[8] It also meant that Morrisons was no longer included in the OFT's investigation as it had only been alleged to have participated in the 2002 FLM Initiative.

32. It is appropriate to record that, following the issuance of the SSO, Tesco wrote to the OFT indicating that it was considering whether it would submit further witness evidence to the OFT. The OFT responded that that was a decision for Tesco but that, in any event, the deadline for submissions on the SSO had elapsed. On 27 July 2011, Tesco provided the OFT with two witness statements (from Mr Arthur Reeves and Mr Thomas Ferguson, of Dairy Crest and McLelland respectively), which were said to corroborate Tesco's position that it had not infringed the Chapter I prohibition. This was in fact the day after the Decision was taken by the OFT, but ten days prior to its notification to the parties. Tesco's position was that the OFT could not take a final decision without taking this evidence into account. The OFT returned the statements unread, explaining that the time for the submission of evidence was over. Tesco tried again on 4 August 2011 and was similarly rebuffed.[9]

B. The Decision

33. On 26 July 2011, the OFT took the Decision that is the subject of this appeal. Confidential versions of the Decision were issued to the respective addressees on 10 August 2011. In the Decision, the OFT found three infringements of the Chapter I prohibition, namely:

> "1.5 The Infringements that are the subject of this Decision are:
>
> i. **The 2002 Cheese Initiative**: A single overall concerted practice in which Asda, Safeway, Sainsbury's and Tesco indirectly exchanged cheese retail pricing intentions via Dairy Crest, Glanbia and McLelland acting as intermediaries.
>
> ii. **The 2003 Cheese Initiative**: A single overall concerted practice in which Asda, Sainsbury's and Tesco indirectly exchanged cheese retail pricing intentions via McLelland acting as an intermediary.
>
> iii. **The 2003 Fresh Liquid Milk Initiative**: A single overall concerted practice in which Asda, Safeway and Sainsbury's disclosed FLM retail pricing intentions via Arla, Dairy Crest and Wiseman acting as intermediaries.
>
> 1.6. Each of these concerted practices had as its object the prevention, restriction or distortion of competition in the supply by national multiple retailers of cheddar and British territorial cheeses or FLM in the UK in breach of the Chapter I prohibition."

[9] See *Tesco Stores Ltd & Ors v Office of Fair Trading (Disclosure Judgment)* [2012] CAT 6, paragraphs 20 and 21.

34. The *dramatis personae* at Appendix II to this judgment sets out, in tabular format, a list of those undertakings to which the Decision was addressed. The 2003 FLM Initiative is not relevant to this appeal because the OFT did not find that Tesco had been involved. We refer to the 2002 and 2003 Cheese Initiatives together as the "Infringements".

35. Each of the parties to the Infringements, except for Tesco, has admitted its involvement by concluding ERAs with the OFT. We deal with the evidential value of those admissions in the context of this appeal by Tesco in Section VII.B. (*The proper approach to the ERAs*) below. In taking the Decision, the OFT relied almost exclusively on documentary evidence. The Decision states, at paragraph 5.484, that "[g]*iven the volume and nature of the contemporaneous documents relating to the 2002 Cheese Initiative, the OFT decided not to prioritise interviewing witnesses relevant to that allegation.*" Before us, the OFT described the documentary evidence on which it relied as "*strong*", stating that it tells a "*very compelling story*". At paragraph 28 of its Defence, the OFT stated that:

> "[t]he documentary evidence in this case is contemporaneous and it is clear and strong. No amplification of this evidence is required, by further documentary evidence or oral testimony, when considering the nature of the infringements found by the OFT."

36. Tesco was fined £10.4 million for its involvement in the 2002 and 2003 Cheese Initiatives. The other retailers and the suppliers were also fined, subject to reductions of between 30 and 35 per cent as a result of their respective ERAs, and have all paid their fines. None of the ERA parties appealed, even though it would have been open to them to do so.

IV. TESCO'S APPEAL TO THE TRIBUNAL

37. On 10 October 2011 Tesco lodged an appeal with the Tribunal under section 46 of the 1998 Act against the findings of infringement made against it in the Decision and, in the alternative, against the amount of the penalty imposed. The appeal was heard over 17 days between 26 April and 13 July 2012.

38. In accordance with the Chairman's Order of 22 November 2011 (Timetable), this judgment addresses only the issues as to infringement raised by Tesco. Those

issues are primarily questions of fact as to the existence, or not, of the concerted practices found by the Decision, although as will be clear from what follows, certain legal issues did arise on which it was necessary to give judgment. As will be seen, the Tribunal has concluded that only some of the communications between Tesco and its competitors, via their common suppliers, have been proved, to the requisite standard, to constitute infringements of the Chapter I prohibition and thus only parts of the Decision should stand as against Tesco. In light of that conclusion, further argument will be required as to penalty in due course.

39. Before turning to the substance of the appeal, we feel obliged to express our concerns as to the way in which the parties have conducted this appeal. It has not been a model of procedural economy. Throughout this appeal the Tribunal has been required to determine an array of interlocutory disputes between the parties, the majority of which it should have been possible for the parties to resolve between themselves. The confidentiality of third party documents was a most-vexed and frequently-recurring issue. More generally, however, issues on which the parties failed to agree ranged from who would open the appeal and the documents which were to comprise the hearing bundle, to the order in which witnesses would be cross-examined and even the arrangements necessary to hear one witness by video conference (although this latter point did not result in an order of the Tribunal). The Tribunal's Registry was copied on substantial amounts of correspondence between the parties on such issues (including email correspondence between Counsel), and a significant amount of time, and no doubt costs, was expended as a result of the parties' inability to agree on what we regard as relatively straightforward matters, which commonly arise in litigation.

40. We express the hope that, in future, it will be possible for parties to be more constructive, and less combative, when addressing such matters. Parties' efforts to reach agreement on procedural and logistical matters in future proceedings will have the full support of this Tribunal and would, in our view, be more conducive to the effective and efficient resolution of cases before this Tribunal.

V. THE STATUTORY FRAMEWORK

41. The Decision concerns alleged infringements of the Chapter I prohibition contained in section 2(1) of the 1998 Act, which reads:

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part."

The Chapter I prohibition applies, in particular, to agreements, decisions by associations of undertakings or concerted practices, which directly or indirectly fix purchase or selling prices, or any other trading conditions: see section 2(2)(a) of the 1998 Act. Section 3 of the 1998 Act provides that the Chapter I prohibition does not apply to the various cases excluded pursuant to Schedules 1 to 3 to the 1998 Act; none of the exclusions apply in this case. Chapter III of the 1998 Act sets out the OFT's powers in relation to investigations under that Act (see paragraph 117 below).

42. In determining questions arising under the Chapter I prohibition, the OFT, and the Tribunal on this appeal, are required to apply the principles laid down in section 60 of the 1998 Act, which, among other things, require us to ensure, so far as possible, that questions arising under the 1998 Act in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising under EU law. That of course includes ensuring consistency with the jurisprudence of the Court of Justice and General Court of the European Union.

43. Pursuant to paragraph 3 of Schedule 8 to the 1998 Act, the Tribunal's task on this appeal under section 46 is to determine the appeal on the merits by reference to the grounds of appeal set out in Tesco's Notice of Appeal.

VI. LAW ON CONCERTED PRACTICES AND INDIRECT EXCHANGES OF FUTURE PRICING INTENTIONS

44. Before we come to our discussion of the parties' submissions on the facts of this case, it is necessary to consider the principal authorities, both at the EU level and in domestic law, to which we have been referred. There are no EU cases dealing specifically with the circumstances in which there can be a concerted practice by virtue of indirect contact between two or more undertakings via a common supplier. So far as domestic cases are concerned, there are the Tribunal's decisions in Cases 1021 & 1022/1/1/03 *Allsports Ltd and JJB Sports plc v OFT* [2004] CAT 17 ("*Football Kits*") and Cases 1014 & 1015/1/1/03 *Argos Ltd and Littlewoods Ltd v OFT* [2004] CAT 24 ("*Toys and Games*"), as well as the single judgment of the Court of Appeal in the appeals against those decisions, [2006] EWCA Civ 1318 ("*Toys and Kits*").

A. Jurisprudence of the EU Courts

45. Article 101(1) of the Treaty on the Functioning of the European Union (the "TFEU") does not define what is meant by a concerted practice. The concept was first considered by the Court of Justice in Case 48/69 *ICI v Commission* [1972] ECR 619 ("*Dyestuffs*"). The Court dismissed nine appeals against a decision of the Commission fining ten manufacturers of dyestuffs for entering into three concerted practices to increase prices for those products. The Court explained that the object of the inclusion of concerted practices in what is now Article 101(1) TFEU is to bring within the prohibition:

> "64. … a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."

46. The Court continued that a concerted practice has an independent meaning which encompasses forms of co-operation other than just those belonging to the concept of agreements between undertakings (paragraph 65). The Court noted that the question whether there had been "*a concerted action*" in that case could only be determined if the evidence upon which the decision was based was considered as a whole, taking account of the specific characteristics of the market (paragraph 68).

The Court went on to reject the producers' attempts to explain away the price increases and held:

> "118. Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases."

47. In Joined Cases 40/73, etc.,[10] *Suiker Unie v Commission* [1975] ECR 1663, a case involving *inter alia* alleged restrictions on those to whom sugar was to be supplied, the Court of Justice again considered the concept of concerted practice under Article 101(1) TFEU. In paragraphs 173 and 174, the Court of Justice laid down what have since been accepted as governing principles for the concept of a concerted practice:

> "173. The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.
>
> 174. Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."

There is, therefore, a clear and important difference between undertakings intelligently adapting their behaviour in light of the existing and anticipated conduct of competitors, which is legitimate, and co-ordination that has as its object or effect the influencing of a competitor's conduct on the market or disclosing the course of conduct which a competitor has decided to adopt, or is contemplating adopting, on the market, which is not permissible.

[10] Joined Cases 40 to 48/73, 50/73, 54 to 56/73, 111/73, 113/73 and 114/73

48. In Joined Cases T-25/95 etc.,[11] *Cimenteries CBR v Commission* [2000] ECR II-491 the Court of First Instance (now the General Court) considered various alleged collusive contacts involving a large part of the European cement industry. The General Court stated that:

> "1849. … the concept of concerted practice does in fact imply the existence of reciprocal contacts … That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it ...
> ...
> 1852. ... In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market … It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market." (references to authorities omitted)

49. In Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125 the Court of Justice affirmed the validity of a Commission decision finding that Anic had participated in a EU-wide cartel operating in the polypropylene production sector from 1977 to 1983. The Court re-affirmed what it had held in *Suiker Unie*, above, and stated:

> "118. It follows that, as is clear from the very terms of Article [101(1)] of the Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two."

So far as the relationship of cause and effect between undertakings concerting together and their subsequent conduct on the market is concerned the Court held that:

> "121. ... subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period …"

This is commonly referred to as the "*Anic* presumption". (See also Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, paragraphs 161-163.)

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[11] Joined cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95.

50. The Court of Justice was asked, on a preliminary reference, to consider the nature and operation of the *Anic* presumption in Case C-8/08 *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529. The Court referred to what it had said in paragraph 121 of its judgment in *Anic* and held:

> "59. Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails."

The Court further held that what matters is whether the participating undertakings were afforded:

> "61. … the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question."

51. This presumption is justified by the commercial and economic reality that competing undertakings are likely to take into account how their competitors are planning to behave on the market when determining their own strategy and conduct. The disclosure of future pricing intentions significantly reduces, and may indeed eliminate, uncertainty as to competitors' future conduct on the market allowing an undertaking to alter its behaviour accordingly. As a result of the disclosure or exchange of information, the participating undertakings are likely to behave differently on the market than if they were required to rely only on their own perceptions, predictions and experience of the market. Accordingly, the likely outcome of such an exchange is that the market will not be as competitive as it might otherwise have been.

52. It is clear from the judgments of the Court of Justice in *Anic* (paragraph 121) and *T-Mobile* (paragraph 61) that the evidential burden is on the participating undertakings to adduce evidence to rebut the presumption and establish that their concerted action did not have any effect on their conduct on the market.

53. Although there is no EU authority on the point, it was common ground that the *Anic* presumption applied to the indirect exchange between competitors of confidential future pricing intentions.

B. Judgment of the Court of Appeal in *Toys and Kits*

54. The parties were agreed that the existence of a concerted practice in this case should be assessed by reference to the judgment of the Court of Appeal in *Toys and Kits*. We have given careful consideration to this judgment, and the decisions of this Tribunal in the cases giving rise to it. We do not find it necessary or desirable to summarise the various lengthy judgments and will instead focus on the essential propositions relevant to the disposal of this appeal.

55. While Tesco sought to distinguish the present case from the facts of both *Toys and Games* and *Football Kits*, the OFT, for its part, submitted that a clear parallel could be drawn between the facts of *Football Kits* and this case. The Tribunal does not, however, consider a detailed comparison of the particular facts of the earlier cases with those relevant to this appeal to be a fruitful, or particularly informative, exercise. It seems to us that the following observation of Lloyd LJ (with whom Chadwick and Wall LJJ agreed) in *Toys and Kits* is apposite:

> "22. Counsel for all the Appellants submitted that many of the observations in the cases from which these propositions are drawn need to be understood in the light of the particular facts. They pointed out that it is just as essential to a concerted practice as it is to an agreement that there be a consensus between the two or more undertakings said to be parties to the agreement or concerted practice. That is true, but concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for this purpose."

56. The above passage, in our judgement, rightly emphasises the fact-specific nature of any assessment as to whether a concerted practice exists. It also highlights the way in which the courts have refrained from seeking to define the concept of a concerted practice with a degree of precision that would artificially restrict the breadth of the concept of a 'concerted practice'. A concerted practice is a versatile concept. The task of this Tribunal is to consider whether the facts we find to be proved demonstrate that Tesco entered into a concerted practice within the meaning of the Chapter I prohibition.

57. The parties agreed that, if the propositions set out by Lloyd LJ at paragraph 141 of *Toys and Kits* (set out in full at paragraph 67 below) were met, that would be sufficient to establish an infringement of the Chapter I prohibition. The parties did not agree whether those propositions exhaustively defined the circumstances in which a concerted practice could arise through indirect contact, however. In that paragraph Lloyd LJ stated that a retailer, supplier and another retailer may be properly regarded as parties to a concerted practice, having as its object the restriction of competition, in circumstances where:

(a) retailer A discloses to supplier B its future pricing intentions;

(b) A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is, or may be, one);

(c) B does, in fact, pass that information to C;

(d) C may be taken to know the circumstances in which the information was disclosed by A to B; and

(e) C does, in fact, use the information in determining its own future pricing intentions.

58. Thus, each of the 'A to B' and the 'B to C' communications comprises a conduct element and a mental element. There are, of course, two conduct elements necessary to establish an infringement: first, the transmission by one retailer of its future pricing intentions to a common supplier; and, secondly, the onward transmission by that supplier to, and receipt by, the competing retailer. Each conduct element must be accompanied by the requisite state of mind on the part of the relevant retailer.

C. A to B: retailer A discloses its future pricing intentions to supplier B

59. Disclosures of actual or likely retail prices by a customer to its supplier are often part of normal commercial dialogue. Suppliers may be better informed about the

suitability of a particular retail price point, both in absolute terms and relative to the products of other suppliers, than a retailer. A supplier may be legitimately concerned that, without that information, the retailer will incorrectly position the supplier's goods in the market and that the supplier will be unable to negotiate appropriate cost prices. In *Toys and Kits*, the Court of Appeal was clearly of the view that bilateral, vertical discussions between a supplier and its customer in relation to matters such as "*actual or likely retail prices, profit margins and wholesale prices or terms of sale*" may be necessary and, therefore, permissible (see paragraph 106). The Court of Appeal was equally clear, however, that competition law concerns may arise where a retailer discloses such pricing information to its supplier, which uses it for anti-competitive purposes such as by disclosing it to other retailer-customers. This can amount to the knowing substitution of practical co-operation for the risks of competition by the retailers.

D. Retailer A's state of mind

Principles of attribution

60. Attribution of a mental state to a corporate entity depends on the interpretation of the legal rule that calls for the question of attribution to be decided (*Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500, at 507, per Lord Hoffmann). The relevant legal rule in this case is the Chapter I prohibition. Hence, the state of mind to be attributed to an undertaking should be determined as a matter of UK and, by virtue of section 60(2) of the 1998 Act, EU competition law. Common law concepts of ostensible authority and/or vicarious liability are therefore not relevant (see Case No. 1122/1/1/09 *AH Willis & Sons Limited v OFT* [2011] CAT 13, paragraphs 23-26).

61. An "*undertaking*" is not defined in the 1998 Act, nor in the TFEU, but its meaning has been clarified by the jurisprudence of the EU Courts. It is well-established that an undertaking does not correspond to the commonly understood notion of a legal person under, for example, English commercial law. It is much wider and can include several corporate entities, so long as they are acting as a single economic unit and the corporate entities within this unit do not act independently on the market (*Willis*, paragraphs 27-30 and the case law cited there).

62. In *Suiker Unie*, the Court of Justice stated, at paragraph 539, that employees form part of the same undertaking, or "*economic unit*", with their employer. Employees are "*auxiliary organs forming an integral part of the principal's undertaking*" (paragraph 542). It was on this basis that the Court of Justice attributed the employees' collusive activities to their respective employers in the sugar industry. Since an undertaking comprising a body corporate can only act through the individuals employed by it, the acts or conduct of an undertaking are inevitably performed by those individuals. It follows that any act by any employee could, potentially, lead to an infringement attributable to their corporate employer, with whom they comprise the same undertaking.

63. It appears to have been common ground that Tesco was the undertaking responsible for the acts of (at least) Mr Scouler, Mr Hirst and Mrs Oldershaw, which were found by the OFT to comprise the Infringements during the course of 2002 and 2003. It was not suggested by Tesco that any of these individuals acted without authority or disobeyed instructions given to them.

The requisite state of mind

64. The state of mind that retailer A must have, at the time of disclosure, as to the use which supplier B makes of its future pricing intentions has been a central feature of this appeal. We have reached the following conclusions.

65. It is important to consider why the retailer's state of mind matters in a case of this kind. Where commercially sensitive information is disclosed directly by retailer A to retailer C, it is often unnecessary to go behind the fact of the disclosure in order to assess the parties' states of mind. The mere fact of a direct communication of future retail pricing intentions between horizontal competitors is almost invariably sufficient to demonstrate that each acted with the requisite state of mind (although it is conceivable that there may be rare situations where this is not the case). Where supplier B is interposed between A and C, however, there can be no presumption as to A's state of mind. The onward transmission of A's pricing intentions to one of A's competitors, C, is made by their common supplier, B. It is therefore incumbent on a competition authority to demonstrate that A acted with the relevant state of

mind to avoid A being held strictly liable for the conduct of B, over whom it may have limited control.

66. The requirement of knowledge can be seen in the classic definition of a concerted practice given by the Court of Justice in *Dyestuffs* (see paragraph 45 above). It was also an important feature of the Court of Appeal's reasoning in *Toys and Kits*. Establishing the requisite state of mind, namely that retailer A may be taken to have intended, or actually foresaw, that its future intentions would be conveyed to its competitor, retailer C, shows that dealings between a supplier and its customers have gone beyond the legitimate framework of a vertical relationship and have given rise to an unlawful, albeit indirect, horizontal element. As Counsel for Tesco rightly observed at the hearing, a concerted practice consisting of indirect contact between competitors, via their common supplier, is "*no different in substance from two competing retailers sitting across a table and telling each other what their prices be will be next week*";[12] "[t]*hat's the vice, it's the substance and not the form*".[13]

67. In considering the need to establish an appropriate state of mind on the part of retailers A and C, Lloyd LJ in *Toys and Kits* held at paragraph 141:

> "The proposition which, in our view, falls squarely within the *Bayer* judgment in the ECJ and which is sufficient to dispose of the point in the present appeal can be stated in more restricted terms: if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition." (emphasis added)

68. Establishing the state of mind of retailer A (and retailer C, of course) is a question of fact. A person's state of mind must be assessed by reference to all the circumstances. The subjective evidence of an individual witness, as to his or her own state of mind at the relevant time, perhaps given several years later, is undoubtedly relevant but is not necessarily conclusive. The Tribunal must consider

[12] Transcript, Day 1, p. 12.
[13] Transcript, Day 1, p. 23.

all the relevant circumstances, of course including contemporaneous evidence, in order to determine whether retailer A may be taken to have intended that the information it was disclosing to its supplier would then be passed on by that supplier to other retailers.

69. In carrying out that assessment, we note that the Court of Appeal's test, quoted above, refers to disclosure "*in circumstances where A may be taken to intend that*" supplier B would pass its information on to retailer C. It follows that the state of mind of retailer A may be inferred from the circumstances. Indeed, the Court of Appeal held that, given the facts of *Toys and Kits*, the relevant employees of retailer A "*must have realised*", "*must have been aware*" or "*must have known*" that the disclosure of A's future pricing intentions to supplier B would be passed on by that supplier to retailer C (see, for example, paragraphs 94, 97, 142 and 144 of Lloyd LJ's judgment). The question is, therefore, taking into account all the evidence placed before the Tribunal, what must have been in A's mind at the relevant time. In that connection, the OFT referred us to the unanimous judgment of the Privy Council, delivered by Lord Hoffmann, in *Barlow Clowes International Ltd v Eurotrust International Ltd (Isle of Man)* [2005] UKPC 37:

> "26. ... Since there is no window into another mind, the only way to form a view on these matters is to draw inferences from what [an individual] knew, said and did, both then and later, including what he said in evidence. That is what the judge did and it is hard to see what other method could have been adopted."

Of course, we accept that *Barlow Clowes* was not a competition law case but concerned rather the scope of personal liability for dishonest assistance in a breach of trust. We refer to the above passage because it makes clear that a court is entitled to draw inferences from what a person knew, said and did, both at the relevant time and later. A previously-held state of mind is not an observable fact, nor something which is typically documented at the time.

70. We note also that in *Toys and Kits*, Lloyd LJ said that a finding of an infringement would be all the stronger where there is reciprocity, in the sense that C, having already received A's future pricing intentions, discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that

information to (amongst others) A, and B does so (paragraph 141). This, however, is not a necessary ingredient of an infringement.

71. Furthermore, the OFT, in its written closing submissions, made much of the fact that in *Toys and Kits* the Court of Appeal sometimes referred to actual foresight that information "*would be passed on*" and sometimes to the prospect that it "*might be passed on*" (emphases added). The OFT argued that either would suffice for a finding that retailer A "*actually*" foresaw how its information would be treated by supplier B. The Tribunal does not consider that these differences in expression can bear the weight the OFT seeks to place on them. It is our view that the Court of Appeal's judgment must be read as a whole and in context, and applied with care. The proposition in paragraph 141 of the Court of Appeal's judgment is clear and we propose to apply it as we understand it. On that basis, we reject the submission that foresight that future retail pricing intentions "*might*" be passed on is sufficient to establish the requisite state of mind. For this reason we also reject the OFT's suggestion, also made in written closing, that it is sufficient in law for retailer A "*to have a pretty good idea*" that supplier B would treat A's information in "*a cavalier fashion ... which **might** include disclosure*" (emphasis in original) to one of A's competitors.

72. The absence of any legitimate commercial reason for a disclosure by retailer A of its future pricing intentions to supplier B may be indicative of the requisite state of mind, when viewed in light of all the circumstances known to the disclosing party at the time of the communication. In considering whether there is a legitimate reason in such circumstances, it is important to distinguish between communications to the effect that a retailer will reduce its prices, on the one hand, and that a retailer will maintain or increase its prices, on the other. In the case of a planned reduction in the retail price, the retailer might legitimately relay its intentions to the supplier, for example, in an attempt to secure a lower cost price to help fund the anticipated loss of margin. There may be fewer legitimate commercial reasons for the transmission of a retailer's intentions to maintain or increase its prices. One such legitimate reason, however, undoubtedly relevant to the facts of this appeal, was that a cheese retailer will need to disclose its intention to increase retail prices of random-weight

cheeses to a supplier in order for that supplier to print the new retail prices on the packs of cheese in advance of supply (as to which see paragraph 18(b) above).

73. Finally, there was considerable dispute as to whether a lesser state of mind than "*intend or may be taken to intend*" can be sufficient for a finding of an unlawful concerted practice. We address the parties' submissions on this point in the context of Strand 5 of the 2002 Cheese Initiative (see paragraphs 350-354, below).

74. In summary, we propose to adopt the following approach to the issue of state of mind of retailer A:

(a) acts of any employee may be attributed to his or her corporate employer, with whom they comprise the same undertaking;

(b) a retailer's state of mind is a subjective mental state but the law applies an objective standard as to whether that mental state existed or not;

(c) a retailer intends a particular result of its conduct if it actually foresees that result;

(d) a retailer may be taken to intend a particular result of its conduct, having regard to all the evidence placed before the Tribunal, including the evidence of the person alleged to have held the state of mind and the surrounding circumstances; and

(e) it is trite law that inadvertent or accidental disclosures are unlikely to constitute circumstances from which the requisite state of mind can be inferred.

E. B to C: Supplier B passes on retailer A's future pricing intentions to retailer C

75. The next limb of an infringement is that supplier B must be shown, as a matter of fact, to have transmitted retailer A's future pricing intentions to retailer C. This is a question, which will arise only if the conduct and mental elements of the A to B transmission have been established. Counsel for Tesco submitted that, even if the

information received by Tesco, in the role of C, did relate to future retail prices, the information in question was not believed by the individual recipients at Tesco and, in fact, turned out to be inaccurate. However, the fact that one party does not believe what another has said, or suspects that it will turn out to be false, does not rule out the possibility of the existence of a concerted practice (bearing in mind throughout the burden and standard of proof). Of course, if it can be factually established that the relevant individual at Tesco did not believe, and did not have reason to believe, that the information was information belonging to Tesco's competitor, then that may be relevant to the assessment of whether Tesco received the information with the requisite state of mind (discussed in the next sub-section; see, in particular, paragraphs 83 and 84). It cannot, however, affect the question of whether B, as a matter of fact, transmitted A's future retail pricing intentions to C.

76. Anti-competitive collusion between competitors may be riddled with distrust and suspicion. An agreement and/or concerted practice may nevertheless be found to exist, provided, of course, that there is sufficient and cogent evidence of the necessary conduct.

77. In Case T-186/06 *Solvay SA v Commission*, judgment of 16 June 2011, one of the appeals against the European Commission's decision in relation to the *Hydrogen peroxide and sodium perborate* cartel, the General Court concluded that Solvay had taken part in a concerted practice which had the object of restricting competition and stated:

> "152. That finding is not called into question by the applicant's argument that, given the lack of mutual trust between the competitors, it was inconceivable that they could have engaged in concerted practices.
>
> 153. The different views of the participants, or the lack of trust between them, are not in themselves sufficient to preclude the existence of concertation capable of being categorised as a concerted practice. The applicant's arguments do not tell against the facts established by the Commission, from which it is apparent that, despite a certain lack of trust between them, the competitors met regularly in the period concerned and exchanged information on market conditions and their commercial strategy with the aim of preparing an anti-competitive agreement."
>
> (The General Court's judgment has been appealed by Solvay to the Court of Justice; see Case C-455/11 P, not yet decided).

78. Counsel for Tesco further submitted that there was an important difference where a retailer, C, receives individualised, as opposed to aggregated, data from its supplier B. In general, the exchange of individualised data is much more likely to lead to a collusive outcome and thus restrict competition than the exchange of aggregated data. In support of this contention, reliance was placed on paragraphs 73, 74 and 89 of the European Commission's *Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements* (OJ 2011/C 11/01) ("Guidelines on Horizontal Co-operation Agreements"), to which this Tribunal must "*have regard*" pursuant to section 60(3) of the 1998 Act. Paragraphs 65 to 68 of the Guidelines make clear that one of the main competition concerns about the exchange of information is that it can facilitate co-ordination of competitors' behaviour and distort competition.

79. In our judgement, the exchange of individualised data is more likely to facilitate co-ordination because it makes it easier for companies to reach a common understanding regarding future prices or sales. It also contributes to a more credible prospect of retaliation which disciplines the co-ordinating companies. Conversely, the exchange of aggregated data is less likely to lead to a collusive outcome since it is less likely to be indicative of specific competitors' future conduct or to lead to a common understanding of business behaviour. Even then, however, it cannot be excluded that the exchange of aggregated data may facilitate a collusive outcome, depending on the particular facts of the case. We take account of this distinction below, when considering whether the indirect exchanges of information found by the OFT eliminated, or substantially reduced, uncertainty on the market, with the result that competition was restricted.

80. Tesco further submitted that, during the relevant period of 2002, the movements in cheese prices being discussed by suppliers and retailers were in the public domain. It was common ground that exchanging information already in the public domain is unlikely to infringe the EU and/or UK competition rules. In this respect, Tesco drew our attention to the judgment of the Court of Justice in Case C-7/95 P *John Deere Ltd v Commission* [1998] ECR I-3111.

81. We have also had regard to paragraph 92 of the Guidelines on Horizontal Co-operation Agreements and the case law there cited. Given that the law on this point is relatively clear, we consider that this submission really raises points of fact as to what information was legitimately divulged as part of parallel discussions between a supplier and its retailers. This includes whether that information was generally and equally accessible to all suppliers and customers at the relevant time, and whether there were particular difficulties involved in gathering the relevant information such that it was not, in fact, equally accessible to all suppliers and customers. We deal with these points below.

F. Retailer C's state of mind

82. In our judgement, it is sufficient for the OFT to prove that retailer C may be taken to have known the circumstances in which A disclosed its future retail pricing intentions to B (see paragraph 141 of *Toys and Kits*, quoted above).

83. As we have said above, the relevant individual receiving the information at retailer C may state that he or she did not believe that the information communicated by supplier B was, in reality, confidential information belonging to retailer A, for example, because he thought B was simply engaging in market speculation. If that were true, then that would mean that retailer C could not be taken to have known the circumstances in which the information was disclosed by A to B. That, however, will be a matter of fact to be assessed by the Tribunal in light of the evidence. The circumstances known to the individual at retailer C will be a relevant consideration for that assessment. If, for example, that individual knows that his supplier, B, is in negotiations with retailer A about cost and retail price increases, and B subsequently tells him that A will be increasing its prices on a particular date, it will scarcely be credible for the individual at C to maintain that it never occurred to him that the information came from A.

84. In *Toys and Kits*, when discussing the Tribunal's judgment on liability in the *Football Kits* appeal ([2004] CAT 17, paragraph 659), Lloyd LJ said:

> "The Tribunal may have gone too far if it intended that suggestion to extend to cases in which A did not, in fact, foresee that B would make use of the pricing information to influence market conditions or in which C did not, in fact,

appreciate that the information was being passed to him with A's concurrence" (paragraph 91; emphasis added).

85. The reference to A's concurrence is not repeated elsewhere in the judgment. It does not appear, for example, in the test suggested in paragraph 141 of the judgment, which simply refers to whether "*C may be taken to know the circumstances in which the information was disclosed by A to B*". We do not consider that this slight variation between the texts makes any substantive difference. It is to be noted that Lloyd LJ formulated the proposition in paragraph 141 to fall squarely within the parameters of the judgment of the Court of Justice in Joined Cases C-2/01 & C-3/01P *BAI eV and Commission v Bayer AG* [2004] ECR I-23. In that judgment the Court of Justice had approved the General Court's approach to the concept of an agreement, which centred around the existence of a "*concurrence of wills*" (Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383, paragraph 69). The Court of Appeal was satisfied that the proposition in paragraph 141 established a sufficient degree of consensus for the Chapter I prohibition to apply. The key point is, in our view, that C must be shown to have appreciated the basis on which A provided the information to B, so that A, B and C can all be regarded as parties to a concerted practice.

G. Retailer C's use of Retailer A's future pricing intentions

86. The final element of the proposition formulated by Lloyd LJ in *Toys and Kits* is that retailer C does, in fact, use retailer A's future pricing intentions in determining its own future pricing intentions. In our view, the word "*use*" in this context is to be understood as referring to retailer C taking into account retailer A's future pricing intentions when making decisions as to its own future conduct on the market. There was no dispute that the *Anic* presumption, as described at paragraph 49 above, applies in these circumstances. Even where C's participation is limited to the mere receipt of information about the future conduct of a competitor, the law presumes that C cannot fail to take that information into account when determining its own future policy on the market. It is open, of course, for C to seek to demonstrate that it determined independently the policies it pursued and did not act on the basis of A's future pricing intentions.

VII. THE EVIDENCE

87. There were wide-ranging and hotly contested disputes of fact between the parties. They took quite different approaches to how the Tribunal should assess the evidence. After setting out the burden and standard of proof, which was uncontroversial, we set out our approach to the evidence generally, including the ERAs, the documentary and witness evidence, and the various notes of interview with persons employed at the time of the alleged infringements. We then give our general assessment of the witnesses who gave evidence before us in Section VIII. (*Witnesses heard by the Tribunal*) below.

A. Burden and standard of proof

88. It was not in dispute that, since the legal burden of proof lies with the OFT to establish an infringement of the Chapter I prohibition, the burden also lies on the OFT to establish each of the analytical steps which are pre-requisites to a finding of an A-B-C transmission of information, amounting to a concerted practice. The standard of proof is the civil standard of balance of probabilities (see *Willis*, paragraphs 46 and 47, and the case law there cited). We have also, of course, taken account of the principle of the presumption of innocence, enshrined in Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms (Treaty Series No. 73 (1953) Cmd 8969), in the context of alleged infringements of the 1998 Act, which may result in the imposition of financial penalties. Any doubt in the mind of the Tribunal as to whether a point is established on the balance of probabilities must operate to the advantage of the undertaking alleged to have infringed the competition rules, in this case, Tesco.

B. The proper approach to the ERAs

The ERAs concluded by the OFT

89. As we have said, seven addressees of the SO, and subsequently addressees of the SSO and Decision, entered into ERAs with the OFT admitting liability for one or more of the infringements ultimately found in the Decision. Copies of the ERAs, as amended, were annexed to the Decision.

90. In the course of this appeal, Tesco has termed the ERAs, perhaps accurately, "*corporate admissions*". They are certainly agreements entered into by various bodies corporate with the OFT, in which the relevant company (or companies) admitted participation in one or more of the infringements found in the Decision.[14] They are not admissions on the part of the individuals employed, or formerly employed, at each of the ERA parties. Nor indeed were any such admissions necessary, since the Chapter I prohibition applies to anti-competitive conduct by undertakings. It is clear that in the case of these infringements the relevant undertakings were the retailers/suppliers. As Longmore LJ (with whom Pill and Lloyd LJJ agreed) held in the case of *Safeway Stores Limited & Ors v Twigger & Ors* [2010] EWCA Civ 1472 at paragraph 25, which arose out of the same factual background as this appeal, "*it was sufficient for the OFT to show that the companies intentionally ... infringed the provisions of the 1998 Act; the companies have accepted they did so infringe the 1998 Act ...*".

91. The ERAs are brief documents. For the purposes of describing the ERAs, it is convenient to refer to one of the actual documents for illustrative purposes. Reference will be made here to the ERA entered into by Asda on 6 December 2007. Nothing should be read into the choice of Asda's ERA. The other six ERAs entered into by the other admitting parties were in substantially the same form as that entered into by Asda.

92. The ERA, which is in the form of a letter sent by the OFT and countersigned on behalf of Asda, states, in pertinent part for present purposes:

> "... the [OFT] proposes to make a decision in terms of the Statement of Objections ... that Asda and the other parties set out in paragraph 3 of the SO have infringed the Chapter I Prohibition of the Competition Act 1998 ... as listed in the Appendix (the 'Infringements').
>
> ... Further to discussions between the OFT and Asda, this letter (the 'Agreement') sets out the terms upon which the OFT would be prepared to resolve its investigation of the Infringements, were Asda to accept these terms.
>
> 1) Asda will, by signing the Agreement, admit its involvement in the Infringements.

[14] It is to be noted that not all companies admitted involvement in both Infringements, and also that some admitted involvement in the 2003 FLM Initiative. Note also the amendments to the ERAs described at paragraphs 31(f) above and 96 below, in relation to the 2002 FLM Initiative, the 2003 FLM Initiative and the 2003 Butter Initiative.

..."

93. The Appendix to Asda's ERA defined each infringement for which liability was to be admitted. In Asda's case that was initially the 2002 FLM Initiative, the 2002 Cheese Initiative, the 2003 FLM Initiative and the 2003 Cheese Initiative. Each infringement is defined in broad and similar terms. We set out only one definition below by way of example:

> "Asda Group Limited ('Asda') has infringed the Chapter I prohibition of the Competition Act 1998 through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions by participating in the following initiatives described in the Statement of Objections, issued on 20 September 2007:
> ...
> The 2002 Cheese Initiative
> (i) the single overall concerted practice between Asda, Safeway, Sainsbury, Tesco, Dairy Crest, Glanbia and McLelland which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections ..."

94. The ERA also contains various undertakings by Asda to, among other things, fully co-operate with the OFT in its ongoing investigations. In relation to any subsequent proceedings before this Tribunal, Asda committed to using its:

> "f) ... reasonable endeavours to facilitate, and secure the complete and truthful co-operation, of its current and former directors, officers, employees and agents, even if Asda is not a party to those CAT proceedings, in:
>
> (i) assisting the OFT or its counsel in the preparation for those CAT proceedings;
> (ii) if requested by the OFT or its counsel, attending those CAT proceedings; and
> (iii) speaking to their witness statements and being cross-examined on such witness statements in those CAT proceedings."

95. The ERA further provides that, whilst the OFT would accept a concise memorandum from Asda indicating material factual inaccuracies in the SO, should those representations go so far as to, in the opinion of the OFT, contest Asda's liability for the infringements, the OFT may treat the ERA as ceasing to be effective. In return for its admission, as well as its full co-operation, the OFT reduced Asda's fine by 35 per cent. The other ERA parties received reductions in their fines of between 30 and 35 per cent also.

96. The decision by the OFT, following the issuance of the SSO, not to pursue certain of the alleged infringements necessitated amendments to the ERAs (see paragraph

31(f) above). Variation agreements to that effect were entered into by the various ERA parties between late March and early April 2010.

The OFT's position on the ERAs

97. In the SSO, the OFT sought to rely on the ERAs as evidence in support of its findings against Tesco in relation to the 2002 Cheese Initiative. At paragraph 5.473 of the Decision, however, the OFT, having considered submissions by Tesco that such reliance was inappropriate, decided that the ERAs:

> "... do not, on their own, amount to evidence demonstrating Tesco's involvement in the 2002 Cheese Initiative. Accordingly, the OFT does not place any reliance on these third party admissions in making its infringement finding in respect of Tesco" (emphasis added).

98. In its Defence to this appeal, the OFT stated that the ERAs were "*clear evidence*" of the admitting parties' involvement in the 2002 and 2003 Cheese Initiatives. The OFT explained that it relied on each ERA, if necessary, as evidence of the state of mind of the admitting party in question, which, it submitted, the Tribunal can and should take into account. The OFT maintains that it did not, and does not, rely on the ERAs as evidence of Tesco's involvement in the alleged infringements of the Chapter I prohibition.

Is Tesco correct that no weight at all should be attached to the ERAs?

99. Counsel for Tesco submitted that "*no weight should be attached to these admissions*", whether as evidence of the admitting parties' participation in the Infringements, and their respective states of mind, or "*for any other purpose in this appeal*."

100. Counsel for Tesco argued that these "*corporate admissions*" were in truth no more than commercial decisions by the admitting parties, and may even have been taken without knowing the true extent of their liability. It is impossible to know, it was said, whether the ERAs were entered into because the admitting parties considered the allegations of infringement justified or simply in order to take advantage of the very significant reductions in penalties offered by the OFT. Reliance was also placed on the fact that each ERA included a stipulation that an admitting party

which appeared to contest its liability in submissions on factual inaccuracies contained in the SO, and/or SSO, might lose its penalty reduction as a consequence of the OFT withdrawing the ERA.

101. We accept that the decisions to admit liability for the infringements alleged in the SO (or SSO), and ultimately found in the Decision may well have been in part commercially motivated. We do not assume, nor is it in our view necessary to assume, that the admitting parties necessarily investigated and verified all of the allegations made by the OFT. Our approach to the evidential value of the ERAs does not depend on what the admitting parties did or did not do. It is not unreasonable to suppose that it was in the admitting parties' interests to investigate and verify the allegations made against them to the extent they considered that to be appropriate. To establish the liability of the admitting parties, it was sufficient that, absent duress or any misrepresentation, the admitting parties entered into the ERAs, thereby agreeing to fulfil the obligations set out therein. Our attention was drawn to the judgment of Cranston J in *R (on the application of Crest Nicholson plc) v OFT* [2009] EWHC 1875 (Admin), where the learned judge was required to consider the status of a 'fast track offer' made by the OFT in the context of the *Construction Bid-rigging* case. The rationale behind the 'fast track offers' made in *Crest Nicholson* (see paragraphs 8-16 of Cranston J's judgment) was similar, but not identical, to that of the ERAs offered by the OFT in the present case. Cranston J held at paragraph 69 that a response to the fast track offer was "*obviously a commercial decision. However, it involved asking parties to admit liability for serious infringements of the Competition Act 1998. Infringement proceedings under the Competition Act 1998 are of a quasi-criminal nature ...*" Cranston J continued at paragraph 70 that "[a]*cceptance of the offer would have had evidential value*" and, at paragraph 71, that "[a]*cceptance was a commercial decision, but a commercial decision with significant legal consequences.*"

102. We respectfully agree with the learned judge's reasoning and treatment of the fast track offers, and consider that a similar approach should be taken to the ERAs entered into in this case. It is neither necessary nor desirable for us now to go behind the ERAs to ascertain the reasons for which each admitting party entered into those agreements. Each company that enters into an ERA must consider for

itself whether to admit liability for an alleged infringement of the 1998 Act and, in reaching that decision, it will, no doubt, take account of such factors as it considers appropriate. We consider that a very real factor that would have weighed against entering into the ERAs, a factor also recognised by Cranston J in *Crest Nicholson* at paragraph 68, was the possibility of reputational harm resulting from the admission. In our judgement, in a competitive consumer market such as the retail cheese market, a retailer admitting liability for entering into an anti-competitive concerted practice would risk reputational harm. Each retailer, and indeed each supplier, that entered into an ERA must be taken to have weighed this in the balance with such other factors as it considered relevant, and decided nonetheless to admit liability and co-operate with the OFT. That decision must, and in our judgement does, have legal consequences.

103. Counsel for Tesco submitted that the fact that the ERAs had to be amended following the OFT's decision not to pursue the 2002 FLM Initiative and the 2003 Butter Initiative in effect meant that parties which had previously admitted their involvement in those alleged infringements had, in fact, admitted to conduct that the OFT no longer maintained was unlawful. The OFT argued, however, that that was not the case. Counsel for the OFT submitted that, whilst the OFT had decided not to pursue certain allegations made in the SO and SSO because it did not have sufficient evidence against those parties which had decided *not* to admit liability, that did not mean either that the conduct did not occur or that it was not unlawful. We consider that there is force in that, as there is in the OFT's argument that, as a public authority, it had to decide how best to allocate its resources. The fact that the admissions in the ERAs were amended, demonstrates clearly why the admissions cannot stand as evidence against Tesco, but we do not consider that this prevents the ERAs from having *any* evidential value as against the admitting parties. In the context of this appeal, we have not found it necessary to reach any conclusions as to whether the previously alleged infringements did, or did not, occur.

104. Counsel for Tesco further submitted that the ERAs could have no probative value on this appeal because they were not signed by any of the individual employees of the admitting parties who were said to have been directly involved with the Infringements. In our judgement, that submission is misconceived. As noted

above, the Chapter I prohibition is addressed to undertakings and the relevant undertakings here were the corporate retailers and their suppliers, not the employees through which they acted. The companies entered into the ERAs, thereby accepting their liability for the alleged infringements and that is sufficient (see *Twigger*, cited at paragraph 90 above).

105. A related, and in our view equally misconceived, submission by Tesco was to the effect that no reliance could be placed on the ERAs because the OFT did not call as witnesses the individuals who in fact executed those documents. By declining to call those individuals, Tesco argued, the OFT had deprived it of the opportunity to cross-examine them. As already discussed, the ERAs are admissions by the undertakings accused of the Infringements; the decisions to enter into the ERAs were corporate ones taken, presumably, at the appropriate level within each company's corporate hierarchy. Obviously a legal person cannot itself execute a document and must act through those individuals to whom it has devolved the necessary authority to act on its behalf. It follows that in the present circumstances the identity of the particular individual acting on behalf of an admitting party is, in our judgement, irrelevant, provided of course that he or she had sufficient authority to bind the company. At no point was it suggested by Tesco that the individuals who executed the ERAs lacked the requisite authority to do so.

106. Finally, Counsel for Tesco submitted that the ERAs do not make it clear whether the admitting parties are taken to be admitting only their participation in the Infringements in general or some, or all, of the underlying facts alleged by the OFT in the SO and/or SSO. It was said that, since the ERAs do not require the admitting parties to admit the truth of every allegation contained in the SO and, indeed, envisaged only concise submissions as to "*material*" factual inaccuracies, it is clear that admissions may be made in respect of matters that the admitting parties do not accept as true. We have taken this submission into account in our assessment of this case and note that the OFT did in this case take into account concise submissions on material factual inaccuracies when preparing its Decision.

107. For these reasons, we do not accept Tesco's submission that the ERAs are of no evidential value at all in assessing the conduct and state of mind of the admitting

parties in the context of this appeal by Tesco. There is undoubtedly a question, however, as to the probative evidential value of the ERAs and how much reliance can be placed upon them.

What is the evidential value of the ERAs?

108. As we have already held, and as the OFT indeed accepted in the Decision, the ERAs cannot be relied on at all in relation to the findings of infringement against Tesco. That is to say, they cannot stand as evidence of Tesco's conduct or state of mind. The OFT made clear that it did not contend, for example, that because Asda admitted its participation in a concerted practice involving Tesco, that admission was evidence of Tesco's involvement. Indeed, even as regards the conduct and state of mind of the admitting parties, Counsel for the OFT stated that the OFT relied not only on the ERAs but also on the findings of fact made in the Decision.[15]

109. In the context of the alleged hub-and-spokes communications, the conduct and state of mind of an admitting party, or parties, will necessarily play a part in establishing the infringement, or infringements, found in respect of a non-admitting party. Therefore, whilst we accept that the OFT is entitled to consider the ERAs as forming *some part* of the evidence supporting the findings of infringement against the admitting parties, we must consider to what extent that evidence can be said to be of value in the sense of being probative or reliable in the context of this appeal by Tesco.

110. For the reasons set out below, it is our judgment that the ERAs, even as regards the conduct and state of mind of the parties which entered into them, must be regarded as having little or no probative value in the context of this appeal by Tesco. As will be clear from the preceding subsection (see paragraphs 99-107 above):

(a) The ERAs are unsworn documents, containing admissions which Tesco has not had the opportunity to test by cross-examining the individuals who it is alleged engaged in the conduct or had the relevant state of mind. This, it seems to us, is a particularly important factor given the obligation contained

[15] Transcript, Day 2, p. 82.

in each ERA requiring the relevant admitting party to use its reasonable endeavours to secure the co-operation and attendance of witnesses – an undoubtedly powerful tool in the hands of the OFT but one of which it has not availed itself;

(b) It is not clear from the wording of the ERAs precisely what conduct and state of mind each ERA party was in fact admitting to. The documents are brief and formulaic in nature, and lack specificity;

(c) It is necessary to bear in mind that there was a limit placed on the extent of representations as to factual inaccuracies in the SO and SSO that each ERA party was permitted to make before the OFT would be entitled to withdraw the benefit of the ERA (see paragraph 95 above); and

(d) Although entering into an ERA with the OFT is, in one sense, contrary to the interests of an admitting party, which might be thought to make it more likely than not that the admission is true, there are a number of other factors that might lead an undertaking to take a 'commercial' decision to admit liability for an infringement, which might be, at least in part, untrue or which the undertaking simply has not investigated. These factors include the prospect of a substantial penalty reduction and the avoidance of potentially protracted proceedings both before the OFT and, possibly, before this Tribunal. As we have said (see paragraph 101 above), we have not assumed that the admitting parties necessarily investigated and verified all of the allegations made by the OFT. Indeed, in this regard we note that we heard evidence from Mr Alastair Irvine, formerly of McLelland prior to its acquisition by Groupe Lactalis, that the latter company did not involve any of the former management team in the preparation of submissions to the OFT, notwithstanding that Groupe Lactalis only acquired the business after the period which the OFT was investigating.[16]

111. Of course, it would be open to Tesco to accept the admitting parties' conduct and states of mind as found by the OFT in the Decision and take issue only with

[16] Transcript, Day 7, p. 88.

findings made in respect of Tesco itself. Tesco must, however, have the opportunity to challenge the findings as regards the admitting parties if it chooses to do so, since those findings are inextricably linked to the OFT's findings against Tesco. Where Tesco decides to challenge the conduct or state of mind of an admitting party as found by the OFT, we do not consider that it would be either appropriate or just to require Tesco to seek disclosure of documents belonging to its retailer-competitors, nor to seek the issuance of witness summonses to employees (or former employees) of its competitors, in order to put those matters in issue. The burden of proof lies with the OFT. The OFT is, therefore, required to prove its case as to an admitting party's conduct or state of mind by adducing evidence of those matters. Such evidence must then be evaluated and a judgment made as to its probative value applying the normal civil standard, namely the balance of probabilities. Whilst the evidence which the OFT relies on can include the ERAs, in light of the factors set out in the preceding paragraph, the ERAs have little or no probative value on this appeal, given their formalistic nature. The bare existence of the ERAs cannot be used as a means of short-circuiting the need for an assessment of all the relevant facts and circumstances in order to establish an admitting party's conduct and state of mind (if they are put in issue by Tesco) in relation to the events said to comprise the 2002 and 2003 Cheese Initiatives.

112. Our discussion in this judgment of the conduct and states of mind of the various admitting parties, and our treatment of the ERAs as evidence of those matters, must be read and understood in light of this conclusion.

The ERA procedure in general

113. The Tribunal wishes to record its concern that the OFT does not appear, in this case or in others, to have realised the full potential of the ERAs. Each admitting party has undertaken to "*maintain continuous and complete co-operation*" with the OFT (see paragraph 94 above). Such co-operation continues during any proceedings before the Tribunal and requires the ERA party to use reasonable endeavours to facilitate and secure the complete and truthful co-operation of its current and former employees in attending such proceedings. Despite this, however, we were not

provided with any witness evidence from any of the admitting parties by the OFT,[17] despite the fact that such evidence would probably have materially assisted in the disposal of this appeal – in which party's favour we do not, of course, know without having heard that evidence.

114. The Tribunal also notes that the ERAs differ significantly from the European Commission's settlement procedure in cartel cases under Regulation 622/2008 amending Regulation 773/2004 (OJ 2008/L 171/3). In future cases, the OFT may wish to consider aligning the approach it takes to entering into ERAs with the procedure adopted by the Commission and, in particular, to request that an admitting party provide the OFT with a detailed settlement submission (along the lines of paragraph 20 of the Commission's Notice on the conduct of settlement procedures OJ 2008/C 167/1). Such submissions are, in our view, likely to have considerably more probative value than ERAs in the form that we have seen in the course of this proceeding.

C. Calling witnesses

115. Tesco has been extremely critical of the OFT's approach to witness evidence. In argument, Counsel for Tesco laid considerable emphasis on the OFT's failure to interview witnesses during its investigation or indeed to call witnesses for this appeal. This failure, it was said, could not be justified and substantially undermined the OFT's case. The Tribunal should, argued Tesco, (a) decline to draw inferences in favour of the OFT's case and (b) should draw adverse inferences from the OFT's failure to call certain witnesses. According to the OFT, in the absence of any ground of appeal challenging the fairness of its investigation, it is neither necessary nor desirable for the Tribunal to review the manner in which the OFT conducted its investigation. The "*only question*", according to the OFT, is what does the evidence relied on in the Decision and placed before the Tribunal in fact establish.

116. The importance of the issues raised by Tesco calls for a return to first principles and the restatement of some familiar but, fundamental, propositions. First, the evidence on which the OFT wishes to rely in support of an alleged infringement of the 1998

[17] Although it is to be noted that Tesco did call witnesses from Dairy Crest and McLelland.

Act is a matter for it during the administrative stage. Of course, the OFT must act fairly. The OFT must also put to the parties the evidence on which it relies to establish the infringement alleged. There is no rule of law, however, that, in order to establish a Chapter I infringement, the OFT has to rely on written or oral witness evidence (see Case No. 1008/2/1/02 *Claymore Dairies Ltd v OFT* [2003] CAT 18, paragraphs 8 and 9).

117. Secondly, the OFT's powers of investigation and enforcement are set out in Chapter III of the 1998 Act and the rules made under it (the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (S.I. 2004/2751) (the "OFT's Rules"). Under section 25(1) of the 1998 Act the OFT may conduct an investigation where it has reasonable grounds for suspecting, *inter alia*, that there has been an infringement of the Chapter I prohibition. We were told that the OFT, when it begins any investigation, will do so largely on the basis of documentary evidence.[18] When conducting such an investigation, the powers of the OFT are to request information, in particular documents, and conduct inspections pursuant to sections 26 to 28A of the 1998 Act. Whilst the OFT can ask individuals about the content of documents or their location, it does not have the power to ask more generally for explanations of facts relating to the subject-matter of an inspection (*cf*. the powers of the European Commission under Article 20(2)(e) of Council Regulation (EC) No 1/2003, OJ 2003/L 1/1).

118. Thirdly, there is no rule of law which prevents the OFT from interviewing (or seeking to interview) employees, or former employees, of companies implicated in an investigation. The OFT noted the possibility of asking individuals to voluntarily attend an interview when their corporate employer has applied for immunity or leniency and/or signed an ERA. The OFT availed itself of that possibility in the present case but focused on the investigation of the alleged FLM Initiatives and did not interview other witnesses on prioritisation grounds (see paragraphs 2.92, 2.93 and 5.484 of the Decision).

119. Counsel for the OFT pointed out that the OFT's Rules do not provide it with the power to compel witnesses to attend for questioning. That is true, but we find it

[18] Transcript, Day 15, p. 57.

surprising that the lack of a power of compulsion should be thought to either preclude or discourage the OFT from even attempting to contact witnesses who might be able to provide details or evidence of material facts (although we note, of course, that in this case the OFT considered that it already had sufficient evidence of an infringement). It is clear that the OFT is not obliged to ask for witness statements; it is, however, equally clear that it is not barred from asking for them.

120. We do not think that the OFT could be fairly criticised if it had asked an individual to attend an interview, the individual in question had refused to co-operate and the OFT had decided to rely on other evidence available to it in order to prove its case. We would expect any responsible public body at least to ask itself whether there are witnesses who might be able to provide evidence of a material fact or shed light on an alleged infringement. By declining to contact relevant individuals to ascertain whether they would be willing to co-operate, there is a risk that a public body forgoes potentially promising lines of inquiry.

121. The fourth point, closely linked to the third, is that the OFT's failure to call witnesses runs a risk that, on an appeal, the Tribunal may ultimately conclude that the OFT has failed to prove the alleged infringement. If the OFT chooses to base its case on what turns out to be incomplete, inconclusive or inconsistent documentary evidence, then that evidence may not be sufficiently strong to satisfy the Tribunal, on the balance of probabilities, that an infringement has occurred (see, to that effect, *Willis* at paragraph 68). We note that, even where the OFT does choose to rely on witness evidence, that is of course no guarantee of success before this Tribunal.

122. Tesco invited us to modify our approach to, and assessment of, the available evidence simply because the OFT had chosen not to rely on witness evidence. That is a proposition that seems to us to go too far. It is not the task of this Tribunal to speculate as to why the OFT did not interview particular witnesses, still less do we consider it appropriate to refrain from drawing inferences that seem appropriate to us on the basis of the evidence presented. Ultimately, the Tribunal must consider the merits of the decision in the light of all the direct and circumstantial evidence placed before it.

123. Fifthly, if there is an appeal to the Tribunal, the Tribunal must determine the appeal "*on the merits by reference to the grounds of appeal set out in the notice of appeal*": paragraph 3(1) of Schedule 8 to the 1998 Act. So far as the evidence before the Tribunal is concerned, rule 22(2) of the Competition Appeal Tribunal Rules 2003 (S.I. 2003/1372) (the "Tribunal's Rules") provides:

> "The Tribunal may admit or exclude evidence, whether or not the evidence was available to the respondent when the disputed decision was taken."

The Tribunal's Rules do not draw any distinction between the appellant and the respondent so far as adducing evidence is concerned. They give the Tribunal a wide discretion as to what evidence is placed before it. The Tribunal's Rules also empower the Tribunal to call for evidence on its own initiative under rule 19(3) and refer explicitly, in rule 22(2), to evidence that was not available to the respondent when the decision was taken.

124. The following points emerge from the Tribunal's case law as regards adducing new evidence:

(a) an appellant may challenge a decision on any ground it so wishes and may do so on the basis of evidence that was not available to the OFT when it took the decision: Case 1001/1/1/01 *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1, paragraph 117;

(b) the OFT should normally be prepared to defend an impugned decision on the basis of the material before it when it took that decision: *Napp* [2001] CAT 3, paragraph 77;

(c) it is not the task of an appellant, nor of the Tribunal, to supplement the evidence relied on by the OFT: Case 1121/1/1/09 *Durkan Holdings Ltd & Ors v Office of Fair Trading* [2011] CAT 6, paragraph 110;

(d) there is a rebuttable presumption against permitting the OFT to advance a new case or to rely on new evidence that could properly have been made available, or relied upon, during the investigation: *Napp* [2001] CAT 3, paragraph 77;

(e) the above presumption is justified by the fact that an appeal is brought against the decision as taken and the Tribunal's task is to review, on the merits, that decision, not a subsequently enhanced or re-cast version of the decision; it also ensures that the procedural requirements of the administrative procedure are respected: *Napp* [2001] CAT 3, paragraph 77;

(f) the presumption is rebuttable to account for circumstances where, for example, an appellant makes a new allegation or produces new evidence, such that the OFT is permitted to adduce rebuttal evidence on appeal (as opposed to adducing evidence that was necessary to prove the infringement found in a decision); and

(g) the Tribunal must be vigilant to ensure the fairness of the appeal process. The procedures of this Tribunal are designed to deal with cases justly, in close harmony with the overriding objective in civil litigation under rule 1.1 of the Civil Procedure Rules 1998.

125. Sixthly, strict rules of evidence do not apply in proceedings before the Tribunal (see *Guide to Proceedings*,[19] paragraph 12.1 and the case law cited). Our approach to the evidence in this case has been to begin with the undisputed findings contained in the Decision, as well as the common ground between the parties. We then considered the contemporaneous documents placed before us. Having regard to the broad terms of rule 22(2) of the Tribunal's Rules, there was no dispute about the admissibility of any of the documents originally comprising the appeal bundle (although issues arose later as to a further bundle produced by Tesco and a report that the OFT sought to admit in the latter stages of the hearing[20]). Where the parties parted company with one another was as to the weight, if any, properly to be given to the documentary evidence relied on by the OFT. The Tribunal's approach has been to give each document what appears to be its natural meaning, and accord it such weight as appears appropriate, taking into account when, and the

[19] The requirements of the Tribunal's Guide to Proceedings, dated 20 October 2005, constitute a Practice Direction issued by the President pursuant to Rule 68(2) of the Tribunal's Rules.

[20] The report in question was not admitted in evidence and we did not take account of it in arriving at this judgment (see the Tribunal's ruling, delivered by the Chairman, at Transcript, Day 16, p. 14).

circumstances in which, it was prepared, the identity of the author, whether it contains hearsay or multiple hearsay and any other factors likely to affect its reliability. In that connection, whilst the technical rules of evidence do not apply in this Tribunal, we find section 4(1) and (2) of the Civil Evidence Act 1995 to be a helpful checklist for determining how much weight is to be attributed to what would in the High Court be termed hearsay evidence.

126. If, as is the case here, the Appellants contest the meaning or significance of a document relied on by the OFT, in the absence of any witness statement from the author of the document, the Tribunal has to consider the language used in the document and seek to determine what the author meant by it. The starting point will be that the author meant what they said and said what they meant. A document is not made in a vacuum, however, and should not be construed as if it had been; we have therefore read documents against the factual background known to the parties at the time. If the Tribunal's conclusion is that a document is unclear or ambiguous, even when read in light of the prevailing circumstances and other evidence, then any doubt as to the meaning of that document must be resolved in favour of the Appellants.

127. The Tribunal's approach has been to give witness statements such weight as seems appropriate, as it has with the oral evidence given in the witness box. This is the ordinary process of assessment of evidence.

128. We are unable to accept Counsel for Tesco's submission in closing that where there is a conflict between oral evidence and a document that has not been attested to by a witness, the oral evidence should carry greater weight.[21] We do not think that it is necessary or desirable to elevate the probative value of oral, over documentary, evidence in this way. Rather, in seeking to resolve disputes of fact, we have looked for support for a witness's account, whether from the documents, other witnesses or surrounding circumstances. Where there is a conflict of evidence, we have followed the approach of Robert Goff LJ in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1 at 57, (endorsed by the Privy Council in *Grace Shipping v Sharp & Co* [1987] 1 Lloyd's Rep 207 at 215):

[21] Transcript, Day 13, p. 7.

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

The OFT's decision not to call witnesses

129. Counsel for Tesco submitted that the Tribunal should draw adverse inferences from the OFT's decision not to call witnesses (which Tesco termed a "*failure*") if there was no good reason for the decision. Tesco's case was that the OFT should have called witnesses to give evidence on key issues of disputed fact; by not doing so it deprived Tesco of the chance to test parts of the OFT's case in cross-examination.

130. In considering this submission by Tesco, it is appropriate to refer to the judgment of Brooke LJ (with whom Roch and Aldous LJJ agreed) in *Wisniewski v Central Manchester Health Authority* [1998] P.I.Q.R. 324 (CA) at 340 (which we drew to the attention of the parties) where he derived the following principles to be applied by the ordinary courts when considering the failure of a party to call a relevant witness in civil proceedings:

> "1 In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> 2 If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> 3 There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> 4 If the reason for witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

131. These principles have subsequently been referred to and applied by, at least, Mann J in *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] EWHC 2017

(Ch), paragraphs 71 and 72, and Briggs J in *Polar Park Enterprises v Allason* [2007] EWHC 22 (Ch) at paragraph 30.

132. In light of *Wisniewski*, we considered whether the OFT had provided a good reason for not having called any witnesses. In the arguments before us, the OFT advanced two reasons: first, that the Tribunal's case law on public-authority respondents adducing evidence precluded the OFT from calling witnesses; and, secondly, that the documentary evidence on which it had relied was sufficient to prove its case. Tesco submitted that neither reason was satisfactory.[22]

133. Turning to the first of the OFT's reasons, it was suggested, for the first time, in closing that the Tribunal's case law (summarised in paragraph 124 above) prohibited the OFT from calling witnesses since this would have amounted to "*bolstering*" its case on appeal. We consider this argument to be without merit. The OFT could not be accused of impermissibly augmenting, changing or bolstering its case if it were to call witnesses to counter or rebut claims made by witnesses called by an appellant. The OFT would still be relying upon the findings and analysis contained in the Decision. Various decisions of this Tribunal in the *Construction Bid-rigging* appeals[23] made it very clear that where salient facts are disputed by an appellant that was an addressee of the decision, it may be difficult for the Tribunal to resolve those disputes in the absence of evidence from a witness who has been deposed by the OFT in the ordinary way and whose version of events could then be tested in cross-examination by the appellant disputing them. In the absence of such witness evidence, the outcome may have to turn on the burden of proof.

134. As the OFT itself pointed out, Tesco produced, for this appeal and for the first time,[24] detailed, narrative accounts in witness statements from five different

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22 It is appropriate to record that Counsel for Tesco applied for specific disclosure of "*all documents in the possession or control of the OFT that demonstrate the taking of that decision* [not to call witnesses]" (see Transcript, Day 15, pp. 81-84). Unsurprisingly, the OFT opposed that application (see Transcript, Day 15, pp. 85-88) and, after taking time for consideration, we refused it. Our ruling was delivered by the Chairman (see Transcript, Day 15, pp. 93-95). It is also appropriate to record that Counsel for Tesco reserved her position on permission to appeal that ruling pending delivery of this judgment.

23 See for example, *Willis* at paragraph 68 and *Durkan* at paragraph 108.

24 See however paragraph 32 above.

witnesses. Each witness confirmed the content of their witness statements with a statement of truth. They were then cross-examined and, in some cases, re-examined, at the oral hearing. The OFT also noted that Tesco put forward a positive case, for the first time, as to the state of mind of Asda, Safeway and Sainsbury's when disclosing or receiving relevant information. We reject the OFT's suggestion that the Tribunal's case law prevented it from tendering witnesses for cross-examination when that evidence may have countered assertions made by the Appellants' witnesses. This would not have meant that the OFT had advanced a new case or relied on new facts or reasons. It would have meant, however, that witness evidence as to the content and meaning of emails and documents on which the OFT had relied would have formed part of the Tribunal's record. Such evidence might have put the Tribunal in a better position to evaluate the correctness, weight and/or relevance of the evidence before it. Indeed, this appears to have been recognised by the OFT at an earlier stage of this proceeding. At a case management conference held on 7 November 2011, Counsel for the OFT stated that the OFT was considering whether or not to call witnesses and stated that that would be "... *rebuttal witness evidence, evidence responding to the witness evidence from Miss* [sic] *Oldershaw and the new evidence*."[25]

135. As to the OFT's second reason for not calling witnesses, we do not hold that that decision by the OFT in this case should necessarily tilt the evidential scales in Tesco's favour. In its Defence, and again in its closing submissions, the OFT explained that its case rested on the documents on which it had relied in the Decision. In its view, those contemporaneous documents were clear and strong evidence of the Infringements found and no amplification of that evidence was necessary. This means that the Tribunal must simply decide whether that evidence is sufficient to establish a Chapter I infringement.

136. Applying the principles in *Wisniewski*, set out above, the Tribunal is satisfied that a credible explanation has been given for witnesses' absence, namely the OFT's position is that its case stands or falls on the documents. The explanation may not be wholly satisfactory because it might mean that the Tribunal cannot resolve certain issues of fact. Indeed, Tesco argued that a number of the documents relied

[25] See Transcript of Case Management Conference, held 7 November 2011, at p 16.

upon by the OFT were far from clear and noted that explanations had not been available because of the OFT's decision not to gather evidence from the authors and/or recipients of the documents. We shall address that argument in the factual context in which it arises. As noted above, in light of the OFT's decision not to seek witness evidence, any doubt in the mind of the Tribunal as to the content or meaning of documents relied on by the OFT must operate to the advantage of Tesco, as the undertaking alleged to have infringed the Chapter I prohibition. We do also bear in mind, however, the OFT's observation that evidence in cases of this sort may often be fragmentary in nature.

D. Reliance on notes of interview

137. The OFT (in the Decision) and Tesco (in its Notice of Appeal) relied on notes and/or transcripts of interviews (together, the "notes of interview") that had been conducted with individuals who were employed by one or other of the companies under investigation at the time of the Infringements. Those interviews were conducted either by the OFT during the investigation or by solicitors acting for one or other of four ERA parties, namely Asda, Dairy Crest, Glanbia and Wiseman. None of the individuals who were interviewed have been called to give evidence, except for Mr Arthur Reeves of Dairy Crest. No one from Tesco was interviewed.

138. By the time of this appeal, the OFT submitted that, in light of the Tribunal's judgments in the *Construction Bid-rigging* appeals, the Tribunal should place no substantial weight upon these notes of interview. This was because the individuals in question were not being called to give evidence before this Tribunal and, therefore, their evidence would not be tested by cross-examination. Further, the OFT contended that its case did not depend upon those notes of interview. Tesco went further, however, and submitted that the OFT could not rely on the notes of interview *at all*. According to Tesco, however, *it* could validly rely on the notes of interview since, in its view, they constituted exculpatory, rather than incriminatory, evidence. There was no reason, it was said, why an undertaking accused of breaching the prohibitions in the 1998 Act should be prevented from praying in aid any exculpatory statements that have been made by relevant individuals during interviews conducted by, or transcripts of which were provided to, the OFT.

139. We share the doubts of other Tribunal panels as to whether material contained in a note of an interview (especially one conducted by lawyers acting for an admitting party, rather than by the OFT) – even if reviewed and confirmed by the individual concerned – can constitute a proper means of evidencing alleged infringements in a case of this kind (see, for example, *Willis* at paragraph 67). We agree with the OFT, therefore, that the Tribunal should place no substantial weight upon the notes of interview, some of which were not in any event contemporaneous. We note the OFT's position that its case does not depend on those transcripts/notes and would observe that, to the extent that Tesco considered one or more of the interviewees to have made statements pertinent to the disposal of this appeal, it was open to Tesco to seek to call that individual as a witness. Our approach to the various notes of interview, whichever party sought to rely on them, has been a cautious one, and we have looked for corroboration, whether from contemporaneous documents, surrounding circumstances or witnesses who did give evidence before us, wherever possible.

VIII. WITNESSES HEARD BY THE TRIBUNAL

140. Notwithstanding the issues in relation to the calling of witnesses, which we have discussed in the foregoing section, the Tribunal did have the benefit of hearing oral evidence from five witnesses called by Tesco over the course of eight days. Although we will address the witness evidence on specific points as and when they arise in the course of this judgment, we consider it is appropriate to set out initially our general impressions of the witnesses who gave evidence before us. For the sake of convenience, we will take them in the order in which they gave evidence.

141. As a general observation, we recognise that the witnesses were required to give evidence in relation to events which occurred nearly a decade ago. None of the witnesses had, nor professed to have, anything approaching a perfect recollection of the events of 2002 and 2003, even when referred to contemporaneous documentary evidence. This is a point which we have borne in mind when assessing the reliability of a witness's evidence. In particular, there is a risk that, with the passage of time, a witness innocently convinces him- or herself of a version of events that does not in fact represent the truth.

A. Arthur Reeves of Dairy Crest

142. Mr Arthur Reeves was the Commercial Director for Dairy Crest's cheese business in 2002. The Tribunal considered him to be an honest witness, who gave his evidence in a clear and considered manner, with a view to genuinely trying to assist the Tribunal. That said, we considered that the majority of his evidence added little to our deliberations. That is not a criticism of Mr Reeves but a reflection of the fact that, whilst he was involved in, or at least aware of, some of the communications relevant to the 2002 Cheese Initiative, Mr Reeves was not in direct contact with Tesco, nor the other retailers, at the relevant times.[26] More often than not, he was at least one step removed from the day to day correspondence and telephone calls that were taking place between Dairy Crest and the retailers at that time.

B. Thomas Ferguson of McLelland

143. Mr Thomas Ferguson was employed by McLelland at the relevant times. In 2002 he was the national account manager with responsibility for managing the Tesco account and was in regular contact with Mrs Lisa Oldershaw, the buying manager for cheese at Tesco, during the events which comprise the 2002 Cheese Initiative. He seems to have had some involvement with other retailers' accounts also, including Sainsbury's. In 2003 Mr Ferguson was promoted to national account controller and he had less direct contact with the retailers during that period.

144. Whilst we have accepted some of the evidence Mr Ferguson gave on specific points, especially where there is other evidence corroborating his own, we did not, in general, form a favourable impression of Mr Ferguson as a witness. We found a number of his answers to be evasive, defensive and/or unclear. At times he appeared to us to acknowledge that certain emails he had sent or received were, at least on their face, such as to give rise to suspicions that he was passing information about future retail pricing intentions from one retailer to another. Nevertheless, he attempted to explain away the contents of those emails and to chart a safe course through these difficulties in a manner that was not always convincing to the Tribunal.

[26] Transcript, Day 5, p. 44.

145. In several instances, Mr Ferguson failed to provide answers to, what appeared to us to be, straightforward questions, even when they were put to him on a number of occasions. An example of this relates to an email of 21 October 2002 that he sent to Mrs Oldershaw of Tesco. That email appears, on its face, to provide Tesco with information about the future retail pricing intentions of its competitors, particularly Sainsbury's, and it is a document to which we shall have occasion to return below. Counsel for the OFT pressed Mr Ferguson on a number of occasions as to what his motive had been in sending that email. We were concerned that Mr Ferguson was not in fact answering the question put to him and the Chairman, therefore, put the question to him again several times. It became clear, however, that Mr Ferguson was not willing to give a direct, nor frank, answer to the question and it was eventually necessary to move on, leaving the question, in effect, unanswered.[27]

C. Alastair Irvine of McLelland

146. Mr Alastair Irvine was a co-owner and joint managing director of McLelland until that company was purchased by Lactalis in 2004. Mr Irvine had a tendency to give long and, at times, unnecessarily drawn out answers to questions, often addressing himself to matters which were irrelevant to the question he was then answering. His evidence was not, therefore, as straightforward as it might perhaps have been. We generally formed the impression, however, that Mr Irvine was an honest and candid witness, who was genuinely seeking to assist the Tribunal in its task of deciding this appeal.

147. That said, there is a parallel to be drawn between the evidence of Mr Irvine and that of Mr Reeves. Like Mr Reeves at Dairy Crest, Mr Irvine, as joint managing director of McLelland, was two steps removed from the day-to-day contacts between McLelland and the various retailers which it supplied in 2002 and 2003. Notwithstanding that McLelland was a comparatively small undertaking, for much of the relevant period there was at least one individual, Mr Jim McGregor who was the sales director, interposed between the account managers, those in regular contact with the retailers, and Mr Irvine in the McLelland hierarchy.

[27] Transcript, Day 6, pp. 69-72; see also the exchange at Transcript, Day 6, p. 52.

148. As a result, although we found him, in the main, to be a reliable witness, his evidence was largely peripheral to the key issues of liability in this appeal.

D. Lisa Oldershaw, née Rowbottom, of Tesco

149. In 2002 and 2003 Mrs Lisa Oldershaw was, as we have said, the buying manager in charge of British cheese at Tesco. In total, she worked for Tesco for twelve years, from 1995 to 2007.[28] Upon leaving Tesco, Mrs Oldershaw and her family relocated to New Zealand, a fact which took on some significance during the course of the hearing. Shortly before Mrs Oldershaw was due to give evidence, she was forced to return to New Zealand due to a family medical emergency. She did agree, however, to give her evidence to the Tribunal by video conference, sitting late into the night, New Zealand time. We are particularly grateful to Mrs Oldershaw for her agreement to give evidence notwithstanding the unfortunate circumstances at the time. We have taken those circumstances into account when assessing her evidence, as well as the fact that she was ultimately cross-examined by video conference.

150. Mrs Oldershaw struck us as a highly intelligent and competent person, who appeared to be very familiar with the business world. It is in light of that assessment, however, that we have found ourselves unable to accept some of Mrs Oldershaw's evidence.

151. We recognise, as we have said, that the events on which the witnesses gave evidence occurred almost a decade ago and, as such, their memories needed some refreshing. Indeed, there were significant gaps in their recollection of events, which could not adequately be filled by reference to the contemporaneous documents. Nevertheless, it is our view that Mrs Oldershaw's memory was, on occasions, conveniently selective. She would give detailed accounts of certain, highly specific events and yet, at other times, be unable to recall, even in the broadest of terms, related events.

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[28] During the relevant period of 2002 and 2003, Mrs Oldershaw was known by her maiden name of Rowbottom. We shall, however, follow the parties' approach and refer to her as Mrs Oldershaw throughout this judgment.

152. We also found portions of her evidence less than credible. For example, Mrs Oldershaw denied, on several occasions, that information about her competitors' future retail pricing intentions would have been of any interest, or relevance, to her.[29] We reject the truth of those comments. Mrs Oldershaw was plainly aware that she should not have obtained or received her competitors' future pricing information but that is a separate matter from the question of whether such information would have been of interest or relevance to her. We note moreover that Mrs Oldershaw had received a certain amount of competition law compliance training at the relevant time. The precise nature and content of that training was another contentious issue but, at least by 2003, it seems that the training made plain to Mrs Oldershaw that she should not be receiving from, much less discussing with, her supplier information regarding her competitors' future pricing intentions and, indeed, that she should reject any such advances.

153. Mrs Oldershaw also maintained that she viewed every statement from her suppliers about her competitors with "*blanket falseness*".[30] At no point did Mrs Oldershaw suggest, however, that she had informed her suppliers that she regarded all the future pricing information they appeared to be providing her with as false. Moreover, given the detail and specificity of much of the information being communicated to Mrs Oldershaw at the time, we are compelled to reject this evidence as simply not credible.

154. We reject the submission by Counsel for Tesco made in closing that, unless we find Mrs Oldershaw to have been wholly dishonest, we must accept her evidence in its totality, not least because she was said to have no interest in the outcome of this appeal and was not compelled to give evidence. The events with which this appeal is concerned bear directly on the actions and conduct of Mrs Oldershaw in 2002 and 2003 as Tesco's buying manager for cheese. In our judgement she strove to defend the positions she took in the evidence she gave. Some of her evidence we accept and some we reject, which is a common assessment of witnesses in this jurisdiction.

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29 See, for example, Transcript, Day 8, pp. 167 and 168; and Day 9, pp. 7 and 20-22.

30 Transcript, Day 9, p. 136; see also Day 9, p. 9.

E. John Scouler of Tesco

155. Mr John Scouler was the final witness to give evidence to the Tribunal. Mr Scouler is still employed by Tesco and was, at the time of the alleged Infringements, category director for dairy. Mrs Oldershaw reported to the category manager for dairy, Mr Rob Hirst, who in turn reported to Mr Scouler.

156. Mr Scouler left the Tribunal with a mixed impression of his evidence. At times, he was straightforward and gave his evidence in an authoritative manner. However, a recurring theme in his evidence was to state that he had no recollection at all of an event, and he seemed at other times to take refuge in the assertion of a poorer recollection than we consider was in fact the case. He acknowledged that some of the documents put to him in evidence would have been of significant concern to him, and to Tesco, had he seen them at the relevant time: that part of his evidence we certainly accept.

IX. THE 2002 CHEESE INITIATIVE

157. We observe at this point, although it applies equally to the 2003 Cheese Initiative, which we come to below, that it seems to us that the Infringements must be understood and analysed taking account of the totality of the surrounding factual circumstances. At paragraph 37 of its Notice of Appeal, Tesco argued that, although the 2002 and 2003 Cheese Initiatives are alleged to consist of a number of separate A-B-C transmissions, the Decision does not "*analyse systematically each step of each* [of] *these hub and spoke exchanges*". Tesco, therefore, separated out the individual A-B-C transmissions that related to it, each of which Tesco refers to as a "Strand". On this analysis, the 2002 Cheese Initiative comprised nine Strands (although one, Strand 6, was not found to amount to an infringement), whilst the 2003 Cheese Initiative comprised five Strands.

158. In his opening submissions, Counsel for the OFT acknowledged the usefulness of the Strand analysis as a convenient shorthand reference for each of the alleged transmissions of future pricing intentions. He cautioned against adhering too rigidly to this sub-division as an analytical tool, however, arguing that to do so risks failing to see the facts as they really were. He submitted that in each of the 2002

and 2003 Cheese Initiatives, there was a continuum of events spanning September to November in the respective years. Each event has to be seen in the context of what went before and indeed in the light of what happened thereafter.

159. The parties adopted the Strand-analysis throughout the hearing and in the pleadings, and we have found it a useful way of identifying the numerous factual issues, which we have to decide. As will be seen, we adopt that analysis in the course of this judgment also. We agree with the OFT, however, that is important to consider Strands in context and, in particular, in light of what has gone before. Where we differ from the OFT, is that we do not think it appropriate to analyse a Strand in light of events which happened thereafter. In analysing Strand 3 of the 2002 Cheese Initiative, for example, we consider that it is entirely appropriate to have regard to our conclusions on the first two Strands of that Initiative but that it would be inappropriate to decide issues by reference to events said to comprise Strand 4, which had not, at that time, yet happened. That is not to say, of course, that a document prepared at a later date cannot shed light on earlier events but the fact that, for example, a person intended something on one date does not necessarily mean that he or she intended something similar at an earlier point in time.

160. All dates referred to in the sections analysing the individual communications said to comprise the 2002 Cheese Initiative are 2002 dates, unless otherwise stated.

A. Introduction

161. It bears repeating here precisely what the OFT found the 2002 Cheese Initiative to comprise, namely that Asda, Dairy Crest, Glanbia, McLelland, Safeway, Sainsbury's and Tesco infringed the Chapter I prohibition by participating in a single overall concerted practice which had as its object the prevention, restriction or distortion of competition in respect of retail prices of British-produced cheese in the autumn of 2002. In particular, the retailers disclosed information regarding their future retail pricing intentions for cheese to their suppliers in circumstances where they clearly understood that the retail price increases were part of a co-ordinated plan to increase cheese prices across the retail sector as a whole and which also involved the implementation of retail price increases by their competitors. Additionally, the disclosures of retail pricing intentions were frequently reciprocal

in that they were made by retailers after they had received information regarding one or more of their competitors' retail pricing intentions and that certain retailers disclosed that their willingness to increase cheese retail prices was conditional upon their competitors also increasing their prices.

162. The purpose of the 2002 Cheese Initiative was said to have been to assist financially UK dairy farmers by raising the farmgate prices for raw milk. The OFT did not dispute that the retailers and suppliers entered into the 2002 Cheese Initiative with the intention of passing the proceeds of increased retail and cost prices to UK dairy farmers and that they made limited (if any) financial gain from their participation. Whilst this did not affect the infringement findings in the Decision, the OFT indicated at paragraphs 5.27 and 5.28 of the Decision that it had taken the following factors into account when determining the appropriate penalty for each addressee: (i) the motivation behind the participation of the retailers and suppliers in the 2002 Cheese Initiative; and (ii) the fact that they were unlikely to have gained financially from it.

B. Background to the 2002 Cheese Initiative

163. The following factual background to the 2002 Cheese Initiative was common ground between the parties.

164. During the summer of 2002, there was significant unrest among dairy farmers, who were increasingly concerned by the falling farmgate prices for raw milk. Various farmers' organisations, including the National Farmers' Union (the "NFU") and the National Farmers' Union of Scotland (the "NFU Scotland"), were putting intense pressure on the retailers and suppliers to do something to secure an increase in farmgate prices. Another group, which intensified the pressure by pursuing more direct action, was Farmers for Action, a non-union grouping. On 8 July, it issued a press release stating that it had no alternative but to take direct action, such as erecting blockades and picketing, against the suppliers and that all major retailers had been "*notified that they* [were] *about to see a disruption to their supply of milk and dairy products...*".

165. The situation deteriorated and, by late August, the NFU Scotland had issued a public threat to lead demonstrations against the retailers' depots on 19 September "*unless there* [was] *a clear signal that farm gate milk prices* [would] *rise*." These protests had the potential to be most disruptive to the retailers and could have caused substantial damage to their operations, profits and reputations. Indeed, Tesco observed that, in the run-up to Christmas, the retailers were likely to be more vulnerable to direct action than the suppliers.

166. In response to this mounting pressure, on 3 September, Tesco publicly committed itself to supporting the farmers. One of its Directors, John Gildersleeve, stated that Tesco believed there was a "*strong case for them to receive a significant price increase*" from the suppliers. The following day, Tesco publicly called on "*all milk processors to pay* [the farmers] *at least two pence per litre more*" for raw milk in an effort to sustain the UK dairy industry. As Mr Scouler put it, this public call "*delivered the desired PR* [public relations] *coup for Tesco*" but it was accompanied by an increase in pressure on Tesco from its suppliers to accept a cost price increase so that the suppliers could maintain their own margins. Mr Scouler said he had been surprised by these Tesco announcements and that it had put Tesco's dairy team in a difficult position when negotiating cost prices with the suppliers. One of the suppliers, Arla, refused to absorb the 2 ppl farmgate increase in its own margins but, because of the public announcements, it was not open to Tesco to back down and say the suppliers were refusing to fund the price increase. This would have caused a backlash from the farming community. Mr Scouler agreed that Tesco's dairy team had "*effectively been boxed in by the press release* [and it] *became obvious to all that Tesco would have to pay a higher cost price to the processors. However, Tesco couldn't do this without increasing its retail prices if it were to maintain margins*."[31] In oral evidence, Mrs Oldershaw offered a similar assessment of the situation at the time.[32]

167. Following the public announcements, Tesco increased its retail prices for FLM by 2 ppl and agreed to a corresponding 2 ppl increase in the cost price it paid its suppliers for FLM on 9 September. It should be noted that the OFT did not find

31 Transcript, Day 11, pp. 40 and 41.
32 Transcript, Day 8, pp. 62, 63 and 70.

that these retail price increases were infringements of the Chapter I prohibition (as recorded at paragraph 103 above, the OFT decided not to pursue the 2002 FLM Initiative).

168. Tesco's acceptance of this cost price increase in relation to FLM did not, however, come close to achieving the 2 ppl increase in farmgate prices, due to what the OFT referred to as the "*pooling effect*". In essence, this refers to the fact that only about 50 per cent of raw milk produced was processed into FLM and of that only about half (approximately 25 per cent of raw milk production) was sold by the retailers. Roughly 25 per cent of raw milk went into cheese production, the vast majority of which was ultimately sold by the retailers, with the remaining raw milk used for other dairy products, of which the single biggest contributor was butter. Even if all retailers accepted a cost price increase of 2 ppl on FLM and the suppliers passed the proceeds of that increase back to farmers, this would only increase farmgate prices by around 0.77 ppl.

169. Thus, in order to achieve a 2 ppl increase in farmgate prices for raw milk, neither action by a single retailer, even Tesco, nor action on a single dairy product, such as FLM, would be sufficient. Rather, it would be necessary for all suppliers to increase the price they paid to the farmers for the raw milk used in the manufacture of other dairy products, in addition to FLM, including cheese. The suppliers thus sought to secure from their retailer customers cost price increases for all dairy products equivalent to a 2 ppl increase in raw milk prices, with a view to passing back those increases to the farmers.

170. That, essentially, is where the common ground in relation to the events of 2002 ends.

C. Tesco's awareness of a 'Plan'

171. In the Decision, the OFT found that the weight of evidence in relation to the 2002 Cheese Initiative clearly demonstrated that the retailers disclosed information regarding their future retail pricing intentions for cheese to their suppliers in circumstances where they understood that the retail price increases were part of a co-ordinated plan to increase cheese prices across the market. In its Defence, the

OFT submitted that Tesco's awareness of that 'plan' established clearly that Tesco must have intended, or at the least foreseen, that its retail pricing intentions would in fact be passed by its suppliers to its competitors and, equally, that it was reciprocally receiving the future pricing intentions of its competitors as part of the alleged 'plan'. Awareness of the 'plan' was, according to the OFT, central to Tesco's infringement in this case.

172. It was submitted that Tesco's awareness of the 'plan' was established by:

(a) Tesco's awareness of the public call for a 2 ppl increase in farmgate milk prices, a call which Tesco itself had led;

(b) statements made by Tesco at the so-called Tesco Dairy Supply Group Meeting (the "Tesco DSGM") that the price increases on FLM needed to be extended to other dairy products and that action across the retail market, not just by Tesco, was required; and

(c) the receipt by Tesco of a document from Dairy Crest, which, according to the OFT, proposed market-wide, co-ordinated increases in both cost and retail prices for cheese.

173. Unsurprisingly, given its press releases of 3 and 4 September, Tesco does not dispute that it was aware of the call for a 2 ppl increase in farmgate milk prices, although it vehemently denied that this meant it was aware of any plan for co-ordinated retail price increases. Propositions (b) and (c) are discussed in the following subsections.

D. The Tesco DSGM

174. It was against the background set out above that the central topic for discussion at the inaugural Tesco DSGM, held on 13 September, was "*How can we help the farmers?*". The meeting was attended by a significant number of people, although precisely how many has been difficult to determine, with estimates ranging from 70 at one end of the scale (according to Mr Reeves of Dairy Crest,[33] although he did

[33] Transcript, Day 5, p.54.

not himself attend) to 20 at the opposite end (in the view of Mr Ferguson of McLelland[34]). Mr Scouler, who attended on behalf of Tesco (with Mr Hirst, the dairy category manager), put the number at between 30 and 40.[35] Most of the main suppliers were in attendance (except for Glanbia, which did not at the time supply Tesco), as were representatives of the British dairy farmers. No official minute of the meeting was taken and none of the Tesco attendees recalled taking any notes either. Given the highly unusual market circumstances at the time, the Tribunal finds it surprising that no one from Tesco was able to produce any record of the meeting. The representatives of three of the suppliers did, however, take contemporaneous, or near contemporaneous, notes of the Tesco DSGM, and a representative of Wiseman briefly recorded his impressions of the Tesco DSGM in a later document dated 4 October. These notes have come to be referred to according to the supplier which made them: the Dairy Crest Note; the Arla Note; the Express Note; and the Wiseman Note respectively.

175. In the Decision, the OFT relied on these notes to establish the following propositions:

(a) a plan was discussed to increase the farmgate price of raw milk by 2 ppl;

(b) the meeting focused on how to extend this plan beyond raising the retail prices of FLM so as to include cheese and other dairy products;

(c) the implementation of an increase of retail prices for cheese was discussed;

(d) Tesco, emphasising the need to remain competitive in the retail market, stated its willingness to increase its retail prices if its competitors did likewise (these statements were referred to by the OFT as 'conditional commitments');

(e) in signalling its intention to increase retail prices, in conjunction with the conditional commitments, Tesco substantially reduced uncertainty as to its future behaviour; and

[34] Transcript, Day 5, p. 188.
[35] Transcript, Day 11, p. 78.

(f) Tesco made it clear that it expected the suppliers to play an important role in this process. This has been referred to as Tesco issuing a challenge to suppliers.

176. The Tesco DSGM was, it seems, said to form a part of Strand 1 of the 2002 Cheese Initiative (i.e. the first A-B-C communication found by the OFT to infringe the Chapter I prohibition in 2002, which is discussed in Section X. (*Strand 1 of 2002: Tesco as A; Dairy Crest as B; and Asda as C*) below) in that it would inform the analysis of Tesco's mental state. It was also said to be relevant background for the remainder of the events of 2002. For that reason it is addressed in detail at this point, rather than just in the analysis of Strand 1 of the 2002 Cheese Initiative below. It is to be noted that, at paragraph 5.117 of the Decision, the OFT expressly refrained from finding that the Tesco DSGM was the catalyst for the 2002 Cheese Initiative, as had previously been alleged in the SO. In that light, we found the OFT's case on the precise relevance of the Tesco DSGM to be somewhat unclear.

177. In analysing the notes of the Tesco DSGM, we have placed most reliance on the Arla and Express Notes. The Express Note is by far the most detailed and its substance is broadly supported by the contents of the much briefer Arla Note. The Dairy Crest Note was in manuscript and, in places, undecipherable. An attempt to transcribe it was not agreed between the parties. The Wiseman note is neither particularly detailed, nor is it completely contemporaneous but we have no reason to doubt its veracity or accuracy, so far as it goes.

178. In our view the notes of the Tesco DSGM support propositions (a), (b), (c) and (f) set out in paragraph 175 above. First, it seems clear that, given the circumstances at the time, one of the main topics of discussion at the meeting was the possibility of a 2 ppl increase in the farmgate price. We note, of course, that representatives of the dairy farmers were in attendance and that the Express Note records that "*Tesco wanted to see a better return to farmers and the decision therefore taken to facilitate a price increase back to the farmer*". Equally, the Arla Note records, under the heading "*Tesco*", that there was an "[e]*xpectation that the price increase to farmers should be at least 2ppl*". Whilst it appears to be accurate that the need for action to address the problem of farmgate prices was discussed, we do not

accept on the basis of this evidence that the details of any plan to increase retail prices for cheese were discussed, let alone settled, at this meeting.

179. The OFT placed some reliance on a statement attributed to Mr Hirst in the Express Note, that Tesco wanted "*a plan from processors on the 2ppl increase*".

180. It should be noted that the statement attributed to Mr Hirst constitutes multiple hearsay in that it is recorded in the Express Note, the author of which was not called as a witness. Nor did Mr Hirst himself give evidence. Whilst that statement might evidence the fact that Tesco *wanted* the suppliers to devise some plan, it does not evidence any discussion of an actual plan to co-ordinate an increase in retail prices. In any event, the reference in the statement attributed to Mr Hirst to the 2 ppl increase cannot, without more, be interpreted as a reference to a plan in the sense that the OFT used that word, namely a plan to co-ordinate a retail price increase for cheese through the unlawful exchange of future pricing intentions.

181. Secondly, it is also clear that the Tesco DSGM was looking at how to extend the price increases to dairy products beyond FLM. The Express Note recognises that "*supermarket milk is only 25% of total*" and that "*Tesco now looking at other areas*", while the Arla Note records that "*Tesco/processors cautiously optimistic that there is a mood to address the problem with cheese*". We accept that this evidences a desire on the part of those present at the meeting to extend the farmgate price increases beyond FLM to other dairy products, including cheese, with consequent implications for cost and retail prices.

182. Thirdly, a reference in the Arla Note to "*Ask the customers to pay for it*" suggests that a retail price increase was under discussion. This may be supported by a passage in the Dairy Crest Note, which appears to record "*Mood to see* [increase] *in other products butter/cheese. Ultimately consumer pays*". As we have said, however, that handwritten note is most unclear and it may be that it is a reference to "*consumer prefs*", rather than "*consumer pays*". It is, however, unnecessary for us to resolve this point given our overall findings in relation to what happened at the Tesco DSGM. The Express Note records Mr Hirst as stating that he was

"[c]*autiously optimistic that Tesco can now start to move retail prices forward in this area ...*".

183. That a potential retail price increase by Tesco was under discussion is hardly surprising. As Mr Irvine of McLelland noted, if Tesco accepted a significant cost price increase (which was almost inevitable given its public pronouncements in support of farmers) but did not raise retail prices, its margins would be substantially affected (as would Mrs Oldershaw's most important KPI, her margin KPI).[36] Both Mr Scouler and Mrs Oldershaw also gave evidence that any cost price increase would normally be accompanied by a virtually simultaneous increase in retail prices.[37]

184. Fourthly, there can be little doubt that Tesco did issue a challenge to the suppliers to find a way of securing the 2 ppl farmgate price increase. Each of the Arla, Express and Dairy Crest Notes expressly state that a "*challenge*" was issued by Tesco to the suppliers to find a way to achieve a better return to farmers. The mutuality of expression between the Notes makes this finding inescapable. In our view, this is an important part of the factual background for understanding how and why the cheese suppliers, notably Dairy Crest and McLelland, behaved as they did in the weeks and months following the Tesco DSGM.

185. We cannot, however, agree with the OFT's fourth proposition (set out in paragraph 175(d) above), namely that the Notes establish that Tesco gave a conditional commitment to increase its retail prices for cheese, provided that its competitors did the same. The closest that any of the notes of the Tesco DSGM come to recording a conditional commitment were two passages in the Express Note, which the OFT relied on:

> "R Hirst – ... very difficult to move out of line with other competitors but RH senses there is a mood to move some of these prices forward ..."
>
> "J Scouler – at the end of the day we [Tesco] must be competitive. Highlighting that they are up against Walmart's [i.e. Asda's] view of 'lowering the cost of living for the world' ..."

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36 Transcript, Day 7, p. 81.

37 Transcript, Day 11, pp. 62 and 63; and Day 8, p. 97.

186. We consider these statements to be of a different order to those recorded in, for instance, the Waitrose letter of 2000, which stated that it:

> "would have no problem in agreeing to a price ... IF this could a) be passed back through the supply chain to producers and b) ensured that we would not be uncompetitive in the market place as a whole." (emphasis in original)

187. Mr Scouler, in his written evidence, said that whilst he did not recall making the statement attributed to him above, if he had said it then it was no more than a statement of the commercially obvious. Tesco had to remain competitive on the retail market. He confirmed in cross-examination that he did not, and did not intend to, make any conditional commitment to increase Tesco's retail prices and we accept that evidence. We did not have the benefit of oral evidence from Mr Hirst but, in any event, conclude that the statement attributed to him above, namely that it was very difficult for Tesco to move out of line with competitors, was also a statement of the obvious. The Chairman put it to Mr Ferguson, who attended the Tesco DSGM, that this was a statement of the obvious and he agreed that it was, stating that it was a position he had heard a number of Tesco personnel adopt.[38] We accept his evidence on this point. Indeed, we would go so far as to accept the observation by Counsel for Tesco in opening that it was a statement of the "*blindingly obvious, that Tesco* [was] *competing with other supermarkets...*" and would find it difficult to raise retail prices if others did not.[39] That is not enough to establish that Tesco committed to raise its retail prices on the condition that other retailers did likewise. Indeed, it reflects what the Court of Justice found to be a legitimate market practice in *Suiker Unie*, namely: "*the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors.*" (see paragraph 174 of that case, cited at paragraph 47 above).

188. In our judgement, taking account of all the evidence before us, the Tesco DSGM was not intended to be anything more than a roundtable discussion. We note that the OFT did not ultimately find that the Tesco DSGM was a catalyst for the 2002 Cheese Initiative. In reaching our conclusion, we take particular account of the range of attendees at the meeting, which included the farmers and a number of cheese suppliers. We note also that the Wiseman Note records that the Tesco

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38 Transcript, Day 5, p. 202.

39 Transcript, Day 1, p. 36.

DSGM broke up with "*no real conclusion to this discussion perhaps other than the realisation that this* [was] *a very difficult task.*" Equally, one of the authors of the Express Note states, in an email of 16 September, which attached that Note, that: "*for the last hour we were just going nowhere and at times throughout Scoular* [sic] *and Hirst appear to have had different views*." Taking these comments together with the anodyne statements set out in the meeting Notes themselves, we find that the OFT has not established, on the balance of probabilities, that Tesco gave any conditional commitments as to retail price increases for cheese at the Tesco DSGM. We note also that we heard evidence from two attendees at the Tesco DSGM, Messrs Scouler and Ferguson, both of whom denied that any conditional commitments were given by Tesco.

189. It follows from our conclusions above that we must also reject the OFT's fifth proposition (set out at paragraph 175(e), above) that, in so signalling its intentions, Tesco substantially reduced uncertainty as to its future actions.

190. In relation to the Tesco DSGM we conclude, therefore, that, whilst the need for some sort of action to increase farmgate prices was discussed, no details were agreed and no commitments given. Indeed, it would appear that no conclusions of any sort were reached. It is clear that the necessity of applying the price increase to dairy products other than FLM, including cheese, was under discussion. It is also clear that both retail and cost price increases were being contemplated, and that Tesco 'challenged' the suppliers to find a way of securing the 2 ppl price increase. We do not accept, however, that Tesco made any conditional commitment to increase its retail prices, dependent upon its competitors doing the same.

E. The Dairy Crest briefing document

191. At some point between the Tesco DSGM on 13 September and 17 September, Mr Reeves gave an internal presentation to the Dairy Crest sales team. This recognised that the current position in the dairy-farming industry was unsustainable and that doing nothing would only lead to an increase of scrutiny by farmers as to the farmgate prices paid by suppliers compared to retail cheese prices. As Mr Reeves explained, farmers only had visibility of the farmgate prices and the ultimate retail prices. They did not know what the retailers were paying to the suppliers.

Therefore, they knew that someone was making a lot of money out of cheese but they did not know where in the supply chain the margin was being made.[40] Mr Reeves' presentation also stated that "[m]*arket driven change*" would not happen and, therefore, the "*market* [had to] *be actively managed*". The presentation further recorded that the retailers must accept a cost price increase of £200 per tonne of cheese, a sum which roughly equates to an increase of 2 ppl for raw milk.

192. On 17 September, Dairy Crest sales personnel gave presentations to both Asda and Marks & Spencer in which it was proposed that retail prices for cheese be increased by £200 per tonne. Both presentations also proposed to "[m]*ove the whole market forward.*" In his evidence to the Tribunal, Mr Reeves accepted that it was made clear, at least to Asda, that the proposal being put to them was for retail price increases and that that was a proposal being put to all other retailers which Dairy Crest supplied.[41] During the week commencing 16 September, it is clear that Dairy Crest representatives also met, or spoke to, individuals from Safeway and Sainsbury's about the proposed £200 per tonne cost price increase.

193. By 20 September, it appears to have become public knowledge that the suppliers, and in particular Dairy Crest, were seeking a cost and retail price increase for cheese and other dairy products. On that date, *Dairy News*, a widely-read dairy industry publication,[42] reported that Dairy Crest was "*calling on the major retailers to increase the retail price of cheese, butter and cream vowing that it* [would] *pass back any extra cash to its farmers.*" In cross-examination, Mr Reeves explained the rationale for Dairy Crest wishing to see an increase in the retail price for cheese in his oral evidence to the Tribunal:

> "Q. So you knew, and by you I mean Dairy Crest knew, that if you were going to get your increased cost price the retailers were going to have to put up their retail prices, that's correct?
> A. Well, that's what retailers were saying to us."[43]

194. And:

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40 Transcript, Day 5, pp. 81 and 82.

41 Transcript, Day 5, pp. 60 and 62.

42 Transcript, Day 6, p. 201. The Tribunal notes that, on its face, the source of the article in question would appear to be *Farmers Weekly*, but Counsel for the OFT and the witness referred to it as an item from *Dairy News*, and, therefore, so do we.

43 Transcript, Day 5, p. 51.

> "Q. So it was absolutely clear in your view that Dairy Crest would not get its cost price increase unless the retailers could put up their retail prices?
> A. That's what we thought at the time, yes."[44]

195. On 23 September, Dairy Crest sent Tesco a 'briefing document' (the "Dairy Crest briefing document") to clarify the issues associated with its decision to "*increase prices on Cheese, Packet Butter, and Cream with effect from 1st October*." We saw copies of this document that were sent to each of Mr Hirst and Mr Chris Rigby, who was in charge of butter, spreads and fats at Tesco at the relevant time. Mrs Oldershaw accepted that it was likely that she had received, and read, a copy of the Dairy Crest briefing document also.[45]

196. The Dairy Crest briefing document, copies of which were also sent to Asda, Safeway and Sainsbury's at around the same time, stated that Dairy Crest aimed to build on the then recent, retailer-led initiative on FLM by requesting significant price increases for manufactured dairy products, including cheese. It stated that all monies received by Dairy Crest as a result of this increase would be paid to farmers. In relation to cheese, the proposal was for an immediate cost price increase of £200 per tonne, which, as noted above, translates to a price increase of 2 ppl for raw milk. The document clearly envisaged that the cost price increase would result in a retail price increase. Dairy Crest expressed a concern, however, that retail prices should not be raised to levels that would have made British cheeses less competitive than imported cheeses. Retailers were requested to "*bear this in mind*" when considering retail pricing decisions. Under the heading "*Transparency*", Dairy Crest stated that, in its view, "*cash margin maintenance should ... be the rule. Percentage margin will only create accusations of profiteering.*" Dairy Crest had promised to pay farmers all revenue which it recovered from the date on which "*RSPs* [retail selling prices] *and costs ... moved*", which it envisaged happening on 1 October. Finally, under the heading "Media Policy", Dairy Crest pledged that it would never comment on any aspect of individual retailer business decisions, intentions or discussions.

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44 Transcript, Day 5, p. 52.
45 Transcript, Day 8, p. 87.

197. In his evidence Mr Reeves, who was one of the authors of this document, agreed that Dairy Crest was proposing a simultaneous increase in both cost and retail prices for cheese to retailers.[46] He further agreed that, because farmers only had visibility of the farmgate and retail prices, and not of the cost price paid by retailers to suppliers, if retail prices were seen to increase by more than the increase in the farmgate prices, that would lead to accusations of profiteering from the farmers.[47] He also explained that the media policy statement in the Dairy Crest briefing document was not a general statement that Dairy Crest would preserve the confidentiality of retailers' information. It was rather specifically intended to allay fears that information about which retailers had (and which had not) agreed to cost price increases might be leaked to Farmers for Action.[48] We accept the evidence of Mr Reeves in this regard.

198. Mr Scouler could not recall precisely when he saw the Dairy Crest briefing document but accepted that he would have seen it and agreed that, in his view, it proposed a move in both retail and cost prices across the whole cheese market.[49] Mrs Oldershaw accepted that the Dairy Crest briefing document was highly unusual in that it appeared to propose a uniform cost price increase across all cheese lines supplied by Dairy Crest to all retailers. She further agreed that, given the magnitude of the proposed cost price increase, she would have been looking to raise Tesco's retail prices for cheese and that she assumed that all her competitors would find themselves in the same position.[50]

199. Inexplicably, in our judgement, Mrs Oldershaw flatly refused to accept that the Dairy Crest briefing document was a proposal for a retail price increase. Notwithstanding the references in that document to cash margin maintenance, RSPs or 'retail selling prices', and retail pricing decisions, Mrs Oldershaw maintained that the briefing document related to a cost price increase only.[51] We reject this part of her evidence: it is plain from the document that Dairy Crest was proposing a cost and retail price increase. Mr Reeves confirmed this was the intention and Mr

46 Transcript, Day 5, pp. 70 and 71.
47 Transcript, Day 5, pp. 83 and 84.
48 Transcript, Day 5, pp. 71 and 72.
49 Transcript, Day 11, pp. 124, 125, 129 and 130.
50 Transcript, Day 8, p. 88.
51 Transcript, Day 8, pp. 89-94.

Scouler agreed that that was how he would have read and understood the document. We find that Mrs Oldershaw, given her experience and business acumen, in fact realised that the Dairy Crest briefing document was a proposal for a cost *and* retail price increase.

200. That said, it should be noted that the OFT did not contend that the Dairy Crest briefing document was, of itself, an infringement. According to the OFT, the infringement comprised the subsequent disclosure and receipt of future retail pricing intentions by Tesco and the other retailers, all of whom had the requisite state of mind. Counsel for the OFT submitted that the Dairy Crest proposal, and indeed what other suppliers were proposing to the retailers at the same time, was very important background, which is relevant to the infringement and, in particular, relevant to the question of the state of mind of those who participated in the subsequent communications, including Tesco.[52]

201. We accept that the Dairy Crest briefing document is relevant to the assessment of subsequent events in the following respects. It would have been plain to the recipients of that briefing, as indeed Mrs Oldershaw accepted, that it was a generic document, which had been sent to all retailers on the market. Further, it proposed a cost price increase of £200 per tonne *and* a retail price increase. The briefing document stressed that, in Dairy Crest's view, cash margin maintenance should be the rule for the retail price increases, which translated to an increase of 20p per kilo.

202. Taking our conclusions on the Tesco DSGM and the Dairy Crest briefing document together, we conclude that Tesco was aware that to bring about the 2 ppl increase in farmgate prices for raw milk, which it had publicly given its support to, there would need to be an increase in cost and, almost certainly, retail prices for cheese. Tesco was also aware that Dairy Crest had proposed, not only to Tesco but to all the major retailers, that there be a £200 per tonne cost price increase for cheese and a concomitant retail price increase, which should, in Dairy Crest's view, be limited to cash margin maintenance. We consider it appropriate to bear these conclusions in mind when considering Tesco's subsequent conduct. In our judgement, however, the evidence before us does not support the conclusion drawn in the Decision that

[52] Transcript, Day 16, pp. 65 and 66.

Tesco was aware of a 'plan', in the sense intended by the OFT, namely a plan to co-ordinate retail price increases among the retailers through hub-and-spoke transmissions of future price intentions via their common cheese suppliers.

203. It is clear, however, that by the time the Dairy Crest briefing document was circulated to the retailers, those operating on the UK dairy market had recognised that the low farmgate prices for raw milk needed to be addressed. As the *Dairy Industry Newsletter* reported on 24 September, the:

> "industry is now under intense pressure to secure a better long-term deal for Britain's battered milk producers. Dairy Crest have said that they will initiate discussions with all the major supermarket chains with a view to lifting manufacturing margins on cheese, butter and cream ...".

204. We turn now to the events following the Dairy Crest briefing document and to the first strand of the 2002 Cheese Initiative.

X. STRAND 1 OF 2002: TESCO AS A; DAIRY CREST AS B; AND ASDA AS C

A. Outline of Strand 1

205. It was the OFT's case that Tesco passed its future retail pricing intentions for cheese to Dairy Crest in the course of the communications and negotiations between Dairy Crest and Tesco that took place between the Tesco DSGM, held on 13 September, and 27 September. It is alleged that that Tesco information was subsequently passed by Dairy Crest to Asda at a meeting on 27 September.

206. In the Decision, the OFT concluded, first, that the Dairy Crest briefing document, sent to the various retailers between 20 and 23 September, set out a framework to co-ordinate cheese retail price increases, as well as the £200 per tonne cost price increase, which Tesco accepted had been proposed. Secondly, on the basis of that document, the OFT concluded that Dairy Crest was planning to co-ordinate a market-wide retail price increase for cheese. Thirdly, it decided that each retailer would have understood that it was not being asked to act unilaterally in accepting the cost price increase and being urged to increase its retail prices. Each retailer would, the OFT concluded, have understood that Dairy Crest was in contact with each of its competitors. The Decision states that each of the retailers' subsequent actions should be viewed against that background. The Decision found that, at a

meeting of Dairy Crest and Asda personnel, which took place on 27 September, Dairy Crest disclosed to Asda that the "*latest position*" was that Sainsbury's and Tesco had "*agreed to move on all sectors*". This was recorded in a note taken by one of the Dairy Crest attendees, under the heading "*Mechanics – Cheese*". On that basis, the OFT inferred that the information said to have been disclosed to Asda had come from Sainsbury's and Tesco, and found that, in disclosing that information to Dairy Crest, each of Sainsbury's and Tesco had, at the very least, substantially reduced uncertainty as to their future conduct on the market. They were said to have done this with the requisite state of mind (see Decision, paragraphs 5.165-5.174).

B. A to B: did Tesco pass its future pricing intentions to Dairy Crest?

207. In order to evidence the A to B transmission of future retail pricing information by Tesco to Dairy Crest on Strand 1, the OFT relied primarily on the conditional commitments said to have been given at the Tesco DSGM. The OFT also relied upon:

(a) a meeting said to have taken place on 25 September at which the OFT alleges that Dairy Crest discussed with Tesco the Dairy Crest briefing document and a number of 'action points' from an internal Dairy Crest meeting that was held the day before; and

(b) two notes prepared by Mr Colin Stump of Glanbia, dated 25 and 27 September respectively, which were said to evidence that Tesco had passed on its future pricing intentions to Dairy Crest by those dates.

208. It is our judgement that the evidence presented by the OFT is not sufficient to establish, on the balance of probabilities, that Tesco communicated its future retail pricing intentions to Dairy Crest either at the Tesco DSGM or at the meeting said to have taken place on 25 September, or indeed at any time between 13 and 27 September.

The Tesco DSGM

209. We have already found that, on the evidence before us, no conditional commitments to raise retail prices for cheese were given by Tesco at the Tesco DSGM (see paragraphs 185-188 above).

The alleged meeting of 25 September

210. Two separate documents were said to evidence that a meeting took place between Tesco and Dairy Crest on 25 September. The first was a Dairy Crest document entitled "*Action Points from Cheese Increase Meeting*", referring to an internal meeting held on 24 September, which records that Mr Colin Beaumont of Dairy Crest would "*test*" the idea of applying a new quality-mark logo to all own-branded cheese (in the form of a red tractor) at a meeting with Tesco the following day. Of course, this is only evidence that a meeting was planned. It is not evidence that the meeting in fact took place, nor of who attended the meeting for Tesco, nor of what, if anything, was said. Secondly, the OFT relied on a letter written by Dairy Crest in 2005 responding to certain questions posed by the OFT as part of its investigation. That letter states that, according to Dairy Crest's records, a meeting took place at Tesco's Cheshunt offices on 25 September. It states that the meeting was attended by Mr Mark Allen, Dairy Crest's executive director for cheese at the relevant time. When asked about it in 2005, Mr Allen believed that he had attended the meeting with Mr Beaumont, who was the sales director responsible for the Tesco account, and that they met Messrs Scouler and Hirst of Tesco.

211. We find, on the balance of probabilities, that a meeting did take place between Tesco and Dairy Crest on 25 September, and that that meeting was attended by Messrs Allen and Beaumont for Dairy Crest, and by Messrs Scouler and Hirst for Tesco. There are, however, no notes or minutes of that meeting and the only one of the attendees who gave evidence before us, Mr Scouler, said he had no recollection at all of that meeting nor, therefore, of what was discussed at it.[53] We accept his evidence on this point. That meeting took place nearly ten years ago and there are no documents with which Mr Scouler might have refreshed his memory. We are

[53] Transcript, Day 11, pp. 139, 141 and 142.

wholly unsurprised that he could not recall the meeting, let alone the discussions at it. As such, we are unable to make any finding as to what was discussed at the meeting. In our judgement, therefore, there is insufficient evidence to support the OFT's case that Tesco disclosed its future retail pricing intentions for British cheese at this meeting.

212. Counsel for the OFT relied on the note of the 'Action Points' from the Dairy Crest internal meeting of 24 September to suggest that at the meeting of 25 September with Tesco:

(a) Dairy Crest had sought to persuade Tesco to move a section of its cheese category retail prices on 20 October, with the remainder of the cheese category moving on a three-week rolling programme following that date (the OFT referred to these staged price increases as 'waves');

(b) Dairy Crest attempted to "*clear*" with Tesco its intention of making a public announcement that farmers could expect to see retail price increases for cheese from mid-October onwards; and

(c) rather than raising cost prices on individual cheese lines, Dairy Crest proposed that it would separately invoice retailers according to the tonnage supplied per month applying a charge of £200 per tonne, which would assist with pricing transparency.

213. Curiously, given the actual wording of the Dairy Crest 'Action Points' document, it was not suggested by the OFT that the red tractor logo was one of the things that was discussed at the meeting. That document was internal to Dairy Crest, and Mr Scouler had not seen it before. Whilst he accepted, having read it, that it was likely Dairy Crest would have raised those points at the meeting of 25 September, it did not assist his recollection of the meeting at all.[54] Even if Dairy Crest had raised these points at the 25 September meeting, the state of the evidence before the Tribunal, such as it is, tells us nothing about the discussions, if any, at the meeting.

[54] Transcript, Day 11, pp. 140 and 141.

214. Counsel for the OFT put to Mr Scouler that he had, at that meeting, agreed that Tesco would participate in the proposal from Dairy Crest for a £200 per tonne cost and retail price increase for cheese. Counsel for the OFT supported this proposition by reference to a note of a meeting between Asda and Dairy Crest on 27 September (which is also said to evidence the onward B to C transmission of Strand 1) that records "*Latest position is that JS* [Sainsbury's] / *Tesco have agreed to move on all sectors*." Mr Scouler maintained that he could not recall the meeting of 25 September but would be surprised if he had given any indication that Tesco would move on all sectors, not least because that was not part of his role at Tesco.[55] He accepted that at that time he would have been aware that the suppliers were approaching other retailers about cost price increases and that he was open to having a discussion with Dairy Crest about a cost price increase to support the farmers but said that, as far as he could recall, he did not make any commitments relating to the cost price paid by Tesco during September.[56] On balance, we accept Mr Scouler's evidence in this respect. On this issue, he fairly accepted certain things as likely but said, quite plausibly, that he could not recall any specifics. The documentary evidence relied on by the OFT is not sufficient, without more, to establish the propositions for which it contended.

215. As noted above, the OFT also sought to rely on two notes made by Mr Colin Stump of Glanbia. The first, dated 25 September, records that 'DFB', thought to be a reference to a group called Dairy Farmers for Britain, "*called to say Tesco would move if Asda moved.*" At paragraphs 5.195 to 5.197 of the Decision, the OFT referred to this as another instance of Tesco giving a commitment to increase its retail prices for cheese, which was conditional on the actions of another retailer. A representative of Dairy Farmers for Britain attended the Tesco DSGM and the OFT therefore posited that this was information gleaned from that meeting. The second note is dated 27 September. There Mr Stump records that Mr Irvine of McLelland told him that "*Tesco will go if one other major player moves*". The OFT argued that it is "*most likely*" that Mr Irvine received this information from Dairy Crest, which in turn received it from Tesco, at some point between 20 and 25 September

55 Transcript, Day 11, p. 143.
56 Transcript, Day 11, pp. 143-150.

(i.e. that Tesco disclosed its intentions to Dairy Crest, which in turn communicated them to McLelland).

216. It seems to us that there is insufficient evidence before us to establish that Tesco communicated its willingness to increase its retail prices for cheese, provided that another retailer did so also.

217. We note that the record of a call from 'DFB' to Mr Stump at Glanbia represents multiple hearsay and, in the absence of any evidence from Mr Stump, we are unable to place any great reliance on the document. Furthermore, even were the record of that telephone call entirely accurate, it tells us nothing about Tesco's conduct. Whilst we know that a representative of Dairy Farmers for Britain attended the Tesco DSGM, there is no evidential basis for concluding that the information conveyed to Mr Stump in that telephone conversation was given to Dairy Farmers for Britain by Tesco.

218. Nor in our view does the note of 27 September advance matters. That note records information coming from Mr Irvine of McLelland. The OFT asked us to find that the "*most likely*" source of McLelland's 'information' that Tesco would "*go if one other major player moves*" (i.e. Tesco would increase its retail cheese prices if another major retailer did so; this is again described in the Decision as a conditional commitment by Tesco (see paragraphs 5.213 and 5.214)), was Dairy Crest. The OFT based that submission on the fact that Mr Stump also recorded that Mr Irvine had told him that Dairy Crest was meeting with Asda on 27 September, which was said to demonstrate that Mr Irvine (or someone at McLelland) was in contact with Dairy Crest. We accept that that is a possibility but no more than that. But we know, of course, that McLelland and Asda were in regular supplier-customer contact and it is equally possible that the fact of the Dairy Crest meeting was conveyed to McLelland by Asda itself. Moreover, Mr Irvine denied that he had had any contact with Dairy Crest at that time and suggested that the information could have come from any one of a number of sources.[57] The OFT suggested that Mr Irvine's denial of contact with Dairy Crest was implausible because, in its response to the SO, Tesco stated that the suppliers shared information among themselves.

[57] Transcript, Day 7, pp. 62 and 63.

This point was not put to Mr Irvine, however, and that particular thread of cross-examination concluded with the suggestion that information came from Asda *or* Dairy Crest, either of which Mr Irvine accepted was possible.[58]

219. In our judgement, those two notes made by Mr Stump would be a most tenuous basis for concluding, as a matter of fact, that Tesco had conveyed its future pricing intentions to Dairy Crest at a meeting on 25 September, a meeting of which there is no record and of which we have accepted Mr Scouler, the sole attendee who gave evidence before us, had no recollection. In the event, we decline so to find and we hold that Strand 1 of the 2002 Cheese Initiative, as alleged by the OFT, is not proved to the requisite standard. It has not been established on the balance of probabilities that Tesco passed its future retail pricing intentions to Dairy Crest at any time prior to 27 September.

C. The Tribunal's conclusion on Strand 1

220. As set out above, we have concluded that the evidence before us was not sufficient to establish the fact of an A to B transmission from Tesco to Dairy Crest on or before 27 September. In circumstances where the transmission from A to B has not been proved, it is unnecessary to carry out an analysis of the other elements of the alleged infringement, including the B to C transmission, in this instance said to be from Dairy Crest to Asda.

XI. STRAND 2 OF 2002: SAINSBURY'S AS A; McLELLAND AS B; AND TESCO AS C

A. Outline of Strand 2

221. The OFT's case was that, on or before 16 October, Sainsbury's disclosed information on its future retail pricing intentions for cheese to McLelland. McLelland then passed that information to Tesco, together with information concerning other retailers' future retail pricing intentions for cheese, on or before 21 October.

222. In paragraphs 5.243 to 5.266 of the Decision, the OFT concluded that:

[58] Transcript, Day 7, p. 63.

(a) A to B transmission: Ms Sarah Mackenzie of Sainsbury's had informed Mr Tom Ferguson of McLelland that Sainsbury's would increase the retail and cost prices of various lines of cheese supplied to it by McLelland. These prices increases were to take place over a period of three weeks, starting on 21 October. This communication was recorded in an internal McLelland email dated 16 October;

(b) A's state of mind: Sainsbury's may be taken to have intended, and did in fact foresee, that McLelland would use this information about Sainsbury's future retail pricing intentions to influence conditions on the retail cheese market by passing it on to other retailers, including Tesco;

(c) B to C transmission: Mr Ferguson of McLelland did in fact pass Sainsbury's future retail pricing intentions on to Mrs Oldershaw of Tesco. The information disclosed by McLelland to Tesco by email dated 21 October was identical to the information contained in the internal McLelland email dated 16 October;

(d) C's state of mind: Tesco may be taken to have known the circumstances in which Sainsbury's had disclosed its retail pricing intentions to McLelland and did, in fact, appreciate that the information was passed to it with Sainsbury's concurrence; and

(e) C's use of the information: Tesco took the information regarding Sainsbury's retail pricing intentions into account when determining its own future pricing behaviour. There was no evidence to suggest that Tesco rejected the information it received, nor that it did not wish to receive the information regarding Sainsbury's future pricing intentions.

223. We note at this point that the OFT considered each of these to be necessary elements of an alleged infringement for each subsequent Strand of the 2002 and 2003 Cheese Initiatives. As will be seen, we have found it useful to consider these elements sequentially, unless one has not been established by the OFT or is not

contested by Tesco. That said, we have not presented the schematic layout adopted above for the other Strands that we must consider in the course of this judgment.

224. The OFT, therefore, concluded that there was a concerted practice between Sainsbury's, McLelland and Tesco which had as its object the restriction of competition in the British cheese retail market (see paragraph 5.487 of the Decision).

225. Tesco challenged each of the OFT's findings, raising six objections. They were, first, that there was no direct evidence that Sainsbury's had disclosed its future pricing information to Mr Ferguson of McLelland. Secondly, Tesco criticised the OFT's finding as to Sainsbury's intent. Thirdly, Tesco denied that the information subsequently disclosed by Mr Ferguson was either confidential or amounted to future retail pricing intentions. That information was not in any event capable of restricting competition. Further, Tesco claimed that some of the information contained in the email of 21 October turned out to be inaccurate. Fourthly, there was no basis for the OFT to find that Mrs Oldershaw (or Mr Scouler) of Tesco had the requisite state of mind when receiving the information. Fifthly, Tesco was not in a position to use the information passed on by McLelland before it became publicly available. Sixthly, Tesco submitted that the alleged exchange was inconsistent with the OFT's theory of harm. Before addressing these challenges in turn, we set out the relevant factual background to Strand 2.

B. Background to Strand 2

226. Mr Ferguson of McLelland wrote to Ms Mackenzie of Sainsbury's by letter dated 1 October proposing "*to move the cost of all cheese across the board*". Attached to his letter was a spreadsheet setting out the current and proposed cost prices, as well as the current retail prices, for *all* cheeses supplied by McLelland to Sainsbury's at that time.[59] Mr Ferguson confirmed in his evidence before us that he would have sent similarly worded letters to other retailers.[60] Mr Ferguson followed up his initial letter to Sainsbury's by an email dated 3 October, which stated that it enclosed details "*which will cover off the proposed £200 per Tonne movement*

[59] Transcript, Day 6, p. 13.
[60] Transcript, Day 6, p. 4.

across the Cheese range" supplied by McLelland. In respect of retail prices he wrote:

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

227. In our judgement, these emails make clear that, in early October, McLelland proposed to Sainsbury's a £200 per tonne increase in the cost price of all its cheese products and, also, for Sainsbury's to increase its retail prices so as to maintain cash margin. Mr Ferguson fairly accepted this was what McLelland was doing at that time.[61] We note, of course, that the Dairy Crest briefing document, discussed above, and received by Sainsbury's on or around 23 September, made the same proposal.

228. At or around the same time, McLelland planned to approach all of the retailers it supplied (initially in writing) to propose a £200 per tonne cost price increase for all cheese lines supplied to them in order to "*resolve the farmers' current problems*". This fact was recorded in the internal Glanbia memorandum of 27 September (referred to at paragraph 207(b) above) and was not disputed by Tesco.

229. On or around 4 October, Ms Finn Cottle of Sainsbury's wrote to Farmers for Action and stated that:

> "With regards to cheese we are still discussing the implementation of cost price increases with all our processors. It is intended that we will pass on an increase in our buying prices by £200 / tonne in approx 3 weeks, for all our standard cheese range, provided other retailers also accept this. I must stress that if others do not generally support this initiative, I will have to withdraw my support for cheese, if I find I am uncompetitive in the wider market place."

230. In our judgement, this letter shows that, although Sainsbury's wished to pass on the cost price increase of £200 per tonne suggested by its suppliers, it was concerned that it would be undercut by other retailers. This is relevant to ascertaining Sainsbury's state of mind at the time.

[61] Transcript, Day 6, pp. 6-8.

C. A to B: did Sainsbury's pass its future pricing intentions to McLelland?

A to B transmission

231. On 16 October Mr Ferguson of McLelland sent an email to his colleague, Mr Jim McGregor (the "16 October email"). Mr Ferguson stated, in particular, that Ms Sarah Mackenzie of Sainsbury's had confirmed that:

(a) cost and retail prices on Seriously Strong pre-pack would move from 21 October;

(b) own-label and pre-pack brands would move on 4 November; and

(c) deli and Sainsbury's own-label 'Taste the Difference' would move on 11 November.

The 16 October email did not specify whether the prices moving on 4 and 11 November were cost only or cost and retail prices. In our view the natural inference from the email, read a whole, is that it was referring to cost *and* retail prices. We did not understand Tesco to suggest to the contrary. Given the statement "*cost and Retails*" for Seriously Strong pre-pack would move, had Mr Ferguson wanted or intended to distinguish between the prices he was referring to in relation to the 4 and 11 November moves, he would, and easily could, have done so.

232. Tesco argued that there was no direct evidence of there having been a disclosure from Sainsbury's to McLelland of the information contained in the 16 October email. It pointed out that the OFT had not interviewed Ms Mackenzie about this matter during its investigation, nor have we heard evidence from her. So far as Sainsbury's planned retail price increases and the dates of those increases were concerned, Tesco noted that Mr Ferguson did not accept in cross-examination that he did, in fact, have confirmation of them from Ms Mackenzie of Sainsbury's.[62] The alternative possibilities would appear to be that Mr Ferguson was making his own general market assessment (as he claimed in the witness box) or that he was simply making it up and, in the process, deceiving his colleague. Whether either of

[62] Transcript, Day 6, pp. 22-25.

those is a plausible explanation depends on how far the 16 October email is consistent with other available evidence, as well as our assessment of Mr Ferguson's evidence on this point.

233. Whilst we note that both Sainsbury's and McLelland entered into ERAs with the OFT, which on their face constitute evidence of the disclosure of future retail pricing information by Sainsbury's to McLelland, for the reasons already given (see paragraphs 108-112 above), we consider that the ERAs have little, if any, probative value in this appeal.

234. An internal McLelland document entitled "*Price Move Update*" records, however, the information exactly as it appeared in the 16 October email. It also records that Sainsbury's would increase the cost and retail prices for Cathedral City and Pilgrim's Choice, Dairy Crest and North Downs brands respectively, on 21 October. Mr Ferguson accepted that this document had been created at the relevant time as a result of McLelland's discussions with retailers, including Sainsbury's.[63] It seems to us that such a contemporaneous document, which the author never anticipated would be seen outside McLelland, is likely to be more credible than Mr Ferguson's possible alternative explanation given years later. We have seen no documentary evidence supporting Mr Ferguson's assertion that the 16 October email records his own market assessment of the likely movements in Sainsbury's cheese retail prices. We did not think that his evidence on this particular topic was entirely frank and we do not accept it. In our view the 16 October email means what it says, namely that Ms Mackenzie of Sainsbury's had confirmed the matters set out in paragraph 231 above. In paragraph 87 of its Notice of Appeal, Tesco acknowledged that "*it may well be*" that Sainsbury's was the source of the information provided by McLelland to Tesco on 21 October. We consider there is no realistic basis for Tesco doubting that Sainsbury's was the source and that it did, in fact, disclose to McLelland, on or before 16 October, its confidential intentions to increase its cheese retail prices, together with the dates on which those increases would be implemented.

63 Transcript, Day 6, p. 36.

Sainsbury's state of mind as 'A'

235. The next question for us to decide is whether that information was disclosed to McLelland in circumstances where Sainsbury's may be taken to have intended, or in fact foresaw, that McLelland would make use of that information to influence market conditions by passing that information to other retailers, of whom Tesco was one. Although Tesco's case, as set out in the Notice of Appeal, was rather more narrowly drawn, since it did not expressly challenge Sainsbury's state of mind, our conclusion on this point is as follows.

236. We have taken into account the fact that Sainsbury's has entered into an ERA in this case. On its own, however, Sainsbury's ERA has little, if any, probative value in establishing that Sainsbury's had the requisite state of mind at the relevant time. We consider, however, that Sainsbury's admission of infringement made in its ERA is substantiated by the following matters.

237. When it disclosed its future pricing intentions to McLelland on or before 16 October, Sainsbury's, at the very least, substantially reduced uncertainty as to its future conduct on the retail cheese market by disclosing the course of conduct that it had decided to adopt, or was contemplating adopting. By that time Sainsbury's had made clear to McLelland (and other suppliers) that it would accept the cost price increase with the intention also of increasing its retail prices for cheese by 20p per kilo (cash margin maintenance), provided that other retailers did not undercut those prices. Sainsbury's having accepted the cost price increase, McLelland knew that it would have been able to increase its farmgate prices by 2 ppl if its other customers reacted in the same way as Sainsbury's. Given the clarion call to take action to help UK dairy farmers and the fact that market forces did not support an increase in the cost and retail price of cheese at the time, McLelland had the incentive and ability to act as the hub for passing on retailers' pricing intentions. By persuading each retailer that the others were prepared to increase their retail prices, McLelland would increase the likelihood of successfully increasing its cost prices for all of its cheese products across all of its customers.

238. We do not accept that Sainsbury's conduct in disclosing to McLelland the information set out above, on or before 16 October, is explained or justified by legitimate commercial reasons, given the prevailing circumstances on the market that were known to Sainsbury's at the time (see paragraph 72 above). Sainsbury's revealed the date on which it was proposing to increase its retail prices for fixed-weight branded cheese products as to which there can be no labelling justification (since that applied only to random-weight lines). Initially, Mr Ferguson frankly accepted that there was no commercial reason for him to record that information.[64] We reject his later attempt to explain that there was some legitimate packing reason for having this information.[65] Ms Mackenzie of Sainsbury's also told Mr Ferguson the date (4 November) on which she was proposing to increase Sainsbury's retail prices for deli cheese prices, which again had no labelling justification. Other than producing (or sourcing) and then supplying it, the suppliers had no role in relation to deli cheese – they neither packed it for retail, nor priced it and, as such, had no reason to be discussing retail prices for deli cheese with their customers. Finally, Sainsbury's told McLelland about the timing of its proposed price move for Taste the Difference, a cheese product which McLelland did not even supply to Sainsbury's at that time.

239. The internal McLelland Price Move Update document (see paragraph 234 above) clearly shows that Sainsbury's had told McLelland that it would be increasing the retail prices of branded, fixed-weight cheese products which McLelland did not even supply to Sainsbury's (namely, Dairy Crest's Cathedral City and North Down's Pilgrim's Choice). This information was not a matter which McLelland had any legitimate interest in knowing.

240. In our judgement, Sainsbury's provided confidential pricing information to McLelland on or before 16 October in circumstances in which it may be taken to have intended that that information would be passed on to other retailers, including Tesco, in support of suppliers' proposals to increase cost prices by £200 per tonne and thereby increase raw-milk farmgate prices by 2 ppl. This dialogue cannot be characterised as a normal or innocuous, bilateral pricing discussion between a

64 Transcript, Day 6, p. 25.
65 Transcript, Day 6, pp. 64 and 65.

customer and one of its suppliers. Sainsbury's knew, or may be taken to have known, that what it had told McLelland was neither necessary for, nor justified by, its supply relationship. We consider that Sainsbury's provided information to McLelland for it to use to persuade other retailers to accept, and pass on, McLelland's proposed cost price increase. Having obtained this information McLelland was then able to inform other retailers that Sainsbury's was going to (a) accept the cost price increase of £200 per tonne, (b) increase their retail prices by an equivalent amount (i.e. cash margin), and (c) move those retail prices in stages on particular dates, thereby reducing uncertainty and risk for other retailers to accept the same cost price increase, and pass it on to consumers by raising retail prices.

241. We conclude that Sainsbury's may be taken to have intended, and in fact foresaw, that McLelland would make use of its future pricing intentions by passing that information on to other retailers, including Tesco, to influence conditions on the retail cheese market.

D. B to C: did McLelland pass Sainsbury's future pricing intentions to Tesco?

242. The main document relied on by the OFT to support its finding that McLelland, in fact, passed on Sainsbury's pricing information to Tesco was an email sent by Mr Ferguson of McLelland to Mrs Oldershaw of Tesco at 4.59pm on 21 October (the "21 October email"). The meaning of the contents of this email was debated at such length before us that it is appropriate to reproduce it in full:

> "Hi Lisa
> Spreadsheet attached which will cover off the Current supply prices and the new position with the proposed £200 per Tonne recovery. I have provided the recommended Retail going forward plus the position to protect your own margin. As we discussed last week other parties are confirming that they will protect Cash Margin on this occasion but not % MARGIN. We will need to discuss this as time develops this week and reach a conclusion.
> The timescales are as we proposed.
> Ie. 4th of November for Pre-pack and the 11th of November for Deli. Sainsbury are confirming that the new retails on Branded pre-pack will be in place Tuesday this week.
> Thanks, Tom"

243. Before we consider Tesco's detailed criticisms of the OFT's findings in respect of this email, it is helpful to identify the four pieces of information which the 21 October email conveyed:

(a) it attached a spreadsheet showing how Tesco's current retail prices for cheese lines supplied by McLelland would increase if it were to accept the cost price increase and protect either its cash margin or percentage margin on those lines;

(b) it confirmed that other parties, i.e. retailers other than Tesco, would move their respective retail prices by an equivalent amount to McLelland's proposed cost price increase of £200 a tonne, thereby maintaining their cash margin;

(c) it confirmed that prices for pre-pack cheese were planned to move on 4 November and deli cheese on 11 November; and

(d) it confirmed that Sainsbury's intended to move its retail prices for branded pre-pack cheese on 22 October.

Cash margin maintenance

244. Tesco argued that it was impossible to know whether "*other parties are confirming that they will protect Cash Margin*" was a statement that McLelland had derived from Sainsbury's or other retailers. We reject the criticism that this statement was too imprecise by providing no specifics of named retailers, dates or prices. We do not think that it was necessary for the OFT to satisfy us of the specific names of the retailers or particular price points or dates in question. We also reject a related criticism that the statement was not one of particular parties' individualised future pricing intentions. According to the Decision, Asda, Safeway, Sainsbury's and Tesco were the four largest grocery retailers in the UK at the material time. As noted above, each of them identified the other three as their closest competitors for the retail sale of cheese. Neither of these findings was disputed by Tesco in this appeal. Given also that Mrs Oldershaw acknowledged that she knew that each of the major cheese suppliers was proposing a cost price increase of £200 per tonne to each of the major retailers, the 21 October email, read in its context, clearly refers to

(at the very least) the intentions of Tesco's closest competitors to maintain cash margin.[66] In our judgement, any other interpretation would be unrealistic.

245. Counsel for Tesco also made the point that the 21 October email stated that the "*other parties are confirming*" and not that the other parties had, in fact, confirmed their respective intentions to maintain cash margin. Mr Ferguson's evidence, however, was that the information about cash margin was based on his conversations with the retailers about their future pricing intentions, as well as any other market intelligence he might have gathered at the time.[67] We conclude that it is clear that the words "*are confirming*" referred to this ongoing dialogue between Mr Ferguson and the retailers, and that the information about retailers' margin intentions was both confidential and future in nature.

246. A further argument advanced by Tesco was that the information contained in the 21 October email concerning Sainsbury's maintaining cash margin turned out to be incorrect. This was because, on 22 October, Sainsbury's increased its retail prices for a 250g pack of Seriously Strong by one penny more than cash margin maintenance. Whether the information about Sainsbury's margin intentions ultimately turned out to be inaccurate does not preclude the existence of a prior concerted practice. Where the facts already indicate a sufficient consensus on the part of the undertakings in question, it is irrelevant if one of them subsequently acts contrary to its communicated intention.

247. Another challenge by Tesco to the allegedly anti-competitive nature of the information on cash margin maintenance was that, by 21 October, it was already in the public domain. We reject this challenge. We agree with the OFT that there was no evidence showing that any or all of the major retailers had publicly announced that they were planning to maintain cash margin. There is certainly nothing to that effect in any of the suppliers' press releases and/or trade press reports that we have seen and which had been published before 21 October. Tesco referred us to an article, published in *Farmers Weekly* on 20 September, to the effect that Dairy Crest was calling on the major retailers to increase the retail price of cheese, amongst

66 Transcript, Day 8, pp. 125-127.
67 Transcript, Day 6, pp. 50 and 51.

other dairy products, and that it would pass back "*all the extra cash*" to its farmers. In our judgement, this dairy news item simply confirmed that Dairy Crest wanted to increase its cost price for cheese, butter and cream in order to increase the farmgate price it paid for raw milk by 2 ppl and that Dairy Crest expected the retailers to increase retail prices to fund this. The report said nothing about whether cheese retail prices would in fact increase, let alone by what amount. The report amounts to nothing more than a public statement by Dairy Crest to pass back to farmers any "*extra cash*" that it received from the retailers. It is fanciful to contend that the specific information on cash margin maintenance, set out by Mr Ferguson in the 21 October email, was anything other than highly confidential.

248. Finally, we reject Tesco's suggestion that Strand 2 was inconsistent with the OFT's theory of harm that there had been co-ordinated retail price increases. The fact that the available evidence suggests that Mr Ferguson waited five days (from 16 to 21 October) to pass on only some of the confidential retail pricing information he possessed at the time is beside the point. The point is that Mr Ferguson did pass on to Tesco confidential pricing information relating to Sainsbury's. To establish a Chapter I infringement of the kind alleged, it is not necessary for a supplier to pass on all, or even the most salient, of the confidential retail pricing information in its possession. If the OFT could intervene only where a supplier had passed on all of the confidential price information available to it, that would unduly reduce the effectiveness of the Chapter I prohibition. In our view, the conduct element of a B to C transmission is made out if supplier B passes on retailer A's confidential future retail pricing intentions to C, one of A's competitors. That is precisely what Mr Ferguson did in this instance.

Dates of proposed retail price increases

249. Before us, Mrs Oldershaw suggested that the dates recorded in the 21 October email for retail prices on pre-pack and deli cheeses on 4 and 11 November respectively were in fact planned price moves at *Tesco.* That evidence was, in our view, incorrect. Although the email is not a model of clarity and the text is rather awkwardly presented, it seems to us that Mr Ferguson was referring to the dates on which *other* parties intended to increase their retail prices for pre-pack and deli

cheeses. This appears to be the case for a number of reasons. First, the information on timescales was interposed between the reference to "*other parties*" confirming their intentions as to retail margins, on the one hand, and Sainsbury's future retail price moves for pre-pack cheese, on the other. Secondly, Mrs Oldershaw could point to no contemporaneous documentary evidence supporting her assertion that, as at 21 October, she had contemplated moving Tesco's retail prices on deli cheeses on 4 November.[68] Thirdly, the only internal document that throws any light on when Tesco proposed to change its cheese retail prices was prepared by Mrs Oldershaw herself in advance of notifying her suppliers of those changes on 29 October.[69] That document, prepared at some point before 30 October, indicates that Mrs Oldershaw was not proposing to change cost or retail prices for deli cheese until 17 November. Fourthly, we note that, according to an email sent by Mrs Oldershaw on 29 October, Tesco required its cost prices to move on Sundays, and yet 4 and 11 November were both Mondays. Finally, we do not think that it was a coincidence that the dates contained in the 21 October email very closely correspond to those contained in the 16 October email, although this cannot, of course, have affected Mrs Oldershaw's understanding of the matter since she did not see the latter email.

250. The combined effect of all these considerations is that, in our judgement, the timescales in the 21 October email concern Sainsbury's, not Tesco's, future retail prices and we reject Mrs Oldershaw's suggestion to the contrary as unfounded. This was the OFT's primary case and we do not consider it necessary to consider whether Mr Ferguson may also have been referring to the timescales for retailers other than Sainsbury's.

Sainsbury's retail prices for branded pre-pack

251. We have found that Sainsbury's was the source of this information in the 21 October email. We agree with the OFT that McLelland did not need this information for labelling purposes as McLelland's branded cheese, Seriously Strong, was a fixed-weight, pre-pack cheese and the price would, therefore, have

[68] Transcript, Day 8, p. 154.
[69] Transcript, Day 8, p. 151.

been displayed on the shelf edges in the retailers' stores. Tesco strenuously argued that the information that Sainsbury's "*new retails on Branded pre-pack will be in place Tuesday this week*" was not capable of restricting competition because the retail prices would become visible in-store the next day, 22 October. We deal with this argument in the context of Tesco's alleged use of this information, below.

Tesco's state of mind as 'C'

252. We must now consider whether, at the time that Mrs Oldershaw received the 21 October email, Tesco (through her) knew, or may be taken to have known, the circumstances in which the information was disclosed by Sainsbury's to McLelland.

253. The OFT, at paragraph 80 of the Defence, presented its case on Tesco's state of mind by reference to four "*aspects*" of the primary facts, which it was said would be sufficient to establish the Infringements, either individually or cumulatively:

(a) The first was that Tesco was aware of a 'plan' for an across-the-board increase in retail prices for cheese. We have already found above, in our analysis of Strand 1, that there was no 'plan', in the sense which the OFT used that word. We note, however, that, as the Court of Justice held at paragraph 173 of *Suiker Unie* (set out at paragraph 47 above), the concept of a concerted practice "*in no way require*[s] *the working out of an actual plan*". The underlying principle is rather "*that each economic operator must determine independently the policy which he intends to adopt on the common market*". The importance of that principle was re-affirmed by the Court of Justice in paragraph 32 of its judgment in *T-Mobile* (cited above).

(b) The second aspect advanced by the OFT was that, at the material time, Tesco had disclosed its willingness to increase its retail prices if other retailers did the same, in other words that it had conditionally committed to increase its retail prices. Again, we have already found that the evidence before us does not establish that Tesco, in fact, gave any conditional commitments between 13 and 27 September. This second aspect must,

therefore, also fail as the basis for the OFT's case on Tesco's state of mind for this Strand.

(c) The OFT's third point was that, in certain instances, Tesco disclosed its retail pricing intentions to a supplier, having already received from that supplier the future retail pricing intentions of a competitor. Prior to receiving the 21 October email, however, neither Mrs Oldershaw, nor anyone else at Tesco, was alleged to have *received* any information from its competitors, via a common supplier, as to their future pricing intentions. Thus, the OFT's 'disclosed-having-received' argument cannot be relevant to the analysis of Strand 2. Nor, given our findings above on Strand 1, can the inverse proposition be made out, namely that the 21 October email was an instance of Tesco 'receiving-having-disclosed'.

(d) The fourth point, on which (given our conclusions in (a) to (c) above) the OFT must succeed if it is to defend its finding on Strand 2, is that Mrs Oldershaw had the requisite state of mind in circumstances where there was no legitimate commercial reason for Tesco to have received the future retail pricing intentions of one of its competitors.

254. Tesco denied that Mrs Oldershaw (or Mr Scouler) had received information about Sainsbury's future pricing intentions with the requisite knowledge as to the circumstances in which McLelland had obtained that information. We do not agree.

255. We start by considering Mrs Oldershaw's evidence as to her state of mind at the time she received the 21 October email. It was Mrs Oldershaw's evidence that, on receiving an email from a supplier, she would simply "*take out the important bits ... and move on*",[70] although she did not explain what she considered to be the "*important bits*" of an email from one of her suppliers. In relation to the 21 October email specifically, Mrs Oldershaw stated in her written evidence that she "*just read the email, decided it was not important and moved on.*" She claimed that the information was unimportant because it was, in her view, just another example of a supplier engaging in sales hustle. Telling a retailer that its main competitors had

[70] Transcript, Day 9, p. 9.

agreed to pay a higher cost price was, in her view, no more than a standard negotiating tactic on the part of suppliers to persuade the retailer to accept a cost price increase. On this basis, she claimed that it had simply never occurred to her that the information in the 21 October email could have come from Sainsbury's.[71]

256. We accept the OFT's criticisms of Mrs Oldershaw's evidence in this respect. We have seen how Tesco's cheese suppliers had the ability, incentive and opportunity to gather, and pass on, future retail pricing information from their retailer-customers in order to bring about proposed cost price increases of £200 per tonne. Given the situation on the domestic dairy market at the time, McLelland and Dairy Crest were seemingly desperate to secure the agreement of their retailer-customers to a cost price increase so that they could increase farmgate prices by 2 ppl, thereby alleviating the intense pressure on them from the farmers.[72] This was clear following the distribution of the Dairy Crest briefing document on or around 23 September and McLelland writing to its customers on 1 October.

257. The unrealistic nature of Mrs Oldershaw's position on this point was demonstrated by her insistence that she ignored everything that the suppliers told her about the prices of Tesco's competitors, unless it was supported by evidence that those prices were already in-store, for example a till receipt. She maintained that she "*took the stance that everything was incredible. Noncredible* [sic]"[73] and that she viewed everything with a "*blanket falseness*"[74]. We do not believe her evidence on this point. It is not credible for an intelligent, successful and commercially astute cheese buyer, such as Mrs Oldershaw, to claim that she dismissed out of hand what were, on their face, valuable pieces of competitors' commercially-sensitive information that came her way. Had she really chosen to dismiss this information, we would have expected her to reply to the 21 October email, telling Mr Ferguson that she was not interested in what her competitors were planning (as opposed to retail price moves which were already visible in-store). This would have been an obvious, simple and effective way of stopping the flow of information and is what

71 Transcript, Day 8, p. 161.
72 See, for example, Transcript, Day 8, pp. 161 and 162.
73 Transcript, Day 8, p. 169; see also Day 8, p. 172.
74 Transcript, Day 9, p. 136; see also Day 9, p. 9.

Mr Scouler indicated he would have done.[75] Mrs Oldershaw confirmed that she did not revert to Mr Ferguson and tell him to stop providing her with all this information.[76] Equally, the 21 October email records that Mrs Oldershaw and Mr Ferguson discussed the other retailers' positions on cash margin maintenance in the week commencing 14 October. She could, and should, have taken that opportunity to instruct Mr Ferguson to refrain from giving her information about the future retail pricing intentions of her competitors. Mrs Oldershaw did neither of those things, however.

258. Instead, Mrs Oldershaw took the following, rather startling, positions in the witness box:

> "Q. So your evidence is, is it, that given the basket policy, which we've discussed, and given the pressure that you were under from your senior managers to accept these cost price increases, that if you had received clear and unambiguous information that, for example, Asda was going to raise its retail prices in a week's time, you were entirely indifferent to that information?
>
> A. Yes. Yes."[77]

And:

> "Q. So your evidence is, is it, that what the other retailers were going to do and when was completely irrelevant to your considerations?
>
> A. Yes, for my action points, yes."[78]

And also:

> "Q. I'm suggesting to you that this information about everybody else going on cash margin across all products was of considerable significance to you?
>
> A. And I'm saying it wasn't."[79]

259. Thus, Mrs Oldershaw asserted in essence that, even if she had believed what Mr Ferguson had been telling her about her competitors' future pricing intentions (which she denied), it was nonetheless a matter of supreme indifference to her. We find that to be a wholly incredible assertion. In our judgement, it is not unreasonable to suppose that a commercially-shrewd enterprise would be interested

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75 Transcript, Day 11, pp. 173 and 174.
76 Transcript, Day 9, p. 10.
77 Transcript, Day 8, pp. 167 and 168.
78 Transcript, Day 9, p. 7.
79 Transcript, Day 9, p. 22.

in, and, were it not unlawful to do so, would make use of, a competitor's future pricing intentions. Indeed, Mrs Oldershaw's evidence on this point was inconsistent with her evidence that competitiveness against the other retailers was of critical importance to Tesco's sales, and to her own KPIs. We find ourselves unable to accept Mrs Oldershaw's evidence that she had no interest in her competitors' future intentions.

260. It is instructive to consider why a supplier in the position of McLelland would inform, and continue to inform, Mrs Oldershaw about matters she claimed to have been indifferent to, and uninterested in. Mrs Oldershaw had no answer for this. She simply maintained that it was a sales tactic that, she assumed, may have worked with other retailers. Mr Reeves in his evidence suggested at one point that senior Dairy Crest personnel may have misled their retailer-customers at times by giving them information that was not entirely true. He also stated, however, that this was not something suppliers would, or could, make a habit of. Moreover, in response to a question from the Chairman, Mr Reeves said that he suspected there would have been half-truths involved given all the conversations taking place with the retailers.[80] So far as McLelland's relationship with Tesco was concerned, Mr Ferguson stated that Tesco was one of McLelland's most important customers at the time. He accepted in cross-examination that he would not have wanted to jeopardise McLelland's relationship with Tesco, nor lose the trust of Mrs Oldershaw, by giving her false information.[81] Mrs Oldershaw accepted that it would have been risky for suppliers to have provided her with imprecise, inaccurate or unsubstantiated information. This is because, had she acted in reliance on such information and accepted a cost price increase of the magnitude of £200 per tonne across all Tesco's cheese lines but then discovered that the information had been mere "*bluff and bluster*" (as she termed it in her second witness statement), Tesco could have lost millions of pounds and Mrs Oldershaw's margin KPI would have suffered also. Mrs Oldershaw accepted that, had she relied on any information from McLelland (which she denied) that was later discovered to have been false or inaccurate, this would have been the case.[82]

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80 Transcript, Day 5, pp. 107-111.
81 Transcript, Day 5, p. 179; and Day 6, p. 68.
82 Transcript, Day 8, pp. 174 and 175.

261. Having rejected Mrs Oldershaw's positive evidence as to her state of mind when she received the 21 October email, we must now consider whether the evidence before us is sufficient to establish the requisite mental state on the part of Mrs Oldershaw. In our judgement the following conclusions are inescapable:

(a) it is plain that the 21 October email contained other retailers' future retail pricing intentions and, in particular, those of Sainsbury's;

(b) that information, which related to Tesco's competitors' intentions to maintain cash margin on retail cheese sales and much more specific information relating to Sainsbury's, was clearly not in the public domain and cannot be regarded as anything other than highly confidential;

(c) having rejected the assertion by Mrs Oldershaw that she regarded every statement by her suppliers about her competitors' future intentions as false, on receipt of the 21 October email, we find that Mrs Oldershaw must have realised that it did in fact contain information from Sainsbury's and others;

(d) Mrs Oldershaw must have realised at the time she received the email that, since that information related to Sainsbury's and was highly confidential, there was no reason for her to have it. We note that, during cross-examination, Mr Scouler stated that, had he received the 21 October email (which he denied), he "*would be getting some information* [he] *shouldn't be getting*".[83] We agree with the OFT that Mrs Oldershaw must have realised the same thing, although she refused to accept that in her evidence. Counsel for Tesco pointed out that Mr Scouler had, when giving evidence, referred to "*Tuesday of next week*" as opposed to Tuesday, 22 October, the day after the 21 October email when referring to the "*new retails on Branded pre-pack*" information. Counsel thus suggested Mr Scouler had misunderstood the 21 October email, which meant his statement that the information contained therein was improper, should not be relied upon. Having considered the questions put to Mr Scouler and his answers, however, it seems to us that he

[83] Transcript, Day 11, p. 173.

clearly understood the contents of the 21 October email and candidly acknowledged that it contained inappropriate pricing information; and

(e) Mrs Oldershaw could easily have, but did not, take any steps to reject or distance herself the information provided to her by Mr Ferguson (again, as Mr Scouler said he would have done), nor did she at any point simply tell him to stop wasting his time sending her such information because she disregarded it all in any event. Instead, she allowed Mr Ferguson to continue sending her what was, on its face, information about Tesco's competitors' future retail pricing intentions and then sought before us to maintain that that was normal, and that she simply ignored all of it. We reject her evidence on this point.

262. At paragraph 43 of its judgment in *T-Mobile* (cited above), the Court of Justice held that an "*exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings*". Or, as Counsel for Tesco rightly put it in closing: "*The substance of the infringement is always information exchanged between competitors that is such as to reduce uncertainty and restrict competition. That's always what you're looking for*".[84] We consider that the OFT was correct to find such an exchange in this instance.

263. On the basis of the propositions (a) to (e) set out at paragraph 261 above, the information disclosed in the 21 October email clearly satisfies the test set out in *T-Mobile*, in that it was plainly sufficient to remove, or substantially reduce, uncertainty on the part of Mrs Oldershaw (and, therefore, Tesco, taking into account the principles of attribution outlined at paragraphs 60-63 above) as to how Tesco's competitors intended to behave on the retail cheese market in the future. This was of particular relevance at the time Mrs Oldershaw received the 21 October email, since her evidence was that she had, by that point, been told by her superiors at Tesco to accept the suppliers' £200 per tonne cost price increase.[85] This was because Tesco wanted to fulfil its public commitment to support the dairy farmers

[84] Transcript, Day 12, p. 112.
[85] Transcript, Day 8, pp. 65, 167, 168 and 170.

by doing what it could to bring about an increase in the farmgate price of 2 ppl. Faced with the unavoidable prospect of having to increase Tesco's retail prices (to protect its retail margin, whether on a cash or percentage basis), Mrs Oldershaw had to contend with considerable uncertainty and risk as to how, and when, to move her retail prices. The 21 October email removed, or substantially reduced, that uncertainty and risk.

264. An issue which arose during cross-examination of Mrs Oldershaw and Mr Scouler was the possibility that Tesco could offset, or at least minimise, its loss of margin that would otherwise have arisen from accepting a cost price increase without a concomitant retail price increase.[86] This issue was not specific to Strand 2 of 2002 but it is convenient to address it here.

265. Each of Mrs Oldershaw and Mr Scouler suggested that Mrs Oldershaw could, among other things, seek greater volume discounts from the suppliers in the course of bulk-cheese purchases,[87] use "*marketing budgets*"[88] and/or negotiate more favourable payment terms. The money saved by these various dealings meant (it was said) that it would have been possible for Tesco to accept higher cost prices for its cheese, without a retail price increase, and yet offset any margin loss. Counsel for Tesco submitted that these "*other monies*" were part and parcel of a continuous process of negotiation between Mrs Oldershaw and her cheese suppliers. The "*other monies*" supposedly meant that it would not have been a concern for Tesco to raise its retail prices for all its British cheeses by 20p per kilo first, or unilaterally, or without the knowledge as to whether other retailers would also raise their retail prices. We agree with the OFT, however, that this assertion must be rejected for the following reasons.

266. Neither Mrs Oldershaw nor Mr Scouler mentioned these "*other monies*" in their carefully considered witness statements prior to giving oral evidence to this Tribunal. Whilst Mrs Oldershaw did make some reference to volume discounts in paragraph 14 of her third witness statement that was in the context of explaining how her performance at Tesco was assessed. At no point before her oral evidence,

86 See Transcript, Day 8, pp. 75-78; and Day 11, pp. 67-70.
87 Transcript, Day 8, p. 76.
88 Transcript, Day 8, p. 46.

however, did Mrs Oldershaw suggest that she could have accepted the £200 per tonne cost price increase in 2002, without also increasing retail prices. On the contrary, Mrs Oldershaw's second witness statement stated that she "*could not afford to accept this cost price increase without increasing Tesco's retail prices to protect* [Tesco's] *margin*".

267. Nor have we been referred to any documentary evidence suggesting that Mrs Oldershaw requested, still less obtained, "*other monies*" by way of discounts or others deals from her suppliers to offset, or minimise, the effect of accepting the suppliers' across-the-board cost price increase of £200 per tonne. This is surprising, if these "*other monies*" were really such a feature of the negotiations going on at the time. We also find it difficult to believe that Tesco, as a matter of commercial reality, could agree to pay its suppliers an extra £200 per tonne for cheese (which was in any event to be passed back to the farmers) and, almost simultaneously, demand that the suppliers find ways of saving Tesco approximately £200 per tonne by way of discounts and so on, effectively cancelling out the cost price increase just achieved.

268. Further, it is unrealistic to suggest that these "*other monies*" could come anywhere close to compensating for the effect of Tesco accepting a £200 per tonne cost price increase without any increase in its retail prices. Mrs Oldershaw initially asserted that "[o]*n paper you lose millions of pounds* [as a result of accepting the £200 per tonne cost price increase] *but then you bring in your millions of pounds worth of other deals to shore up that margin*."[89] She later was driven to accept, however, that these additional monies could "*bridge some of the gap but there would be a retail price increase needed*".[90] Thus, even if Mrs Oldershaw had sought and obtained these additional monies, it appears that they alone would not have been sufficient to offset the net loss on retail margins that would have arisen from a cost price increase of £200 per tonne on all cheese lines, unaccompanied by a retail price increase.

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89 Transcript, Day 8, p. 46.

90 Transcript, Day 8, p. 77; see also Mr Scouler's concurring evidence at Transcript, Day 11, p. 70.

269. Accordingly, the Tribunal rejects the suggestion that Mrs Oldershaw could have obtained, or did in fact obtain, sufficient ancillary benefits in the form of "*other monies*" so as to compensate for the effect of Tesco accepting a cost price increase of £200 per tonne across all of its cheese lines, without increasing its retail prices.

270. The question which remains, however, because of the indirect nature of the communication from Sainsbury's to Tesco (via McLelland), is whether, at the time Mrs Oldershaw received the 21 October email, she knew (which she denied), or may be taken to have known, the circumstances in which Sainsbury's passed its future pricing intentions to McLelland. We find that she may be taken to have known those circumstances.

271. We have noted that the 21 October email was not the first time that Mrs Oldershaw and Mr Ferguson had discussed the future pricing intentions of Tesco's competitors in relation to cash margin maintenance. It appears to have been, at the least, the second such occasion, as the text of that email itself makes clear: "*As we discussed last week other parties are confirming that they will protect Cash Margin on this occasion*" (emphasis added). Had no such discussion taken place, the natural response would have been for Mrs Oldershaw to enquire which discussions Mr Ferguson was referring to. There is no record of her having done so. Indeed, Mrs Oldershaw accepted in cross-examination that, since Mr Ferguson reiterated the point in his email, he had likely made the point to her the previous week also.[91] This strongly suggests that Mrs Oldershaw had engaged in at least one prior discussion with Mr Ferguson on the issue of other retailers' margin intentions. She was not, therefore, an unwilling recipient of a one-off, 'out-of-the-blue' communication of information from Sainsbury's via McLelland.

272. We have noted too that Mrs Oldershaw accepted that she knew McLelland (and other suppliers, including Dairy Crest) was "*desperate*" to persuade Tesco to accept the proposed cost price increase.[92] She also knew that each of Tesco's major cheese suppliers, including McLelland, was having discussions with each of Tesco's major competitors to persuade them to accept the same across-the-board

91 Transcript, Day 8, p. 127.
92 Transcript, Day 8, p. 162.

£200 per tonne cost price increase and that this was, in effect, a whole market move.[93] Indeed, in her second witness statement she explained that it was her perception at the time that her "*cheese suppliers were trying to achieve an increase in the cost price for cheese across all their retailer customers*". Mrs Oldershaw further accepted that she knew that "*it was likely that anybody accepting a cost price increase would have to increase the retails*" because they would have been under similar pressures from KPIs and margins as she was.[94]

273. In our judgement, there was no legitimate commercial reason for McLelland to have been given the following information, which was conveyed to Tesco in the 21 October email:

(a) The first of these pieces of information was that other retailers would be raising their retail prices to protect cash margin. McLelland could, of course, have discerned that for itself in relation to any random-weight cheeses it supplied to the retailers, since it would have had (at some point) to be provided with the new retail prices for packing purposes. However, the information was not confined to random-weight cheeses; indeed, the statement appears to constitute information that the other retailers planned to protect cash margin across *all* their respective cheese lines. We have been unable to find an innocuous explanation or commercial rationale for a retailer to provide such a broad statement of intent to its cheese supplier. In our judgement, the only plausible explanation is that Sainsbury's may be taken to have intended McLelland to make use of that information so as to influence market conditions by passing that information to other retailers, including Tesco. It would be extraordinary to conclude that, when Mrs Oldershaw received this information, it did not occur to her that this was connected with the question of the across-the-board increase of cost and retail prices by £200 per tonne.

(b) The second piece of information was that Sainsbury's intended to increase its retail prices for deli cheese on 11 November (as to which see paragraph

93 Transcript, Day 8, p. 163.
94 Transcript, Day 8, p. 163.

238 above). Here too there was no legitimate reason for Sainsbury's to have given McLelland that information. It would have been plain to Mrs Oldershaw that Sainsbury's chose to convey its pricing intentions for deli cheese to McLelland.

(c) The final piece of information contained in the 21 October email was that Sainsbury's would be moving its retail prices for "*Branded pre-pack*" cheese on "*Tuesday* [22 October] *this week*". Leaving to one side whether, in the particular circumstances of this transmission, that information was such as to be capable of restricting competition (a point dealt with in the next sub-section of this judgment), we have concluded that, in the circumstances, there was no legitimate commercial reason for Sainsbury's to have given McLelland this information (see paragraph 238 above). It seems to us that, in light of the circumstances known to Mrs Oldershaw (see in particular paragraphs 272 above and 274 below), taken together with the absence of any labelling justification, it would have been apparent to Mrs Oldershaw that the reason Mr Ferguson had this information was because Sainsbury's intended him to use it to persuade all of McLelland's other retailer-customers to accept the cost price increase of £200 per tonne. This was so that the market would increase cheese cost *and* retail prices at, or around, the same time.

274. Mrs Oldershaw was, at the time she received the 21 October email, Tesco's buying manager for cheese. She must have appreciated that there was no legitimate commercial reason for Sainsbury's, or any other retailer, to have given McLelland all of the information contained in the 21 October email other than with a view to influencing the future pricing decisions of its competitors. She accepted that she was aware: (i) that McLelland was talking to all its retailer-customers with a view to persuading them to increase their costs prices; (ii) which would have meant retail price increases; and (iii) that her competitors would have been faced with the same uncertainties, KPI-pressures and difficult decisions that she was.

275. For the foregoing reasons, it is our judgment that Mrs Oldershaw knew, or may be taken to have known, on receipt of the 21 October email, that the pricing

information contained therein, had been provided to McLelland by Sainsbury's with the intention that it would be passed on to other retailers.

E. C's use of the information: Tesco's use of Sainsbury's intentions

276. Tesco submitted that it had rebutted the *Anic* presumption that it took into account the information contained in the 21 October email in order to determine the policy which it intended to pursue on the market. The argument was that, by 5pm on 21 October, Tesco could not have used the information about Sainsbury's retail prices for branded pre-pack cheese before those prices went public and became visible in-store the next day.

277. It follows from *T-Mobile* that there is a presumption of a causal connection between the concertation and the conduct of the undertakings on the market. This presumption applies even if the concerted action is the result of a contact between the participating undertakings on a single occasion. We consider that it is possible to rebut the *Anic* presumption by showing that an undertaking has repudiated the influence of the contact or communication in question and can show that it closed its mind to the knowledge otherwise gained. This might occur where, for example, immediately after a communication, an undertaking exits the market and it is therefore no longer active on the market. In those (rare) circumstances there can be no practice which has been concerted. The view contended for here is that the information about Sainsbury's branded pre-pack cheese retail prices became publicly available before the knowledge and awareness obtained from the 21 October email could have been put to use.

278. We are satisfied that the statement in the 21 October email concerning the movement of Sainsbury's branded pre-pack retail prices could have been verified by public sources more quickly than it could have been acted on by Tesco (*cf.* Joined Cases T-202/98, T-204/98 and T-207/98 *Tate and Lyle plc & Ors v Commission* [2001] ECR II-2035, paragraph 60). By the time that information had been disclosed at 5pm on 21 October, we find that it was not capable of being used by Tesco in any meaningful way to distort competition.

279. We agree with the OFT, however, that Tesco's submission, even if well-founded on that point, misses the further point that the 21 October email also contained other confidential and commercially sensitive information (namely, that other retailers had decided to maintain cash margin when they increased their retail prices and the dates on which Sainsbury's intended to increase retail prices for certain cheese products). Hence, it is presumed that Tesco could not fail to take into account those other two pieces of information in order to determine the policy which it intended to pursue on the market. Tesco's submissions on 'use' seem to us to be incapable of succeeding in circumstances where their other points on the nature of the other price information contained in the 21 October email have failed.

280. Finally, we note that, as the OFT explained in response to a request from Tesco for further and better particulars, by the phrase 'co-ordination' of cost and retail price increases, the OFT meant "*acting on the market otherwise than independently*". Given our findings above in relation to Mrs Oldershaw's knowledge as to the genesis of the information contained in the 21 October email, we find that to have been the case.

F. The Tribunal's conclusion on Strand 2

281. For these reasons, the above evidence establishes that there was a concerted practice between Sainsbury's, McLelland and Tesco arising from contacts between 16 and 21 October, whereby Sainsbury's disclosed its future pricing intentions to Tesco via McLelland, and that each of Sainsbury's and Tesco acted with the requisite state of mind. Thus, when Sainsbury's passed on its future retail pricing intentions, it may be taken to have intended, and in fact foresaw, that McLelland would, in turn, pass that information to Sainsbury's competitors. Equally, when Tesco received that information from McLelland, it may be taken to have known the circumstances in which Sainsbury's had initially passed on that information.

XII. STRAND 3 OF 2002: TESCO AS A; DAIRY CREST AS B; AND SAINSBURY'S AS C

A. Outline of Strand 3

282. In paragraphs 5.283 to 5.321 of the Decision, the OFT concluded that, on 30 October, Neil Arthey of Dairy Crest sent an internal email to various Dairy Crest staff informing them that Tesco had "*confirmed*" that it would be implementing various cheese price increases. The next day, Paul Feery, also of Dairy Crest, sent an email to Sarah Mackenzie of Sainsbury's setting out "*the latest information from Tesco on their price increases*". The OFT's case was that Tesco disclosed the information contained in the 30 October email to Dairy Crest who in turn passed that information on to Sainsbury's.

283. Tesco denied that it had disclosed its retail pricing intentions to Dairy Crest other than in respect of one cheese (Weight Watchers' mature cheddar, in respect of which it was accepted that Mrs Oldershaw had told Dairy Crest that Tesco would be moving to a new retail price of £8.19 per kilo), for which disclosure it had a legitimate commercial reason. In addition, Counsel for Tesco contended that the OFT had not made out its case on the requisite mental state on the part of either Tesco or Sainsbury's.

B. Background to Strand 3

284. On 18 October Mr Arthey sent an email to Mrs Oldershaw attaching a spreadsheet he had prepared to show how the retail prices for Dairy Crest cheeses sold by Tesco might change if Tesco accepted the proposed £200 per tonne cost price increase. Mr Arthey followed up this email by providing Mrs Oldershaw with further information on 21, 22 and 28 October. Mrs Oldershaw recalled that Mr Arthey "*was ringing me practically every day at this point*", a sign of "*how desperate Dairy Crest was to get the cost price increase through*". Mrs Oldershaw accepted that she knew that Dairy Crest had been discussing the same cost price increase with the other retailers at this time (see paragraphs 198 and 201 above).

285. The evidence is that, by 29 October, Mrs Oldershaw had been instructed by her superiors at Tesco to accept the cost price increase of £200 per tonne proposed by

the suppliers. She had prepared a document setting out her "*Cheese £200 T plan*" for "*Cost and Retail moves*". This document contained the dates on which she planned to move the cost and retail prices for the various cheeses sold by Tesco at the time, supplied by a number of different suppliers. That document broke down the planned price moves, both by cheese category and on a line-by-line basis. On 29 October, Mrs Oldershaw wrote a single email to six of Tesco's cheese suppliers, including Mr Ferguson of McLelland and Mr Arthey of Dairy Crest, stating:

> "I will call you all tomorrow with Confirmation of cost price changes and Retails where relevant.
> At the moment the plan is for the following to be [changed] from SUNDAY 3rd Nov (we HAVE to change costs on a SUNDAY, please note that you MUST change on a Sunday also)
>
> 3rd Nov
> Brands
> Regionals
> Stilton
> Speak tomorrow
> …"

Mrs Oldershaw explained that this sort of round-robin email was unusual. It would not have been her normal practice to notify all of her suppliers of new cost prices in a single email. On this occasion, however, she had been working under pressure (due to the number of cheese lines she had been managing) and thought that the suppliers were all receiving the same £200 per tonne increase on the same date for the lines mentioned in her email of 29 October. Mrs Oldershaw further explained that she "*trusted* [her] *suppliers to take the information they needed and did not believe or expect they would pass this information on*".

286. We find very surprising the suggestion that a retailer would contact all of its major suppliers via a single email and thereby tell each of them information relating to the retailer's intended price moves on the lines that were supplied to that retailer by only some of the suppliers. The notion that Mrs Oldershaw simply trusted each supplier to extract the information pertinent to it and to entirely disregard the remainder relating to their competitors is, in our judgement, unrealistic.

C. A to B: did Tesco pass its future pricing intentions to Dairy Crest?

A to B transmission

287. An email from Mr Arthey of Dairy Crest (who was not called to give evidence by either side) to a number of his colleagues on 30 October 2002 (the "Arthey Email") was said to evidence the A to B transmission of future retail pricing information by Tesco to Dairy Crest on that date. The parties referred us to a note of an interview with Mr Arthey conducted by Dairy Crest's solicitors on 29 October 2007, which we consider below. Mrs Oldershaw explained that a conversation she had with Mr Arthey on 30 October 2002 was the culmination of the cost price negotiations she had been conducting with Dairy Crest over the previous weeks. In December 2007 Mrs Oldershaw verified the statement in Tesco's response to the SO that it was unclear whether she had disclosed cost or retail prices to Dairy Crest on 30 October 2002. By the time she gave evidence to this Tribunal, however, Mrs Oldershaw was adamant that she had told Mr Arthey about cost price changes only (with the exception of the Weight Watchers cheese).

288. On 30 October Mrs Oldershaw rang each of the suppliers she had emailed the day before, as she indicated she would. She accepted that in those conversations she read out her list of dates and categories contained in her "*Cheese £200 T plan*" document.[95] Mrs Oldershaw confirmed that the contents of the Arthey Email, sent to numerous Dairy Crest recipients later that day, recorded the conversation that she had with him.[96] The subject of that email is "*Price increases*". The body of the Arthey Email stated:

> "Following a conversation late this afternoon Tesco have confirmed that all branded Pre Pack cheese will go up as of Monday 4th November.
> The only exception is Cath[edral] City 400g due to promotional activity – this line will move on 15.12.02
> Their regional cheeses and Stilton are also due to increase at this time.
>
> They have confirmed the price for Weight Watchers Mat[ure] at £8.19 per kilo targeted to move 11.11.02
> Finest, speciality lines and cotta*g*e cheese will move on the 11.11.02

[95] Transcript, Day 9, pp. 79 and 80.
[96] Transcript, Day 9, pp. 72 and 73.

> They have now informed me that they intend to move all the other own label lines on the 18.11.02 ie Mild, Medium, Mature, Extra Mat[ure] and Farmhouse, sliced and grated and healthy eating
>
> this is a 1 week delay on Mild & Medium
>
> Deli lines are also due to move on 18.11.02"

289. In our judgement, the Arthey Email above records that Mrs Oldershaw had told Mr Arthey that Tesco intended to change both its cost and retail prices for the cheese lines shown on the dates indicated. We have reached this conclusion for five reasons.

290. First, it was common ground that, when speaking to Mr Arthey Mrs Oldershaw read out the details of her "*Cheese £200 T plan*". According to that document, it contained details of Mrs Oldershaw's "*Cost and Retail moves*". It shows that Mrs Oldershaw was intending to move cost and retail prices at or around the same time. Reading the Arthey Email together with Mrs Oldershaw's "*Cheese £200 T plan*" document, it is apparent that the dates in the email relate to dates for cost and retail price changes.

291. Secondly, whereas Mrs Oldershaw's email of 29 October had made clear that both Tesco and its suppliers had to change their *cost* prices on Sundays (i.e. on 3, 10, and 17 November – the dates set out in her "*Cheese £200 T plan*" document), all of the dates contained in the Arthey email are Mondays (i.e. 4, 11, and 18 November). In our view, this makes it more likely that the Arthey Email is referring to cost and retail prices since we note that in respect of the new price for the Weight Watchers' cheese, which it was accepted referred to the retail price, the date given was a Monday.

292. Thirdly, Mrs Oldershaw explained in her second witness statement that when she was planning to increase retail prices, but had not decided the particular price point, she "*would generally inform* [her] *suppliers that a change was imminent so that they could run down stocks at the old retail prices*." In the same statement, Mrs Oldershaw stated that her reason for giving Dairy Crest the information recorded in the Arthey Email was to enable Dairy Crest to run down its stocks. Dairy Crest would, however, only start running down stocks of random-weight cheese on which

the retail prices were going to change. A change to the cost price only would have no impact whatsoever on Dairy Crest's packing of cheese for a retailer. In its written Reply, Tesco suggested that Mr Arthey began the process of running down Dairy Crest stocks because he would have inferred that retail prices would change at about the same time as cost prices. We reject this suggestion as contrary to commercial reality. It is not credible for Tesco to maintain that a major supplier of cheese would start to run down its stocks based on Mr Arthey's guesswork or inferences only. If Mr Arthey's 'inference' proved to be incorrect, Dairy Crest might well have found itself unable to supply its biggest retailer-customer with the cheese stocks it required. Equally, had Mrs Oldershaw actually intended Dairy Crest to start running down its stocks of packed and priced Tesco cheeses, as Tesco now claims, then she would actually have told Mr Arthey that retail prices were changing at a similar time to cost prices and not merely hoped that he would draw the correct inference.

293. Fourthly, it is clear that Mrs Oldershaw did not confine herself to matters of legitimate interest to Dairy Crest. In addition, she told Mr Arthey the dates of Tesco's proposed cost and retail price movements across all cheeses processed and distributed by all suppliers, not just those cheeses supplied by Dairy Crest.[97] Mrs Oldershaw attributed this unusual disclosure to the fact that she had been working under great pressure at the time. We accept that Mrs Oldershaw worked under pressure. In our view, however, this did not justify Mrs Oldershaw giving Mr Arthey information about the cost prices Tesco proposed to pay for cheeses provided to it by suppliers other than Dairy Crest. This was not an inadvertent slip. Mrs Oldershaw divulged information about numerous cheese categories Dairy Crest did not supply to Tesco including Stilton, Finest, Regionals, Speciality, Sliced & Grated and own-label Farmhouse. Disclosure of this confidential information could have been easily avoided. Attached to Mrs Oldershaw's "*Cheese £200 T plan*" document was a spreadsheet setting out the cheese lines by supplier. This would have made it straightforward for her to read off the spreadsheet supplier by supplier.

294. Fifthly, Mr Reeves, one of the Dairy Crest recipients of the Arthey Email, stated in his witness statement that he had understood it to refer to retail price increases, not

[97] Transcript, Day 9, pp. 80-83.

just cost prices. This was because Dairy Crest did not supply some of the cheeses mentioned in the email. Tesco argued that this was merely Mr Reeves's opinion and that he had no personal knowledge of whether the information in the Arthey Email related to cost prices, retail prices or both. We accept that this was simply Mr Reeves's reading of the email and that, of course, his understanding cannot be decisive of Mr Arthey's intention when writing the email. However, Messrs Reeves and Arthey were colleagues, and it is not unreasonable to suppose that Mr Arthey wanted his email to be properly understood by his colleagues. That being the case, it does seem to us that Mr Reeves' understanding of the email is evidence that we can properly take into account as supporting our own reading of that document.

295. We turn now to consider Tesco's submission that the Arthey Email should be read in light of Mrs Oldershaw's email of the day before, which stated that she would tell her suppliers "*cost price changes and Retails where relevant*". It is, however, plain that Mrs Oldershaw did not disclose just cost price changes and retail prices "*where relevant*" to the individual suppliers. On the contrary, she candidly accepted that she read out the price movements for all of Tesco's cheese categories, including those not supplied by Dairy Crest. The fact that Mrs Oldershaw disclosed the exact proposed retail price for Dairy Crest to pack and label the price of Weight Watchers cheese (£8.19 per kilo, which represented a cash-margin-maintenance increase of 20p per kilo) does not mean that the dates shown for other cheeses were merely for Tesco's cost price changes. We agree with the OFT that, having regard to Mrs Oldershaw's knowledge at the time and her motivations for informing Dairy Crest, it is more likely than not that the rest of the Arthey Email referred to a series of retail and cost price increases.

296. Tesco also suggested that the Arthey Email was simply a boast by Mr Arthey to his colleagues that he had persuaded Mrs Oldershaw to accept the cost price increase of £200 per tonne. This was based on comments made by Mr Bill Haywood and Mr Arthey, both of Dairy Crest, contained in notes of discussions that took place between each of them and Dairy Crest's solicitors on, respectively, 27 September and 29 October 2007. Neither of the notes indicates clearly whether the Arthey Email was referring to cost price changes, retail price changes or both. In any event, both notes are unsigned and unsworn, and neither Mr Haywood nor Mr

Arthey were called to give evidence. In those circumstances, we consider that the notes of interview are of little assistance in resolving the issues before us and that we could place little, if any, weight on them in any event.

297. Taking our conclusions on the Arthey Email together with the surrounding circumstances, we are satisfied to the requisite standard that the information disclosed by Mrs Oldershaw related to Tesco's future cost and retail pricing intentions for the cheese categories listed.

Tesco's state of mind as 'A'

298. It was common ground that the information contained in the Arthey Email was commercially sensitive and confidential. It was also undisputed that that information was passed by Dairy Crest to Sainsbury's and that it should not have been. The OFT submitted, and we agree, that Mrs Oldershaw may be taken to have intended that Dairy Crest would pass on the dates for retail price changes for various categories of cheese to Tesco's competitors.

299. In support of this conclusion, we note that Mrs Oldershaw accepted that she had received and read the Dairy Crest briefing document circulated the previous month. We have found that that briefing document proposed both a cost price increase of £200 per tonne and, contrary to Mrs Oldershaw's evidence, a retail price increase on the basis of cash margin maintenance. Mrs Oldershaw also accepted that she had appreciated that the Dairy Crest briefing document had been sent to her competitors (see paragraph 201 above). On that basis, we find that Mrs Oldershaw may be taken to have known that information as to whether Tesco would be increasing its cost and retail prices, and, if so, when those increases were to be implemented, would have been of considerable significance in bringing about the £200 per tonne cost price increase for cheese. She knew how "*desperate*", as she accepted in cross-examination, Dairy Crest was to secure that cost price increase. In the light of our findings on Strand 2 and the actions of McLelland in that context, Mrs Oldershaw also knew, or may be taken to have known, that suppliers were prepared to pass on, and did pass on, one retailer's future pricing intentions to other retailers.

300. Further, we agree with the OFT that there was no legitimate reason for telling Dairy Crest the dates for retail price changes which were then recorded in the Arthey Email. Most of the information Mrs Oldershaw told Mr Arthey related to cheese lines produced and supplied by other suppliers. We have already rejected Mrs Oldershaw's explanation that this was an inadvertent error on her part (see paragraph 293 above). In our view, the only plausible explanation for disclosing that information is that Mrs Oldershaw wanted to bring about the across-the-board increase in cost and retail prices of £200 per tonne. The fact that Mrs Oldershaw gave a specific new retail price for a Weight Watchers cheese line only serves to demonstrate how information on future retail pricing intentions would be communicated in circumstances where there was a legitimate packing and pricing rationale for passing such information to a supplier, i.e. if a retailer was telling its supplier to label a cheese at a particular retail price, the retailer would specify that price. Such a rationale cannot be said to apply to the broad range of information conveyed in this instance.

301. We do not accept Mrs Oldershaw's evidence that she expected Mr Arthey to keep confidential all of the information conveyed to him and subsequently recorded in the Arthey Email. Even if Mrs Oldershaw had only told Mr Arthey about Tesco's cost price increases (and said nothing about its intended future retail prices), why would she expect him to keep confidential information about the dates on which Dairy Crest's competitors were to receive cost price increases from Tesco? It makes little, if any, commercial sense unless she had intended Mr Arthey to pass on what were, in fact, cost and retail price changes to Tesco's retailer-competitors. If Mrs Oldershaw had genuinely wanted Dairy Crest to keep the information to itself then, given her knowledge of what was going on at the time, she could have readily insisted on confidentiality being maintained or, better still, only conveyed such information as it was actually necessary to convey as part of that supply relationship.

302. Mrs Oldershaw, in her written evidence, asserted that she simply "*trusted her suppliers to take the information they needed*". We find it difficult to square the level of trust Mrs Oldershaw claimed that she reposed in her suppliers to keep confidential Tesco's price information (without expressly instructing them to do so)

with her asserted level of mistrust of anything they told her about other retailers' intentions.[98] We recognise that it is possible for a person to repose differing levels of trust in another depending what that other is doing. Given the prevailing circumstances known to Mrs Oldershaw at the time, however, we cannot accept that Mrs Oldershaw implicitly trusted her suppliers to protect Tesco's confidential information. Those circumstances included that Dairy Crest had proposed a cost and retail price move increase to all its retailer-customers, that Dairy Crest was desperate to get these price increases through and that Mrs Oldershaw had already received another retailer's future pricing intentions from a common supplier. If the truth of the matter were that Mrs Oldershaw had not intended any onward transmission by Dairy Crest of Tesco's future pricing information to Tesco's competitors, then she could have taken, and we would have expected her to have taken, suitable precautions, particularly given the events comprising Strand 2. It would have been simple and appropriate for her to tell Dairy Crest not to handle Tesco's information in the same way that she knew that McLelland had handled Sainsbury's information. We have seen no record that she did so.

303. The fact that Mrs Oldershaw had the requisite state of mind is in our view confirmed by the fact that she was disclosing her future pricing intentions in circumstances where she had already received those of Sainsbury's (in Strand 2). This is an example of the OFT's 'disclosed-having-received' argument (see paragraph 253(c) above). In *Toys and Kits*, Lloyd LJ stated at paragraph 141 that a finding of an infringement would be all the stronger where a retailer, having previously participated as a willing recipient of future price information (i.e. as retailer C), subsequently discloses to a supplier B its future pricing intentions in circumstances where it may be taken to intend that B will make use of that information to influence market conditions by passing that information to one or more of its competitors. In our view, that is precisely what happened here.

304. Tesco submitted that it is not possible to rely on the above argument because Strand 2 involved McLelland, not Dairy Crest. Because the OFT did not allege that Dairy Crest had communicated any future price information to Tesco before Strand 3, Counsel for Tesco argued that Mrs Oldershaw had no reason to believe that

[98] See Transcript, Day 8, p. 30 and 31; and Day 9, pp. 12 and 13.

information she furnished to Dairy Crest would be passed on to Tesco's competitors. However, we have found that Mrs Oldershaw received future pricing intentions from one of Tesco's competitors with the requisite state of mind and through a common supplier, McLelland. We have also found that she knew that both McLelland and Dairy Crest were doing everything they could to get the retailers to increase their cost and retail prices, and for the same reasons. In those circumstances, when Mrs Oldershaw imparted the dates for Tesco's cost and retail price increases to Dairy Crest, she may be taken to have intended that it would be passed on in the same way as Sainsbury's information had been.

305. Accordingly, it is difficult to accept that Mrs Oldershaw disclosed her future pricing intentions to Mr Arthey on 30 October with any intention other than that they be passed on by Dairy Crest. That information was communicated in a context where she knew that the suppliers were actively seeking to increase cost prices by £200 per tonne and to achieve that by facilitating concomitant retail price increases. We are satisfied that she may be taken to have intended that Dairy Crest would make use of Tesco's pricing intentions to influence conditions on the retail cheese market by passing that information to other retailers, including Sainsbury's.

D. B to C: did Dairy Crest pass Tesco's future pricing intentions to Sainsbury's?

306. The final limb of Tesco's challenge to the OFT's findings on Strand 3 was as to Sainsbury's state of mind when it acted as retailer C.

Sainsbury's state of mind as 'C'

307. We are satisfied that, when Ms Mackenzie of Sainsbury's received the email from Mr Feery of Dairy Crest on 31 October, passing on the information contained in the Arthey Email, Ms Mackenzie may be taken to have known that this was confidential information coming from Tesco and that Tesco had disclosed it to Dairy Crest intending it to be passed on to other retailers.

308. Whilst we start from the proposition that Sainsbury's ERA constitutes some evidence of its state of mind at the time Ms Mackenzie received Mr Feery's email,

in accordance with our general approach (see paragraphs 108-112 above), we are of the view that the probative value of that evidence is very low. We consider, however, that Sainsbury's admission of the infringement is confirmed by the following matters.

309. First, the beginning of Mr Feery's email can have left Ms Mackenzie in no doubt as to where he had obtained the information. The subject of the email was "*TESCO PRICE INCREASES*." The opening sentence of the email reads: "*Please find below the latest information from Tesco on their price increases*" (emphasis added). There is no need for us to set out the remaining contents of the email because it is virtually the same as the Arthey Email (set out in paragraph 288 above). The only, and in our view inconsequential, difference between them is that Mr Feery omitted the penultimate line of the Arthey Email (to the effect that the change in Tesco's retail prices for mild and medium own-label lines had been delayed by one week). This does not, however, alter the fact that the contents of Mr Feery's email would have substantially reduced Sainsbury's uncertainty as to Tesco's future pricing intentions on a number of retail cheese lines. In reaching this conclusion, we have well in mind the principle in the EU authorities, relied upon by Tesco and the OFT, that the requirement of independence precludes any direct or indirect contact between economic operators by which an undertaking (i.e. Tesco) discloses to its competitors (i.e. Sainsbury's) its decisions or deliberations concerning its own anticipated conduct on the market (i.e. its future retail pricing intentions), with the likely result that competition was restricted.

310. Secondly, we consider that it would have been clear, indeed obvious, to Ms Mackenzie, Sainsbury's senior cheese buyer, that a substantial number of the Tesco products listed in the 31 October email were not lines which required price-labelling by Dairy Crest. The reason is that they were not random-weight lines (other than, of course, the Weight Watchers cheese). We find that it would have been readily apparent to the senior buyer at Sainsbury's that there was no legitimate commercial reason for Dairy Crest to possess Tesco's future retail pricing intentions for these various lines. We are conscious that we have not heard evidence from Ms Mackenzie as to what she can recall she thought at the time. Even so, we do not consider that the meaning of this particular contemporaneous document requires

explanation or oral amplification. It is plain that there was no reason why Mr Feery had this information other than because Tesco intended Dairy Crest to use it to persuade other retailers to accept and pass on the cost price increase of £200 per tonne, so that the whole market would increase cheese cost and retail prices at, or around, the same time.

311. Thirdly, we note that prior to Strand 3 Sainsbury's had previously indicated that it was willing to raise its retail prices but only if other retailers raised their prices too. In a letter from Ms Finn Cottle of Sainsbury's to Farmers for Action, for example, it was stated that Sainsbury's intended to "*pass on an increase in our buying prices by £200 / tonne in approx 3 weeks, for all of our standard cheese range, provided other retailers also accept this.*" An internal Dairy Crest Commercial Sales Group memorandum, prepared by Mr David Flower, on "*Sainsbury's Cheese Price Move*", dated 16 October, also records that "*Sainsbury's want to move branded lines as this will have the least impact and Sainsbury's will be able to measure the markets* [sic] *reaction before they move their Own Label lines. If there is no reaction then the Own Label moves will be delayed*." We recognise that this document provides only indirect evidence as to Sainsbury's state of mind at the time and that we have not heard evidence from Mr Flower. However, Tesco did not challenge the authenticity of the document or the veracity of its contents. The document, in our view, evidences the conditionality of Sainsbury's position in relation to its future retail pricing intentions.

312. A fourth aspect of the factual matrix that confirms our conclusion that Sainsbury's had the requisite state of mind is that, by 31 October, Sainsbury's had disclosed its own future pricing intentions to one of its suppliers so that they would be passed on to other retailers. Using the A-B-C terminology, having acted as retailer A in Strand 2, it then played the part of retailer C for the purposes of Strand 3. In our judgement, it must have been apparent to Sainsbury's that, if its cheese suppliers were passing on its future pricing intentions to other retailers, by the same token the suppliers would be passing the intentions of other retailers to Sainsbury's, based on their discussions with other retailers. Receipt of confidential pricing information after disclosure is a relevant consideration when assessing retailer C's state of mind. As we noted above in relation to Tesco, we are mindful of the fact that the supplier

in Strand 2 was McLelland, not Dairy Crest. We consider, however, that our conclusions on Strand 2 remain relevant to our assessment of Sainsbury's state of mind in this Strand for the same reasons as they are to Tesco's state of mind in this Strand (see paragraph 304 above).

313. Tesco did not challenge the OFT's finding that Sainsbury's had used Tesco's confidential information that it had received from Dairy Crest.

E. The Tribunal's conclusion on Strand 3

314. For these reasons, the above evidence establishes that the OFT was correct to find that there was a concerted practice between Tesco, Dairy Crest and Sainsbury's arising out of communications that took place between 29 and 31 October, whereby Tesco disclosed its future pricing intentions to Sainsbury's via Dairy Crest and that each of Tesco and Sainsbury's acted with the requisite state of mind. Thus, when Tesco passed its future retail pricing intentions to Dairy Crest, it knew, or may be taken to have intended, that Dairy Crest would, in turn, pass that information to Tesco's competitors. Equally, when Sainsbury's received that information from Dairy Crest, it may be taken to have known the circumstances in which Tesco had passed that information to Dairy Crest.

XIII. STRAND 4 OF 2002: TESCO AS A; DAIRY CREST AND/OR McLELLAND AS B; AND SAFEWAY AS C

A. Outline of Strand 4

315. In paragraphs 5.387 to 5.398 of the Decision, the OFT set out its findings that:

(a) on or before 5 November, Tesco had disclosed to Dairy Crest and/or McLelland that it intended to increase its retail prices for cheese on 11 and 18 November by 10 pence per 500 grams (which equates to 20p per kilo, or £200 per tonne);

(b) Tesco, in disclosing that information, was to be taken to have intended that Dairy Crest and/or McLelland would pass it on to one or more of Tesco's

competitors, including Safeway, in order to influence retail market conditions; and

(c) Tesco's future retail pricing intentions were passed by Dairy Crest and/or McLelland to Safeway, which knew the circumstances in which the information had been disclosed by Tesco.

316. In order to evidence this A-B-C transmission, the OFT principally relied on an email dated 5 November from Mr Russell White of Safeway to Messrs Tim Lawrence and Matthew Jipps, also of Safeway, which stated that Safeway was about "*to execute a market wide* [Retail Selling Price] *increase on the full range of UK cheeses*", on "*11th and 18th of November*" by an average of "*10p per 500g piece and 5p per 250g, to show our support* [for the farmers]". The email also recorded that "*all major players will be moving by the same amount on the same day*".

317. Counsel for Tesco submitted that there was no evidential basis for the OFT's findings that the pricing information contained in Mr White's email had come from Tesco, that Tesco had consented to the disclosure, or that Tesco had intended (or actually foreseen) that the information would be passed on to its competitors.

B. A to B: did Tesco pass its future retail pricing intentions to Dairy Crest and/or McLelland?

318. We accept that it is plausible that the phrase "*all players*" used in Mr White's email referred to Safeway's major retailer-competitors, including Tesco. In our judgement, however, there are, at least, two inter-related fault lines running through the OFT's findings on this Strand: first, there is no evidence of a transmission of the relevant pricing information by anyone at Tesco; and, secondly, there is no evidence of receipt of that information by either Dairy Crest or McLelland. Whilst Mr White clearly had obtained *some* information from *somewhere*, that is, in essence, all we can infer from his email of 5 November.

319. Were we to accept, as the OFT found in the Decision, that Mr White's email was sufficient to evidence the retailer A to supplier B transmission of this Strand, we

would, in effect, be finding that Tesco disclosed its future retail pricing intentions to Dairy Crest and/or McLelland on the basis of no more than three assumptions:

(a) that "*all players*" included Tesco, perhaps not an unreasonable assumption;

(b) *if* Mr White's email did in fact refer to Tesco's pricing intentions, that, by 5 November, Tesco had in fact communicated its intention to increase retail prices "*by the same amount*" (which would have to be presumed to mean 10p per 500g, or 5p per 250g, of cheese) "*on the same day*" (notwithstanding the reference to "*day*" in the singular, this must be taken as referring to the retail price movements on both 11 and 18 November); and

(c) *if* Tesco had in fact transmitted such information, that it was received by Dairy Crest or McLelland, or both.

320. The Tribunal has not heard evidence from the author of the Safeway email, Mr White (nor indeed from any other witness said to have first-hand knowledge of that email). We are, therefore, not in a position to verify the OFT's assessment of the Safeway email and we consider that the series of assumptions seemingly made by the OFT in the Decision is, without more, insufficient to support a finding of a Chapter I infringement. It is, of course, possible (not least in light of our findings on Strand 3 above) that the relevant pricing information had been divulged by Tesco to Dairy Crest and/or McLelland, which then passed it to Safeway but, in the absence of any evidence to that effect, Tesco is entitled to have such doubts resolved in its favour.

321. The OFT also sought to rely on its findings regarding Strand 6 (which, for the reasons set out below, was not found to be a Chapter I infringement) to evidence that Tesco had disclosed its retail pricing intentions to McLelland for the purposes of Strand 4. Under Strand 6 (see paragraphs 356-360 below) the OFT found that the price information contained in an email dated 4 November from Mr Stuart Meikle, of McLelland, to Mr Mike Owen, of Co-op, must have been based on what one of Mr Meikle's colleagues (most likely Mr Ferguson) had told him about Tesco's retail pricing intentions. That being the case, the OFT argued that

McLelland was in a position to transmit the same information to Safeway by 5 November.

322. Before this Tribunal, Mrs Oldershaw accepted that she had had to tell Mr Ferguson of McLelland of the amount and timing of any retail price changes on the random-weight cheese products that McLelland supplied to Tesco. Mr Meikle's email expressly states that he believed that Tesco would move its retail prices on "*random weight McLelland retails*" on 11 November and "*all own label lines*" (which were also random-weight cheeses) on 18 November. On its face, Mr Meikle's email suggests that Tesco *may* have disclosed information to McLelland about its pricing intentions on random-weight lines. Putting to one side the question of whether there was a legitimate reason for Tesco to have made such a disclosure (which there might have been for such random-weight lines), we do not consider that that disclosure was sufficient to demonstrate the A to B transmission of Strand 4. Quite apart from anything else, this information apparently in McLelland's possession about Tesco's random-weight products, does not explain how, let alone why, Safeway *knew* (to use the term used by Lloyd LJ in *Toys and Kits*) that Tesco intended to move its retail prices for other (namely, fixed-weight and deli) cheeses. We note in this regard that the Safeway email of 5 November, containing the information allegedly conveyed at the B to C stage, refers to increases on the "*full range of UK cheeses*".

323. Counsel for the OFT submitted that Mr Ferguson probably obtained the relevant information during a conversation with Mrs Oldershaw on 30 October, which, in the OFT's view, would have been similar to the one she had with Mr Arthey of Dairy Crest the same day (see the A to B of Strand 3, at paragraphs 287-297 above). Mr Ferguson could not remember the details of that conversation.[99] Mrs Oldershaw said that she did not know where McLelland had obtained the information recorded in Mr Meikle's email. There does not appear to be any contemporaneous document showing that Tesco had disclosed the amounts of its intended retail price changes to McLelland for its full range of cheeses on or before 5 November. In closing, the OFT submitted that "*hard information*" about the retailers' future retail pricing intentions was "*generally flowing in all directions*" on 4 and 5 November. That

[99] Transcript, Day 6, pp. 93 and 94.

may well have been the case but we consider that it is incumbent on the OFT to actually prove that in order to substantiate its case on Strand 4, namely that Tesco had disclosed the relevant pricing information, recorded in the Safeway email, to Dairy Crest and/or McLelland by 5 November.

324. Paragraph 5.389 of the Decision refers to the fact that the amount and purpose of the proposed increases in Safeway's retail prices were consistent with Dairy Crest's and McLelland's earlier proposals. But the fact that those suppliers were simultaneously proposing a cost price increase of £200 per tonne (and an equivalent retail price increase) before 5 November does not mean that Tesco had told either of them how it would adjust its retail prices once it had accepted the cost price increase.

C. The Tribunal's conclusion on Strand 4

325. We conclude that the evidence before us is not sufficient for us to find, on the balance of probabilities, that Tesco disclosed, in the context of Strand 4, its future retail pricing intentions to Dairy Crest and/or McLelland prior to 5 November. We, therefore, hold that Strand 4 of the 2002 Cheese Initiative, as found in the Decision, is not proved. That being so, we do not need to decide whether each of Tesco and Safeway had the relevant state of mind.

XIV. STRAND 5 OF 2002: ASDA AS A; DAIRY CREST AS B; AND TESCO AS C

A. Outline of Strand 5

326. In paragraphs 5.332 to 5.352 of the Decision, the OFT found that, on 4 November, Mr Arthey of Dairy Crest sent an email to Mrs Oldershaw, copied to two of his colleagues, Messrs Ryder and Beaumont (the latter was Mr Arthey's line manager), (the "4 November email") in which he stated his "*understanding is that Asda will be applying £200 per tonne ie 20p per Kilo to* [retail selling prices] *of Smart Price Mild & Mature*". Attached to the email was a spreadsheet which contained "*the suggested* [retail selling prices] *of cheese lines that* [Dairy Crest] *supply to Asda following the price increase*". The OFT's case was that Asda provided confidential pricing information to Dairy Crest in circumstances in which it intended that Dairy Crest would make use of that information to influence market conditions; Dairy

Crest did so on 4 November by passing that information to Tesco in circumstances where Tesco may be taken to have known the circumstances in which the information was disclosed by Asda to Dairy Crest; and Tesco took account of the information in determining its own future pricing intentions. The OFT found that these communications collectively constituted a breach of the Chapter I prohibition. Tesco challenged each of these findings by the OFT.

B. A to B: did Asda pass its future pricing intentions to Dairy Crest?

A to B transmission

327. In the Decision, the OFT relied on the following matters in support of its finding that Asda had provided confidential future pricing information to Dairy Crest on or before 4 November:

(a) a note of discussions between Mr Arthey and Eversheds LLP, Dairy Crest's solicitors, that took place on 29 October 2007;

(b) the ERAs entered into, respectively, by Asda and Dairy Crest;

(c) the 4 November email and the attached spreadsheet.

We address each of these matters in turn.

328. Paragraph 5.340 of the Decision referred to the note of discussions with Mr Arthey prepared by Dairy Crest's solicitors on 29 October 2007. The note indicates that Mr Arthey apparently believed that he could "*have known that* [Asda] *were accepting* [Dairy Crest's] *proposals and worked out the prices"* for himself (by simply applying 20p to each price in line with Dairy Crest's desire to see only a cash margin increase). Alternatively, the note records Mr Arthey suggesting that Mr Kenton Robbins, Dairy Crest's senior account manager for the Asda account at the time, may have given the list of Asda's prices to him. The note states, however, that Mr Arthey could "*not remember exactly how*" he had obtained Asda's price information contained in the 4 November email. Given Mr Arthey's apparent uncertainty, the OFT's submission before us that its case did not depend upon such

notes and the fact that Mr Arthey was not called to give evidence, we do not consider that this note evidences that Asda passed its future retail pricing intentions to Dairy Crest on or before 4 November.

329. We have taken into account the ERAs, which the OFT entered into with each of Asda and Dairy Crest, as evidence of each admitting party's conduct and state of mind. In line with the approach set out at paragraphs 108 to 112 above, however, we consider that those ERAs are of only very limited evidential value. In the context of this Strand, however, we consider that the admissions of liability by both parties to the alleged A to B transmission are corroborated by the following matters.

330. We note first that, although there is no direct evidence of the A to B transmission, the 4 November email is indirect evidence of Asda having disclosed its future retail pricing intentions to Dairy Crest. Secondly, we reject Counsel for Tesco's contention that the 4 November email referred to retail prices suggested by Dairy Crest to Asda, as opposed to prices actually contemplated by Asda. In our judgement, the ordinary and natural meaning of the email is that Mr Arthey understood that Asda "*will be applying*" the prices specified in the email and that his "*understanding*" had been informed by Asda. Thirdly, we think that it is significant that the Smart Price cheeses referred to in the 4 November email were fixed-weight products which are priced on the shelf edge. As such it could not be said that Dairy Crest required the future retail prices for those lines so as to pack and label the cheeses. There was, therefore, no legitimate reason for Mr Arthey to possess that information (still less for him to have passed it on to Tesco). Fourthly, we have taken into account the evidence of Mr Reeves of Dairy Crest in relation to this email. When he was taken to it in cross-examination, he acknowledged that "*we* [Dairy Crest] *shouldn't be sharing one retailer's intentions with another*".[100] Drawing together all these factors, we find that it is more likely than not that Mr Arthey had received this information from Asda. The Decision found that the information was probably received via Mr Robbins who was the Dairy Crest employee responsible for managing the Asda account at the time. Whilst this does not alter our finding that Dairy Crest received Asda's future retail pricing

[100] Transcript, Day 5, p. 145.

intentions, we do not find that there is sufficient evidence to demonstrate that it was Mr Robbins who obtained the information from Asda.

331. It was further submitted on behalf of Tesco that the price information contained in the 4 November email was a matter of public record. In this regard Tesco referred to a news item that appeared in the *Dairy Industry News* the following day, on 5 November, which stated that "*Tesco, Sainsbury, Asda and others, will increase wholesale cheese prices by £200 per tonne as from this week, and their retail prices will be increased over the next 2-3 weeks*". This, however, does not evidence that Asda had publicised whether, still less precisely when, it was going to accept the cost price increase nor how it might adjust its retail prices. Nor does the article report the amount of the retail price increase, nor on which lines the increase would be applied. As we have said, it was publicly known during the autumn of 2002 that the suppliers had proposed a cost price increase of £200 per tonne for cheese; when and how each of the retailers would respond to the proposals was uncertain. We therefore reject Tesco's submission relating to the public nature of the information.

332. Tesco also argued that the information contained in the 4 November email was the result of a straightforward arithmetical calculation (i.e. Mr Arthey simply added 20p per kilo to Asda's existing in-store retail prices). If that was correct, then the 4 November email did not contain anything remotely confidential. We do not, however, accept this argument. It overlooks the fact that the email also revealed to Tesco that Asda had (a) accepted Dairy Crest's cost price increase of £200 per tonne and (b) confirmed that it would increase its retail prices, in particular on Smart Price cheeses (the Asda equivalent of Tesco Value lines). Neither of these pieces of information could have resulted from simple mechanistic calculations.

333. In light of the foregoing, it is unnecessary for us to finally determine whether the retail prices shown in the spreadsheet were simple calculations by Dairy Crest. Were we to do so, however, we would have been minded to reject that submission. The spreadsheet listed Asda's suggested retail prices for various pre-packed cheeses supplied to it by Dairy Crest. In our view, it is more likely than not that the spreadsheet recorded the outcome of the discussions that had taken place between Dairy Crest and Asda. During the weeks prior to 4 November, Dairy Crest had

proposed a cost price increase of £200 per tonne and a commensurate retail price increase (to maintain cash margin) to its retailer-customers, including Asda. In the Decision, the OFT found that Asda had received confidential information regarding its competitors' retail pricing intentions from Dairy Crest and had disclosed its retail pricing intentions to another supplier, Glanbia. By entering into its ERA, Asda has admitted that this was the case. Against this background, we do not regard as correct Tesco's suggestion that Mr Arthey had calculated Asda's suggested retail prices without recourse to, or having received information from, Asda. The spreadsheet shows price increases of 20p per kilo because Asda had not only accepted Dairy Crest's cost price increase of £200 per tonne, but had also acquiesced to the proposal in the Dairy Crest briefing document to increase retail prices so as to protect cash margin.

334. In closing, Counsel for Tesco pointed out that, on 9 and 10 November, the prices of two of the smaller sizes of Asda's Smart Price mild cheese actually fell. The fact, however, that Asda departed from its previous pricing intentions does not mean that it did not originally intend to increase prices by 20p per kilo, as recorded in the 4 November email. Future prices are, by their very nature, uncertain. That Asda may subsequently have altered its intentions is not, of itself, a reason to doubt that Asda had disclosed its future pricing intentions to Dairy Crest.

335. In those circumstances, we have concluded that Asda disclosed its future pricing intentions to Dairy Crest on or before 4 November.

Asda's state of mind as 'A'

336. The next issue before us is whether the information contained in the 4 November email had been disclosed to Dairy Crest by Asda with the requisite state of mind. Our starting point in analysing this Strand, as against Tesco, is that Asda's ERA constitutes some evidence of its state of mind when it disclosed its future retail pricing intentions to Dairy Crest. As we have already explained, however, it is evidence that has very little value in the context of this appeal by Tesco.

337. Tesco disputed the OFT's finding that Asda had the requisite state of mind and argued that there was nothing to support the finding that Asda may be taken to have intended and did, in fact, foresee that Dairy Crest would make use of that information to influence conditions on the cheese retail market.

338. The Tribunal notes, at the outset, that we do not know which Asda employee passed the information contained in the 4 November email to Dairy Crest, any more than we know who at Dairy Crest received it. No one working for Asda at the time was called to give evidence.

339. Tesco referred us to a transcript of an interview with Mr Storey conducted by Mr Tom Heideman, an official of the OFT, on 26 June 2008 (the "Storey Interview"). The Storey Interview was conducted as part of the process of agreeing the ERA between Asda and the OFT. Mr Storey (referred to as "DS" below) was asked questions, in particular, about his reaction to Mr Arthey having sent the 4 November email to Mrs Oldershaw:

> "[OFT] Would you ever, I mean, are you surprised that Neil Arthey was telling Lisa [Oldershaw of Tesco] that, well, providing her with a spreadsheet showing the suggested ...?
> DS Yes I am, yes.
> [OFT] So I take it you wouldn't expect that to happen then?
> DS No.
> [OFT] Not even under the pressure of, you know, at the time of farmers and...
> DS No, although, as we said earlier, I think it was accepted that, across the industry, that Dairy Crest were trying to pass down to farmers 20p a kilo, so we all naturally assumed that all retails would go up by 20p.
> [OFT] But you wouldn't have expected them to...?
> DS No.
> [OFT] ... circulate around a spreadsheet relating to your own...
> DS Certainly not, no.
> …
> [OFT] … where Dairy Crest passes on information about Asda's prices, you said you were surprised to see that email?
> DS Yes, because we – I'm just trying to recall if we – we do ask them in most emails not to divulge that information to other retailers. Because we have to provide that information for them to pre-price packs."
>
> (Transcript of Storey Interview, pp 38-40.)

340. We agree with Tesco that the Storey Interview casts considerable doubt on the OFT's finding that Asda had the relevant state of mind on or before 4 November. It

is readily apparent from these transcript excerpts that Mr Storey did not foresee, still less intend, that Mr Arthey would pass on the spreadsheet of Asda's suggested retail prices to Mrs Oldershaw. The transcript records that Mr Storey was asked about the spreadsheet attached to the 4 November email. It seems clear, however, that Mr Storey's apparent surprise, indeed disquiet, concerned Dairy Crest's disclosure of Asda's future prices to Tesco generally. We bear in mind, of course, that this transcript of the Storey Interview was unsigned and unsworn, and, moreover, that we have not heard evidence from Mr Storey. That said, we also bear in mind that we are not relying on this transcript in order to uphold a finding of an infringement. It shows Mr Storey's reaction when he was told that Asda's future pricing intentions had been transmitted to one of its major competitors. Had the OFT wished to clarify Mr Storey's evidence or challenge the veracity of the answers he gave in 2008, then it was incumbent on the OFT to call him to give evidence.

341. For these reasons, and notwithstanding the formalistic admission of liability contained in its ERA, we are in doubt as to whether someone at Asda had the requisite state of mind at the time of the A to B transmission of Strand 5.

342. We turn next to consider the sufficiency of the evidence on which the OFT relied to support its finding that Asda knew, or in fact foresaw, that the information contained in the 4 November email would be passed by Dairy Crest to Tesco. That evidence was as follows:

(a) Asda's awareness of the existence of a plan to co-ordinate retail price increases for cheese in order to subsidise an increase in farmgate prices (paragraph 5.348 of the Decision);

(b) Asda having told McLelland that it would be moving its retail cheese prices on particular dates in November;

(c) Asda having received information regarding other retailers' retail pricing intentions from Dairy Crest (paragraph 5.171 of the Decision);

(d) the evidence of Mr Reeves, of Dairy Crest, that the 4 November email was "*inappropriate*" because Dairy Crest "*shouldn't be sharing one retailer's intentions with another*" as it "*knew that was anticompetitive*";[101] and

(e) an internal Dairy Crest email dated 24 October suggesting that Mr Reeves had "*intelligence*" about Asda intending to increase its own-label retail prices.

We deal with each of these points in turn.

343. First, we have seen evidence that Asda had received the Dairy Crest briefing document in late September and knew that Dairy Crest was doing everything it could to persuade the retailers to increase their cost and retail prices. Those facts, however, do not, of themselves, prove that there had been a plan to co-ordinate retail price increases for cheese in order to increase farmgate prices by 2 ppl, still less that Asda was aware of such a plan.

344. Secondly, the OFT referred us to the fact that Asda had discussed the proposed increases in cost and retail prices with its cheese suppliers, including Dairy Crest. In the Decision, the OFT found that Asda had disclosed its pricing intentions to two of its cheese suppliers, Glanbia and McLelland, on at least two prior occasions. For example, Mr Meikle of McLelland sent an email to Mr Storey of Asda on 23 October recording the fact that they had discussed Asda's intention to change retail prices for pre-pack cheese on 4 November and deli cheese on 11 November. We were not shown any evidence, however, as to Asda's state of mind when it made those disclosures and the OFT has not demonstrated that Asda may be taken to have intended, or in fact foresaw, that Dairy Crest would make use of the information contained in the 4 November email in the way that it did. We are mindful that it is often necessary to reconstitute certain details of a case by inference but inferences must be based on some evidence if they are to be found reliable. We have not seen such evidence so far as Asda's state of mind in connection with this Strand is concerned.

[101] Transcript, Day 5, pp. 144 and 145.

345. Thirdly, it was the OFT's case that Asda had received information from Dairy Crest about its competitors' future retail pricing intentions. On 1 October, for example, Asda personnel wrote emails to one another to the effect that Dairy Crest had told them that other retailers would be increasing their retail cheese prices as a result of Dairy Crest's proposed cost price increase of £200 per tonne (see paragraphs 5.223 to 5.230 of the Decision). None of those individuals were called to give evidence. We have seen no evidence that any of the Asda employees who had previously received information from Dairy Crest (or any other supplier) about the future pricing intentions of Asda's competitors were involved in dealing with Dairy Crest on or around 4 November. We do not know whether any of the individuals at Asda who had sent or received the emails on 1 October subsequently disclosed Asda's future pricing intentions to Dairy Crest a little over a month later. In those circumstances, we are unable to find that Asda may be taken to have intended that Dairy Crest would pass that information to Tesco.

346. Fourthly, we do not consider that the evidence of Mr Reeves assists us. He was not a recipient of the 4 November email and his evidence, given in 2012, as to what he thought that the 4 November email might have meant does not shed any light on what any of the employees of Asda thought or knew on or before 4 November 2002.

347. Fifthly, the OFT drew our attention to an email from Mr Richard Wilkinson of Dairy Crest, entitled "*Price Increase Update*", sent to a large number of his colleagues, including Messrs Arthey and Reeves. The email was sent on 24 October and read as follows:

> "After raising [retail selling prices] on [Cathedral City], [Sainsbury's] have now stated that they want to wait to raise prices on own label products until they have evidence that Asda and Tesco are moving. Arthur Reeves is in [Sainsbury's] tomorrow and will push for them to continue on track rather than wait based on intelligence that he has on Tesco and Asda.
>
> We are now packing blank labels for Asda and packing the new priced packs for [Marks & Spencer] so the movements are in the pipeline. This needs to be communicated so that the lag created by everyone waiting for each other to move in store can be reduced."

348. It was pointed out on behalf of the OFT (correctly) that the email suggests that Mr Reeves had obtained "*intelligence*" that Asda and Tesco were going to increase the

retail prices of their own-label cheeses. The email also implies that Mr Reeves would use this information to reassure Sainsbury's that it would not be undercut by its competitors. We note in passing that Mr Reeves could not recall these matters. Importantly, however, what this email does not evidence is that Asda envisaged that Dairy Crest would pass its future pricing intentions to other retailers. Given this, it is not possible for the OFT to rely on this email as showing that Asda had provided the pricing information contained in the 4 November email to Dairy Crest in circumstances where it may be taken to have intended that Dairy Crest would make use of that information to influence conditions on the retail cheese market.

349. We note that there does not appear, from the limited evidence before us, to have been a legitimate commercial reason for the disclosure by Asda to Dairy Crest of its future retail pricing intentions. Contrary to the position in Strands 2 and 3 above, however, we have not seen nor heard any direct evidence of the actual transmission by Asda and we do not know the precise terms or manner in which it was made. Thus, we are not persuaded to the relevant standard that the OFT has established that Asda acted with the requisite state of mind.

C. Can the OFT rely on a lesser state of mind than intent and/or actual foresight?

350. At paragraph 3.44 of the Decision, the OFT set out a three-step framework, which it applied in analysing the evidence before it. For present purposes, it suffices to set out the first two of those steps only, which follow closely the test set out by Lloyd LJ in *Toys and Kits*:

> "i. retailer A disclosed its future retail pricing intentions to supplier B in circumstances where retailer A may be taken to have intended or did, in fact, foresee that supplier B would make use of that information to influence market conditions by passing that information to other retailer competitors of retailer A (of whom retailer C is or may be one); and
>
> ii. supplier B did, in fact, pass that pricing information on to retailer C in circumstances where retailer C may be taken to have known the circumstances in which the information was disclosed by retailer A to supplier B or retailer C did, in fact, appreciate that the information was being passed to it with retailer A's concurrence ..." (emphasis added)

In paragraph 3.46 of the Decision, the OFT stated that it considered that:

> "... where an undertaking discloses its future retail pricing intentions to a supplier in circumstances in which it is 'reasonably foreseeable' that that information will be passed on to other retailers in order to influence market conditions, this might well be sufficient to establish a concerted practice in a particular case ..." (emphasis added)

Importantly, however, the OFT expressly refrained from deciding whether a lesser state of mind than intent or actual foresight would be sufficient (see paragraph 3.47) because it concluded that that higher standard was met.

351. In its Defence, the OFT stated that its case "*on this appeal is that, as in* [*Toys and Kits*]*, there is no need to decide whether a lower standard in relation to state of mind would be sufficient, since in any event the higher standard is met*." It did, however, seek to reserve the right to make submissions as to the sufficiency of lesser states of mind if necessary and, in particular, "*as regards a standard of 'recklessness' in the sense of actual awareness of risk*" that future retail pricing information would be passed on to a competing retail by a common supplier.

352. In its Skeleton Argument, the OFT contended that the requisite standard of 'knowledge' for proving the existence of a concerted practice is not limited to 'intention' but includes 'foresight' also. The OFT submitted that such a standard "*certainly encompasses recklessness*" and also "*that 'suspicion' or 'foresight of the possibility' is sufficient*". When it came to opening submissions, the OFT's case had evolved somewhat further and we were invited, in the event that we did not find Lloyd LJ's test in *Toys and Kits* to be satisfied, to make findings on the basis of a "*suspicion, hope*, [or] *taking of risk*". By the time of its written closings, the OFT's position was that it was "*entirely appropriate, and indeed logically necessary*" to find an infringement of the Chapter I prohibition in "*any of the following circumstances: (i) where A did know or (ii) where A suspected or (iii) where A could have known or (iv) where A ought to have known*" that supplier B "*would (or might)*" pass its confidential future pricing intentions to another retailer, C.

353. We note, as indeed the OFT did, that in *Toys and Kits*, Lloyd LJ expressly left open the question of whether or not a lesser state of mind than intent or actual foresight is sufficient. His Lordship did, however, express some reservations on the point. He indicated at paragraph 91 of his judgment (see also paragraph 140) that the Tribunal

panel in *Football Kits* "*may have gone too far*" if the reference in its decision to reasonable foreseeability was intended to suggest that the requisite state of mind would exist in circumstances "*in which A did not, in fact, foresee that B would make use of the pricing information to influence market conditions or in which C did not, in fact, appreciate that the information was being passed to him with A's concurrence*."

354. While we also consider that the OFT may, in its opening and closing submissions recorded above, have gone too far, we, like the Court of Appeal, do not decide the point, albeit our reasons for not doing so are different. The Court of Appeal declined in *Toys and Kits* to decide the point because it determined that the higher standard of knowledge, namely intent or actual foresight, was met. In relation to this Strand, we have concluded that that higher standard is not met. The Tribunal is of course conscious that paragraph 3(2)(e) of Schedule 8 to the 1998 Act provides that the Tribunal may make any decision which the OFT could itself have made. In the circumstances of this appeal by Tesco, however, we do not consider that it would be either appropriate or fair for us to exercise that power so as to determine this point. As we have said, this Tribunal's task is to review, on the merits, the decision taken (see paragraph 124(e) above). It was open to the OFT to take its Decision, whether primarily or in the alternative, on the basis that a lower standard of proof was sufficient to make out the infringements and setting out its rationale for that conclusion. It specifically chose not to do so. If we were to now decide that point, and if we were to decide it in the OFT's favour (on which we do not comment), that would have the effect of reducing the evidential burden placed on the OFT to establish the Infringements as against Tesco. Tesco would, in effect, be disadvantaged by virtue of its own appeal against a decision, which was taken on the basis of intent or actual foresight.

D. The Tribunal's conclusion on Strand 5

355. For these reasons, the Tribunal is not satisfied, on the balance of probabilities, that there was a concerted practice between Asda, Dairy Crest and Tesco arising from contacts on or before 4 November. The OFT has failed to prove that Asda may be taken to have intended, or that it in fact foresaw, that the information contained in the 4 November email would be passed by Dairy Crest to Tesco. For the reasons

set out above, we do not consider it appropriate to determine the question as to whether any lesser state of mind is sufficient.

XV. STRAND 6 OF 2002: ASDA, SAFEWAY, SAINSBURY'S AND TESCO AS A; McLELLAND AS B; AND CO-OP AS C

356. On 4 November, Mr Stuart Meikle of McLelland sent an email to Mr Mike Owen of Co-op with the subject line "*Price movement*". That email outlined the cheese retail price movements which Mr Meikle considered would be made by the other major retailers "*over the next two weeks*". The OFT concluded that this email constituted a disclosure by McLelland to Co-op of the future retail pricing intentions for a number of Co-op's competitors, including Tesco. Mr Meikle indicated, in particular, that he believed that Tesco would increase its retail prices for random-weight cheese lines supplied by McLelland on 11 November and that, on 18 November, Tesco would increase its retail prices on all own-label lines. Mr Meikle gave similarly specific indications with respect to each of Asda, Safeway, Sainsbury's, Morrison's and Somerfield. His summary of the general position was that McLelland expected "*all retails to move over the next two weeks, provided all the information that we are currently picking up is correct*".

357. In the Decision, the OFT rejected the representation by Tesco, made in response to the SO, that the information contained in the email merely constituted Mr Meikle's speculation as to what would happen in the market. The OFT concluded that the information contained in Mr Meikle's email stemmed from, and was disclosed to McLelland by, each of the retailers concerned.

358. The OFT's analysis of this email and the surrounding circumstances is set out at paragraphs 5.353 to 5.366 of the Decision. The OFT did not consider that there was sufficient evidence on its file to find that, when he received Mr Meikle's email, Mr Owen would have appreciated the circumstances in which the other retailers disclosed their future retail pricing intentions to McLelland and did not, therefore, find that Strand 6 amounted, in and of itself, to an infringement of the Chapter I prohibition.

359. The OFT did, however, find that each of Asda, Safeway, Sainsbury's and Tesco may be taken to have intended, and did in fact foresee, that McLelland would make use of their future retail pricing intentions to influence the retail cheese market by passing that information on to their respective competitors, such as Co-op. The OFT set out its reasons for that conclusion at paragraphs 5.360 to 5.365 of the Decision.

360. Although the OFT did not conclude that Strand 6 amounted to an infringement, it relied on it nevertheless as important contextual evidence in that it was said to amount to another instance of Tesco having disclosed its future retail pricing intentions for cheese to McLelland. We deal with the specific relevance of these events in the context of other Strands, as and when appropriate.

XVI. STRAND 7 OF 2002: TESCO AS A; McLELLAND AS B; AND SAINSBURY'S AS C

A. Outline of Strand 7

361. In paragraphs 5.374 to 5.383 of the Decision, the OFT found that, on 5 November, Mr Ferguson of McLelland wrote to Ms Mackenzie of Sainsbury's informing her that "*ASDA have moved all sizes of Smart price mild cheddar to £2.69 per kilo and Smart Price mature cheddar to 3.69 per Kilo*" and that "[t]*his will be matched by Tesco*". The OFT's case was that Tesco had disclosed its future pricing intentions to McLelland, which then passed that information to Sainsbury's, and both Tesco and Sainsbury's had the requisite state of mind.

362. Tesco challenged this finding of infringement on two grounds. It argued, first, that there was no evidence that Tesco had told McLelland that it would match Asda's prices (i.e. no A to B transmission); and, secondly, that any such disclosure by Tesco to McLelland (which was denied) had not been made with the requisite state of mind.

B. A to B: did Tesco pass its future pricing intentions to McLelland?

A to B transmission

363. On 4 November Mr Arthey of Dairy Crest sent an email to Mrs Oldershaw of Tesco informing her that Asda would be increasing its retail prices for Smart Price cheese by 20p per kilo (see Strand 4 above). The next day, on 5 November, Mr Ferguson of McLelland informed Ms Mackenzie at Sainsbury's of Asda's price moves on Smart Price cheese. Mr Ferguson also stated that Tesco would match Asda's new retail prices on its competing Value cheese lines. At paragraph 5.377 of the Decision, the OFT found that Asda and Tesco subsequently increased the retail prices of, respectively, certain Smart Price and Value cheese lines, and decreased the prices of others.

364. We have seen no direct evidence that Mrs Oldershaw told Mr Ferguson how she intended to react to Asda's new Smart Price cheese retail prices. It is nevertheless this Tribunal's judgement, for the reasons set out below, that the information in question relates to Tesco's future retail pricing intentions and that Mr Ferguson was most likely to have obtained that information from Mrs Oldershaw.

365. We do not accept either the evidence of Mr Ferguson or Mrs Oldershaw that Mr Ferguson assumed, deduced or guessed that Tesco would mirror Asda's price changes. Mr Ferguson asserted that his assumption had been based on his "*market experience*" and his knowledge of how Tesco's basket policy worked (as to which see paragraph 23 above). We find this portion of his evidence not to be credible. It seems to us that, whilst it is possible that a well-informed supplier may have conjectured that Tesco would match price *reductions* by Asda, as its basket policy required, it was common ground that that policy did not apply to price *increases* by a competitor. Although Tesco might have followed Asda and increased its prices in order to boost its margin, it is also possible that Tesco might have held its prices down in order to undercut Asda and gain greater market share through lower prices. Indeed, Mr Ferguson accepted, in cross-examination, that there could have been circumstances in which Tesco might have wished to undercut Asda.[102] As such, it

[102] Transcript, Day 6, p. 121.

appears to us that there was no apparent way Mr Ferguson could have predicted, with such confidence, the future direction of Tesco's prices for Value cheese lines absent some inside information from Tesco.

366. Mrs Oldershaw claimed that it was obvious that any "*margin hungry*" buyer would raise the price of Value cheese in order to match Asda.[103] We do not accept the logic or accuracy of that claim. It is neither obvious nor commercially realistic to expect that a buyer would *habitually* follow the price increases of one of her competitors. Whilst such a course might be commercially advantageous on some occasions, it might also have been profitable for Tesco to undercut its major rivals at other times. Mr Scouler accepted in cross-examination that there might well have been instances in which Tesco was "*making a good profit from ...* [a] *product ... Your competitors may not have even picked ... up ... the fact that you were cheaper ...* [B]*y raising the price potentially you might have lost a competitive advantage ...*".[104] We note also that one of the exhibits to Mrs Oldershaw's second witness statement was a list of prices of Tesco Value cheese lines, some of which appear to have been offered at a lower price than Asda's Smart Price cheese during the autumn of 2002. This situation appears to have continued between September and November with no impetus on the part of Mrs Oldershaw to increase Tesco Value prices to match those of Asda. It does not, therefore, appear that there was any strong basis from which Mr Ferguson could have assumed, and told Sainsbury's with such certainty, that Tesco's retail prices would inevitably follow Asda's upwards. We also bear in mind our earlier observations about the risks for a supplier of giving one of its retailer-customers incorrect information and Mr Ferguson's comments in this respect (see paragraph 260 above).

367. Further, since McLelland did not supply or pack Tesco's Value cheese lines at the time, there appears to have been no reason for Mr Ferguson to have this information in his possession. It had nothing to do with the ordinary course of McLelland's relations with Tesco. Given this, and the unconvincing witness evidence on the point, we find that the statement regarding Tesco's pricing intentions contained in Mr Ferguson's email of 5 November to Sainsbury's was, more likely than not,

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103 Transcript, Day 9, pp. 161 and 162.

104 Transcript, Day 11, p. 26.

based on a prior communication by Mrs Oldershaw to Mr Ferguson that Tesco intended to match Asda's new retail prices for Smart Price mild and mature cheddar.

Tesco's state of mind as 'A'

368. We have concluded that, when Mrs Oldershaw disclosed Tesco's future pricing intentions to Mr Ferguson on or before 5 November, she may be taken to have intended, and in fact foresaw, that this information would be passed on by McLelland to other retailers, including Sainsbury's. In this regard, we refer to, and rely on, our assessment of Mrs Oldershaw's evidence as to her state of mind in connection with Strands 2 and 3 (see paragraphs 252-275, and 298-305 above, respectively). We also take into account the fact that the communication by Mrs Oldershaw to McLelland that Tesco would match these retail price increases by Asda cannot be explained away as part of the normal commercial dialogue between Tesco and McLelland since the latter did not then supply Tesco Value cheese to Tesco. That being the case, we find that it is more likely than not that Mrs Oldershaw disclosed her pricing intentions to Mr Ferguson in the knowledge and expectation that he was acting as a 'middleman' for the exchange of such intentions between retailers.

369. By 5 November, Mrs Oldershaw of Tesco had received one of her competitors' future pricing intentions from McLelland (Strand 2) and had disclosed her future intentions to one of her cheese suppliers, Dairy Crest, for onward transmission to one of Tesco's competitors (Strand 3). In both instances we found her to have acted with the requisite state of mind. Given those communications, we conclude that Mrs Oldershaw may, in the context of this Strand 7, be taken to have intended, and in fact foreseen, that what she told Mr Ferguson about Tesco's intentions with regard to cheeses not supplied to it by McLelland would be passed on to other retailers.

370. It also appears to us that, against the background of (a) each of the major cheese suppliers having proposed a cost price increase of £200 per tonne; (b) the likelihood and expectation of retail price increases in order to maintain margin should that cost

price increase be accepted; and (c) the commercial reality that, whilst Tesco would not want to be more expensive than Asda, it might decide to be less expensive so as to gain a competitive advantage, the information disclosed by Mrs Oldershaw to Mr Ferguson that Tesco would match Asda's new Smart Price prices – whether they increased or decreased – was information of the sort that Tesco intended McLelland to use to influence market conditions by passing it to other retailers, such as Sainsbury's.

C. The Tribunal's conclusion on Strand 7

371. The OFT found that Sainsbury's received Tesco's future retail pricing intentions and that Sainsbury's may be taken to have known the circumstances in which McLelland came by that information. The OFT further found that Sainsbury's used the information. These points were not contested by Tesco. Accordingly, we hold that, on the balance of probabilities, there was a concerted practice between Tesco, McLelland and Sainsbury's arising on or around 5 November, whereby Tesco disclosed its future pricing intentions to Sainsbury's via McLelland and that Tesco (and Sainsbury's) acted with the requisite state of mind.

XVII. STRAND 8 OF 2002: ASDA AS A; McLELLAND AS B; AND TESCO AS C

A. Outline of Strand 8

372. In paragraphs 5.399 to 5.407 of the Decision, the OFT found that, on or before 4 November, Asda had disclosed the timing of its future retail price increases on own-brand and deli cheese lines to McLelland, and did so with the relevant state of mind; this information was then transmitted to Tesco on 8 November 2002 during a conversation between Mr McGregor of McLelland and Mrs Oldershaw.

373. Tesco submitted that there was no evidential basis for the OFT's conclusion that future pricing intentions had been communicated from Asda to McLelland or from McLelland to Tesco. Even if there had been such communications, Tesco contended that neither Asda nor Tesco had been shown to possess the necessary mental state for a finding of an infringement.

B. A to B: did Asda pass its future pricing intentions to McLelland?

A to B transmission

374. In order to evidence the A to B transmission of future retail pricing information by Asda to McLelland on Strand 8, the OFT particularly relied on:

(a) the ERAs entered into by, respectively, Asda and McLelland; and

(b) an email with the subject line "*Price movement*", sent by Mr Stuart Meikle, then McLelland's manager for the Co-op account, to Mr Mike Owen of Co-op on 4 November.

375. It is our judgement that the evidence presented by the OFT establishes, on the balance of probabilities, that Asda communicated its future retail pricing intentions to McLelland on or before 4 November.

376. Although the ERAs entered into by each of Asda and McLelland constitute some evidence of the transmission of future price information from Asda to McLelland, and receipt of that information by the latter, the probative value of that evidence is, as we have said in previous Strands, very low.

377. The OFT also relied on an email from Mr Meikle of McLelland to Mr Owen of Co-op, dated 4 November, in which Mr Meikle conveyed his belief that Asda "*will move all deli and pre-pack own label*" on 11 November. This is one of the instances where the OFT has relied on events relating to Strand 6 as evidence in support of its finding of a Chapter I infringement on this Strand. The fact that the OFT did not interview Mr Meikle, nor Mr Owen, does not, in our view, affect the probabilities of what had been disclosed by Asda. On a fair reading of this email, it suggests to us that McLelland possessed intelligence concerning the likely timing of Asda retail price increases for own-label lines. The email refers to what Mr Meikle 'believed' would happen. In light of the circumstances at the time, we are inclined to construe the email as referring to his belief based on conversations he, and his colleagues, had been having with McLelland's retailer-customers, including Asda. In reaching this conclusion, we bear in mind the evidence of Mr Ferguson who,

when cross-examined, accepted that there had been ongoing discussions between McLelland and Asda, which were the likely source of Mr Meikle's information.[105]

378. Tesco submitted that, by 8 November, it had been reported in the public domain that Asda was intending to increase its prices. This is the same news report as the one described in connection with Strand 5 above (see paragraph 331 above). This news item did not report anything about when precisely Asda intended to increase its retail prices, on which cheese lines or by how much. None of these matters were genuinely public at or around the time of the communications said to comprise Strand 8.

379. For the above reasons, we are satisfied to the requisite standard that Asda had disclosed to McLelland information relating to its future retail pricing intentions for own-label cheeses.

C. B to C: did McLelland pass Asda's future pricing intentions to Tesco?

B to C transmission

380. At this point it is necessary to interrupt the chronological sequence of events and return to Mrs Oldershaw's "*Cheese £200 T plan*" for "*Cost and Retail moves*" (see paragraph 285 above). As we have already mentioned, that document had been prepared to help Mrs Oldershaw inform Tesco's suppliers on 30 October about intended price moves on various cheese lines. It shows, in particular, that she had planned to move cost and retail prices for own-label cheeses sold by Tesco on 17 November. As explained below, this was said by the OFT to be relevant to what McLelland may have told Mrs Oldershaw just over a week later, on 8 November.

381. Between 29 October and 7 November it appears that Mr Ferguson wrote to Mrs Oldershaw several times in order to ascertain the dates and amounts of Tesco's intended retail price changes. On 7 November Mr Ferguson asked Mrs Oldershaw to confirm the new retail selling prices for packing Tesco own-label, random-weight cheese lines supplied by McLelland. The email asked Mrs Oldershaw to reply either by return email or by telephoning one of his colleagues, Mr McGregor. The

[105] Transcript, Day 6, p. 129.

next day, 8 November, Mr McGregor sent an email to his colleagues at McLelland, Messrs Irvine and Ferguson, recording a conversation he had had with Mrs Oldershaw concerning the increase of Tesco's retail prices for own-brand cheese lines. The email reads:

> "Lisa called to state Tesco will not commit to moving Own Brand until they see that Asda have moved and therefore will not give us their [retail selling prices]. While they are relatively confident that everything is in place with Asda, they are taking a "We won't believe it until we see it" stance."

382. It was common ground, therefore, that Mr McGregor had been in contact with Mrs Oldershaw on 8 November. His email above referred to Mrs Oldershaw's apparent unwillingness to change Tesco's retail prices for its own-label cheese lines unless and until Asda had changed the prices of its competing lines (this is referred to in the Decision as the fourth instance of conditional commitment being given by Tesco (see paragraph 5.402)). What Mr McGregor did when Mrs Oldershaw rang was controversial. There would appear to be at least two possibilities. Mr McGregor may have tried to reassure Mrs Oldershaw that it was safe for Tesco to raise its retail prices by telling her that Asda was planning to increase its retail prices on own-label cheeses. Alternatively, he may have written the 8 November email in order to garner his colleagues' views as to what, if anything, he should do next.

383. Paragraph 5.403 of the Decision found that the first of these possibilities was the most likely. The OFT relied particularly on Mr McGregor's statement: "*While they* [i.e. Tesco] *are relatively confident that everything is in place with Asda ...*". In our judgement, however, this comment does not of itself provide any insight as to what Mr McGregor might have said to Mrs Oldershaw. The statement does not make clear, for example, whether this was something that Mrs Oldershaw had said to Mr McGregor – which, self-evidently, cannot evidence the B to C transmission (i.e. McLelland to Tesco) – or something Mr McGregor had told Mrs Oldershaw. Assuming it is the latter, the remark "*everything is in place*" could refer to a number of things, including: (a) McLelland confirming Asda's ongoing commitment to raise cost and retail prices for cheeses across-the-board; (b) a general reference to Asda's future pricing intentions; (c) a specific reference to the timing of Asda's new prices for own-label cheeses; or (d) something entirely different. We simply are not in a position to know what "*everything*" refers to. The Tribunal does not know

what Mr McGregor, the author of the 8 November email, recalled of the conversation and the surrounding circumstances because neither party called him to give evidence.

384. In her second witness statement, Mrs Oldershaw stated that during their conversation on 8 November, Mr McGregor "*may have said something about Asda being likely to move soon*". Mrs Oldershaw was cross-examined on this topic. It was put to her that she had been given detailed information about Asda's prices. Mrs Oldershaw did not accept that suggestion. She maintained that she did not recall the conversation on 8 November in detail and in particular did not recall any discussions about Asda. We have no reason to doubt Mrs Oldershaw's evidence on this point.

385. The OFT contended that Mr McGregor must have told Mrs Oldershaw about Asda's intention to increase its retail prices for own-label cheeses on 11 November because McLelland wanted Tesco to do the same the following week (on 18 November). This would have been in accordance with Mrs Oldershaw's "*Cheese £200 T Plan*". Had Tesco's agreement been delayed until after 11 November, the OFT argued, Tesco's new retail prices for own-label cheese would not be able to take effect on 18 November. They would not have taken effect until after that date due to the time taken to run down stocks of cheese and/or to affix new price labels. The difficulty with the OFT's contention is that, whilst it suggests that McLelland may have had the motivation to pass the information it had about Asda's future retail prices to Tesco, it does not prove that McLelland, in fact, did so. The OFT's case, whilst logically quite possible, overlooks the absence of documentary or witness evidence suggesting that the B to C transmission actually took place in this Strand.

386. We accept, in line with our general approach set out at paragraphs 108 to 112 above, that the OFT can rely on McLelland's ERA as some evidence of its conduct. The probative value of that evidence is, however, very low and the burden of proof rests on the OFT. Given the paucity of evidence before us on this point, and the doubt which must operate to the advantage of Tesco on this appeal, we are unable to conclude that Mr McGregor informed Mrs Oldershaw about the timing of Asda's planned increases for its retail prices for own-label cheese.

D. The Tribunal's conclusion on Strand 8

387. Our overall conclusion is that, whilst the OFT has established that Asda passed its future pricing intentions to McLelland, the general and specific matters relied upon by the OFT were not sufficient to establish the fact of a B to C transmission from McLelland to Tesco on (or around) 8 November. In circumstances where the transmission from B to C has not been proved, we do not need to reach a decision on whether Asda and Tesco had the relevant state of mind.

XVIII. STRAND 9 OF 2002: TESCO AS A; McLELLAND AND/OR DAIRY CREST AS B; AND ASDA AS C

A. Outline of Strand 9

388. In paragraphs 5.424 to 5.437 of the Decision, the OFT found that, on or before 13 November, Tesco had raised its retail prices on Stilton and disclosed to either McLelland or Dairy Crest, or to both suppliers, that, unless Asda also increased its retail prices for Stilton, Tesco would reduce its retail prices again. The OFT's case was that this amounted to a disclosure by Tesco of its future pricing intentions to Dairy Crest and/or McLelland, which then passed that information to Asda. The OFT found that both Tesco and Asda had the requisite state of mind at the time of disclosure and receipt respectively.

389. The main issue between the parties in respect of this Strand was whether the information about Tesco's retail pricing intentions for Stilton, which McLelland and/or Dairy Crest passed on to Asda, originated from Tesco.

B. A to B: did Tesco pass its future pricing intentions to McLelland and/or Dairy Crest?

A to B transmission

390. There is no direct evidence of a transmission from Tesco to either McLelland or Dairy Crest to the effect that Tesco would reduce its retail price for Stilton if Asda did not move its retail prices up. In paragraph 5.436 of the Decision, the OFT referred to the "*pattern of evidence*", emanating in particular from Asda, that this

transmission must have taken place. Before the Tribunal it was the OFT's case that such a transmission took place in light of the following matters:

(a) By 13 November, Tesco had on a number of occasions made a number of commitments to increase its retail prices conditional upon its competitors, and in particular Asda, also increasing their retail prices (paragraph 5.435 of the Decision);

(b) On 29 and 30 October, Mrs Oldershaw of Tesco had informed both McLelland and Dairy Crest of her pricing intentions for Stilton, even though neither of them supplied Stilton to Tesco at the time (Long Clawson was the relevant supplier of Stilton to Tesco at the time);

(c) On 12 November, Mr Ferguson sent Messrs Doyle, Skeffington and Day, all of McLelland, an email relating to Tesco's retail prices. It had the subject line "*Tesco own label Cheddar*" and indicated that, as at 12 November, Tesco had not confirmed any movement on retail prices (given the subject line, presumably any movement on retail prices for Tesco "*own label cheddar*") to McLelland and that "[c]*ommunication will be daily with Tesco to target Retail movements*".

(d) On 13 November, Mr David Storey of Asda sent an internal email to a number of colleagues including Messrs Peter Pritchard, Harvey Bennett, and Chris Brown. Mr Storey stated that, although Asda had not yet increased prices for Stilton, "*all*" its competitors (other than Kwik Save) had "*moved up*". Mr Storey recorded, however, that "*others*" had "*indicated that they would move* [Stilton retail prices] *back down unless*" Asda moved up.

We address each of these matters in turn below.

391. First, we have already found that there is insufficient evidence before us to find that any of the conditional commitments to raise retail prices for cheese found by the OFT were given by Tesco during the autumn of 2002 (see the following paragraphs above: 185-188 (in relation to the Tesco DSGM); 215 and 216 (in relation to the

Glanbia note of 25 September); 218 (in relation to the Glanbia note of 27 September); and 382-384 (in relation to Mr McGregor's email of 8 November)).

392. Secondly, we accept that, in her 'round-robin' email of 29 October, Mrs Oldershaw had told all of her suppliers of her planned cost and retail price movements for cheese, including Stilton. This was followed by her telephone conversations with McLelland and Dairy Crest, amongst others, during which she probably informed them that she planned to increase cost and retail prices for Stilton by 4 November (as to which, see paragraph 288 above). We have already expressed our surprise in respect of those communications (see paragraph 286 above). This applies, *a fortiori*, to the disclosure by Tesco of its retail prices for Stilton to McLelland and Dairy Crest because neither of them supplied that cheese to Tesco at the time. Yet this disclosure does not evidence that Tesco had informed either McLelland or Dairy Crest that it would move its Stilton prices back down unless Asda increased its prices. Mrs Oldershaw categorically denied having provided such an indication on or around 13 November.[106] We cannot, in the absence of some further evidence, assume, still less conclude, that Mrs Oldershaw's communications at the end of October demonstrate either that she (i) at that time, or (ii) at some later but unspecified time, disclosed to McLelland and Dairy Crest that, if Asda did not match Tesco's retail price increases on Stilton, Tesco would reduce those prices again.

393. Thirdly, the OFT referred us to an internal McLelland email sent on 12 November. We note that this email is not referred to in the Decision. In any event, the email does not indicate that Tesco had told McLelland about its future retail pricing intentions for Stilton. All it shows is that McLelland had been engaged in an ongoing "*dialogue*" with Tesco "*regarding the market movement of £200 per Tonne*" and that Tesco had not confirmed "*any movement on retail* [prices]". The email also refers to stock levels and the time taken for packing cheeses. This suggests that McLelland had been keen to ascertain Tesco's new retail prices for random-weight cheeses so that they could be packed and labelled in a timely manner, in order to, as Mr Ferguson put it in the email, "*ensure that we continue with our* [s]*ervice levels*". It does not establish that Mrs Oldershaw had

[106] Transcript, Day 9, pp. 179 and 180.

communicated to McLelland that Tesco would move its retail prices on Stilton back down, unless Asda moved up its prices.

394. Fourthly, the OFT relied on an internal Asda email, dated 13 November, which recorded that Asda had not yet increased its retail prices for Stilton but "*All have moved up except Kwik Save*". The email also noted that Asda had apparently been told that "*others have indicated* [that they] *will move back down unless we follow due to moving 2 weeks ago*". The OFT submitted that the word "*others*" must have included Tesco as Tesco was Asda's main competitor. The OFT further submitted that the email was an internal and contemporaneous Asda document, and there was no reason to doubt its veracity. Even if we accepted both of those submissions, they do not mean that this email evidences that Tesco had been the source of that pricing information during a prior communication with one or both of Dairy Crest and McLelland.

395. In our judgement, the email does not, of itself, demonstrate a communication from Tesco to either McLelland or Dairy Crest. The position recorded by Mr Storey could equally be, as Tesco suggested, a logical deduction made on the basis of Tesco's basket policy, which allowed for a limited period in which Tesco's retail price for a basket product could be higher than those of a competitor. This might explain the reference in Mr Storey's email to an indication that others would reduce their prices again "*due to moving 2 weeks ago*". We do not consider it necessary to determine this point but record it to demonstrate the ambiguity that exists and which, in accordance with our approach set out at paragraph 126 above, must be resolved in favour of Tesco, since the burden of proof rests with the OFT. We note also that, since Mr Storey was not called as a witness, we do not know what he might have said about the circumstances that led him to write this email.

396. In the light of all these considerations taken together, the Tribunal considers that, in so far as it concerns Tesco, the evidence set out in that part of the Decision which relates to Strand 9 is not sufficient to support the conclusion that there had been an A to B transmission from Tesco to McLelland and/or Dairy Crest.

C. The Tribunal's conclusion on Strand 9

397. We conclude that the evidence relied upon by the OFT is not sufficient for us to find that Tesco passed its future retail pricing intentions to Dairy Crest and/or McLelland on or before 13 November. In our judgement, Strand 9 of the 2002 Cheese Initiative is not proved on the balance of probabilities. That being so, we do not need to decide whether each of Tesco and Asda had the relevant state of mind.

XIX. THE TRIBUNAL'S OVERALL CONCLUSIONS ON THE 2002 CHEESE INITIATIVE

398. In conclusion, as regards Strands 2, 3 and 7 of the 2002 Cheese Initiative, Tesco's appeal as to liability is dismissed. We have found that the evidence relied upon by the OFT was sufficient to establish, on the balance of probabilities, the concerted practices found in the Decision in which Sainsbury's and Tesco indirectly exchanged cheese retail pricing intentions via McLelland (Strand 2) and via Dairy Crest (Strand 3). We have also concluded that Tesco was party to a concerted practice whereby it indirectly communicated its future retail pricing intentions to Asda, via McLelland (Strand 7). We have found, however, that there was insufficient evidence to support the findings made by the OFT in the Decision in respect of Strands 1, 4, 5, 8 and 9 of the 2002 Cheese Initiative. As such, the OFT's finding that Tesco had infringed the Chapter I prohibition in those respects is set aside.

XX. THE 2003 CHEESE INITIATIVE

399. All dates referred to in the following sections analysing the individual communications said to comprise the 2003 Cheese Initiative are 2003 dates, unless otherwise stated. We adopt the same approach to the Strand analysis here as we did in relation to the 2002 Cheese Initiative (see paragraphs 157-159 above).

A. Introduction

400. The OFT found that, in September and October, Asda, McLelland, Sainsbury's and Tesco infringed the Chapter I prohibition by participating in a single, overall concerted practice which had as its object the restriction of competition in respect of

retail prices of British cheddar and territorial cheeses through the co-ordination of retail price increases in respect of cheese supplied by McLelland to each of these retailers. Each of Asda, Sainsbury's and McLelland have admitted their liability for this infringement by entering into their respective ERAs with the OFT.

401. The features of the 2003 Cheese Initiative found by the OFT in the Decision differed from those relating to the 2002 Cheese Initiative in two particular respects. First, the 2003 Cheese Initiative was narrower in scope since the OFT found that it involved only a single supplier, McLelland, and only three of the four major retailers, namely Tesco, Asda and Sainsbury's. Secondly, although the 2003 Cheese Initiative, like that in 2002, involved a proposed cost price increase of £200 per tonne, that increase had nothing to do with bringing about an increase in farmgate prices. Whilst Tesco indicated, on at least one occasion, its preference that any extra revenue received by McLelland from the proposed cost price increase be passed back to farmers, the OFT considered that the motivation for the 2003 Cheese Initiative was McLelland's desire to improve its margins in the face of rising production costs, which it considered threatened the viability of its business. In order to make the proposed cost price increase acceptable to its retailer-customers, McLelland is said by the OFT to have assisted Asda, Sainsbury's and Tesco to co-ordinate common retail price increases on McLelland cheese lines.

B. Background

402. The pertinent background to the 2003 Cheese Initiative began with a letter written by McLelland's sales director, Mr McGregor, to Mrs Oldershaw of Tesco on 29 August. That letter was initially sent to Mrs Oldershaw as an attachment to an email from Mr Stuart Meikle but, it seems, was also sent by post. Mr Meikle held the position of Tesco account manager at McLelland at the time, following Mr Ferguson's promotion to the position of national account controller earlier in 2003. Mr McGregor's letter stated that McLelland had decided to increase its cost prices across the entire range of cheeses it supplied to Tesco with effect from 1 October. Mr McGregor stated that:

> "I am sure you are aware of the current situation in the dairy market with cheese stocks running low and forecast to become shorter unless returns begin to improve. This, combined with the fact that we have not increased our manufacturing costs outside of fluctuations on the milk price in the last five years, means that we have

> no option but to make this move. Specifically, rising costs on labour, distribution and insurance have markedly increased year on year and we need to recover against this inflation.
>
> Your account manager will be able to provide you with further details on your position, and will forward a breakdown of the cost implications by product line."

403. Mr Meikle's covering email referred to a meeting which was planned between him and Mrs Oldershaw for, and did in fact take place on, 4 September, in order to discuss McLelland's proposed cost price increase. The email indicates that, amongst other things, they were also due to discuss a concern Tesco had regarding the margins that it was achieving on McLelland's branded pre-pack cheddar, Seriously Strong.

404. We have also seen a copy of Mr McGregor's letter of 29 August, which was sent to Safeway (which was not found by the OFT to have participated in the 2003 Cheese Initiative). Although we have not seen copies of letters sent to either Asda or Sainsbury's, it is common ground that they received a similar proposal, in one form or another. Indeed, the text of Mr McGregor's letter suggests that it was a generic letter sent to a number of McLelland's customers. On 5 September, Mr Calum Morrison, McLelland's account manager for Sainsbury's, sent an email to Sainsbury's attaching a copy of a PowerPoint presentation, which to set out the rationale for the proposed cost price increase. The first slide, which was titled "*Price Increase*", recorded:

> "• £200 tonne increase on all business from October 2003
> • This is to bring margin back into cheese for the manufacturer
> • Not related to milk prices
> • This will be a total market move
> • All major suppliers
> • All major retailers
> • All [retail selling prices] will move..."

405. At this point in our judgment, we consider it appropriate to record that the OFT's decision not to call witnesses in this appeal has affected the Tribunal's ability to determine what happened in 2003. This is partly because the documentary evidence is incomplete and, often, far from conclusive; but also because the key individual at McLelland in 2003 (as regards the Tesco account) was Mr Meikle, from whom we heard no evidence. The majority of McLelland documents relied upon by the OFT

to establish the 2003 Cheese Initiative were authored by Mr Meikle, and passed between him and Mrs Oldershaw of Tesco. It was Mr Meikle who had day-to-day responsibility for the Tesco account in 2003. Mr Ferguson was neither the author, nor the recipient, of the material documents. In this context, and taking account of the circumstances, we have resolved ambiguities in the evidence in favour of Tesco, in accordance with our general approach set out at paragraph 126 above.

XXI. STRAND 1 OF 2003: ASDA AS A; McLELLAND AS B; AND TESCO AS C

A. Outline of Strand 1

406. The OFT's findings in respect of Strand 1 of the 2003 Cheese Initiative are set out at paragraphs 5.513 to 5.517, and 5.529 to 5.539 of the Decision. In essence, the OFT found that, during a telephone conversation on Friday, 26 September, Mr Meikle of McLelland informed Mrs Oldershaw of Tesco that it was Asda's intention to raise its retail prices for cheese on Monday, 29 September. It is not clear whether this information related only to cheese lines supplied to Asda by McLelland or cheeses more generally. Either way, the OFT found that this was information, which Asda had communicated to McLelland on or before 24 September. On the basis of the evidence set out in paragraphs 5.589 to 5.613 of the Decision (which is in the form of three internal Asda emails dated 10, 22 and 23 October, respectively), the OFT concluded that Asda had disclosed its future retail pricing intentions to McLelland in circumstances where it may be taken to have intended, and did in fact foresee, that McLelland would make use of that information to influence conditions on the retail cheese market by passing Asda's future retail pricing intentions to Asda's competitors.

B. Background to Strand 1

407. The OFT's case on this Strand rests principally on an internal McLelland document authored by Mr Meikle and titled "*Tesco Briefing*" (the "Tesco Briefing Note"). Although the document was undated, it was common ground, based on its content, that it was most likely drafted on 2 or 3 October. The Tesco Briefing Note set out Mr Meikle's understanding of the then "*present situation*" with respect to the discussions between Tesco and McLelland, *vis-à-vis* the proposed cost price

increase of £200 per tonne. It was prepared as a briefing for McLelland's sales director, Mr McGregor, and its joint managing director, Mr Irvine, in advance of a meeting scheduled to take place on 6 October with Mr Scouler and Mrs Oldershaw, both of Tesco. We shall return to that meeting below. Before coming to the communications alleged to constitute this Strand, it is necessary to say a little more about the Tesco Briefing Note, since it is that document which forms the basis of the OFT's case on the A to B transmission.

408. The Tesco Briefing Note recorded that, at the close of the 4 September meeting between Mr Meikle and Mrs Oldershaw, Mrs Oldershaw "*accepted the cost increase on the basis that we* [McLelland] *would work to increase retail prices across the market to maintain retailer margin.*"

409. The OFT found, at paragraphs 5.499 and 5.500 of the Decision, that the record of the meeting of 4 September in the Tesco Briefing Note proved that Mrs Oldershaw had accepted McLelland's cost price increase as at 4 September, subject to a conditional commitment to participate in co-ordinated increases in retail prices for cheese. Tesco challenged the veracity of that version of events.

410. Mrs Oldershaw accepted in cross-examination that she knew that McLelland would be approaching the major other retailers regarding the cost price increase.[107] She also accepted that Mr Meikle had proposed a retail price increase to her, as "*all suppliers do when they ask for* [a] *cost price increase*".[108] Mrs Oldershaw's evidence was, however, that she never agreed to cost price increases at a first meeting with one of Tesco's suppliers and that she did not do so on this occasion either.[109] She also denied that she gave the conditional commitment attributed to her by Mr Meikle in the Tesco Briefing Note.[110] Indeed, it was her evidence that at that time there was no discussion of retail prices because she had not yet accepted the cost price increase.[111]

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107 Transcript, Day 10, p. 54.
108 Transcript, Day 10, p. 56.
109 Transcript, Day 10, p. 56.
110 Transcript, Day 10, pp. 61 and 62.
111 Transcript, Day 10, p. 61.

411. Mr Irvine of McLelland said in cross-examination that the conditional commitment, which Mrs Oldershaw was recorded as having given or acquiesced to, was an instance of McLelland trying to represent "*that this is a safe rise, everybody is going up, all the processors, all the retailers, all the prices, this is safe ... don't be alarmed about it. So we are trying to create a safe scenario for everybody to put their prices up.*"[112] There are, however, several reasons to treat this evidence with caution. First, Mr Irvine could not recall actually having seen the Tesco Briefing Note at the time, although he accepted he may have done.[113] Secondly, even had he done so, he was not in attendance at the meeting of 4 September (that was attended by Mr Meikle and Mrs Oldershaw only) and so his evidence was no more than his interpretation of the Tesco Briefing Note some nine years on. Thirdly, Mr Irvine's evidence contradicts the unequivocal evidence of Mrs Oldershaw, the only witness we have heard who was at the meeting in question. She maintained that no such commitment was given.

412. Mrs Oldershaw stated that, although she had not ruled out the possibility of Tesco accepting the cost price increase, she dragged out the process as long as she could, as was her usual practice, by requesting that McLelland provide a more detailed justification for it. Mrs Oldershaw suggested that Mr Meikle may have misinterpreted the fact that she did not reject outright the proposed cost price increase as an in-principle acceptance of it. She also speculated that Mr Meikle may have chosen to present matters in the Tesco Briefing Note so as to cast himself in a better light for the benefit of his superiors.

413. On the balance of probabilities we reject the speculation by Mrs Oldershaw that Mr Meikle, in effect, fabricated her acceptance of the cost price increase to impress his superiors. It seems to us unlikely (although we recognise of course that we have not heard evidence from him) that Mr Meikle would have fabricated information for the purpose of briefing his superiors prior to a meeting with McLelland's most important customer, Tesco.

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112 Transcript, Day 7, p. 114.
113 Transcript, Day 7, p. 113.

414. Mr Meikle recorded in the Tesco Briefing Note, however, that "*Lisa* [Oldershaw] *requested a further explanation as to why we* [McLelland] *arrived at the figure of £200*". That further explanation was duly sent by Mr Meikle on 12 September. This appears to be inconsistent with Mr Meikle's recorded understanding that Mrs Oldershaw had already accepted the cost price increase. On the basis of the evidence before us, the most likely explanation for this is that Mr Meikle had, incorrectly, understood Mrs Oldershaw to have accepted, in principle, the proposed cost price increase at the 4 September meeting but that she needed further convincing that the figure of £200 per tonne was justified. Our conclusion is reinforced by the fact that Mr Meikle also recorded in the Tesco Briefing Note that, on Tuesday, 30 September, he had a telephone conversation with Mrs Oldershaw in which she stated that "*she had not agreed to the £200 cost increase and that further justification was needed ...*". This is consistent with Mrs Oldershaw's evidence that, first, she had not accepted the cost price increase at the 4 September meeting and, secondly, that she had followed her normal policy and dragged out cost price negotiations for as long as possible.

415. The Tesco Briefing Note goes on to record that "[a]*ll conversations subsequent to this meeting* [of 4 September] *focused on what was happening to retail prices with my understanding* [being] *that the £200 increase was agreed*." We have not seen a record of any conversations between Mr Meikle and Mrs Oldershaw "*focused*" principally on retail prices. Indeed, on 24 September, Mr Meikle sent Mrs Oldershaw an email addressing both cost and retail prices. Whilst that email does appear to proceed on the basis that Mrs Oldershaw had accepted the proposed cost price increase, we have not been taken to any reply from Mrs Oldershaw to that email and it contradicts the position recorded in the Tesco Briefing Note that, on 30 September, Mrs Oldershaw said she had not accepted the cost price increase and further justification was required.

C. A to B: did Asda pass its future pricing intentions to McLelland?

A to B transmission

416. The Tesco Briefing Note records that, on 26 September Mr Meikle spoke to Mrs Oldershaw by telephone and told her that it was McLelland's understanding that

"*Asda would move to new retail prices from Monday 29th September*." At paragraph 5.531 of the Decision, the OFT relied on this statement as evidencing that Mr Meikle had disclosed Asda's future retail pricing intentions to Mrs Oldershaw. It was the OFT's case that Asda was the source of that information.

417. To support its case, the OFT relied on an email sent by McLelland's logistics manager, Mr Gerry Doyle, to Messrs McGregor and Ferguson, both of McLelland, on 24 September, which states in material part:

> "Jim [McGregor] / Tom [Ferguson]
> Further to my telephone conversation with Tom who confirmed that Asda will be moving to new retails effective from Monday the 29th.
> I urgently require the following information before I can proceed with the price change. ..."

The reference to "*proceed*[ing] *with the price change*", appears to be a reference to packing random-weight cheeses at the new retail prices.

418. The clear terms in which that email was expressed, "*Asda <u>will</u> be moving*" (our emphasis), suggests that Mr Ferguson had received that information from Asda. It is hard to conceive how else Mr Ferguson could have been so certain of the date of the retail price move by Asda. The email also makes it clear that McLelland proposed to act on the information. This further supports the OFT's conclusion, set out at paragraph 5.514 of the Decision, that the information, ultimately passed by Mr Meikle to Mrs Oldershaw, originated from Asda. Tesco now accepts that this is possible but argues that it is not a conclusion open to us because the OFT called no witnesses from Asda. We disagree. We do not consider that evidence from an employee of Asda is necessary in order for us to hold that the information given first by Mr Ferguson to Mr Doyle, and then by Mr Meikle to Mrs Oldershaw, originated from Asda. For the reasons set out above, that is a clear and permissible inference from the contemporaneous documentary evidence.

419. Whilst we have seen no direct evidence of how Mr Meikle obtained that information, we were told that McLelland operated from very small office premises and we accept that it is likely that one of his colleagues, such as Mr Ferguson who it appears had the information originally, gave him that information. It is equally

possible of course that one of his colleagues simply forwarded him Mr Doyle's email.

420. We have, therefore, concluded, that Asda did, either on or shortly before 24 September, communicate to McLelland that Asda would be increasing its retail prices for, at the least, cheeses supplied to it by McLelland on 29 September.

Asda's state of mind as 'A'

421. In order for the A to B limb of this Strand to be established, Asda must have had the requisite state of mind at the time it passed its future retail pricing intentions to McLelland. In other words, we must find that Asda may be taken to have intended, or in fact foresaw, that McLelland would pass Asda's future retail pricing intentions to its competitor-retailers with a view to influencing conditions on the retail cheese market.

422. The OFT submitted that Asda's state of mind could be inferred from any or all of the following matters:

(a) Asda subsequently received and acted on confidential future pricing information without objection. This is based on three internal Asda emails dated 10, 22 and 23 October respectively and, in so doing, Asda expressly discussed how its pricing behaviour would give a "*strong signal that* [it] *had no intention of holding back the market*";

(b) the 2003 FLM Initiative provided similar examples of Asda acting conditionally and participating in the co-ordinated setting of retail prices;

(c) Asda's participation in the 2002 Cheese Initiative;

(d) Asda was facing the same request for a cost price increase that Tesco was facing and Asda would not have wanted to be 'out of line' on retail prices; and

(e) Asda's admission of its participation in the 2003 Cheese Initiative pursuant to its ERA.

423. We have concluded that, based on the evidence we have seen, these points do not, whether individually or cumulatively, substantiate the OFT's conclusion, as recorded at paragraph 5.516 of the Decision, on this issue.

424. In our judgement, although the OFT can rely on Asda's ERA as some evidence, it is very little probative value in establishing Asda's conduct and state of mind at the relevant time. Furthermore, Tesco has challenged that evidence and argued that there is nothing to support the conclusion that Asda had disclosed its future retail pricing intentions to McLelland with the intention, or actual foresight, that McLelland would use that information to influence market conditions on the retail cheese market by passing it to Asda's competitors. On the contrary, Tesco argued that Mr Doyle's email of 24 September showed that Asda had clearly provided its future retail pricing intentions for the legitimate purpose of packing and labelling. We must, therefore, examine each of the other points relied upon by the OFT to establish Asda's state of mind. It is convenient to address these in reverse order.

425. First, it is true that Asda was faced with the same proposal for a cost price increase from McLelland that its competitors had received but that, of itself, tells us nothing about how Asda reacted to that proposal. Whilst the Tribunal accepts that Asda was unlikely to have wanted its retail cheese prices to be higher than those of its competitors, that simple commercial reality is not sufficient to discharge the burden of proof on the OFT, namely to prove on the balance of probabilities that Asda had disclosed its retail pricing intentions to McLelland with the requisite state of mind on or shortly before 24 September.

426. Secondly, whilst Asda accepted that it participated in the 2002 Cheese Initiative, that was a separate infringement, which occurred approximately one year previously and in markedly different market circumstances, most notably, the intense pressure from the farmers for an increase in farmgate prices. Furthermore, we have no evidence as to who the individuals concerned at Asda were in this particular instance since we do not know who passed this information to

McLelland. He or she might have been different from any of those individuals involved in the 2002 Cheese Initiative. We simply do not know. Whilst the infringement is committed by Asda as an undertaking, and not by the individuals employed by it (who form a part of the same undertaking with their corporate employer), Asda's state of mind can only be established by reference to the knowledge and intentions of its employees.

427. Thirdly, similar criticisms to those set out in the previous paragraph can be made as regards the OFT's reliance on Asda's participation in the 2003 FLM Initiative. We have seen no evidence that the same individuals were involved at Asda with both cheese and FLM, and it is clear that, according to the Decision, McLelland was not involved in the 2003 FLM Initiative. It did not supply FLM and was not an addressee of that part of the Decision: see paragraphs 1.5.iii. and 7.2.

428. Fourthly, it is our view that, whatever the correct interpretation of the emails of 10, 22 and 23 October referred to at paragraph 422(a) above, those communications post-date that of 24 September by a fortnight and more. In our view, what Asda did with information it appears to have received on or around 10 October can shed little, or no, light on its state of mind when imparting its own intentions to McLelland, with a *prima facie* legitimate commercial purpose, on or before 24 September. There would need to be some evidence demonstrating that the same state of mind existed at that earlier time. No such evidence has been adduced in this appeal.

429. For these reasons, we have reached the conclusion that there is insufficient evidence before us to establish the requisite state of mind on the part of Asda at the time it passed its future retail pricing intentions to McLelland on, or shortly before, 24 September.

D. The Tribunal's conclusion on Strand 1

430. It is, therefore, our judgement that, although the OFT has established that Asda passed its future retail pricing intentions to McLelland on or before 24 September, the evidence was not sufficient to satisfy us to the requisite standard that Asda may be taken to have intended, nor that it in fact foresaw, that that information would be

passed by McLelland to Asda's competitors. In circumstances where the OFT has failed to establish a necessary element of the A to B transmission, there is no need to carry out an analysis of the alleged B to C transmission, said to be from McLelland to Tesco.

XXII. STRAND 2 OF 2003: SAINSBURY'S AS A; McLELLAND AS B; AND TESCO AS C

A. Outline of Strand 2

431. The OFT's findings in relation to Strand 2 of the 2003 Cheese Initiative are set out at paragraphs 5.541 to 5.559 of the Decision. It was the OFT's case that, on 30 September, Mr Meikle disclosed to Mrs Oldershaw that Safeway and Sainsbury's were going to increase retail prices on certain cheese lines in that he faxed to Mrs Oldershaw "*pristine*" labels, showing retail prices which those retailers had not yet begun to change in-store. The OFT found that that information had been previously disclosed to McLelland by Safeway and Sainsbury's and, in the case of Sainsbury's only, that that had been done with the intention or foresight that such information would be passed to other retailers. No infringement was found against Safeway, however, because the OFT accepted that it was not in possession of any evidence in relation to the 2003 Cheese Initiative demonstrating the circumstances in which Safeway had disclosed its future retail pricing intentions to McLelland.

B. Background to Strand 2

432. On 29 September, Mr Brian Skeffington of McLelland sent an internal email to Mr John Bolton, the manager of McLelland's Mauchline packing facility. That email was copied to several other McLelland employees, including Mr Calum Morrison and Mr Meikle, the account managers for Sainsbury's and Tesco respectively. Mr Skeffington stated as follows:

> "To confirm [the] earlier telephone call in which I asked for your assistance to provide photocopy examples of all pre-pack labels that have been packed with the new retail prices as advised ...
>
> This information is to send to the buyers this afternoon so that they can be encouraged with proof that retails have moved and expedite price increases across the board."

433. The OFT analysed this email in the Decision at paragraphs 5.518 to 5.528. It determined that this email meant that McLelland staff were planning to, and did, photocopy price labels to demonstrate to the retailers' cheese buyers, like Mrs Oldershaw at Tesco, that retail price increases were being implemented by their competitors. During the investigation, McLelland informed the OFT, pursuant to its ERA, that the labels copied were most likely Safeway and/or Sainsbury's labels. The OFT concluded that they were both. The OFT further concluded that the retail prices to which the labels related were future prices. It reached this conclusion on the basis of the wording used in Mr Skeffington's email, taking into account the fact that, for random-weight cheeses, there would be a time-lag between packing them with the new prices printed and those same packs reaching the retailers' shelves (see paragraph 18(b) above).

C. A to B: did Sainsbury's pass its future pricing intentions to McLelland?

A to B transmission

434. Whilst we note Sainsbury's and McLelland's ERAs, there is no direct evidence of a transmission from either Sainsbury's or Safeway, in the role of 'A', to McLelland as 'B', of their respective future pricing intentions. It was the OFT's case, however, that such transmissions must have taken place in light of an email sent by Mr Meikle of McLelland to Mrs Oldershaw of Tesco on Tuesday, 30 September. It stated, in pertinent part:

> "Lisa,
> ...
> I have faxed copies of the Safeway & JS [Sainsbury's] labels to you.
> Safeway Savers Mild has increased in price by 26p / kilo and JS [Sainsbury's] "Isle of Bute" has increased by 20p / kilo.
> Regards,
> Stuart"

That email was also said to evidence the B to C (McLelland to Tesco) transmission for this Strand.

435. Both of the cheeses referred to in Mr Meikle's email were random-weight cheeses, meaning that McLelland had printed the prices on the labels on the instructions of Safeway and Sainsbury's respectively. In order for McLelland to have printed those labels, it is axiomatic that the two retailers must have provided their new retail

prices to McLelland. It goes without saying that, at the time those prices were provided to McLelland by the retailers, they would have been future prices.

436. We are satisfied, on the evidence before us, that by 30 September, someone at Sainsbury's (and Safeway) had disclosed its future retail pricing intentions to McLelland and that there was, therefore, an A to B transmission.

Sainsbury's state of mind as 'A'

437. It is now necessary to examine the state of mind of Sainsbury's at the relevant time (as we have said, no finding of infringement was made against Safeway). The OFT found at paragraph 5.543 of the Decision that Sainsbury's disclosed its future retail pricing intentions to McLelland in circumstances where it may be taken to have intended, and did in fact foresee, that McLelland would pass that information on to competing retailers to influence conditions on the retail cheese market. The OFT accepted that Sainsbury's would have needed to disclose its retail pricing intentions to McLelland in respect of Isle of Bute cheddar in order for the latter to print the relevant prices on the labels. As such, the OFT accepted that there was a legitimate reason for the disclosure (see Decision, paragraph 5.522). The OFT relied, however, on the context in which that disclosure was made in order to establish that Sainsbury's nevertheless had the requisite state of mind:

(a) the proposal for a "*£200 tonne increase on all business from October 2003*" sent by McLelland to Sainsbury's on 5 September (see paragraph 404, above), which referred to a "*total market move*" involving retail price increases for all cheeses by "[a]*ll major retailers*";

(b) there was no evidence suggesting that Sainsbury's took any steps to distance itself from that proposal and Sainsbury's did not identify any inaccuracies regarding this email as part of its representations on the SO and SSO;

(c) Sainsbury's entered into an ERA with the OFT; and

(d) Sainsbury's participation in the 2002 Cheese Initiative.

438. It is our judgement that those factors, whether taken individually or cumulatively, are not sufficient to establish that Sainsbury's passed its future retail pricing intentions to McLelland with the requisite state of mind. First, we reject the OFT's reliance on Sainsbury's conduct during the 2002 Cheese Initiative for the same reasons that we rejected it in relation to Asda under Strand 1 of the 2003 Cheese Initiative (see paragraph 426 above). Secondly, whilst Sainsbury's ERA can stand as evidence of Sainsbury's state of mind, it has little or no probative value in this regard and, as Tesco observed, there was quite clearly a legitimate labelling reason for Sainsbury's to have provided its future retail pricing intentions to McLelland. Thirdly, as Tesco pointed out, although Sainsbury's received the presentation slides on 5 September, nothing in that presentation proposed that McLelland would co-ordinate or facilitate any unlawful information exchanges. In his witness statement, Mr Ferguson of McLelland said that the slides were "*over-enthusiastic*" and did not accurately represent the position. In particular, he said that there should not have been any reference to all retailers moving their retail prices because McLelland simply did not have that kind of influence. Mr Scouler of Tesco also commented on the slides in his second witness statement (although he did not see them at the time) and said that, in his view, they were not very sophisticated and would have been unlikely to convince any other retailer. Given the consistency in their evidence, and the absence of any evidence to the contrary, we accept these points made by Messrs Ferguson and Scouler.

439. In addition, we note that, on the basis of the evidence before us, Sainsbury's appears to have passed its future retail pricing intentions to McLelland in relation to one line of cheese only, namely Isle of Bute cheddar, at the relevant time. There was self-evidently a legitimate commercial reason for that disclosure, as the very existence of the label faxed by Mr Meikle to Mrs Oldershaw demonstrates. Taking account of Lloyd LJ's statement at paragraph 106 of *Toys and Kits* that there ought not to be a "*cloud of illegality*" hanging over normal, bilateral communications between a retailer and its supplier, it seems to us that, in circumstances where there was a legitimate commercial reason for Sainsbury's to convey the future retail price of Isle of Bute cheddar to McLelland, the OFT must do more than fall back on "*the context in which the disclosure was made*" to establish the requisite state of mind. In this respect we note that this was an instance where, had the OFT chosen to call

witness evidence from Sainsbury's, the outcome may – and we put it no higher than that – have been different.

440. For those reasons, we reject the OFT's case that Sainsbury's disclosed its future retail pricing intentions to McLelland with the necessary state of mind and, as such, the OFT has failed to establish the A to B transmission of this Strand.

D. The Tribunal's conclusion on Strand 2

441. For the reasons set out above, it is our judgement that, although the OFT has established the A to B transmission of future retail pricing intentions by Sainsbury's to McLelland at some point before 30 September, the evidence before us was not sufficient for us to find that Sainsbury's may be taken to have intended, nor that it in fact foresaw, that that information would be passed by McLelland to Sainsbury's competitors.

442. In other instances where the OFT has failed to establish a necessary element of a Strand, we have concluded our analysis at that point. In this instance, however, it is necessary for us to address one particular point arising from the receipt by Mrs Oldershaw of the labels from Mr Meikle since it is of some significance for our analysis of Strand 5 below.

E. Consequential matters arising out of Strand 2

443. It is necessary for us to consider Mrs Oldershaw's actions following receipt of the faxed labels (whether they in fact represented future pricing information or not by that time is a point we do not decide). In her second witness statement, Mrs Oldershaw recorded that she had been concerned at the time she received the fax from Mr Meikle because the labels appeared to be "*pristine*". She believed that the "*labels had come from McLelland's packing units, and that the products they related to might not yet have been available in-store.*" It was her evidence that she telephoned Mr Meikle to tell him that he should not send her information like that and, indeed, that she took the matter sufficiently seriously that she raised it internally with Mr Scouler. A meeting between Mr Scouler and Mrs Oldershaw, on the one hand, and Messrs Irvine and McGregor of McLelland, on the other, was scheduled for 6 October (the "6 October Meeting") (it was in preparation for this

meeting that Mr Meikle had produced the Tesco Briefing Note discussed under Strand 1 above). Mrs Oldershaw stated that at the 6 October Meeting, she complained to the McLelland representatives about Mr Meikle having faxed her the "*pristine*" labels.

444. Mrs Oldershaw accepted that, prior to the 6 October Meeting, she did not raise Mr Meikle's conduct with anyone at McLelland, other than with Mr Meikle himself. She also said that she had no recollection at all of Mr Meikle's response to her telephone call complaining about his conduct. Mrs Oldershaw could not recall whether she had made any written record of her concerns or not. When it was put to her that, had she really harboured any concerns about the labels, she would have recorded them since that was what Tesco's competition law compliance programme required of Tesco staff, she professed not to recall the content of the training she had received. She accepted that there did not appear to be any documents supporting her evidence that she telephoned Mr Meikle to complain about the "*pristine*" labels he faxed to her on 30 September.[114]

445. In support of her evidence that she had concerns about Mr Meikle's fax, however, Mrs Oldershaw referred to a document titled "*McLelland Price Increase Proposal*" (the "Scouler Briefing Note"). That document was undated but it was Mrs Oldershaw's evidence that it was an internal note that she had prepared for Mr Scouler to brief him for the 6 October Meeting. Item number 7 in the Scouler Briefing Note read: "*Competition comission* [sic] *training desperately needed*." In her third witness statement, Mrs Oldershaw said that this corroborated her account that she had raised the "*pristine*" labels issue with Mr Scouler and that it was intended to act as a prompt at the 6 October Meeting to raise the issue that McLelland needed to implement some sort of competition law compliance training. In cross-examination, Mrs Oldershaw maintained that she had "*tabled Competition Commission compliance training on the basis of the label issue*".[115] Mr Scouler confirmed in cross-examination that the Scouler Briefing Note was in the format he usually received from one of his buyers ahead of a meeting with a supplier and that

[114] Transcript, Day 10, pp. 81-83.
[115] Transcript, Day 10, p. 102.

it was likely that he received the document in advance of the 6 October Meeting, although he could not specifically recall receiving this document.[116]

446. The OFT took a number of points on the Scouler Briefing Note. First, it was suggested by Counsel for the OFT that that Note could have been prepared, or at least updated, after the 6 October Meeting. Both Mr Scouler and Mrs Oldershaw demurred from that suggestion[117] and, in the absence of any evidence to the contrary, we accept their evidence on this point. On its face, there is nothing in the terms of the Scouler Briefing Note to suggest that it was not prepared in advance of the 6 October Meeting and there would seem, as Mrs Oldershaw pointed out, to be no reason to go back to such a brief document after a meeting and "*update it with random things*".[118]

447. It was also suggested for the OFT that the reference to "*Competition comission* [sic] *training*" could have been a reference to the Code of Practice set up by the Government following a recommendation from the Competition Commission after its investigation into the activities of supermarkets in 1999 and 2000.[119] Mrs Oldershaw, despite referring to that investigation in her third witness statement, maintained in cross-examination that she had no recollection at all of the investigation, nor of the Code, and that "*Competition comission* [sic] *training*" was simply the phrase that she and other buyers used for "*that kind of training*", in other words, training on competition law obligations.[120] We find the discrepancy between Mrs Oldershaw's recollection at the time she prepared her third witness statement (March 2012) and the time she gave oral evidence before us (May 2012) surprising. However, her position that the reference to the Competition Commission in the Scouler Briefing Note was not a reference to the Code of Practice was corroborated by Mr Scouler's evidence[121] and, taking the two together, we accept that evidence.

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116 Transcript, Day 12, p. 79.
117 See respectively, Transcript, Day 12, pp. 79 and 80; and Day 10, pp. 107 and 110.
118 Transcript, Day 10, p. 107.
119 "*Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom*", October 2000, CM 4842.
120 Transcript, Day 10, pp. 47, 48, 109 and 110.
121 Transcript, Day 12, pp. 81 and 82.

448. Mrs Oldershaw claimed that she raised the issue of Mr Meikle's "*pristine*" labels with the McLelland representatives at the 6 October Meeting. When asked about this in cross-examination, Mrs Oldershaw stated that she believed she had "*definitely raised the label issue*".[122] We do not accept her evidence on this point. Although there was evidence before us suggesting that competition law issues arose in the course of the meeting, Mrs Oldershaw's version of events is contradicted by the evidence of Messrs Scouler and Irvine who both attended the meeting also. Mr Scouler had no recollection at all of the "*label issue*" being raised at the meeting, nor could he specifically recall it being raised in advance although he said that it may have been.[123] There is no other evidence to support her recollection of events.

449. Both Mr Scouler and Mr Irvine remembered, however, that competition-related issues were raised at the 6 October Meeting, but by Mr Scouler, not by Mrs Oldershaw. Mr Irvine recalled suggesting that McLelland's proposed cost price increase might lead to an increase in retail prices for cheese by all grocery retailers, although he did not give any details and revealed no one's specific pricing intentions. Both recalled Mr Scouler putting a stop to that line of discussion as being inappropriate.[124] It would be surprising, if Mrs Oldershaw had actually raised the issue of the "*pristine*" labels, for both these witnesses to recall a discussion in which Mr Scouler sharply put an end to a discussion initiated by Mr Irvine about a generalised increase in retail cheese prices but to have no recollection of a related, and potentially more serious, issue regarding Mr Meikle's conduct being raised. Furthermore, Mr Irvine had no recollection of ever receiving a complaint about Mr Meikle's conduct in any context and indeed he stated that, had there been such a complaint from Tesco, he would "*remember* [it] *very clearly*", it would have "*absolutely stuck in* [his] *mind*".[125] Whilst he did not attend the 6 October Meeting, we also note that Mr Ferguson, Mr Meikle's direct superior at McLelland, was not aware of any complaint having been made about Mr Meikle.[126]

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122 Transcript, Day 10, p. 103.
123 Transcript, Day 12, p. 78.
124 See Transcript, Day 7, pp. 118 and 119; and Day 12, p. 77.
125 Transcript, Day 7, p. 15.
126 Transcript, Day 6, pp. 170 and 171.

450. From the foregoing, we draw the following three conclusions. First, we find that the reference to "*Competition comission* [sic] *training*" in the Scouler Briefing Note was a reference to the issue of the "*pristine*" labels faxed to Mrs Oldershaw by Mr Meikle. Whilst we have some hesitation in reaching this conclusion, not least because it was a somewhat opaque reference to an issue that Mrs Oldershaw stated she regarded as very important, we reject the OFT's ambitious suggestion that this was a reference to the Code of Practice for supermarkets and there was no other suggestion as to what the phrase might have been a reference to. Secondly, in light of our first finding, we accept Mrs Oldershaw's evidence, albeit with some hesitation again, that she raised the labels issue with Mr Meikle by telephone. Finally, in light of the evidence of Messrs Scouler, Irvine and Ferguson, and there being no other indication of the labels having been discussed, we reject Mrs Oldershaw's evidence that she raised the issue of the labels at the 6 October Meeting. It is not necessary for us to speculate as to why that matter was not raised at the 6 October Meeting.

XXIII. STRAND 3 OF 2003: SAINSBURY'S AS A; McLELLAND AS B; AND TESCO AS C

A. Outline of Strand 3

451. The OFT found in the Decision, at paragraphs 5.546 to 5.559, that on 2 October Mr Meikle emailed to Mrs Oldershaw a spreadsheet showing the "*old/current*" and "*new*" prices for various lines of cheese supplied by McLelland to Tesco's competitors. The OFT found that the "*new*" prices relating to Sainsbury's were not yet in store and, therefore, were future retail prices. The OFT submitted that Sainsbury's had given that information to McLelland in circumstances where it may be taken to have intended, or in fact foresaw, that it would be disseminated to its competitors such as Tesco and that Mrs Oldershaw should be taken to have known the circumstances in which Sainsbury's disclosed that information.

B. Background to Strand 3

452. On 2 October, Mr Meikle of McLelland sent Mrs Oldershaw an email stating that "*Sainsbury's have moved retail prices across more of their own label products ...*" Mr Meikle then set out eight lines of cheese with the previous and current prices in

relation to each. He signed off saying "*I have copies of the labels so let me know if you need them faxed to you.*" Notwithstanding the reference here to "*labels*", the OFT accepted in its closing submissions that these related to Sainsbury's prices that had just come in-store.

453. Mrs Oldershaw replied about 20 minutes later requesting that Mr Meikle produce a "*matrix of all your* [McLelland's] *lines, who stocks what and what retail* [prices] *they are currently at.*" Later that day Mr Meikle responded:

> "The attached is a matrix of our pre-pack and deli brands showing the prices across the multiples [i.e. the national multiples, being another way of referring to the retailers]. I have included the old/current retail and the new retail price where relevant. I will keep this updated as changes become visible and also let you know on any own label moves that we identify.
> Give me a call if you want any more information."

Mr Meikle attached a spreadsheet setting out 11 lines of pre-pack cheese and seven lines of deli cheese. For each of Tesco, Asda, Sainsbury's, Safeway and the Co-op, the spreadsheet had two columns titled "*Old Retail*" and "*New Retail*" respectively. The "*New Retail*" column was blank for each of Tesco and Asda. In respect of Sainsbury's, Safeway and the Co-op, some cells in the "*New Retail*" columns for pre-pack cheeses contained prices, whilst other stated "*n/a*", presumably denoting those lines a particular retailer did not stock. There were no "*New Retail*" prices for any of the deli cheeses sold by any of the retailers.

454. The evidence before us suggests that on 2 October, when Mr Meikle emailed Mrs Oldershaw, the "*new*" prices for at least five of the eight pre-pack cheese lines which were stocked by Sainsbury's and included in the spreadsheet, were in fact already in Sainsbury's stores. As the OFT itself noted in the Decision, Sainsbury's, in a memorandum on what it considered to be material factual inaccuracies in the SO, informed the OFT that its retail pricing data suggested that the prices recorded by Mr Meikle for the two branded Seriously Strong lines were in store by 30 September. In addition, we know from other documents on the record, that prices of three random-weight lines were also in-store on or before 2 October. In respect of the other random-weight lines, we simply do not know when those prices appeared in store.

455. It was, however, the OFT's case that the prices in the "*New Retail*" column were future retail prices. Nevertheless, it made no finding of infringement in respect of Safeway or Co-op because it had no, or at least no sufficient, evidence "*in relation to the circumstances under which either retailer disclosed its cheese retail pricing intentions to McLelland.*"

C. A to B: did Sainsbury's pass its future pricing intentions to McLelland?

A to B transmission

456. The OFT did not, in the Decision, give any indication as to when it considered that Sainsbury's passed its future retail pricing intentions to McLelland, nor is there any direct evidence of that transmission. In relation to the random-weight, pre-pack cheeses included in the spreadsheet (nine lines, although Sainsbury's only appears to have stocked six of those), it is clear that Sainsbury's must, at some point prior to 2 October, have passed its future retail pricing intentions to McLelland in order for McLelland to have packed those cheeses. That does not, however, follow for the two fixed-weight lines included in the pre-pack section of the spreadsheet (250g and 500g packs of Seriously Strong), which would not have had the price printed on them. Whilst it is of course quite possible that Sainsbury's had passed its future retail pricing intentions in respect of the fixed-weight cheeses to McLelland, there is simply no evidence of that.

457. We find that Sainsbury's must have passed its future retail pricing intentions in respect of the random-weight cheeses to McLelland and, therefore, in respect of those lines at least, there was an A to B transmission of future retail pricing intentions from Sainsbury's to McLelland.

Sainsbury's state of mind as 'A'

458. At paragraph 5.550 of the Decision, the OFT found that Sainsbury's disclosed the relevant information to McLelland in circumstances in which it may be taken to have intended, and did in fact foresee, that McLelland would use that information to influence conditions on the cheese retail market by passing it on to competing retailers in order to facilitate further cheese retail price increases. The OFT's

reasons for that finding were in fact precisely the same reasons on which the OFT relied in relation to Strand 2 of the 2003 Cheese Initiative (see paragraph 437 above). We rejected those reasons in that context (see paragraphs 438-440 above) and we reject them again here for the same reasons.

459. We therefore conclude that the OFT has not established that Sainsbury's passed its future retail pricing intentions to McLelland in circumstances in which it may be taken to have intended, or did in fact foresee, that McLelland would pass that information on to Sainsbury's competitors, including Tesco.

D. The Tribunal's conclusion on Strand 3 of the 2003 Cheese Initiative

460. For the reasons set out above, it is our judgement that, although the OFT established the A to B transmission of future retail pricing intentions by Sainsbury's to McLelland in respect of certain random-weight cheese lines at some point prior to 2 October, the evidence before us did not provide a sufficient basis for us to conclude that Sainsbury's may be taken to have intended, nor that it in fact foresaw, that that information would be passed by McLelland to Sainsbury's' competitors.

XXIV. STRAND 4 OF 2003: ASDA AS A; McLELLAND AS B; AND TESCO AS C

A. Outline of Strand 4

461. It was the OFT's case, set out at paragraphs 5.560 to 5.570 of the Decision, that on 7 October, Mr Meikle sent Mrs Oldershaw an updated version of the spreadsheet he had previously sent to her on 2 October (see Strand 3 above, in particular paragraph 453). The spreadsheet this time included prices for Asda cheeses and, on the basis of the language used in the covering email, it was the OFT's case that those prices, at least in relation to the random-weight cheeses listed, were future, and thus confidential, prices.

462. The OFT found that Asda disclosed that information in circumstances where it may be taken to have intended, and did in fact foresee, that McLelland would pass that information to Asda's competitors. It concluded that Asda's employees knew that they were acting as part of a "*coordinated market move*".

B. Background to Strand 4

463. On 7 October Mr Meikle emailed Mrs Oldershaw twice. His first email, sent at 08:55, stated:

> "Hi Lisa,
> Quick update on the retail position of Seriously Strong.
> Asda – 250g Coloured and White was £1.52, now £1.71
> - 400g Coloured and White was £2.56, now £2.68
> These prices are taken from the Asda website. We will buy some product form [sic] store this morning and I can fax the receipts to you as confirmation ..."

On the basis of that email, it seems that Asda had moved the retail prices of Seriously Strong pre-pack cheese in-store. The OFT did not seek to contend otherwise.

464. Mr Meikle's second email, sent slightly under two hours later at 10:47, however, on its face appears to pass Asda's future retail pricing intentions to Mrs Oldershaw of Tesco. That email stated as follows:

> "Hi Lisa,
> Please find attached an updated spreadsheet including the new retail prices that Asda will run on McLelland Random Weight branded lines.
> The only Asda label line we do is Extra Special Mull of Kintyre 250g where the retail price has moved from £1.48 to £1.68 ..."

465. The attached spreadsheet was, as Mr Meikle's covering email indicated, an updated version of that sent on 2 October. Apart from McLelland's Seriously Strong, the column of "*New Retail*" prices for Tesco remained blank. That for Asda was, however, filled in. The OFT concluded that it was "*evident*", in particular from the description of those prices as "*new retail prices that Asda **will run***" (emphasis as it appears in the Decision), that the updated spreadsheet contained Asda's future retail pricing intentions. The OFT noted that Asda had not submitted any factual inaccuracies on the OFT's finding in this respect.

C. A to B: did Asda pass its future pricing intentions to McLelland?

A to B transmission

466. The evidence is that the information regarding the retail prices for the random-weight branded lines supplied by McLelland to Asda and set out in Mr Meikle's spreadsheet was passed to McLelland by Asda on 3 October.

467. On 2 October Mr Jonathan Betts of Asda sent an email to Mr Chris Reid of McLelland. He confirmed that Asda had accepted McLelland's proposed cost price increase of £200 per tonne in relation to deli and pre-pack cheeses (this would appear to be a reference to both random- and fixed-weight cheese lines), and that he would inform McLelland the following day "*what changes* [Asda] *will be making, if any, to* [its] *retail position*". The following day, 3 October, Mr Betts emailed Mr Reid at 17:07 stating:

> "... Attached above please find the revised retails per kg I would like applying to your brands supplied to ASDA. Products priced at these levels should be sent into our depots from Monday 6 October onwards ..."

The attachment to Mr Betts' email was a spreadsheet setting out "*revised*" retail prices for 13 lines of cheese. That email was forwarded by Mr Reid to Mr Meikle and Mr Calum Morrison, the McLelland account managers for Tesco and Sainsbury's respectively, on 7 October, a little under an hour before Mr Meikle sent his updated spreadsheet to Mrs Oldershaw. Of the 13 cheese lines for which Mr Betts set out "*revised*" retail prices, only six appeared in Mr Meikle's spreadsheet but the prices for those lines all match precisely the "*revised*" retail prices Mr Betts had notified to McLelland.

468. At the time that McLelland received the information (subsequently conveyed to Tesco) from Asda on 3 October, it quite clearly represented Asda's future retail pricing intentions.

Asda's state of mind as 'A'

469. The OFT found that Asda may be taken to have intended, and in fact foresaw, that its future retail pricing intentions would be passed by McLelland to Asda's retailer-competitors. Tesco contested this finding. We have not, however, determined this matter because, as we explain below, whatever Asda's intentions, by the time Mr Meikle sent his updated spreadsheet to Mrs Oldershaw at 10:47 on 7 October, the retail prices it contained appear to have been live in Asda stores.

D. B to C: did McLelland pass Asda's future pricing intentions to Tesco?

470. As noted, there can be little doubt that Mr Meikle's email to Mrs Oldershaw on 7 October communicated to Tesco information that McLelland had received from Asda. The prices for Asda's pre-pack, branded cheeses set out in the "*New Retail*" column of the updated spreadsheet are exactly the same as those set out by Mr Betts of Asda in his email to McLelland's Mr Reid on 3 October. It is clear that those prices were future prices when Asda notified them to McLelland. That does not necessarily mean, however, that the prices, by the time of transmission to Tesco on 7 October, *still* constituted future information on retail prices. In her opening submissions, Counsel for Tesco relied on an internal Asda email sent by Mr Betts shortly after Mr Meikle's email to Mrs Oldershaw, to establish that they were not future prices (seemingly the only occasion that either party referred to this document).[127]

471. We have concluded that Mr Betts' email of 7 October provides clear, contemporaneous evidence that the Asda prices set out in Mr Meikle's updated spreadsheet were no longer future prices at the time they were sent to Mrs Oldershaw. Mr Meikle sent the updated spreadsheet containing the "*new retail prices that Asda will run on McLelland Random Weight <u>branded</u> lines*" (our emphasis) to Mrs Oldershaw at 10:47 on 7 October. A mere fourteen minutes later, at 11:01, Mr Betts sent an email to a number of his Asda colleagues. The subject line read "*Cheese pricing Update*". Mr Betts wrote "***Brands** moved in the market this Monday ... Retails on our* [Asda's] *<u>branded</u> products moved <u>this morning</u> in line with increased costs*" (bold text in original; underlining added). It might be thought that the reference to "*our branded*" cheeses was a reference to Asda own-label products. That impression is immediately dispelled, however, by the very next line of Mr Betts' email which states that "***Own label** is pursuing a more cautious route ...*" (bold text in original). It is not clear whether Mr Meikle in fact appreciated that he was not sending future pricing information to Mrs Oldershaw, although we note in passing that it was Mrs Oldershaw's evidence that she did not understand the updated spreadsheet to contain future retail pricing information.

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127 Transcript, Day 2, p. 73.

472. Thus, by the time that Mr Meikle emailed Mrs Oldershaw for the second time on 7 October, the retail prices for Asda's branded cheeses were already current retail prices. As such, there was no transmission by McLelland to Tesco of Asda's *future* retail pricing intentions. The OFT did not seek to argue that the transmission of retail pricing information that had only very recently become current (as opposed to future) information was anti-competitive by effect.

473. In light of the foregoing, it is not necessary for us to determine whether Mrs Oldershaw took the information communicated to her by Mr Meikle into account in setting Tesco's retail prices. We would simply note that, if she did indeed take that information into account (and the evidence suggests that she did), it was legitimate for her to do so since, in so doing, she was, to paraphrase the Court of Justice's judgment in *Suiker Unie*, simply adapting intelligently to the existing conduct of her competitors on the market.

E. The Tribunal's conclusion on Strand 4

474. For the reasons set out above, it is our judgement that, whilst Asda did pass its future retail pricing intentions to McLelland on 3 October, McLelland did not pass that information on to Tesco until a time at which those prices were already effective and publicly available in Asda stores. As such, the OFT failed to establish, on the balance of probabilities, that there was any communication of future retail pricing intentions from McLelland to Tesco, i.e. B to C, in the context of this Strand.

XXV. STRAND 5 OF 2003: TESCO AS A; McLELLAND AS B; AND ASDA AS C

A. Outline of Strand 5

475. The OFT found, at paragraphs 5.571 to 5.613 of the Decision, that Mrs Oldershaw sent an email to Mr Meikle of McLelland on 9 October disclosing Tesco's future retail pricing intentions in respect of a number of cheese lines. The OFT accepted that there may have been a legitimate packing reason for that disclosure. It concluded, however, that, because it had found that Mrs Oldershaw had received Asda's future retail pricing intentions only two days previously and since she did not expressly request that McLelland keep Tesco's information confidential, Tesco

may be taken to have intended, or to have in fact foreseen, that McLelland would pass that information to one or more of Tesco's competitors.

476. The OFT also found that the new retail prices notified to Mr Meikle on 9 October had not been set independently by Tesco, in that they corresponded very closely (and, in a number of cases, precisely) to those set by Asda, which Mr Meikle had sent to Mrs Oldershaw on 7 October (see Strand 4 above).

B. Background to Strand 5

477. Following the 6 October Meeting, it would appear that Mrs Oldershaw had a further discussion with Mr Meikle. On 8 October Mr Meikle emailed Mrs Oldershaw attaching a spreadsheet showing the new retail prices that McLelland would "*pack the McLelland random-weight brands at for supply to Tesco*". Mr Meikle also explained that he had "*suggested new retail prices*" for Tesco generic mature cheddar lines. He further requested confirmation from Mrs Oldershaw as to the new retail prices for Caledonian and Scottish lines, as well as confirmation of the dates on which the new cost prices were to be applied. The spreadsheet attached to Mr Meikle's email listed two deli lines, Seriously Strong Coloured and Seriously Strong White. In respect of the latter, the spreadsheet provided a "*New Retail Price*" of £6.83 which was described as a "*Suggested new retail* [price] *to maintain % margin*". The "*New Retail Price*" for the former line was left blank. The spreadsheet provided for a "*New Cost* [Price] *Effective From*" date, stated to be 19 October, in respect of both deli lines. Mr Meikle's covering email made no reference to the retail prices of either of these two deli lines but did refer to 19 October as the date for the application of the new cost prices.

C. A to B: did Tesco pass its future pricing intentions to McLelland?

A to B transmission

478. On 9 October, Mrs Oldershaw replied to Mr Meikle's email of the previous day stating:

> "Stuart
>
> I have amended some of the suggested [retail selling prices] ... please pack to these [retail selling prices] ASAP. – thanks

> As for Costs ... we will increase your cost price by £200 [per tonne] ...
>
> Costs on Seriously Strong PRE PACKS will move on Sun 12th October[.] Costs on all other Mclelland [sic] lines (with the EXCEPTION of [Seriously Strong] Deli as I need to discuss) will move on Sun 19th October ..."

Mrs Oldershaw's email attached a new version of the spreadsheet attached to Mr Meikle's email of the previous day, setting out the various new retail prices, which she was requesting that McLelland pack the various random-weight cheese lines at.

479. It is, therefore, clear that Mrs Oldershaw did send McLelland Tesco's future retail pricing intentions.

Tesco's state of mind as 'A'

480. We find that Mrs Oldershaw's email clearly had a legitimate commercial explanation: she was asking McLelland to pack the random-weight cheese lines at the retail prices set out in the spreadsheet attached to her email and confirming the dates on which the new cost prices would become effective for certain lines. We must therefore consider whether there is any evidence supporting the OFT's case that, notwithstanding that legitimate explanation, Mrs Oldershaw may be taken to have intended, or to have actually foreseen, that McLelland would pass that information to Tesco's competitors in order to influence conditions on the retail cheese market.

481. At the hearing the OFT sought to suggest that, because the spreadsheet attached to Mrs Oldershaw's email had a retail price in it for Seriously Strong White deli, she must have discussed that price with Mr Meikle. It was put to her in cross-examination by Counsel for the OFT that there was no reason for her to have been discussing deli retail prices with Mr Meikle.[128] Mrs Oldershaw accepted that she would have discussed the *cost* prices for deli cheeses with Mr Meikle but denied having ever discussed Tesco's *retail* prices for deli lines. She explained that, although the attachment to Mr Meikle's email of 8 October contained a retail deli price, that did not mean that she had requested that a deli price be suggested by

[128] Transcript, Day 10, pp. 114-117.

McLelland,[129] still less that she intended or foresaw McLelland would pass such information to her competitors. She also pointed out that, whilst Mr Meikle's version of the spreadsheet showed an effective date for the cost price increase in relation to the deli lines, the version she returned to him attached to her email of 9 October had "ON HOLD" by both deli lines because she wanted to discuss those dates.[130] In her third witness statement, Mrs Oldershaw also explained that the retail price of £6.83 in respect of Seriously Strong White deli which appeared in the spreadsheet she sent to Mr Meikle was "*not a future retail price* [she] *intended to implement, but a suggested retail price included in the original version of the spreadsheet ... to maintain ... percentage margin*." Mrs Oldershaw confirmed that that remained her evidence in re-examination by Counsel for Tesco.[131] We accept Mrs Oldershaw's evidence in this respect. It accords with, and supports, our own reading of the emails of 8 and 9 October, and their respective attachments.

482. Is there then any other basis for finding that Mrs Oldershaw may be taken to have intended, or in fact foresaw, that McLelland would pass Tesco's information to Tesco's competitors? At paragraph 5.573 of the Decision, the OFT found that Mrs Oldershaw disclosed her future retail pricing intentions to Mr Meikle in circumstances where, only two days earlier on 7 October, he had sent to her Asda's future retail pricing intentions. That finding of course relies on the OFT's conclusions in relation to Strand 4. Given our finding, set out at paragraphs 470 to 473 above, that that information no longer constituted *future* retail pricing information at the time it was sent by Mr Meikle to Mrs Oldershaw, this provides no support for the OFT's finding on this point.

483. At paragraph 5.577 of the Decision, the OFT also relied on its finding that on three other, prior occasions, namely Strands 1 to 3 of the 2003 Cheese Initiative, McLelland passed to Mrs Oldershaw information about the future retail pricing intentions of Tesco's competitors. Although we have not found any of those Strands to be made out on the evidence that was before us, it will be recalled that, in our judgement, the OFT's case on each of those Strands failed in relation to the

129 Transcript, Day 10, p. 115.
130 Transcript, Day 10, p. 118.
131 Transcript, Day 10, p. 134.

state of mind of retailer A. We did not, therefore, consider it necessary to analyse whether Mrs Oldershaw, on receipt of the alleged B to C transmission by McLelland to Tesco, would have appreciated the circumstances in which she was being given her competitors' future retail pricing intentions (if indeed that was the case). Nor do we consider that to be necessary now. In the context of Strand 2 above, we found as a matter of fact that, on 30 September, when Mr Meikle faxed to Mrs Oldershaw two allegedly "*pristine*" labels, Mrs Oldershaw, believing that those labels represented the future retail pricing intentions of her competitors, rebuked Mr Meikle by telephone and raised her concerns within Tesco with Mr Scouler prior to the 6 October Meeting (although not at the meeting itself). Given that finding, it is our judgement that Mrs Oldershaw cannot be taken to have intended, nor did she in fact foresee, that McLelland would pass Tesco's future retail pricing intentions to Tesco's competitors on or after 9 October. When viewed against that background, we do not find noteworthy the fact that Mrs Oldershaw did not make a written request to Mr Meikle that he treat Tesco's retail pricing intentions as confidential. She had already spoken to him about sending her other retailers' information only a few days earlier and we consider that it was, at the least, implicit that he should treat Tesco's information confidentially also.

D. The Tribunal's conclusion on Strand 5

484. For the reasons set out above, it is our judgement that, whilst Mrs Oldershaw did convey her future retail pricing intentions to McLelland on 9 October, there was a legitimate commercial reason for that communication and the OFT has failed to establish that Mrs Oldershaw may be taken to have intended, or that she in fact foresaw, that McLelland would pass that information to Tesco's competitors.

XXVI. THE TRIBUNAL'S OVERALL CONCLUSIONS ON THE 2003 CHEESE INITIATIVE

485. In conclusion, we have found that there was insufficient evidence to support a number of the conclusions reached by the OFT in the Decision and that none of the five Strands of the 2003 Cheese Initiative, as found in the Decision, are proved as against Tesco. In our judgement, therefore, the finding at paragraphs 1.5.ii. and 7.2 (third indent) of the Decision that there was in 2003 a single overall concerted practice in which Asda, Sainsbury's and Tesco indirectly exchanged cheese retail pricing intentions via McLelland, should be set aside as against Tesco.

XXVII. DISPOSAL OF TESCO'S APPEAL ON LIABILITY

486. For all these reasons, it is our unanimous conclusion that Tesco's appeal against the OFT's findings of infringement in relation to the 2002 and 2003 Cheese Initiatives should be allowed in part.

487. The OFT's findings in relation to the 2002 Cheese Initiative are set aside as against Tesco, save in relation to the communications known as Strands 2, 3 and 7 of that Infringement, where the OFT found that:

(a) Strand 2: On or before 16 October 2002, Sainsbury's disclosed its future retail pricing intentions for cheese to McLelland, in circumstances where Sainsbury's may be taken to have intended, and in fact foresaw, that McLelland would make use of that information to influence market conditions by passing it to other retailers; McLelland did in fact pass Sainsbury's intentions to Tesco, and did so in circumstances where Tesco may be taken to have known the circumstances in which the original disclosure was made;

(b) Strand 3: On 30 October 2002, Tesco disclosed its future retail pricing intentions for cheese to Dairy Crest in circumstances where Tesco may be taken to have intended, and in fact foresaw, that Dairy Crest would make use of that information to influence market conditions by passing it to other

retailers; Dairy Crest did in fact pass Tesco's intentions to Sainsbury's, and did so in circumstances where Sainsbury's may be taken to have known the circumstances in which the original disclosure was made; and

(c) Strand 7: On 5 November 2002, McLelland disclosed to Sainsbury's that it was Tesco's future retail pricing intention to match a number of retail price increases made by Asda, having received that information from Tesco, and that each of Tesco and Sainsbury's acted with the requisite state of mind in disclosing and receiving that information.

It is therefore our judgement that the OFT was right to find that, as a result of its conduct on those three occasions, Tesco did engage in conduct, which had as its object the restriction of competition in relation to the supply of British-produced cheddar and territorial cheeses in the UK, contrary to the Chapter I prohibition. Whether that is sufficient to amount to participation by Tesco in the single overall concerted practice referred to as the 2002 Cheese Initiative and found by the OFT in the Decision, or whether those three instances should be viewed as single, isolated infringements, is a matter for further argument. The remainder of the OFT's findings in relation to Tesco and the 2002 Cheese Initiative are set aside as against Tesco.

488. The OFT's finding that Tesco infringed the Chapter I prohibition by participating in the 2003 Cheese Initiative is set aside in its entirety as against Tesco.

XXVIII. CONSEQUENTIAL MATTERS AND DIRECTIONS

489. As will be clear from paragraph 487 above, this judgment will require us to receive submissions as to whether or not Tesco's infringing conduct in 2002 is sufficient to constitute participation in the single overall concerted practice known as the 2002 Cheese Initiative, in addition to hearing argument in relation to the level of the financial penalty imposed on Tesco.

490. The parties are invited to seek to agree the appropriate form of order disposing of this phase of the appeal on liability and setting out a proposed timetable for the remainder of the proceedings. That is to be submitted to the Tribunal in draft, with any areas on which the parties are unable to reach agreement indicated, within one month of the date on which this judgment is handed down.

Lord Carlile of Berriew C.B.E., Q.C. | Clare Potter | Margot Daly

Charles Dhanowa O.B.E., Q.C. (Hons)
Registrar

Date: 20 December 2012

APPENDIX I: GLOSSARY OF DEFINED TERMS

Defined term	Meaning	Paragraph where first used
16 October email	The email sent by Mr Ferguson to Mr McGregor, each of McLelland on 16 October 2002	231
1998 Act	The Competition Act 1998 (as amended)	2
21 October email	The email sent by Mr Ferguson of McLelland to Mrs Oldershaw of Tesco on 21 October 2002	242
4 November email	The email sent by Mr Arthey of Dairy Crest to Mrs Oldershaw Tesco, copied to two of his Dairy Crest colleagues, Messrs Ryder and Beaumont on 4 November 2002	326
6 October Meeting	The meeting between Mr Scouler and Mrs Oldershaw of Tesco, and Messrs Irvine and McGregor of McLelland, held on 6 October 2003	443
admitting party	See "ERA party"	31(c)
Arla	Arla Foods Limited and Arla Foods UK Holding Limited	30
Arthey Email	The email sent by Mr Arthey of Dairy Crest to a number of his Dairy Crest colleagues on 30 October 2002	287
Asda	Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited and Broadstreet Great Wilson Europe Limited	31
basket policy	Tesco's policy of matching any lower prices charged by one of its major retailer-competitors on a notional basket of goods	23
Dairy Crest	Dairy Crest Limited and Dairy Crest Group plc	13(a)
Dairy Crest briefing document	Dairy Crest document sent to Tesco and other retailers on or around 23 September 2002 relating to the proposed £200 per tonne cost price increase	195

Defined term	Meaning	Paragraph where first used
Decision	The decision taken by the OFT on 26 July 2011, issued on 10 August, and entitled "Dairy retail price initiatives" (Case CE/3094-03)	2
Dyestuffs	Case 48/69 *ICI v Commission* [1972] ECR 619	45
ERA	Early resolution agreement	31(b)
ERA party	Refers to one of the seven parties that concluded ERAs with the OFT, namely Asda, Dairy Crest, Glanbia, McLelland, Safeway, Sainsbury's and Wiseman	31(c)
farmgate price	The price paid to the farmers by the suppliers for the raw milk	11
FLM	Fresh liquid milk	1
Football Kits	Judgment of the Tribunal in Cases 1021 & 1022/1/1/03 *JJB Sports plc and Allsports Ltd v OFT* [2004] CAT 17	44
Glanbia	The Cheese Company Limited, Waterfood Foods International Limited, Glanbia Investments (UK) Limited and Glanbia (UK) Limited	13(b)
Guidelines on Horizontal Co-operation Agreements	Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements, OJ 2011 C11/1	78
Infringements	The 2002 and 2003 Cheese Initiatives as defined at paragraph 1.5 of the Decision and set out at paragraphs 33 and 34 of the judgment	9
KPIs	Key performance indicators	22
McLelland	Lactalis McLelland Limited	13(c)
Morrisons	WM Morrison Supermarkets plc	31(b)
national multiples	See "retailers"	15
NFU	National Farmers' Union	164
NFU Scotland	National Farmers' Union of Scotland	164

Defined term	Meaning	Paragraph where first used
notes of interview	Notes and/or transcripts of interviews that were conducted (whether by the OFT or solicitors acting for one or other of the ERA parties) with individuals who were employed by one or other of the companies under investigation at the time of the Infringements	137
OFT	The Respondent, namely the Office of Fair Trading	2
OFT's Rules	The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751)	117
ppl	Pence per litre	1
raw milk	The untreated, unprocessed milk bought directly from dairy farmers by the suppliers	11
retailers	Those grocery retailers with multiple stores across Great Britain, the so-called "national multiples", who were addressees of the Decision, including Tesco	15
Safeway	Safeway Stores Limited, Stores Group Limited and Safeway Limited	31(a)
Sainsbury's	Sainsbury's Supermarkets Limited and J Sainsbury plc	31(a)
Scouler Briefing Note	The briefing note prepared by Mrs Lisa Oldershaw for Mr John Scouler, both of Tesco, in advance of the 6 October Meeting	445
SO	The Statement of Objections issued by the OFT on 20 September 2007	31(b)
SSO	The Supplementary Statement of Objections issued on 23 July 2009	31(e)
Storey Interview	Interview conducted by Mr Heideman of the OFT with Mr Storey of Asda on 26 June 2008	339
suppliers	A reference to both processors and suppliers of dairy products to the retailers	12
Tesco	The Appellants, namely Tesco Stores Limited,	2

Defined term	Meaning	Paragraph where first used
	Tesco Holdings Limited and Tesco plc	
Tesco Briefing Note	An internal McLelland document created by Stuart Meikle on or around 2 or 3 October 2003	407
Tesco DSGM	The Tesco Dairy Supply Group Meeting held on 13 September 2002	172(b)
TFEU	The Treaty on the Functioning of the European Union	45
Toys and Games	Judgment of the Tribunal in Cases 1014 & 1015/1/1/03 *Argos Ltd and Littlewoods Ltd v OFT* [2004] CAT 24	44
Toys and Kits	Judgment of the Court of Appeal ([2006] EWCA Civ 1318) in the joined appeals against the Tribunal's judgments in *Football Kits* and *Toys and Games*	44
Tribunal's Rules	The Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) ,as amended by the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (S.I. 2004/2068)	123
Wiseman	Robert Wiseman & Sons Limited and Robert Wiseman Dairies plc	31

APPENDIX II: DRAMATIS PERSONAE

Addressees of the Decision (see paragraphs 1.5 and 7.2 of the Decision)

Infringement(s)	Undertaking(s)	Defined term used in Judgment
2003 FLM Initiative	Arla Foods Limited and Arla Foods UK Holding Limited	Arla
2002 Cheese Initiative 2003 Cheese Initiative 2003 FLM Initiative	Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited and Broadstreet Great Wilson Europe Limited	Asda
2002 Cheese Initiative 2003 FLM Initiative	Dairy Crest Limited and Dairy Crest Group plc	Dairy Crest
2002 Cheese Initiative	The Cheese Company Limited, Waterfood Foods International Limited, Glanbia Investments (UK) Limited and Glanbia (UK) Limited	Glanbia
2002 Cheese Initiative 2003 Cheese Initiative	Lactalis McLelland Limited, which was formed following the acquisition of A McLelland & Son Limited by Groupe Lactalis	McLelland
2002 Cheese Initiative 2003 FLM Initiative	Safeway Stores Limited, Stores Group Limited and Safeway Limited	Safeway
2002 Cheese Initiative 2003 Cheese Initiative 2003 FLM Initiative	Sainsbury's Supermarkets Limited and J Sainsbury plc	Sainsbury's
2002 Cheese Initiative 2003 Cheese Initiative	Tesco Stores Limited, Tesco Holdings Limited and Tesco Plc	Tesco
2003 FLM Initiative	Robert Wiseman & Sons Limited and Robert Wiseman Dairies plc	Wiseman

Individuals referred to in the course of the Judgment

Where an individual's name is followed by "(W)", this denotes that he or she gave evidence before the Tribunal. All positions within an organisation are stated as at 2002/3.

Person	Organisation; and, where relevant, role	Paragraph where first introduced
Allen, Mark	Dairy Crest; executive director for cheese	210
Arthey, Neil	Dairy Crest; account manager for Tesco (cheese and spreads from January 2001 to February/March 2003)	282
Beaumont, Colin	Dairy Crest; sales director with responsibility for Tesco account	210
Bennett, Harvey	Asda; general manager for chilled foods and dairy products	390(d)
Betts, Jonathan	Asda; cheese buyer	467
Bolton, John	McLelland; manager of packing facility at Mauchline	432
Brown, Chris	Asda	390(d)
Cottle, Finn	Sainsbury's; general manager for dairy and cheese	229
Day, Alasdair	McLelland	390(c)
Doyle, Gerry	McLelland; operations manager	390(c)
Feery, Paul	Dairy Crest; senior national account manager for Sainsbury's	282
Ferguson, Thomas (W)	McLelland; in 2002 account manager for Tesco and in 2003 national account controller	32
Flower, David	Dairy Crest; commercial director for cheese, liquids and spread for the Sainsbury's account	311
Haywood, Bill	Dairy Crest; managing director, retail milk and juice	296
Heideman, Tom	OFT; investigation team	339
Hirst, Rob	Tesco; category manager for dairy	63

Person	Organisation; and, where relevant, role	Paragraph where first introduced
Irvine, Alastair (W)	McLelland; joint managing director	146
Jipps, Matthew	Safeway	316
Lawrence, Tim	Safeway; commercial manager for pricing	316
Mackenzie, Sarah	Sainsbury's; senior buyer for cheese	222
McGregor, Jim	McLelland; sales director	147
Meikle, Stuart	McLelland; national account manager for Tesco (2003 only)	321
Morrison, Calum	McLelland; account manager for Sainsbury's	404
Oldershaw, Lisa (W)	Tesco; buying manager for cheese	9
Owen, Mike	Co-op; cheese buyer	321
Pritchard, Peter	Asda	390(d)
Reeves, Arthur (W)	Dairy Crest; commercial director for cheese	18(b)
Reid, Chris	McLelland; account manager for Asda	467
Rigby, Chris	Tesco; buyer for butter, spreads and fats	195
Robbins, Kenton	Dairy Crest; senior account manager for Asda	328
Ryder, Chris	Dairy Crest	326
Scouler, John (W)	Tesco; category director for dairy	63
Skeffington, Brian	McLelland; sales support manager	390(c)
Storey, David	Asda; senior buyer for cheese	338
Stump, Colin	Glanbia	207(b)
White, Russell	Safeway	316
Wilkinson, Richard	Dairy Crest	347