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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1160-65/1/1/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27 October 2011

Before:

VIVIEN ROSE
(Chairman)
DR ADAM SCOTT OBE TD
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) IMPERIAL TOBACCO GROUP PLC
(2) IMPERIAL TOBACCO LIMITED**

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

CO-OPERATIVE GROUP LIMITED

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

WM MORRISON SUPERMARKET PLC

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

**(1) SAFEWAY STORES LIMITED
(2) SAFEWAY LIMITED**

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

**(1) ASDA STORES LIMITED
(2) ASDA GROUP LIMITED
(3) WAL-MART STORES (UK) LIMITED
(4) BROADSTREET GREAT WILSON EUROPE LIMITED**

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

**(1) SHELL UK LIMITED
(2) SHELL UK OIL PRODUCTS LIMITED
(3) SHELL HOLDINGS (UK) LIMITED**

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING (DAY 23)

Note: Excisions in this transcript marked “[...][C]” relate to passages excluded.

APPEARANCES

Mr Mark Howard QC, Mr Mark Brealey QC and Mr Tony Singla (instructed by Ashurst LLP) appeared on behalf of the Appellants Imperial Tobacco Group Plc and Imperial Tobacco Ltd.

Mr Rhodri Thompson QC and Mr Christopher Brown (instructed by Burges Salmon LLP) appeared on behalf of the Appellant Co-operative Group Ltd.

Mr Pushpinder Saini QC and Mr Tristan Jones (instructed by Hogan Lovells International LLP) appeared on behalf of the Appellants WM Morrison Supermarkets Plc and Safeway Stores Ltd and Safeway Ltd.

Mr James Flynn QC and Mr Robert O'Donoghue (instructed by Norton Rose LLP) appeared on behalf of the Appellants Asda Stores Ltd, Asda Group Ltd, Wal-Mart Stores (UK) Ltd and Broadstreet Great Wilson Europe Ltd.

Ms Dinah Rose QC and Mr Brian Kennelly (instructed by Baker & McKenzie LLP) appeared on behalf of the Appellants Shell U.K. Ltd, Shell U.K. Oil Products Ltd and Shell Holdings (U.K.) Ltd.

Mr Paul Lasok QC, Ms Elisa Holmes, Mr Rob Williams, Ms Anneliese Blackwood and Ms Ligia Osepciu (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

1 Thursday, 27 October 2011 --
 2 (10.00 am)
 3 PROCEEDINGS IN CAMERA
 4 **MR LASOK:** Madam, the room seems to be a bit fuller than it
 5 has been in the last few days. The people behind me
 6 from the OFT, some of them you may not have seen before,
 7 but they are all within the confidentiality ring. On my
 8 right is Mr Aldred, who is representing Sainsbury.
 9 Unless there is something that somebody wants to say,
 10 I was proposing to call Fiona Corfield.
 11 **MR ALDRED:** Madam, members of the Tribunal, you will have
 12 seen some correspondence yesterday between us and
 13 Imperial Tobacco, and the position has now been
 14 formalised with regard to what was proposed yesterday,
 15 as between us and Imperial, and if I could just hand up
 16 this, if I may. (Handed).
 17 Madam, I think the only point which was discussed
 18 between myself and the referendaire yesterday related to
 19 the indication, I understand it's in the third point
 20 down, that that is something that the Tribunal is minded
 21 to accept, and on that basis, this would then be agreed
 22 between Sainsbury and (inaudible).
 23 **THE CHAIRMAN:** What the Tribunal has indicated, Mr Aldred,
 24 is that generally speaking a deponent's signed witness
 25 statement and their evidence in the witness box is the

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1 best evidence that they have to give. It's difficult at
 2 the moment to think of circumstances where the Tribunal
 3 would need to refer to a draft witness statement.
 4 **MR ALDRED:** Thank you very much, Madam.
 5 **MR LASOK:** Madam, can I call Fiona Corfield, please.
 6 MRS FIONA CORFIELD (affirmed)
 7 Examination-in-chief by MR LASOK
 8 **THE CHAIRMAN:** Thank you very much. Please sit down,
 9 Mrs Corfield.
 10 **MR LASOK:** Mrs Corfield, I wonder whether you can be given
 11 core bundle 6. {C6/69/429}. If you open that, you
 12 should see a document that is headed "Witness Statement"
 13 and "Fiona Bayley"?
 14 **A.** Yes, that's correct.
 15 **Q.** Can you just confirm that you were at that time
 16 Fiona Bayley?
 17 **A.** Yes, I was.
 18 **Q.** Have you looked at that statement recently?
 19 **A.** I looked at it this morning.
 20 **Q.** Could you just cast your eye over it again and tell us
 21 whether or not that is your statement?
 22 **A.** Yes, it is.
 23 **Q.** Could you turn to the last page, please. Is that your
 24 signature?
 25 **A.** It is, yes.

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1 **Q.** If you go to the very beginning of the statement, the
 2 date of it is 2005, it says in the first line that you
 3 were the buyer for ales, stout and cider at Sainsbury's.
 4 Am I right in thinking that you are no longer employed
 5 by Sainsbury's?
 6 **A.** That's correct, yes.
 7 **Q.** Subject to that change, is there any change that you
 8 would like to make in your statement?
 9 **A.** No.
 10 **Q.** Is it true, to the best of your knowledge and belief?
 11 **A.** Yes, it is.
 12 **Q.** Am I right in thinking that your current employer has
 13 permitted you to take unpaid leave to give evidence at
 14 this hearing?
 15 **A.** They have actually now decided that they will pay me.
 16 **MR LASOK:** Thank you very much. I have no further
 17 questions, but I think there are some people along the
 18 row here who might have one or two for you.
 19 Cross-examination by MR HOWARD
 20 **MR HOWARD:** Good morning, Mrs Corfield.
 21 **A.** Good morning.
 22 **Q.** I am Mark Howard and I am acting for Imperial Tobacco,
 23 and I want to ask you some questions.
 24 You tell us in your statement that you were the
 25 tobacco buyer, I think, from October 2000 to May 2002.

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1 What did you do before October 2000?
 2 **A.** I worked in stores for Sainsbury's, I did an industrial
 3 placement I think in 1986, and then after I finished
 4 university I went to work for Sainsbury's, I did their
 5 training manager programme, trainee admin manager
 6 programme, I worked my way up to deputy store manager
 7 I also had a couple of district jobs to do with stock
 8 control and I think it was sort of bedding in a new
 9 position for -- all the ordering in store was done by
 10 one person, so there was -- was on part of a district
 11 team that supported that role.
 12 **Q.** Was tobacco your first buying job?
 13 **A.** It was, yes.
 14 **Q.** Then you became the buyer subsequently in May 2002 for
 15 ales, stout and cider. How long did you do that for?
 16 **A.** About three -- just over three and a half years.
 17 **Q.** After that, what did you do?
 18 **A.** Then I did spirits from -- I think I got the job in the
 19 November, but I didn't start until the January 2006,
 20 I think that would have been.
 21 **Q.** How long did you do that for?
 22 **A.** I did that for about 18 months and then I was asked to
 23 move on to buying detergent, at which point I had
 24 a discussion with Sainsbury's and I opted to take
 25 redundancy, as that wasn't --

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1 Q. You didn't fancy detergent?
 2 A. Well, it was okay, but not after spirits.
 3 Q. I was being flippant, I am sorry. But leaving aside the
 4 attractions or otherwise of detergent, when you left --
 5 are you working for another supermarket group now?
 6 A. No, when I left Sainsbury's I took up a position with
 7 Palmer & Harvey to be the buyer for the whole of their
 8 beers, wines and spirits category, and I did that for --
 9 I started in January 2008 and did that until
 10 December 2009, so just short of two years, then I had
 11 a year out travelling, and then in January 2011
 12 I started my current job with a company called
 13 Waverley TBS, which is a wholesaler, and I am the
 14 spirits buyer for them.
 15 Q. Okay. Thank you for that. You have been involved now
 16 in supermarkets, both as a manager, in a managerial
 17 capacity, and then as a buyer either at a supermarket or
 18 at one of the wholesalers. Based that on experience,
 19 would it be fair to say that the supermarket environment
 20 is highly competitive?
 21 A. Very competitive.
 22 Q. As I understand it, Sainsbury's, whilst you were there,
 23 keenly monitor the shelf prices of its main competitors,
 24 Asda and Tesco?
 25 A. Yes.

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1 Q. What I am quite interested in just understanding is,
 2 this monitoring, you have told us that you were involved
 3 in tobacco, ales, stouts and cider, and then spirits,
 4 and then subsequently you become involved in beer at
 5 P&H, and spirits in your new job. This monitoring of
 6 prices, presumably as far as you know, that is something
 7 that happens right across the grocery basket, it's not
 8 just a feature of tobacco?
 9 A. No, no, it's not just a feature of tobacco.
 10 Q. Is this the position: what Sainsbury's seeks to do, and
 11 here it's in common with the other major supermarkets,
 12 it seeks to benchmark itself against its competitors
 13 with a view to ensuring that it is no more expensive
 14 than its competitors in relation to the selling price of
 15 items in the shopping basket, which include cigarettes?
 16 A. That depends, because at the time there was a different
 17 index depending on the product area, so tobacco was
 18 100 per cent index, meaning that they expected to be
 19 an exact match, but other commodities, when I moved on
 20 to beer and cider, the index might be, I think it was
 21 105 or something so you had the ability to be more
 22 expensive on some of them.
 23 Q. That's very, very helpful indeed. The supermarket or
 24 Sainsbury's is, as it were, prepared, I don't know,
 25 let's say in respect of whiskey it may say "We don't

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1 mind if we are 5 per cent more expensive" as an example,
 2 but in respect of tobacco at the time it was absolutely
 3 fixed, "We must not be more expensive than Tesco and
 4 Asda".
 5 A. Yes, but on tobacco there was a thing called a low price
 6 guarantee list, and all the key lines were on there,
 7 which probably accounted for, I think I said in my
 8 statement, maybe 90 per cent, 95 per cent of the
 9 turnover, so there would be a few lines that you could
 10 be different on that wouldn't really make any
 11 difference. If it was a very small brand, St Moritz or
 12 something, and you were 10p more expensive, in the
 13 scheme of what that was going to do to the index, that
 14 would have made no difference.
 15 Q. Absolutely, I see that. I am going to come to the way
 16 in which the market was working in tobacco more fully in
 17 a moment, but let's just pursue that for a moment.
 18 Each of the manufacturers -- the three main ones are
 19 Imperial, Gallaher and BAT; correct? -- has a whole host
 20 of brands, don't they?
 21 A. Yes.
 22 Q. Of course some of the brands are ones which may be niche
 23 players, they may be old-fashioned brands which are no
 24 longer smoked much or particularly just niche like
 25 St Moritz appealing to a very small sector of the

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1 market?
 2 A. Correct.
 3 Q. Those ones you are less concerned about, because they
 4 don't form part of what you are talking about as really
 5 this shopping basket that you are monitoring? You need
 6 to say "yes" or "no"?
 7 A. Sorry, yes, that's true.
 8 Q. What you are particularly interested about is the
 9 important brands which more consumers are buying?
 10 A. Correct.
 11 Q. We will come back to how this was working. Subject to
 12 the point about there being certain brands which are of
 13 less interest, in relation to the main brands, I think
 14 you are saying that the practice is you would benchmark
 15 your competitors, and if you found that they were
 16 cheaper than you in respect of a particular brand which
 17 fell within the basket, then your responsibility was to
 18 make sure you matched that price?
 19 A. Yeah, or to ring up and find out why that product was
 20 cheaper, because sometimes it was a mistake and
 21 sometimes the wrong information had been collected.
 22 Q. Obviously if it's a mistake in that it's the wrong
 23 information then you are not more expensive. But one of
 24 the things that you, I think, do is you ring up the
 25 manufacturer, of course, and you want to find out

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1 whether he's bonusing, say in Tesco, having a promotion,
 2 and basically you say "If you have got a promotion in
 3 Tesco, I want it"?
 4 **A.** Yes, I would have done that, but in practice, the
 5 account manager rang you to offer you the bonus, and if
 6 they rang me I expected they were ringing all my
 7 counterparts at the major supermarkets, just as I would
 8 expect that the major counterparts knew that when they
 9 were getting a phone call, I was getting a phone call.
 10 **Q.** Again, we will come back to that, but insofar as if you
 11 found that Tesco, for instance, were deciding that for
 12 their own reasons to cut the price of a particular
 13 brand, which you were monitoring, let's say Richmond,
 14 for the sake of argument, and they put that down, seemed
 15 to be cutting their margin, and putting it down a penny
 16 below you. As I understand it, that was a position
 17 which Sainsbury's wasn't prepared to tolerate?
 18 **A.** No, we would have wanted to have been the same price.
 19 I can't recall them putting the price down of their own
 20 accord. Just as I can't recall us putting --
 21 Sainsbury's having put the price down of their own
 22 accord.
 23 **Q.** Of course you wouldn't necessarily know whether they
 24 were putting it down of their own accord or not, would
 25 you?

1 **A.** Well, if I had seen the price had gone down in Tesco and
 2 I rang the account manager for ITL or Gallaher or
 3 whoever, and they said "We are not funding that, we are
 4 not prepared to offer it to you", then I could assume
 5 they were doing it themselves. I don't recall that ever
 6 happening.
 7 **Q.** We can have a look, there are certainly instances in the
 8 papers where we see, I am not sure whether it's in your
 9 period.
 10 In any event, the obligation, the corporate decision
 11 that you are going to benchmark your competitors and
 12 having tobacco on this [REDACTED] per cent index, that's
 13 a decision that comes from on high; correct?
 14 **A.** Yes.
 15 **Q.** And that's something that you, as the buyer, part of
 16 your job is to ensure that you are meeting this
 17 strategy?
 18 **A.** Correct.
 19 **Q.** This is part of Sainsbury's corporate strategy, isn't
 20 it, this benchmarking?
 21 **A.** Yes.
 22 **Q.** I think you would agree that you, on behalf of
 23 Sainsbury's, and anyone in your position, could never
 24 agree to do anything which in any way hindered you
 25 pursuing that pricing strategy?

1 **A.** No, you wouldn't have done, but any price changes I made
 2 were signed off by my boss.
 3 **Q.** Yes. I didn't ask you that. You need to focus on what
 4 I did ask you. I asked you whether you, in your
 5 position as the buyer, would ever agree to do anything,
 6 make any agreement, say, with Gallaher or Imperial,
 7 which in any way restricted your ability to pursue the
 8 strategy which you were under a duty from your bosses to
 9 observe?
 10 **A.** Well, I don't exactly know what you mean. My job was to
 11 implement the corporate strategy.
 12 **Q.** Yes. Your job was to implement the corporate strategy.
 13 I am not asking you a difficult question. If your job
 14 was to implement the corporate strategy, I assume you
 15 would not agree something with Imperial, say, which
 16 would in any way prevent you pursuing the corporate
 17 strategy?
 18 **A.** Correct.
 19 **Q.** Now, was it the case that, in your dealings with
 20 Imperial, you always made it clear that the need to
 21 benchmark your competitors in the way we have been
 22 discussing was of paramount importance to you?
 23 **A.** Yes.
 24 **Q.** I just want to be clear: if we look at your witness
 25 statement, which you have in front of you, I think, you

1 talk about some of this at paragraph 82 to 84. There
 2 you talk about the monitoring that you at Sainsbury's
 3 were doing in order to ensure that you were meeting the
 4 target; correct?
 5 **A.** Yes.
 6 **Q.** As I understand it, this monitoring in this way was
 7 an important thing to do to ensure, from your
 8 perspective, that you were meeting the target?
 9 **A.** Yes.
 10 **Q.** So as I understand it, you weren't confident that simply
 11 everybody would be receiving the same prices from the
 12 manufacturers and that the supermarkets would all be
 13 charging the same prices, and hence you needed to
 14 monitor the position in order to ascertain what was
 15 going on, and if you found that there were
 16 discrepancies, to then follow it up in order to try and
 17 ensure by one means or another that you were at your
 18 benchmark level?
 19 **A.** That's correct, but the low price guarantee list had
 20 lots of different products, it wasn't just tobacco, so
 21 there was a monitoring process, I guess Sainsbury's had
 22 an agency that went round, checked the prices and
 23 reported back to this team and then that came down to
 24 the buyers.
 25 **Q.** Yes, but I think what you are describing is the -- at

1 this stage you are the buyer for tobacco, and you are
 2 looking at both the Gallaher price list, as I understand
 3 it, and the LPG list?
 4 **A.** There were two different things. Gallaher used to send
 5 in a price survey compiled from their reps' visits.
 6 That was two or three weeks out of date.
 7 **Q.** Right.
 8 **A.** So that wasn't what I based the LPG stuff on. The LPG
 9 stuff was collected by an agency for Sainsbury's and
 10 that came out every week on a specific day.
 11 **Q.** It was an important thing for you, as the tobacco buyer,
 12 to monitor?
 13 **A.** Yes.
 14 **Q.** Yes, I am not suggesting the LPG list was only relevant
 15 to tobacco, obviously it covered a whole host of things,
 16 but you as the buyer for tobacco were only interested in
 17 looking at it from the point of view of tobacco?
 18 **A.** Correct.
 19 **Q.** One of the reasons that tobacco is important, as
 20 I understand it, from Sainsbury's perspective and the
 21 other supermarkets' perspectives, is that although the
 22 margins on tobacco are relatively low -- and we will
 23 come back to the margins in a moment -- the important
 24 thing is that tobacco generates footfall through the
 25 supermarkets, and what you can't afford to do is to

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1 potentially lose that footfall to your competitors; is
 2 that right?
 3 **A.** I wouldn't say it generates footfall, I think it's
 4 an important cash generator for a supermarket, but it
 5 would never be seen as a destination. So it's more the
 6 sort of service where people coming to shop at
 7 Sainsbury's because they have seen a great beer deal
 8 advertised on TV while they're there might buy tobacco,
 9 so you have to have tobacco there, and it would have to
 10 be a competitive price. I don't think people would
 11 choose to shop at Sainsbury's or Tesco or Asda purely on
 12 the basis of tobacco.
 13 **Q.** Right. Well, I think you may be out of kilter with what
 14 other people have said.
 15 **A.** You are asking me my opinion.
 16 **Q.** I'm asking you your opinion, you are entitled to it,
 17 absolutely. Out of curiosity, your statement is dated
 18 2005 [REDACTED]. Since
 19 2005, what discussions have you had about this case?
 20 **A.** Probably none for quite a while, and then periodically,
 21 you know, if there was some change or update,
 22 Nick Grant, the head of the legal department at
 23 Sainsbury's would contact me, because obviously I wasn't
 24 working at Sainsbury's after 2006. So really the
 25 occasional phone call, then it would go quiet for maybe

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1 a couple of years, and then the next thing I would get a
 2 phone call saying now there is something else happening.
 3 **Q.** Have you given any further statement in this matter?
 4 **A.** No.
 5 **Q.** As I understand it, where you see a cheaper price,
 6 looking at the time when you were the buyer, if you
 7 observed through the LPG list a cheaper price in Tesco,
 8 you then will seek to investigate what it is that seems
 9 to be allowing Tesco to price at a more favourable
 10 level?
 11 **A.** Yes.
 12 **Q.** Your strategy would be that if it appeared to be
 13 a mistake because the manufacturer says "Well, I think
 14 they have just made a mistake there, and I'll
 15 investigate it", no doubt you would wait and see whether
 16 the price moved up, but if you ascertained that they
 17 seemed to be bonusing Tesco, then what you would say is,
 18 "Well, you know, why aren't we having the same bonus",
 19 effectively. Is that right?
 20 **A.** If that situation had occurred, then I am sure that's
 21 what I would have said.
 22 **Q.** I think you are saying you don't recall this actually
 23 happening when you were involved; is that right?
 24 **A.** I don't recall a situation where I rang the manufacturer
 25 to see why somebody else was cheaper, and they said "We

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1 are giving them a bonus, we are not prepared to give it
 2 to Sainsbury's", because they had a pricing strategy in
 3 the multiple grocers that was to be the same. So if
 4 they said Tesco's weren't getting a bonus, it's up to
 5 you whether -- it would have been up to me whether I had
 6 matched it or not, but I don't recall a situation where
 7 they ever said "We are giving Tesco's a bonus, we are
 8 not going to give it to you."
 9 **Q.** As I understand it, you don't recall it happening in
 10 practice, but if one looks at your position on behalf of
 11 Sainsbury's and your instructions from on high, in the
 12 event -- if we take it in stages. You see that Tesco
 13 are 2p cheaper on a particular brand, you try and find
 14 out whether they are getting a bonus, and if they are,
 15 then obviously you expect to get a similar bonus;
 16 correct?
 17 **A.** Yes.
 18 **Q.** Right. Now, if in fact what happens is the manufacturer
 19 says "Well, it's nothing to do with us, Tesco themselves
 20 have decided to appear to adopt an aggressive pricing
 21 strategy". Presumably in that event your strategy, the
 22 corporate strategy, would dictate to you that you need
 23 to reduce the price of the brand in your shops?
 24 **A.** The strategy wouldn't dictate that, that didn't happen,
 25 at the time I was buying that didn't happen. So it's

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1 a bit hard to say -- the strategy would have been to
 2 have [REDACTED]
 3 Q. Yes, that's what I'm asking.
 4 A. My boss wouldn't have been happy for me to go and say
 5 "Tesco's are getting a bonus, the supplier is not
 6 prepared to give it to us, therefore we need to fund
 7 that ourselves". Further conversation would have taken
 8 place, and I just don't -- there wasn't a situation
 9 where if a bonus was being offered to Tesco's it wasn't
 10 being offered to Sainsbury's.
 11 Q. You are not answering my question. I understand you say
 12 this did not happen, okay? I am simply trying to
 13 understand what you understood your instructions were,
 14 your standing instructions, and as I understand it in
 15 relation to -- you were a buyer for a number of things,
 16 and in relation to tobacco, the standing instruction
 17 was: we have to -- it's [REDACTED] per cent on the corporate
 18 index; correct?
 19 A. Yes.
 20 Q. In relation to other products, some of those that you
 21 dealt with, it was a different percentage; correct?
 22 A. Yes.
 23 Q. But outside of those percentages, as I understand it,
 24 you did not have any discretion personally?
 25 A. No, it would have been a decision I would have had to

1 have discussed with my boss.
 2 Q. Right, but as you understood it, if you found that you
 3 were out of line on tobacco, it was your job to get
 4 yourselves in line, and if that required getting a bonus
 5 from the manufacturer, you would do so, and if you
 6 couldn't get a bonus, you would still do so?
 7 A. I think that theoretically that is the case.
 8 Q. That's what I am asking you about, what your
 9 instructions were.
 10 A. But I'm saying in practice I would have been expected to
 11 have another conversation with the supplier to get the
 12 bonus, and if I hadn't, I would have had to have gone to
 13 my boss and said "Imperial aren't prepared to give us
 14 a bonus although they're giving it to Tesco, if we go
 15 down off our own bat, it's going to cost this amount of
 16 money", and that would have been their call --
 17 Q. You are misunderstanding my question.
 18 THE CHAIRMAN: Is your question a scenario where she finds
 19 that it is being funded by Imperial but Imperial are not
 20 prepared to give the same bonus to Sainsbury's, or is it
 21 where they find it's not being funded by Imperial?
 22 I think there is some confusion.
 23 MR HOWARD: There are two different scenarios. I understand
 24 the reality of the position is: if you see Tesco below
 25 you in price and you discover that Imperial are funding

1 it, or you surmise that they fund it, you are obviously
 2 going to be -- expect them to provide a similar funding
 3 to you, and if they don't, that would be a major rift in
 4 your relationship; correct?
 5 A. Correct.
 6 Q. I am asking you about a different situation, so can you
 7 please focus on that.
 8 A. I don't think you made that clear.
 9 Q. Well, whether or not I did -- I think I did, but it
 10 doesn't matter -- I would now just like you to focus on
 11 it. What I am asking you about is the situation where
 12 Imperial in this example tell you "we are not providing
 13 any funding to Tesco, this is something that Tesco are
 14 doing off their own bat because they are trying to get
 15 a competitive advantage".
 16 Now, in that scenario, am I correct in
 17 understanding, although you didn't have to deal with it,
 18 that the strategy which you were instructed to pursue
 19 would have indicated that you were supposed to reduce
 20 the price in Sainsbury's in order to match Tesco?
 21 A. The strategy would have indicated that, but as it was
 22 something that didn't happen, I don't know that I can
 23 comment 100 per cent on what the response would have
 24 been. That would have been the strategy, but --
 25 Q. [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 Q. In this field, Asda, they are the most aggressive on
 17 pricing, is that the position, and then followed by
 18 Tesco, and you are trying to keep up with them; is that
 19 it?
 20 A. I don't think anybody was more aggressive than anybody
 21 else on tobacco. Probably on other products where you
 22 could advertise them on TV and get people to go into the
 23 stores, but on tobacco, because nobody would have
 24 an advert on TV saying "We have knocked 10p off
 25 Benson & Hedges", you didn't do that, so I wouldn't say

1 the pricing was any different at Asda and Tesco's on
2 tobacco.
3 Q. Right. Anyway, it wasn't any different, you say, but
4 your strategy, as we already discovered, was you had to
5 match them?

6 A. Yes.

7 Q. [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
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21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]

6 Q. Okay. Perhaps you could go to file 18, tab 69. It's
7 a document after your time, I appreciate.

8 THE CHAIRMAN: Is this annex 18?

9 MR HOWARD: Annex 18, I beg your pardon, tab 69.
10 {D18/69/208}. This is an email at the foot of the page
11 from your successor, Mr Davies, who unfortunately we are
12 not going to hear from. We see at the foot of the page
13 he is comparing prices of Imperial products in Tesco,
14 and you can see he says:

15 "I just need to know [at the foot of the page] if
16 these are correct, and if they are correct, are you
17 funding them, or is it something they have taken on
18 themselves? Of course, if you are funding them down we
19 should look at doing the same as we wouldn't want to be
20 at a competitive disadvantage."

21 As I understand it, you don't recall specific
22 discussions that you had along those lines; is that
23 right?

24 A. Correct. The only time there was a difference, and we
25 rang up and either we had had the wrong information on

1 the LPG list, because one time we got one that was six
2 months' out of date so there was 25 or 30p difference or
3 something, which was clearly a mistake, occasionally if
4 the bonus had been withdrawn and the price was due to
5 have gone back up, we might have put our price back up
6 and Tesco's price hadn't gone back up, but usually that
7 was just around the timing of when the price changes
8 could be affected in each retailer or there had been
9 some ... then the account manager would come back and
10 say "No, it's going up next week", and you would wait
11 a week and it would have gone up.

12 Q. This is a discussion in an email where Mr Davies is
13 saying to Paul Matthews "we can see that the prices in
14 Tesco seem to be lower than ours". I am actually asking
15 you a simple question, could you just focus on it: do
16 you or do you not recall having similar discussions?

17 A. I don't recall having similar discussions.

18 Q. What one then sees in the reply at the top of the page
19 is -- you can see if you just cast your mind down to
20 about the fourth paragraph where he says he's certain
21 that Tesco are not being funded because they are his
22 account, and:

23 "I am also certain that Asda decided on the course
24 of action without our support".

25 Do you see that?

1 A. Yes.

2 Q. There was nothing to stop anybody deciding to do what
3 appears to be going on here to reduce prices off their
4 own initiative; correct?

5 A. Correct, people could have done that, yes.

6 Q. As I understand it, you in Sainsbury's were, in relation
7 to tobacco, is this fair, essentially followers rather
8 than leaders --

9 A. Correct.

10 Q. In the sense that you didn't -- let me just finish. You
11 were followers rather than leaders in that you were not
12 seeking yourselves to reduce prices in order to gain
13 competitive advantage, you simply didn't want to be at
14 a competitive disadvantage to your benchmark
15 competitors?

16 A. Correct.

17 Q. Okay. Can we just consider a separate point now, which
18 is margins on cigarettes in particular, but margins
19 perhaps generally. If we look at the position generally
20 for a moment, Sainsbury's aims obviously to make money
21 through charging a gross margin or mark-up on the goods
22 themselves; correct?

23 A. Correct.

24 Q. An oddity about cigarettes or tobacco which
25 distinguishes tobacco from practically every other

1 product sold is that an enormous percentage of both the
 2 wholesale cost and the ultimate retail selling cost
 3 price is actually tax which is being collected for the
 4 Chancellor of the Exchequer?
 5 **A.** Correct.
 6 **Q.** When supermarkets talk of their margin here in relation
 7 to tobacco, what they are talking of is their uplift or
 8 mark-up on the basis of the wholesale price including
 9 the tax take; correct?
 10 **A.** Yes.
 11 **Q.** Of course the true position is, in respect of tax here,
 12 that the reality is that tax is really a pass-through
 13 item where the supermarkets and the manufacturers are
 14 acting as collecting agents for the Inland Revenue?
 15 **A.** Correct.
 16 **Q.** One of the reasons that the margins in tobacco appear to
 17 be slim as compared with other products is that it would
 18 be unacceptable to charge your full margin on what is
 19 effectively the tax; is that right?
 20 **A.** All -- in terms of the way the margin worked, it worked
 21 out the same on all the products within Sainsbury's, but
 22 it was recognised that there was -- a huge portion of
 23 tobacco was tax.
 24 **Q.** You don't have the same margin on tobacco as on
 25 detergent, do you?

25

1 **A.** No, but that's why the margins on detergents might have
 2 been 40 per cent and the margin on cigarettes might have
 3 been 5 per cent and it was recognised that difference
 4 was largely because of tax.
 5 **Q.** That's why I'm asking you why there was a difference.
 6 Does tax play a role in that?
 7 **A.** Yes.
 8 **Q.** Sorry, I know this is probably obvious to you as the
 9 buyer, but it's important, you understand, that we
 10 understand -- we are just lawyers -- what the rationale
 11 is, why that tax element causes you to be charging much
 12 lower margins, or applying much lower margins. Can you
 13 just explain it to us?
 14 **A.** I just inherited a system of where the margins were.
 15 **Q.** Yes.
 16 **A.** So because a large part of it is tax, there isn't then
 17 the -- you know, and you are going by the recommended
 18 retails and everything, so when you look at the
 19 recommended retail and you look at the cost of the
 20 products, because a lot of it is tax, there isn't then
 21 much left of the margin.
 22 **Q.** Equally, I assume, let's take the 40 per cent that you
 23 charge on detergent or whatever it is, if one -- we take
 24 at the time the -- I can't remember precisely what the
 25 wholesale price of a packet of Richmond was, but let's

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1 it was £3, 80 per cent of which was tax, if you charged
 2 your 40 per cent margin on a packet of cigarettes, you
 3 would be charging 40 per cent on £2.50, which was
 4 actually the tax take, and the consumer might not be
 5 very happy about that. Isn't that right?
 6 **A.** Well, I don't think we would have sold any because we
 7 would not have been consistent with anybody else.
 8 **Q.** That's absolutely right. I am just trying to
 9 understand, you have told us that tax is one of the
 10 reasons, an important reason I think, why the margins on
 11 tobacco are in gross terms low. I am just trying to
 12 explore with you whether you are able to explain why it
 13 is that that tax element has historically driven down or
 14 caused the margins in percentage terms to be low. If
 15 you don't --
 16 **A.** I don't think I can say on a historic basis, no.
 17 **Q.** It's just what you understood was the case. I just want
 18 to understand how the margin works, to you as a buyer.
 19 At the beginning of the financial year, does somebody
 20 say "Look, this is the margin we are looking for in this
 21 category" or how does it work?
 22 **A.** Yes, you would be given targets, from what I remember,
 23 you would be given targets on turnover, probably cash
 24 margin and percentage margin.
 25 **Q.** Right. That comes obviously again from somewhere on

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1 high?
 2 **A.** Yes.
 3 **Q.** Okay. The margin that, in the particular area -- here
 4 we are talking about tobacco but you dealt with
 5 alcoholic drinks -- that's dependent presumably on
 6 commercial judgment about what is acceptable to
 7 consumers and particularly what your competitors are
 8 doing?
 9 **A.** Yes.
 10 **Q.** Now, the margin in tobacco, when you were involved in
 11 this 20-month period, how is it set? In other words, is
 12 it a margin which applies across the board, so that for
 13 tobacco products it's X per cent, or is it by reference
 14 to segments, or how is it done?
 15 **A.** Your total target would have been at total category
 16 level, so my target might have been -- I can't remember
 17 what it was, but say it was 5 per cent, but that would
 18 recognise that some things you were probably making less
 19 than 5 per cent on, and equally maybe pipe tobacco and
 20 cigars would be more than 10 per cent, but it wasn't
 21 split down to say: okay, on premium cigarettes you must
 22 be making 3 per cent, or 5 per cent, and ultra low
 23 cigarettes you must be making 3 per cent. It wasn't
 24 split down like that. I had a target for the whole of
 25 the tobacco category.

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1 Q. Yes.
 2 A. When I was on beer and cider, I think I had separate
 3 targets for beer and separate targets for cider. Again
 4 that was an overall target for the cider category or for
 5 the beer category. How I got there didn't really matter
 6 as long as I got there.
 7 Q. So you get an overall target for tobacco, and then it's
 8 a matter for your judgment as to how to divide that,
 9 what margin I am going to look for in the different
 10 categories, and different segments; is that right?
 11 A. I think that would be more the case with non-tobacco,
 12 because with tobacco it was a lot more prescriptive in
 13 there being the recommended selling prices and the fact
 14 you were getting deferred bonuses to allow you to sell
 15 below those recommended selling prices, and then there
 16 was tactical bonuses. So tobacco was a lot more
 17 prescriptive in -- and because it was also 100 per cent,
 18 in what you could do, the way you could make other money
 19 on tobacco was by negotiating better volume agreements,
 20 so listing money allowances around new products and
 21 everything. But it would have been quite difficult --
 22 I mean, I didn't ever break it down and say "On this set
 23 of products I need to make 5 per cent, on this set of
 24 products I need to make 3 per cent", because it was kind
 25 of already in place, because if the recommended selling

1 prices of Benson & Hedges was £4, and we were getting
 2 a deferred bonus to sell at £3.90, that's what we were
 3 selling at.
 4 Q. In other words, the margin level had already been
 5 established by historical activity; is that right?
 6 A. Yes.
 7 Q. Okay.
 8 I think you are telling us that you have your
 9 overall margin and, as I understand it, insofar as you
 10 look at particular products, what you have to make sure
 11 is that the overall margin that I get across the range
 12 of products then meets my target; is that right?
 13 A. Correct.
 14 Q. Right. Because of the historical position, so when you
 15 come along in 2000, if you look back to 1999, if the
 16 margins that are being charged have achieved the targets
 17 that have previously been set, then presumably you more
 18 or less carry on on the same margin levels; is that
 19 right?
 20 A. Yes, but there is other things you would do to --
 21 because the margin targets would go up every year.
 22 Q. Right.
 23 A. So there would be other things you would have to do. So
 24 for example I introduced a system instead of when you
 25 got a tactical bonus, we didn't use to claim that money

1 in until the end, and that bonus might run for several
 2 months, so Sainsbury's really would be out of pocket for
 3 several months. I changed the system so that we
 4 actually put that bonus on to the system and then we
 5 were collecting it every month --
 6 Q. To make it more efficient.
 7 A. To make it more efficient. Also when I first started
 8 and we were writing all these forms out to claim the
 9 bonuses, we were only claiming on sales out from the
 10 main store, and we were actually selling quite a lot of
 11 tobacco in our petrol filling stations. So part of the
 12 change in the system was also to capture -- was to
 13 invoice on deliveries into Sainsbury's rather than
 14 purely sales out and that captured all that. So there
 15 was other things you could do in terms of margin because
 16 you had to because the targets went up every year and
 17 yet the --
 18 Q. So the big bad boss --
 19 THE CHAIRMAN: Let her finish.
 20 You say the targets went up every year and yet?
 21 A. Yet the difference between the recommended selling price
 22 and probably the deferred bonus would be the same. So
 23 if we were making 5 per cent purely between the price we
 24 were selling out at and the price we were paying in, my
 25 margin target for category might be 7 per cent. So

1 I had to look at other ways of getting money in, because
 2 that bit didn't change. So where I could get other
 3 money in by being more efficient and claiming on
 4 deliveries in rather than sales out, that was a lot of
 5 additional money by negotiating better volume
 6 agreements, by listing fees or charging for pieces of
 7 advertising, those were all things that made up ...
 8 THE CHAIRMAN: That was where you had the flexibility to
 9 achieve a higher margin?
 10 A. Yes.
 11 MR HOWARD: You also presumably had flexibility, I think you
 12 were telling us in terms of negotiating volume discounts
 13 is one area; is that right?
 14 A. Volume override. The volume discounts again were set
 15 because the difference between Q5 being the price on the
 16 price list that we got charged from Palmer & Harvey, and
 17 then some brands attracted Q6 and Q7 discounts, but that
 18 was money that directly came from Palmer & Harvey, and
 19 again was set in the price list as what the Q6 price was
 20 and what the Q7 price was.
 21 Q. I think you were saying you could then seek to negotiate
 22 better discounts?
 23 A. Yes, a volume override, so on every thousand sticks we
 24 might have got 20p, 25p, and it differed between
 25 different manufacturers.

1 Q. In other words, the volume, what you are talking about
 2 there, this volume override, the net effect of it is to
 3 reduce the wholesale price?
 4 A. Yes.
 5 Q. We can call all these things bonuses, overrides,
 6 ultimately what you are interested in is what the net
 7 wholesale price is, aren't you?
 8 A. Yes.
 9 Q. One way you are explaining to us of reducing the net
 10 wholesale price is to try and get a particular form of
 11 discount in the form of an override?
 12 A. Yes.
 13 Q. And that's one of the things that you did, as
 14 I understand it?
 15 A. Yes.
 16 Q. Ultimately, your retail selling price, is this right,
 17 would be based upon your achieving your desired margin
 18 on the particular products?
 19 A. Not completely, no.
 20 Q. Well, what else is it?
 21 A. Because if, for example, you were given a deferred
 22 bonus, say the recommended selling price was £4 on
 23 Benson & Hedges, and --
 24 Q. When you say recommended selling price, can we just be
 25 clear what you are talking about?

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1 A. The recommended selling price in the manufacturers'
 2 price list.
 3 Q. That's what we are all calling the recommended retail
 4 price.
 5 A. Okay.
 6 Q. Sorry, I am not trying to pick you up, but elsewhere the
 7 expression "retail selling price" has been used in
 8 a different way, and it is just important that we are
 9 consistent --
 10 A. The recommended price.
 11 Q. -- but you mean the published recommended retail price,
 12 the RRP?
 13 A. Yes, so if that was £4, the supplier might say, "We are
 14 going to give you a deferred bonus" -- these things were
 15 all in place, "We are going to give you a deferred bonus
 16 so you can sell at £3.90", so we would then sell at
 17 £3.90. If we chose to sell at £3.95, which we could
 18 have done, but we wouldn't have been getting the bonus.
 19 Q. Sure.
 20 A. Equally, we could have sold at £3.85 but have been only
 21 getting the 10p bonus. But in essence we would sell at
 22 the price, at the deferred bonus.
 23 Q. Where they bonus you saying "I am prepared to pay you,
 24 on your example, a 10p bonus", the way that operates,
 25 obviously, if you don't go down to at least £3.90,

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1 then -- as I think you have said elsewhere -- they are
 2 not getting what they are paying for because they are
 3 giving you 10p --
 4 A. Exactly.
 5 Q. But equally if you decide of your own accord to go below
 6 £3.90, they are not going to pay you any more, because
 7 they are only prepared to pay you 10p --
 8 A. Exactly, which is why I wouldn't go below £3.90.
 9 Q. But they are not in any way seeking to restrict you
 10 going below £3.90 --
 11 A. No, no, I am not saying that, I could --
 12 Q. No. I will try not to interrupt you but please try
 13 equally not to interrupt me.
 14 They are not seeking to restrict you going below
 15 £3.90, and indeed you recognised if you did, it might
 16 not be in your interest because you had cut your margin,
 17 but they would be absolutely delighted?
 18 A. Well, I can't comment on the fact they were delighted,
 19 but yes, I would have cut my margin to do that, and
 20 I was able, if I wanted to do that, I could.
 21 Q. You regarded yourself as completely free to do that?
 22 A. Yes, but that would have been going against the
 23 corporate strategy if Tesco's had been selling at £3.90.
 24 Q. Because you didn't feel the need to -- because you
 25 weren't a leader, so if Tesco were at £3.90, your

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1 strategy didn't require you to go below £3.90?
 2 A. Correct.
 3 Q. Your margins, as I understand it, the margins that you
 4 might be looking for, they are obviously not, as it
 5 were, published, that's an internal communication; is
 6 that right?
 7 A. Correct.
 8 Q. Is this right, that it was for you, as the buyer, to
 9 decide what selling price you wanted in accordance with
 10 your corporate strategy and what margin you wanted to
 11 achieve; it was for you to decide that?
 12 A. Well, technically speaking, yes, but as I've just
 13 explained on tobacco it was a bit different because
 14 there was a lot more -- you know, other categories
 15 I worked on you didn't get a deferred bonus to sell
 16 below an RRP, and the RRP's weren't as in evidence and as
 17 kind of adhered to as they were in tobacco.
 18 Q. The RRP's is a peculiar feature of tobacco, isn't it?
 19 A. Yes, I mean, other people -- if somebody was coming
 20 along with a bottle of gin, I might say "what
 21 recommended price are you looking at" or "who would be
 22 your competitors", so I would have an idea but that
 23 doesn't mean to say I would stick to that RRP and it
 24 would never really be published anywhere the same as the
 25 tobacco ones are.

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1 Q. Exactly, and in tobacco, as you know, the RRP's have to
 2 be published as a matter of law, don't they?
 3 A. I wasn't aware that it had to be as a matter of law.
 4 Q. That's the case, and that's something which you are
 5 telling us made tobacco different, that there were these
 6 published recommended retail prices for all the products
 7 so that one could see exactly where the respective
 8 manufacturers stood?
 9 A. Yes.
 10 Q. Right. A supplier, here we are focusing on tobacco, he
 11 can obviously see as a matter of history what margin you
 12 are charging on his products because he knows what his
 13 wholesale price is and he can see what the retail
 14 selling price is, and he can work out the margin by just
 15 comparing the two?
 16 A. What he wouldn't know is the Palmer & Harvey delivery
 17 fee, and that was another thing that was very specific
 18 to tobacco, it was that tobacco wasn't delivered, didn't
 19 go from Imperial Tobacco into a Sainsbury's depot, and
 20 wasn't delivered out by Sainsbury's. All the tobacco
 21 was purchased by Palmer & Harvey, who then delivered it
 22 to Sainsbury's and obviously they charged Sainsbury's
 23 a fee for doing that. So as well as the Q5 price from
 24 the manufacturers' price list, there would then be
 25 a delivery element that was added on and that's what

1 Palmer & Harvey would charge us. So if the price was
 2 [REDACTED], and they charged us [REDACTED], we would get invoiced [REDACTED]
 3 at Sainsbury's. The suppliers didn't, as far as I am
 4 aware, have knowledge of what that delivery element was.
 5 Q. Sorry, so they sell to Palmer & Harvey, Palmer & Harvey
 6 sell it to you --
 7 A. Yes.
 8 Q. -- and they charge you a delivery charge?
 9 A. Correct.
 10 Q. Right. But whilst the suppliers wouldn't know precisely
 11 to the last penny what it was, presumably
 12 Palmer & Harvey's delivery charges are pretty standard?
 13 A. Well, I don't think they are, I think they differ
 14 between contracts, so I think how the Sainsbury's
 15 contract would be constructed would be different from
 16 how the Tesco contract would be constructed.
 17 Q. Do you know that or are you just guessing?
 18 A. I don't know 100 per cent but it would be -- you know,
 19 I wouldn't have knowledge of what -- as a Sainsbury's
 20 buyer I wouldn't have knowledge of what the Tesco
 21 contract with Palmer & Harvey was, but if they would get
 22 more volume, I expect they would be getting it at
 23 a better delivery fee.
 24 Q. Right. In relation to --
 25 DR SCOTT: Sorry, can I just ask one additional question

1 there?
 2 As we understand it, Palmer & Harvey were getting
 3 very large volumes from both ITL and Gallaher?
 4 A. Yes.
 5 DR SCOTT: If they got an additional volume bonus over Q5,
 6 did they pass that on to you?
 7 A. Yes, they did. Yes, they did. And they passed that on
 8 to the multiples [REDACTED] per cent, so if they bought enough
 9 of Benson & Hedges, whatever it is, to attract the Q7
 10 discount, that used to get paid back to Sainsbury's on
 11 a quarterly basis. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 17 DR SCOTT: Ah, that explains it, now I understand what's
 18 going on. Thank you.
 19 MR HOWARD: You have spoken quite a lot about the bonuses
 20 already, and we are obviously going to look at that in
 21 a bit more detail. Is this right both in relation to
 22 tobacco and other products: if a supplier wants to try
 23 to influence you to sell his product at a particular
 24 selling price or less, he needs to ensure that his
 25 wholesale price is set at an appropriate level which

1 allows you to earn the margin that you desire and
 2 achieve the selling price that he is after; is that
 3 right?
 4 A. Yes, but there was never as many discussions about
 5 selling price in any other category than tobacco.
 6 Q. Why is it you are just not answering my question? I am
 7 not asking what discussions there were; I am asking you
 8 about what the manufacturer or supplier needs to do if
 9 he is interested in achieving let's say a particular
 10 retail selling price for his goods. Do you agree that
 11 the way in which you would expect him to seek to
 12 influence you is by setting his net wholesale price at
 13 a level which, together with your margin, would likely
 14 be to result in that retail selling price which he
 15 desired?
 16 A. Well, the reason I say because it was different between
 17 tobacco and other categories, you would be less likely
 18 to go with the retail selling price in other categories,
 19 people could suggest a price, they wouldn't be able to
 20 suggest a price if their wholesale price didn't allow
 21 you to make the margin, if they wanted we want to sell
 22 you £10 and you will only make a couple of per cent then
 23 we clearly wouldn't go with that price.
 24 What I am trying to make -- the point I am trying to
 25 make is there was a lot less discussion about retail

1 prices in every other category I worked on than tobacco.
 2 **Q.** The other categories you worked in, one of the things
 3 that distinguishes them from tobacco is that the
 4 suppliers or manufacturers have a lot of other weapons
 5 in their armoury in order to compete, don't they?
 6 **A.** Yes, but it was through promotions.
 7 **Q.** Through promotions --
 8 **A.** Yes, and advertising.
 9 **Q.** -- television, billboard, advertising?
 10 **A.** Yes.
 11 **Q.** So alcohol you can still advertise, can't you, at this
 12 time you could advertise pretty freely in television and
 13 the cinema and on billboards?
 14 **A.** Yes, and equally the retailers could advertise those
 15 products, bring them in as footfall drivers.
 16 **Q.** The key distinguishing feature of tobacco was of course
 17 that the only real weapon in the armoury of the
 18 manufacturers where they are seeking to compete is
 19 price; that's right, isn't it?
 20 **A.** Correct.
 21 **Q.** That, if one tries to understand, why is there much more
 22 discussion in tobacco about retail selling prices, it's
 23 because retail selling prices are the key battleground
 24 for these manufacturers; correct?
 25 **A.** Correct.

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1 **Q.** What you were finding, when you were this tobacco buyer
 2 for 20 months, there was a lot of discussion about
 3 retail selling prices because there was in fact intense
 4 competitive activity going on, particularly in what you
 5 refer to as the emerging part of the market, namely the
 6 low priced end; that's right?
 7 **A.** The ultra low price end.
 8 **Q.** What I've just put to you is entirely right, isn't it?
 9 **A.** Correct.
 10 **Q.** Thank you.
 11 There are, as we know, different segments of the
 12 tobacco market, aren't there, there is the premium
 13 brand, there is a mid-price, low price and ultra low
 14 price. Were you familiar with that sort of
 15 segmentation?
 16 **A.** Yes.
 17 **Q.** Let's take the ultra low price. From Sainsbury's point
 18 of view, whether you sell a packet of Dorchester or
 19 Richmond doesn't actually make any difference, does it?
 20 **A.** Well, it could, if you had a better overrider agreement
 21 with one manufacturer than the other.
 22 **Q.** Yes -- no -- if you are getting a better term from one
 23 manufacturer then you have a greater incentive to sell
 24 his cigarettes; correct?
 25 **A.** Yes.

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1 **Q.** Let's assume for a moment that the net wholesale price
 2 is the same; right? We will look at that in more
 3 detail. Assuming that was so, it would be a matter of
 4 indifference to you whether you sold Richmond or
 5 Dorchester?
 6 **A.** Correct.
 7 **Q.** Is this right: subject to any question of competitor
 8 activity, which I think you say actually didn't affect
 9 the position of Tesco reducing its prices and your
 10 having to meet them, I mean reducing it without being
 11 funded, so we can perhaps not worry too much about it.
 12 Was your practice that where you had two products which
 13 were competing in the relevant segment that the retail
 14 prices that you set were prices which were ultimately
 15 simply intended to be a reflection of their relative
 16 wholesale prices?
 17 **A.** Sorry, can you just repeat? I didn't quite understand.
 18 **Q.** Would it be fair to say that, if we take two products,
 19 which one sees being sold in Sainsbury's, let's say one
 20 is being sold at £4, they are in the same segment, one
 21 is at £4, and one is at £4.02. So one sees that
 22 differential. Would it be correct to understand that
 23 the retail selling prices of the two products, the one
 24 at £4, and the one at £4.02, reflected the wholesale
 25 selling prices or the wholesale selling cost to you of

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1 the products? So the one that you were selling for £4
 2 was relatively cheaper to you than the one that you were
 3 selling at £4.02?
 4 **A.** No, because what tended to happen was that the different
 5 suppliers had benchmarked products, so the supplier of
 6 Dorchester might have their desire to be the same price
 7 as Richmond, and therefore they would bonus you
 8 accordingly. So if the ongoing price of --
 9 **Q.** Sorry, just --
 10 **THE CHAIRMAN:** Just let her finish what she is saying.
 11 **A.** If the ongoing price was £4, and then one of the
 12 manufacturers had come along and offered it at -- say
 13 the ongoing price was £4.02, one of the manufacturers
 14 had come along and said "We would like to give you
 15 a tactical bonus to go down to £4", there might have
 16 been that disparity in prices for a period of time and
 17 then the other manufacturer would have come along and
 18 said "We see you have reduced that to £4, we want to
 19 reduce ours to £4." In practice there was probably no
 20 difference in the Q5 price of those products at the same
 21 level.
 22 **MR HOWARD:** I understand that. So we all understand that
 23 Dorchester and Richmond, if we talk about those, their
 24 Q5 price was, because in the RRP list they are the same
 25 price.

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1 My question was designed to consider the position --
 2 I think you are agreeing, let's just see -- the net
 3 wholesale price, in other words after taking account of
 4 the bonuses, okay. So in the example you just gave you
 5 say "one manufacturer has paid me a bonus", a deferred
 6 bonus, it doesn't really matter what you call it, "to
 7 get down to £4". Okay? The other manufacturer has not
 8 done that, and his product is at £4.02. Okay? Would it
 9 therefore be fair for us to conclude that in that
 10 situation, before the other manufacturer has responded,
 11 that the net wholesale price to you of the product which
 12 is at £4 was -- the net wholesale price was
 13 correspondingly less than the net wholesale price of the
 14 product that you have at £4.02?
 15 **A.** Yes, because you are attracting the tactical bonus, so
 16 yes.
 17 **Q.** So in other words, the way all of this in fact operated
 18 was that the -- let's approach it from another angle.
 19 Would you agree with this: if Imperial -- look at it
 20 from their point of view -- wished to induce you or
 21 influence you to set retail selling prices at a level
 22 which made their particular product competitive with
 23 a particular Gallaher product, they would only be able
 24 to do so if they sold their product to you at net
 25 wholesale prices after taking account of discounts,

1 promotions and so on which were competitive with
 2 Gallaher's net wholesale prices?
 3 **A.** Yes.
 4 **Q.** Thank you. We know that Imperial and Gallaher, we have
 5 already discussed, published their RRP's and one could
 6 see from those -- well, you knew also from the agreement
 7 that we will come to, which products were competing
 8 against each other, didn't you?
 9 **A.** Yes.
 10 **Q.** In fact, you didn't need to see it in the agreement
 11 because anybody who knew about the RRP's and knew about
 12 tobacco would know which brands were battling it out
 13 against each other, wouldn't they?
 14 **A.** Yes, if you looked at the two price lists, yes.
 15 **Q.** If Imperial wanted the differential in your retail
 16 selling prices in respect of its goods as compared to
 17 those of Gallaher, at least to match the differentials
 18 in RRP's between its and Gallaher's respective products,
 19 do you agree that it would at least have to ensure that
 20 the differentials in its net wholesale prices as
 21 compared to those of Gallaher corresponded to the
 22 differentials in the respective RRP's? Is that too
 23 complicated a question? Let me break it down or try and
 24 put it simply. It's easier if we take an example.
 25 If Imperial's desire is that Richmond, say, should

1 be on your shelf no more than Dorchester, let's assume
 2 that's its desire, because it believes that Richmond, if
 3 it's priced at no more than Dorchester, will be a good
 4 seller. Okay?
 5 **A.** Okay.
 6 **Q.** If that's its view of the world, if it wants to
 7 influence you to do that, it has to ensure that its net
 8 wholesale price of Richmond is no more expensive than
 9 the net wholesale price of Dorchester?
 10 **A.** Correct.
 11 **Q.** This, what we have just discussed, is part of the
 12 commercial background which was known to you and to
 13 Imperial at all times when you were involved in this;
 14 correct?
 15 **A.** Yes.
 16 **Q.** You negotiated, we know, so you came into the department
 17 when there was already a trading agreement in place, and
 18 you negotiated the next trading agreement, didn't you?
 19 **A.** Yes.
 20 **Q.** What we have just been discussing, this background, that
 21 was part of the background, it was the context in which
 22 you understood the first trading agreement was operating
 23 and it was the background against which the 2002 trading
 24 agreement was made; correct?
 25 **A.** Yes.

1 **Q.** If we just go back to the way tobacco works, just so we
 2 understand the bonus structure. As I understand it, you
 3 say that you were paid a bonus by Imperial to reward,
 4 amongst other things, pricing below RRP; is that right?
 5 **A.** Well, not amongst other things, that bonus was paid to
 6 price below RRP.
 7 **Q.** Right, okay. Just so we understand it, the way actually
 8 the world operates here is Sainsbury's and the other
 9 supermarkets, as I understand it, habitually sell
 10 cigarettes at prices below the recommended retail price;
 11 correct?
 12 **A.** Correct, because that bonus is in place.
 13 **Q.** The reason they do that is they get margin support to do
 14 it from the manufacturers; correct?
 15 **A.** Correct.
 16 **Q.** And it's in Sainsbury's interests and the other
 17 supermarkets' interests because by selling below RRP you
 18 can hope for greater volume and make yourselves
 19 competitive with the corner shops and things like that
 20 and the petrol stations who are selling above RRP?
 21 **A.** Correct.
 22 **Q.** Of course it's in Imperial's interests because then they
 23 get larger sales, that's what they are looking at?
 24 **A.** Correct.
 25 **Q.** The interest -- what I think you would confirm is that

1 Imperial, as well as being interested in the relative
 2 price of its product, that is relative to competing
 3 brands, was actually also interested in getting the
 4 prices below RRP, so it was interested in the absolute
 5 levels of prices as well, wasn't it?
 6 **A.** I have never thought about that. I mean, those prices
 7 below RRP were in the -- you know, when I took over that
 8 was the situation and that just carried on.
 9 **Q.** What I am saying is you already told us they wanted to
 10 sell below RRP so they were obviously interested in
 11 ensuring that you did sell at what were relatively --
 12 relatively to the RRP's, their own RRP's -- low prices?
 13 **A.** Yeah, they would have been interested in that because
 14 they wouldn't have paid us a bonus otherwise.
 15 **Q.** Exactly.
 16 **THE CHAIRMAN:** Is that a convenient point at which to break,
 17 or would you like to go on to another topic?
 18 **MR HOWARD:** That's probably a convenient moment.
 19 **THE CHAIRMAN:** We are going to take a ten minute break now,
 20 Mrs Corfield. Because you are in the middle of your
 21 evidence, that means you mustn't discuss the case or
 22 your evidence with anybody from the OFT or any of the
 23 other parties. So you will have to be a bit antisocial,
 24 I am afraid, but just to give everyone a short break.
 25 So we will come back at just after 25 past 11.

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1 (11.18 am)
 2 (A short break)
 3 (11.30 am)
 4 **MR HOWARD:** As I understand it, is this right, during your
 5 period as buyer, Imperial would pay you what are called
 6 tactical or promotional bonuses or deferred bonuses to
 7 incentivise you to reduce the selling price of their
 8 particular brand of cigarettes?
 9 **A.** Correct.
 10 **Q.** This payment of bonuses by suppliers in one form or
 11 another, I just want to see whether this is the
 12 position, although this happened more frequently in the
 13 case of tobacco, I think you are telling us, is it right
 14 that it's not actually unusual that suppliers are paying
 15 bonuses or discounts in order to try and incentivise the
 16 supermarket to price their product competitively?
 17 **A.** I would say in other categories it only happens around
 18 promotions.
 19 **Q.** Right. There are, as I understand it, in other
 20 categories you are telling us that there are less
 21 promotions but where you get promotions then you get
 22 this bonusing; is that right?
 23 **A.** No, in other categories there are more promotions.
 24 **Q.** There are more promotions?
 25 **A.** Yeah, because there were no promotions in cigarettes as

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1 such.
 2 **Q.** What you mean by no promotions in cigarettes, you mean
 3 there is no -- because you are not allowed to advertise
 4 cigarettes, so there is no national campaign where
 5 either the manufacturer or the supermarket, the
 6 retailer, can go out and say "Embassy 5p off for the
 7 next seven days", you can't do that?
 8 **A.** Correct.
 9 **Q.** So there is none of that sort of promotional activity,
 10 but there are promotions in the sense of their -- sorry,
 11 let's take it in stages. In relation to other grocery
 12 items, where you have promotions they are frequently, if
 13 not always, accompanied by advertising?
 14 **A.** Yes.
 15 **Q.** Leaving aside the advertising, where what the
 16 manufacturer or supplier of the alcoholic beverages is
 17 trying to do, which is to persuade you to have
 18 a discount on their retail selling price to reduce it,
 19 so Heineken wants to come down by 5p or whatever it is,
 20 they provide a bonus to you to do that; is that right?
 21 **A.** They do. There will be a structured promotional
 22 programme where people would have to submit their
 23 proposals, and they would be expecting a bigger
 24 discount. You would never just put Heineken down by 5p
 25 and advertise that as a stunning promotion. I think

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1 there was two different things in other categories.
 2 There was regular promotions where you would see
 3 a cross-out that would say "Four pack of Heineken £4.99,
 4 now £3.99, save £1" and then there would be other things
 5 that may be in response to what -- the low price
 6 guarantee list then became a corporate price index and
 7 you were to match your products, so on some of the other
 8 areas, the detergent for example was 100 per cent. So
 9 if some of the products went down at Tesco I would have
 10 to put those products down and we would have to try and
 11 get them funded. So you would probably put a piece of
 12 advertising up that said "new lower price" and that
 13 might only be 2, 3, 4, 5p discount, but a proper
 14 promotional programme where it started on a particular
 15 date, ran for three or four weeks, was all kind of
 16 decided in advance by suppliers submitting proposals.
 17 That didn't happen in cigarettes because they didn't
 18 have --
 19 **Q.** No. As I understand it, the only distinction you are
 20 drawing between cigarettes and detergent is that where
 21 the cigarette manufacturer is trying to get
 22 a competitive advantage, say by trying to persuade you
 23 to reduce the price, he can only do that; what he can't
 24 do is also blow his trumpet to the public, other than
 25 people can see it in the store. He can't go out to the

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1 world and say "We are 5p off".
 2 What I am interested in is obviously we know you
 3 can't promote tobacco, in the sense of having
 4 advertising, but if a manufacturer wants to try and get
 5 a competitive advantage, what he tries to do is induce
 6 a lower selling price for his product, doesn't he?
 7 **A.** Correct.
 8 **Q.** What you are allowed to do, we have heard about things
 9 called shelf barkers, where you can have some form of
 10 advertising in the kiosk which makes it clear that that
 11 particular brand is at a lower price, can't you?
 12 **A.** Yeah, I think you could at the time.
 13 **Q.** It might be more restricted now, but at the time you
 14 could?
 15 **A.** Yeah.
 16 **Q.** So the manufacturer there who's trying to promote his
 17 product by getting a lower price, he does it by
 18 bonusing; correct?
 19 **A.** Correct.
 20 **Q.** Equally, the manufacturer of the detergent who is going
 21 to have a national advertising campaign, say, that his
 22 product is very low for a period of time, the mechanism
 23 by which, as I understand it, he seeks to do that in his
 24 relationship with you -- with the supermarket, I should
 25 say -- is by paying a bonus which is reducing your net

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1 wholesale cost?
 2 **A.** Correct.
 3 **Q.** Thank you.
 4 **DR SCOTT:** Can I just ask a question around this? While you
 5 were the tobacco buyer, did Sainsbury's ever go to the
 6 suppliers and say "We want to promote"?
 7 **A.** No.
 8 **DR SCOTT:** So it was always either a situation in which
 9 a manufacturer came to you and said "We want to do
 10 a tactical bonus" or a situation where you saw something
 11 happening and you went back to them and said "What about
 12 a bonus for us?" So you were never in a situation of
 13 taking a lead.
 14 **A.** No.
 15 **DR SCOTT:** So Sainsbury's were basically a follower in terms
 16 of pricing?
 17 **A.** Yes.
 18 **MR HOWARD:** We have already discussed in part Sainsbury's
 19 corporate strategy, but presumably part of the strategy
 20 in relation to tobacco is ethical considerations as to
 21 whether Sainsbury's wants to be seen to be promoting
 22 tobacco; is that right?
 23 **A.** Yeah, exactly, and it was one of those things where,
 24 even if my sales were really, really good and massively
 25 up on last year, where we had to send comments on Monday

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1 about the week's performance, even if tobacco had been
 2 50 per cent up, that would never have got mentioned.
 3 **Q.** Yes --
 4 **A.** Not something we wanted to shout about, which was quite
 5 annoying when you were the buyer.
 6 **Q.** "We are happy to make money from this, but not really
 7 going to say very much about it and we can't be seen to
 8 be publicly promoting tobacco, we are happy to make the
 9 profits, but we are not going to be seen in the shops to
 10 be trying to encourage, if you like, people to smoke",
 11 that's what it amounts to, "But if people are daft
 12 enough to smoke, then we will sell them to them."
 13 **A.** I suppose that was my stance because I didn't smoke but
 14 it was a legal product, I was paid, and if people were
 15 going to smoke, I wanted them to buy them from
 16 Sainsbury's rather than from somewhere else.
 17 **Q.** Well, your position is rather similar to mine, I don't
 18 smoke.
 19 When a manufacturer pays one of these bonuses in
 20 order to get his price down, of course the key from his
 21 point of view is that the bonus actually does feed
 22 through to a lower shelf price, doesn't it?
 23 **A.** Correct, yes.
 24 **Q.** The key from the Sainsbury's point of view, where
 25 a manufacturer is trying to influence the retail selling

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1 price to come down, is that your position should not be
 2 prejudiced in the sense that your margin should not be
 3 affected?
 4 **A.** Correct.
 5 **Q.** Providing your margin is maintained and you are
 6 competitive or more competitive with your benchmark,
 7 whether one is dealing with cigarettes or alcohol, is it
 8 fair to say you would generally be prepared to accept
 9 a bonus which allowed you to reduce the retail selling
 10 price?
 11 **A.** Yes.
 12 **Q.** Equally, if we focus on cigarettes now, if
 13 a manufacturer of cigarettes has a bonus or promotion
 14 which he ends, so he's paid you tuppence to get the
 15 price of a brand down, and he then tells you that's
 16 ending, you would generally expect to return your price
 17 of the particular cigarettes to the pre-bonus or
 18 promotion level since otherwise you would eat into your
 19 margin?
 20 **A.** Correct.
 21 **DR SCOTT:** Can I just ask one question there?
 22 You have explained that your actual margins weren't
 23 transparent to ITL or to Gallaher, because there were --
 24 **A.** P&H.
 25 **DR SCOTT:** If you were in a situation where, say, Richmond

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1 and Dorchester were at 3.44 both in Sainsbury's and
 2 Tesco's, so at the retail level it's all parity.
 3 **A.** Correct.
 4 **DR SCOTT:** You would have visibility of what the margins
 5 were for you, taking everything into account?
 6 **A.** Theoretically, yes. But in practice, not exactly. I'll
 7 explain what I mean by that. The pricing tab we had was
 8 based on the Q5 invoice price and the selling price, so
 9 you could see what the margin was at that level. We
 10 didn't actually have any one document that then fed in
 11 things like the overrider bonus and all those other
 12 things.
 13 So on a very -- quickly, if somebody had come to me
 14 and said "What's the difference in profitability between
 15 Dorchester and Richmond?", I wouldn't be able to glance
 16 at something and say: one is 5 per cent, one is
 17 5.2 per cent. If all the other things like the invoice
 18 price were the same, which usually they were, but the
 19 overrider volume was different, so say I was getting
 20 [redacted] per thousand sticks and [redacted] on
 21 another, I would know the one getting [redacted] was
 22 different, but we didn't have one document where
 23 everything fed in, because also from a supplier level
 24 there was things like all the listing fees and any
 25 advertising money.

1 So you would have -- to truly work out and compare
 2 the profitability of one manufacturer against another,
 3 you would have had to have fed all that in, and at that
 4 time we didn't have that sort of system. Later on when
 5 I bought some other products you would get a margin and
 6 if you had invoiced a big lump of cash against
 7 something, that would come through in a particular week
 8 and you would have a massive margin showing on
 9 something, because of that money. But at that time all
 10 those things didn't feed in, so we had a document that
 11 said "These are all the invoice prices, these are the
 12 selling prices, this is what the margin is", but it
 13 didn't add those other things in.
 14 **THE CHAIRMAN:** So do I understand, then, that even though
 15 one of your goals was to achieve margin across the
 16 category, it wasn't necessarily the case that you
 17 applied exactly the same margin to -- or you were
 18 earning exactly the same margin on a packet of
 19 Dorchester as a packet of Richmond, even though you were
 20 selling them in the shop at the same price?
 21 **A.** You were probably earning the same margin if you didn't
 22 take into account any override agreements or any other
 23 lumps of cash that were associated with them. In terms
 24 of the invoice price and the tactical bonus, the
 25 tactical bonus was always the same. If you were asked

1 to reduce it by one penny, it was always 43p, because
 2 that was the mathematical formula, it was 43p per
 3 thousand sticks, or if it was 2p it was 85p. So that
 4 would be the same. So if Dorchester came along and said
 5 "We want to reduce a penny, the tactical bonus would be
 6 43p", if Richmond came along and said, "We want you to
 7 reduce a penny", the tactical bonus would have been 43p.
 8 **THE CHAIRMAN:** Right.
 9 **DR SCOTT:** So if we stick with that for a moment, if the
 10 manufacturer came along and offered you a bonus
 11 essentially to do what you were already doing in terms
 12 of having prices which met their requirements, you would
 13 happily take the bonus?
 14 **A.** They would only offer you an additional bonus to do
 15 something additional. So if you are already
 16 getting a deferred bonus to sell 10p below the RRP, and
 17 they came along and said "We will offer you another 43p
 18 per thousand", that would be to go down another penny,
 19 they wouldn't have come along and said "We will offer
 20 you some more money to stick at the price you are at".
 21 It would have been nice if they had.
 22 **MR HOWARD:** As I understand it, what you are saying -- we
 23 will look at the trading agreements in a moment -- and
 24 one has to try and apply this, as it were, in stages,
 25 although of course it doesn't really in real life work

1 like that. If one takes a situation where there is
 2 an RRP published, two RRP's, and leaving aside any
 3 deferred bonuses for a moment, as I understand it, what
 4 you are saying is that, well, the price that we would be
 5 selling these respective products at would be based upon
 6 their wholesale list prices, which were where the RRP's
 7 are the same, the same. And in terms of margin, we were
 8 calculating our margin by reference to the wholesale
 9 list price less the discount we were getting for selling
 10 below RRP; is that right?
 11 **A.** I think if you had -- I don't think you can count it the
 12 same if the products didn't have a deferred bonus,
 13 because if the products had a deferred bonus you had to
 14 sell it at at least that discount below the RRP, that's
 15 why you get the bonus. If you had products that had no
 16 deferred bonus, then we may have sold above RRP and
 17 I think in some instances we did, and particularly with
 18 10s of cigarettes where there was no deferred bonus on
 19 10s, so we did price above the RRP.
 20 **Q.** I see, so where there was no deferred bonus, you priced
 21 wherever, whatever you thought was appropriate?
 22 **A.** Yeah, and in some instances we would, to make money we
 23 would price above the RRP. Because those were on small
 24 brands that didn't then affect the price of the rest.
 25 **Q.** If we just try and go back a stage, I think you told me

1 earlier that if we take the case of Richmond and
 2 Dorchester, where they are being priced in your
 3 supermarket at the same price at £3.50, I am just
 4 interested in looking at it from the point of view of
 5 Richmond. As I understand it, at the time, you were
 6 happy to price them at the same price because the net
 7 wholesale price of Richmond at the time, as you
 8 perceived it, taking account of everything, was no more
 9 than the net wholesale price of Dorchester; is that
 10 right?
 11 **A.** Correct.
 12 **Q.** That's what I thought.
 13 **DR SCOTT:** Hold on, I thought you said you didn't actually
 14 have a sheet which told you ...
 15 **MR HOWARD:** I think your evidence, let's just be quite clear
 16 about it, is absolutely clear and unequivocal about
 17 this, I do not want there to be any doubt about it, that
 18 in the example I gave, we can go back and look through
 19 other ones if need be, but where you priced competing
 20 brands, where we find you were pricing them at the same
 21 price, that was because your perception at the time was,
 22 in the case of the Imperial brand, it was the net
 23 wholesale price was no more than the net wholesale price
 24 of Dorchester. Is that correct?
 25 **A.** Taking the override bonus aside, yes.

1 **Q.** Yes, but you were aware of the override and other
 2 bonuses; correct?
 3 **A.** That wouldn't have made a difference. If somebody had
 4 come to me and said "We want you to reduce the price of
 5 Richmond by a penny and we are going to give you the
 6 tactical bonus to do that", I wouldn't have said "Oh,
 7 but your override bonus isn't enough to do that",
 8 because the penny reduction or the 2p reduction related
 9 to the tactical bonus we were giving.
 10 **Q.** I am asking before you get to a tactical bonus, and it
 11 may be that in the case of Richmond and Dorchester it's
 12 slightly artificial because were they always having some
 13 form of tactical bonus on those?
 14 **A.** A lot of the time. They had a deferred bonus all the
 15 time and a large part of the time there were tactical
 16 bonuses.
 17 **Q.** Yes. The deferred bonus, though, you are telling us was
 18 to get below RRP?
 19 **A.** Yes.
 20 **Q.** And then there are tactical bonuses to go further?
 21 **A.** Yes.
 22 **Q.** If we look at the position at the stage of the deferred
 23 bonus, and as I understand it, you were getting deferred
 24 bonuses from both Imperial and Gallaher, if we take
 25 Richmond and Dorchester?

1 **A.** Correct.
 2 **Q.** You are getting other discounts from the two of them,
 3 that you negotiate, overrides and things of that sort;
 4 correct?
 5 **A.** An override, yes.
 6 **Q.** You get that from both of them as well?
 7 **A.** Yes, but that wasn't necessarily the same amount per --
 8 **Q.** No, but the net position, before we get to a special
 9 promotional situation where one finds two products being
 10 priced at the same level, is it, if we take it from
 11 Imperial's perspective, fair to conclude from what you
 12 are saying that you were satisfied at the time that
 13 Imperial's net wholesale price was competitive with that
 14 of Gallaher?
 15 **A.** I don't think we considered it exactly in that way
 16 because we didn't factor in the override. So there
 17 would have been a difference. If one was giving you 20p
 18 per thousand sticks and the other was giving you 30p --
 19 **Q.** Yes.
 20 **A.** -- that would have made a difference to the net --
 21 **THE CHAIRMAN:** That wouldn't necessarily have made
 22 a difference to the shelf price, is that what you are
 23 saying?
 24 **A.** No, it wouldn't have made a difference to the shelf
 25 price, because if somebody had come along, regardless of

1 what the override was, and said "We want to give you
 2 a bonus to go down a penny" you would have known that
 3 that bonus was being offered to everybody else, and so
 4 you would have accepted it.
 5 **THE CHAIRMAN:** So I think the question -- you will correct
 6 me if I am wrong -- that Mr Howard is trying to get at
 7 is: if I was to go into a Sainsbury's store and see
 8 Dorchester and Richmond are at the same price on the
 9 shelf, if I said "Oh, that must mean that they are
 10 paying the same net price, taking into account all
 11 overrides and bonuses, to ITL for the Richmond packet as
 12 they are paying Gallaher for the Dorchester packet",
 13 would that be a correct inference to draw from the fact
 14 that you can see the two shelf prices are the same, or
 15 could you not really draw that inference?
 16 **A.** I could draw that -- I am not sure whether a consumer
 17 actually would think about that. It's what they are
 18 prepared to pay. I don't know whether the --
 19 **THE CHAIRMAN:** All right. Suppose --
 20 **A.** I don't know how --
 21 **THE CHAIRMAN:** Putting that on one side, if they were for
 22 some reason interested in that, I suppose underlying
 23 that question is an assumption that you would ensure
 24 that the margin that you earn from the Dorchester packet
 25 is the same as the margin you earn from the Richmond

1 packet, taking into account all the bonuses and things
 2 that you --
 3 **A.** They wouldn't have been exactly the same.
 4 **MR HOWARD:** Right. And because? Why?
 5 **A.** Because the overrides were different.
 6 **Q.** Right. But in terms of your calculation of things, as
 7 I understand it, when you were looking at it at the
 8 time, you put the overrides on one side?
 9 **A.** Yes.
 10 **Q.** So that in your calculation, I think this is --
 11 **A.** It was the same in my calculation.
 12 **Q.** So far as you were concerned, you treated the override
 13 as being on one side, over here (indicated)?
 14 **A.** Yes.
 15 **Q.** Happy to get the money but you weren't treating it as
 16 being relevant to the margins, so to answer
 17 the Chairman's question, I think, if one said, dealing
 18 aside the questions of what overrides you have been
 19 able to negotiate, in respect of Dorchester and
 20 Richmond, what was the margin that you understood you
 21 were charging, was it the same, my understanding is the
 22 answer is where they are priced the same you understood
 23 you were charging the same margin?
 24 **A.** Getting the same margin.
 25 **Q.** Yes, getting the same margin. I am sorry.

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1 **A.** Yes.
 2 **Q.** That's fine. Good. I think we have cleared that one
 3 up.
 4 Just pausing for a moment, and I think we have
 5 probably rather covered this, we have already seen that
 6 between supermarkets there is a keen competitive
 7 dynamic; right?
 8 **A.** (Witness nods).
 9 **Q.** As well as this highly competitive position between the
 10 retailers, between the supermarkets, there is frequently
 11 grafted onto this situation a further competitive
 12 dynamic between the suppliers, isn't there?
 13 **A.** Obviously, yes.
 14 **Q.** Just as supermarkets keenly, like hawks, watch what
 15 their competitors -- you are watching Tesco and Asda,
 16 your suppliers are watching like hawks what their
 17 competitors are doing, and particularly what prices
 18 their products are being sold at in your stores;
 19 correct?
 20 **A.** Correct.
 21 **Q.** Yes, and the reason that the suppliers, particularly in
 22 the case of tobacco when you were involved, are keenly
 23 watching what the selling price is of their rival
 24 products, is because if they find themselves out of
 25 kilter, they want to take steps to correct that, in the

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1 same way as you want to take steps to correct the
 2 position if you are out of kilter with Tesco?
 3 **A.** Correct.
 4 **Q.** In the case of tobacco, the only way in which the
 5 manufacturer can take corrective action where he sees
 6 the retail selling price is no longer competitive, the
 7 only thing he can do is reduce his wholesale price by
 8 paying a bonus on the basis that the wholesale price
 9 reduction represented by the bonus is to be fed through
 10 to the shelf price in order to get a shelf price
 11 reduction?
 12 **A.** Correct.
 13 **Q.** In this environment where a manufacturer is seeking to
 14 compete with a rival, so Richmond and Dorchester, and
 15 they talk about a shelf price, would it be fair to say
 16 that invariably you would understand them to mean that
 17 the shelf price referred to was a maximum price, because
 18 what the manufacturer is seeking to achieve is a retail
 19 selling price that at least matches the price of his
 20 rival?
 21 **A.** Correct.
 22 **Q.** The supermarkets and Sainsbury's, if we take
 23 Sainsbury's, I will not ask you to speak on behalf of
 24 supermarkets generally, you are keen to promote
 25 yourselves or Sainsbury's are keen to promote themselves

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1 as consumer champions, aren't they?
 2 **A.** Yes.
 3 **Q.** You have had experience of tobacco and alcohol as
 4 a buyer in a supermarket. Where you get a keen
 5 competitive dynamic between suppliers, do you agree that
 6 what the supermarket is often able to do is exploit that
 7 competitive dynamic between the suppliers in order to
 8 drive down prices?
 9 **A.** I would agree with that.
 10 **Q.** Mm?
 11 **A.** I would agree with that.
 12 **Q.** Yes. What you can do is you can exploit it, when you
 13 see what they are trying to do, by getting one
 14 manufacturer to provide a bonus to promote his product
 15 in the response that that would trigger a competitive
 16 reaction from the other?
 17 **A.** Yes, it was highly likely, if one went down,
 18 particularly if they were seeking to benchmark, so if
 19 Richmond and Dorchester were seeking to benchmark and
 20 one went down, I would say it was highly likely that the
 21 other would follow.
 22 **Q.** Yes. In respect of this battleground that we have been
 23 talking about, the competitive response that one
 24 manufacturer makes to his rival, an important facet of
 25 that, do you agree, is that the party who is seeking to

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1 respond has to feel confident that if he does respond by
 2 reducing his wholesale price, he has to feel confident
 3 that that reduction will be translated into a retail
 4 price reduction?
 5 **A.** Corrects, otherwise he wouldn't have paid the bonus.
 6 **Q.** Exactly. If he can't feel confident that his reductions
 7 are going to feed through, he is going to feel "It's
 8 pointless to become involved in cutting my price because
 9 what's the point in cutting my price if I am not going
 10 to get a lower retail selling price"?
 11 **A.** It was always clear that the bonus was being offered in
 12 return for reducing the shelf price. The bonus wasn't
 13 being offered just for Sainsbury's to make more money
 14 and not actually pass that through to the customer.
 15 **Q.** I think you have agreed with me that there was a keen
 16 competitive dynamic between Imperial and Gallaher at the
 17 time you were involved; correct?
 18 **A.** Yes, there was.
 19 **Q.** In the other areas in which you were involved, ales,
 20 stouts and cider, I assume ales, stouts and cider is
 21 a sort of subsidiary of beer, is it?
 22 **A.** How it was categorised, the beer that I bought was
 23 bitter and regional bottled ales, or all the bottled
 24 ales, whereas the other part of beer was cans, bottles
 25 of lager.

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1 **Q.** Where does lager fit into those categories?
 2 **A.** Lager is part of the beer category, but there was two
 3 beer buyers. There was somebody who solely bought
 4 lager, whether it was in cans or in bottles and then
 5 there was myself that bought bitters and things like
 6 John Smith's and stout, Guinness and all the bottled
 7 ales.
 8 **Q.** Was there a lot of competition in the beer market that
 9 you were dealing with?
 10 **A.** Yes.
 11 **Q.** Was that more or less acute than in tobacco?
 12 **A.** I think slightly less, because you really had two very
 13 big players in tobacco, who probably had similar shares,
 14 whereas in beer there would have been more people. In
 15 spirits again it's slightly different. You have a big
 16 company like Diageo and you have other companies, but
 17 things like Smirnoff, which is a Diageo product, is
 18 massively bigger than any other vodka. So there is
 19 competition, but it's probably not just two people and
 20 it's not, you know, two manufacturers with such similar
 21 sales, there is probably a lot more manufacturers and
 22 products involved.
 23 **Q.** So as I understand it, you are saying that in a way
 24 slightly paradoxically you have two big manufacturers
 25 here, but despite that, actually it was an environment

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1 which was even more competitive than areas where there
 2 were a variety of manufacturers?
 3 **A.** Yeah, I would say tobacco was slightly more competitive.
 4 **Q.** Good. I want to then come in to look a bit more closely
 5 at this tobacco market, and just see what was going on
 6 at this time. When you became involved, I think
 7 advertising in the sense of TV, billboards and so on,
 8 I think it was either dead or almost dead, wasn't it?
 9 **A.** I think almost dead. I don't think there was TV,
 10 I think there may still have been some billboards and
 11 magazines. I think that was probably --
 12 **Q.** It was certainly on the way out --
 13 **A.** Yes.
 14 **Q.** -- because we know from the Bernie Ecclestone saga that
 15 you couldn't have your cigarette brands all over
 16 motorcars or Grand Prix cars; that had moved on, hadn't
 17 it?
 18 **A.** There were still some, I remember going to a snooker
 19 thing, I think there was a B&H Snooker, but I think it
 20 was on the --
 21 **Q.** It was on the way out?
 22 **A.** Yes.
 23 **Q.** It may have been on its last legs. Established brands,
 24 of course there were a number of brands which had
 25 historically obviously been established which went back

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1 a long time and had had advertising associated with
 2 them, and we can think of obvious ones such as
 3 Benson & Hedges and Marlboro; correct?
 4 **A.** Yes.
 5 **Q.** Those sort of established brands, they have a brand
 6 loyalty, don't they?
 7 **A.** Yes.
 8 **Q.** As I understand it from your witness statement, you were
 9 saying this by reference to, I think, premium brands,
 10 but I think it's probably true generally the established
 11 brands, if you have a consumer who is not price
 12 conscious, then he or she generally sticks with their
 13 established brand; is that right?
 14 **A.** Correct.
 15 **Q.** So the person who smokes Marlboro and has done so for
 16 the last ten years and doesn't worry about whether they
 17 are 10p more than something else, basically he just
 18 carries on buying Marlboro?
 19 **A.** Yes.
 20 **Q.** In respect of these established brands, as I understand
 21 your evidence, the consumer who is not price conscious
 22 is brand loyal and so is unlikely to depart from his
 23 preferred choice?
 24 **A.** Correct.
 25 **Q.** In respect of the established brands, there was in fact

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1 little opportunity for one manufacturer to steal, if
 2 that's the right word, consumers from the other?
 3 **A.** Correct.
 4 **Q.** It's of course a fact of life that the majority of
 5 smokers are from the less well-off and so they are
 6 likely to be people who are price conscious; correct?
 7 **A.** Well, a large number of smokers are less well-off.
 8 **Q.** A large percentage of the smoking population are from
 9 the less well-off sections of society?
 10 **A.** Yes.
 11 **Q.** So they are likely to be particularly price conscious?
 12 **A.** Yes.
 13 **Q.** Now, the effect of this, of this change, this situation
 14 in the market where you can't advertise and what is also
 15 going on is the price of cigarettes had gone up
 16 historically because of the constant rises in tax,
 17 hadn't it?
 18 **A.** Yes.
 19 **Q.** So it had become a more and more expensive item; right?
 20 **A.** Yes.
 21 **Q.** The effect of this, what you found was emerging in the
 22 market was that the manufacturers had developed low cost
 23 and ultra low brands in order to attract the price
 24 conscious customers?
 25 **A.** Yes, they had.

1 **Q.** This became, during the period that you were involved,
 2 a key battlefield between them where what they were
 3 trying to do was to gain market share in a critical and
 4 important area of the market?
 5 **A.** Yes.
 6 **Q.** What was happening during your period as a buyer was
 7 absolutely fierce and intense competition between
 8 Imperial and Gallaher in particular as they respectively
 9 sought to gain share of the key low price market?
 10 **A.** Yes.
 11 **Q.** This competition manifested itself in intense price
 12 competition which, during your period, was driving
 13 prices down; that's right, isn't it?
 14 **A.** Correct.
 15 **Q.** Of course the battleground was particularly severe
 16 because not only do you have the prices of cigarettes
 17 going up because of this tax, but you have also of
 18 course got a declining market because the Government is
 19 generally trying to encourage us not to smoke?
 20 **A.** Yes, and I think the market was also declining because
 21 people were buying cigarettes abroad and ...
 22 **Q.** That's right, thank you for that, there is the so-called
 23 I think grey market where people go abroad on booze
 24 cruises and the like and buy up very, very large
 25 quantities of cigarettes, either for themselves or

1 illegally to sell in pubs?
 2 **A.** Yes. I think that the proportion of cigarettes that
 3 were being sold that the government won't actually get
 4 tax from was increasing quite significantly because of
 5 the tax going up all the time in the Budget.
 6 **Q.** Sorry?
 7 **A.** Because the tax was going up all the time in the Budget
 8 and cigarettes were getting more expensive, it
 9 encouraged more people to go on the booze cruises when
 10 cigarettes were cheaper in France to do that, so they
 11 were losing out on taxation.
 12 **Q.** So the Government is losing out on taxation, but if one
 13 is looking at the share of the UK market, the problem is
 14 you have a shrinking market because people are being
 15 encouraged not to smoke and also those who do smoke are
 16 going to different outlets to get their cigarettes?
 17 **A.** (Witness nods).
 18 **Q.** So this makes the battleground even more intense because
 19 in order to try and get market share, what each of these
 20 manufacturers is trying to do is to get the consumers in
 21 this key battleground, namely the low price and ultra
 22 low price; that's right, isn't it?
 23 **A.** That's correct, yes.
 24 **Q.** Good. Thank you. Now we can go on to consider the
 25 trading agreements. Perhaps we can approach it in this

1 way: could I ask you to take again appeal file 17, or be
 2 given that. [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 **THE CHAIRMAN:** [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 Q. [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 (Pause)
 10 Okay? What I just want to ask you about is how you
 11 understood the trading agreement -- here we are talking
 12 about the 2002 one -- worked. Let's see whether my
 13 understanding is correct.
 14 Perhaps we ought to just look at it, just to be
 15 clear what I am asking you about. Go to the second
 16 trading agreement which is in annex 18, and go to
 17 tab 61.
 18 **DR SCOTT:** Do you want us to keep the ITL ...?
 19 **MR HOWARD:** No, we don't need that.
 20 [REDACTED]
 21 [REDACTED]
 22 A. Yes.
 23 Q. Are you familiar with this document?
 24 A. Yes.
 25 Q. Of course you are, you negotiated it, sorry. On the

1 second page is a part dealing with pricing. Again,
 2 I assume you have read that recently and are familiar
 3 with it.
 4 A. Yes.
 5 Q. We have all read it a lot. If you want to, we will take
 6 time, but are you familiar with it?
 7 A. No, I am familiar with it.
 8 Q. Yes. The differential list is right at the end of the
 9 tab. I am now asking you, therefore, about how this
 10 agreement operated in relation to the differentials.
 11 First I want to find out whether you agree that if you
 12 wanted to earn the bonus for pricing in accordance with
 13 Imperial's strategy in relation to the differentials, it
 14 was a matter of Sainsbury's choice whether it would seek
 15 to earn the bonus or not?
 16 A. Yes, it was.
 17 Q. In other words, Imperial was simply offering you
 18 an incentive which Sainsbury's was free to seek to gain
 19 or not, as it saw fit?
 20 A. Correct.
 21 Q. Would you agree that, as far as you were concerned,
 22 there was never any contractual obligation on
 23 Sainsbury's to set prices at or below the levels
 24 specified in the appendix 5?
 25 A. Well, the only obligation would have been if we wanted

1 the bonus.
 2 Q. Yeah, so in other words if you wanted the bonus, it was
 3 up to you, then you would seek to follow this, but as
 4 with any incentive or bonus, it was up to you whether
 5 you chose to pursue it?
 6 A. Yes.
 7 Q. There was absolutely nothing in the arrangement that you
 8 made with Imperial, as far as you were concerned, which
 9 prohibited you from entering into more favourable
 10 arrangements with Gallaher or British American Tobacco
 11 or anyone else?
 12 A. Correct.
 13 Q. The first trading agreement is in a slightly different
 14 form, you will find it back at tab 17, I imagine again
 15 you are familiar with it, it's different in that it's in
 16 this form of slides. Do you remember that?
 17 A. Yes.
 18 Q. As far as you were concerned, is this fair to say, that
 19 although the wording is not precisely the same, and
 20 there may be some aspects we will have to come back to,
 21 the position under the agreement you inherited and the
 22 agreement you negotiated was exactly the same, namely it
 23 was just providing an incentive for you if you followed
 24 the strategy, but you were under no obligation to follow
 25 the strategy?

1 A. Yes, the only difference was the level of overrider
 2 agreement, all the other bits were the same.
 3 Q. That's right. In your agreement, I think it's slightly
 4 higher?
 5 A. Yes.
 6 Q. In fact that's what I wanted to ask you about. Under
 7 the first agreement, what you are calling the overrider
 8 I think was [REDACTED] per the equivalent of a 20s pack,
 9 it was [REDACTED] per thousand sticks?
 10 A. Yes.
 11 Q. That was actually a payment, a bonus, if you met various
 12 criteria as to listing, availability, pricing,
 13 merchandising and advertising, wasn't it?
 14 A. Yes.
 15 Q. It's slightly more in the second agreement, it goes up
 16 from [REDACTED] to [REDACTED] per thousand sticks?
 17 A. Yes.
 18 Q. These payments, these sums of money, were in the context
 19 of what you were doing and the business you were doing
 20 in relation to tobacco, they are very small indeed,
 21 aren't they?
 22 A. The numbers are very small, sorry?
 23 Q. Yes, the value of them is very small to Sainsbury? I am
 24 not saying you don't want it, but in terms of --
 25 A. No, I would say it was very big.

1 Q. Very big in what sense?
 2 A. Well, [redacted] per thousand sticks, we sold something
 3 like 900 million sticks or something. So it sounded
 4 like not very much money when you say [redacted], but
 5 when you times it by the amount of sticks we were
 6 selling, it was a significant amount of money.
 7 Q. What element of that was attributable to the parity and
 8 differential requirements?
 9 A. It was never broken down like that.
 10 Q. Okay.
 11 DR SCOTT: Is the reason why it wasn't broken down, so far
 12 as you were concerned, you can't speak for ITL, unless
 13 they told you, the fact that they anticipated that you
 14 would deliver on each of the elements?
 15 A. I think there hadn't been any problem before delivering
 16 on the elements, so --
 17 DR SCOTT: Yes.
 18 A. I guess they didn't see any reason why there would be
 19 any problem in the future. So it wasn't, if you hadn't
 20 implemented all the price changes there would only be
 21 two-thirds of the money available, or if you hadn't done
 22 this there will only be half the money available, it
 23 wasn't really like that.
 24 DR SCOTT: So your experience?
 25 A. I think a lot of the things where it said about listing

1 new products, it always said "subject to suitable
 2 commercial arrangements", so I think you could have said
 3 "If you are not prepared to offer us a suitable amount
 4 of money, we are not going to list it".
 5 THE CHAIRMAN: There was some wriggle room?
 6 A. Yes.
 7 MR HOWARD: If you look at the agreement, it's actually
 8 quite interesting, because I think this may be what you
 9 are saying, if you turn to the first agreement, and
 10 unfortunately it's quite difficult to see the
 11 pagination.
 12 A. What's the heading on the page?
 13 Q. If you go to what on my copy, I think it seems to be --
 14 can you see a page 13?
 15 A. Probably easier to say what the heading is.
 16 Q. The heading is "Agreement". The first bullet point says
 17 that:
 18 "Sainsbury's and ITL agree that this is a working
 19 document of intent and is not a contract of supply."
 20 (Pause)
 21 THE CHAIRMAN: I think it's actually 43.
 22 MR HOWARD: Oh, is it? Well, anyway, it doesn't matter.
 23 It's 43, if anything, on mine.
 24 A. Yes.
 25 Q. The way you saw this, as I understand it, is that

1 it's -- would this be fair -- it clearly isn't
 2 a contract of supply but in terms of the relationship,
 3 it's really meant to be a sort of overall structure and
 4 then there would be a series of ad hoc arrangements as
 5 you go through the year, particularly in relation to
 6 bonusing?
 7 A. Yes.
 8 Q. Having now looked at the two agreements, we have
 9 previously been over this but let's just confirm the
 10 position as you understood it. I'll come on to how the
 11 differentials worked separately in a moment, but is this
 12 right: Imperial identified in both agreements the price
 13 list differentials between its brands and the competitor
 14 brands, didn't it?
 15 A. Yes.
 16 Q. You knew that Imperial was trying to incentivise you to
 17 ultimately set retail selling prices which reflected
 18 those differentials?
 19 A. Yes.
 20 Q. For your part, whether or not you were going to do that
 21 would depend upon, as you perceived it, whether
 22 Imperial's wholesale selling prices were cheaper than
 23 Gallaher's, and at least reflected the RRP
 24 differentials?
 25 A. Yes.

1 Q. Conversely, where Imperial's wholesale selling prices to
 2 you were less favourable than the RRP differentials, in
 3 other words if they didn't do what you expected them to
 4 do, which was to keep their prices, their net wholesale
 5 prices in line with the RRP's, if they didn't do that,
 6 then you wouldn't in any way consider yourself obliged
 7 or required to do anything in order to meet these
 8 differentials?
 9 A. Correct.
 10 Q. Let's assume there was no such agreement and in the case
 11 of Gallaher, I think you didn't have any such agreement.
 12 Sainsbury's general approach would have been to set
 13 retail selling prices which reflected the wholesale
 14 selling prices and so if there was a differential in
 15 Imperial's favour, then you would expect to set retail
 16 selling prices which reflected that. Correct?
 17 A. Yes.
 18 Q. Insofar as these agreements provided an incentive in
 19 relation to the differentials, as I understand it, the
 20 position is: what it was you were being incentivised to
 21 do you probably would have done anyway, but this was
 22 Imperial essentially trying to get reassurance that it
 23 would not be disadvantaged where it did indeed have net
 24 wholesale prices which at least matched those of its
 25 rival?

1 A. Yes. You could say they didn't really need to put it in
 2 writing, because we had a similar arrangement with
 3 Gallaher, but it wasn't put in black and white.
 4 Q. The thing is, from your point of view, you don't mind if
 5 people pay you money, and if they pay you money to do
 6 what you would do anyway, so much the better; isn't that
 7 right?
 8 A. Yes, we wouldn't have priced below RRP without the
 9 bonus.
 10 Q. I follow that, I was talking about the differentials,
 11 and providing -- as far as you were concerned, you were
 12 only going to price to reflect the differentials if the
 13 wholesale prices that Imperial was providing in fact
 14 corresponded to the differentials?
 15 A. Yes.
 16 Q. So that, insofar as Imperial were paying you
 17 an incentive to do that, the paradox is you would have
 18 done it anyway but they got -- or they may have felt
 19 they were getting some greater security or assurance
 20 that they would not be disadvantaged?
 21 A. Correct.
 22 Q. There is obviously a strategy which you see you told us
 23 from the RRP's whereby you can see which products
 24 Imperial is trying to, where it's trying to compete with
 25 the Gallaher product; correct?

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1 A. Correct.
 2 Q. This differential strategy which you also learn about
 3 from the agreement, presumably you realised the purpose
 4 was for Imperial to make itself competitive against what
 5 it viewed as rival brands?
 6 A. Yes.
 7 Q. We can see in the agreement, do you have the first
 8 agreement there still?
 9 A. Yes.
 10 Q. If you turn to schedule 3, we see the differentials, and
 11 the other agreement is at tab 61, and the differentials
 12 are on the very last page. Right?
 13 A. Yes.
 14 Q. I am not sure we need to turn it up. Let's see if I've
 15 correctly understood your evidence about this in your
 16 statement. We see that -- I am looking at the second
 17 one -- for instance Richmond is expressed as 5p above
 18 Sterling and parity with Dorchester. Do you see that?
 19 A. Yes.
 20 Q. Let's take the parity with Dorchester. Am I correct in
 21 understanding your evidence that, as far as you were
 22 concerned, what this meant is that that was the minimum
 23 position that Imperial were looking for?
 24 A. Yes.
 25 Q. So in other words you, in common with Imperial,

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1 understood that where we read the words "parity with
 2 Dorchester", the commercial understanding was that meant
 3 "at least no more expensive than Dorchester"?
 4 A. Yes.
 5 Q. Similarly, where the agreement, the way it's expressed,
 6 is, say, "Embassy No 1 3p below B&H KS SKUs", KS is
 7 Kingsize, I can't remember, it's gone out of my mind,
 8 what an SKU is.
 9 **THE CHAIRMAN:** Stock-keeping units.
 10 **MR HOWARD:** I was going to say smoking something unit.
 11 Stock-keeping unit. You understood that to mean at
 12 least 3p below.
 13 A. Yes.
 14 Q. Good.
 15 Moving to a different topic: the first thing,
 16 I think, again looking at how all of this agreement
 17 worked, let's see if I can see whether we agree on
 18 certain propositions. You did not consider -- is this
 19 right -- that the trading agreements with Imperial
 20 imposed any -- sorry, let me start again. We have
 21 already agreed that you didn't actually consider the
 22 trading agreements imposed any obligation on you
 23 concerning the price of Imperial's product, it simply
 24 gave you an incentive as to how to price; correct?
 25 A. Yes.

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1 Q. I think it follows from that that still less did you
 2 consider that the trading agreements with Imperial
 3 imposed any obligation on you concerning the pricing of
 4 Gallaher's products?
 5 A. Correct.
 6 Q. At no stage -- is this right -- whatsoever did anyone
 7 from Imperial suggest to you that the trading agreements
 8 gave them any entitlement to influence the pricing of
 9 Gallaher's products in Sainsbury's stores?
 10 A. Correct.
 11 Q. If Mr Matthews or anybody else from Imperial had
 12 suggested to you that you were required, as a result of
 13 these trading agreements, to do something to the price
 14 of Gallaher's products, whether moving them up or down,
 15 you would have told him to get lost in no uncertain
 16 terms?
 17 A. Correct.
 18 Q. Now, I want to consider various scenarios. As
 19 I understand it, in this highly competitive environment
 20 which we have been talking about, sometimes one
 21 manufacturer would strive to gain competitive advantage
 22 and go first, and sometimes the other one would;
 23 correct?
 24 A. Sorry, in terms of a manufacturers' price increase?
 25 Q. No, I didn't make my question clear, for which

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1 I apologise. The position is, we have spoken about this
 2 low price end of the market, the emerging market where
 3 there was a keen battle going on. You remember that,
 4 and you agreed with that. In the battlefield -- as in
 5 any battlefield over price -- somebody will go first,
 6 sometimes, and somebody else would go first?
 7 **A.** Yes.
 8 **Q.** I want to focus on the position now where Imperial took
 9 the plunge and tried to gain competitive advantage
 10 first, which as I understand from your evidence you
 11 recall happening?
 12 **A.** Yes.
 13 **Q.** So Imperial comes to you and it says "I want to reduce
 14 the price of my particular brand, Richmond, in your
 15 stores, and I am prepared to pay you a bonus to do
 16 that". What's Imperial's aim in doing that? Why is it
 17 paying you, say, 5p to do that? What's it trying to
 18 achieve?
 19 **A.** Well, they hope this they will grow their market share
 20 during the period they are lower than their major
 21 competitor, because at that end of the market some
 22 people would have come in and said "I've got £3.50 in my
 23 hand, what are your cheapest cigarettes?", so if
 24 Richmond were cheaper that week, the person behind the
 25 counter would say "It's Richmond", and they would hand

1 over the £3.50 or whatever it was, and they were seeking
 2 to grow their market share.
 3 **Q.** So would you agree that it was utterly obvious that
 4 where they are paying you a bonus to reduce the price in
 5 order to gain the market share, the last thing in the
 6 world that Imperial would want you to do is to reduce
 7 the selling price of the competing Gallaher brand simply
 8 because you had reduced the price of the Imperial brand?
 9 **A.** They wouldn't expect us to do that off our own bat.
 10 **Q.** That would be the last thing in the world they would
 11 want you to do, wouldn't it?
 12 **A.** Yes.
 13 **Q.** Anybody who suggested, looking at these arrangements and
 14 talking to you about them, anybody who had actually
 15 asked you any sensible questions about it, anybody who
 16 suggested to you that the effect of the arrangement that
 17 you on behalf of Sainsbury's had entered into with
 18 Imperial was that where Imperial paid you to reduce the
 19 retail selling price of their cigarettes, that you were
 20 expected to reduce the price of the competing brand, you
 21 were expected by Imperial to do that, you would have
 22 told them that's complete nonsense, if you'd been asked
 23 that?
 24 **A.** Yes, because although the desire in that trading
 25 agreement was to have parity on those brands, and if

1 Imperial took the decision to ask us to reduce the
 2 brand, that wasn't their intention that we then reduced
 3 the price of the other one, but it was that people would
 4 have the opportunity to respond. So if Gallaher had
 5 gone first --
 6 **Q.** We will come to that in a moment, I am taking the
 7 position of Imperial going first. I am simply putting
 8 to you: where Imperial goes first, it's utterly obvious,
 9 both to you and Imperial, that Imperial is not expecting
 10 you, because they have bonused down the price of
 11 Richmond, that you then -- without Gallaher doing
 12 anything -- are going to put down the price of Gallaher?
 13 It's utterly obvious they don't expect you to do that?
 14 **A.** I would agree that that has happened.
 15 **Q.** Yes. Of course if one thinks about it for a moment,
 16 that's contrary to Imperial's interest, but if you were
 17 in a position where, as a result of reducing the price
 18 of Imperial, so Imperial gives you a bonus to reduce the
 19 price of their brand, if, as a result of that, you were
 20 required to reduce the price of the Gallaher product,
 21 but where Gallaher wasn't funding it, the result would
 22 be that you would lose your margin on Gallaher; correct?
 23 **A.** Correct.
 24 **Q.** And you would never ever have agreed to that, would you?
 25 **A.** No.

1 **Q.** If anyone had suggested to you that that was what the
 2 trading agreements provided, and that's what the
 3 incentive payments were for, you would have said to
 4 them, "That's totally ridiculous, not what anyone
 5 involved, whether from Imperial or Sainsbury's position
 6 or anyone with any sense whatsoever could have
 7 understood"?
 8 **A.** Correct.
 9 **Q.** Now let's turn to something similar. Say, in the light
 10 of the trading agreements, and it's going back over some
 11 ground that we have previously covered, you notice that
 12 an Imperial product was cheaper in Tesco. No disrespect
 13 to Sainsbury's, but they are all the same to me. Such
 14 is the benefit of internet shopping.
 15 Now, to move again off being flippant, say you
 16 notice that an Imperial product is less expensive in
 17 Tesco, okay, that's the hypothesis. We have already
 18 discussed that -- well, let me ask you this: although
 19 this didn't happen in your time, as far as you recall,
 20 am I correct in understanding your evidence that if you
 21 saw that event, you regarded yourself as free, if you
 22 chose, to reduce the price of the Imperial product to
 23 meet Tesco?
 24 **A.** Yes.
 25 **Q.** Of course you would try and get Imperial to pay for it

1 by funding it?
 2 **A.** I would have got Imperial to pay for it, if it had been
 3 correct.
 4 **Q.** Now, is it fair to say, in this event, if this had
 5 happened, if you had reduced the price of an Imperial
 6 brand because you had to do it to match Tesco, and it
 7 doesn't really matter for this purpose whether you get
 8 funded by Imperial, but let's assume you don't, you
 9 wouldn't have regarded yourself as under any obligation
 10 to do anything to the competing Gallaher product which
 11 wasn't being discounted in Tesco, would you?
 12 **A.** No.
 13 **DR SCOTT:** But as I understand it, you would, as you said
 14 just now, expect ITL to fund you down, wouldn't you?
 15 **A.** Yes.
 16 **MR HOWARD:** The reason you expect that is that, I mean, of
 17 course, if you see your competitor at a better price
 18 than you, you will try and flex your muscles with
 19 Imperial because you will either suspect that it is
 20 Imperial that's funding it, whatever they say, or if
 21 they are not funding it you still basically say "Well,
 22 I expect you to pay because I've got to reduce my price
 23 to match Tesco".
 24 That's right, isn't it?
 25 **A.** Yes.

1 **Q.** The interesting thing about that is that your perception
 2 of the position is that -- and I am not in any way
 3 criticising this -- Sainsbury, when dealing with
 4 a supplier like Imperial, is quite muscular, is in
 5 a position to say "Well, I see that's happening and
 6 I really think you ought to help me meet it"?
 7 **A.** Yes.
 8 **THE CHAIRMAN:** Sorry, were you about to qualify that?
 9 **A.** Well, I was going to say that to be fair, I think the
 10 strategy that the tobacco suppliers had was a pricing
 11 strategy within the multiple grocers, so I don't think
 12 they were seeking to give advantage to one grocer over
 13 another, which might not be the case, say, with alcohol,
 14 but they had a strategy for multiple grocers where they
 15 had good visibility, they had a good representation of
 16 their brands, and so they weren't seeking to give
 17 Sainsbury's an advantage over Tesco's or Tesco's an
 18 advantage over Sainsbury's, which is why I was
 19 confident, if they rang me up to offer me a bonus, they
 20 were having that conversation with my counterparts or
 21 vice versa, and this is why it didn't tend to happen
 22 that I would see the price being cheaper somewhere else
 23 through a bonus that had been offered that hadn't been
 24 offered to me.
 25 **THE CHAIRMAN:** So am I right in thinking, then, that with

1 some other products it was more usual to have exclusive
 2 promotions that, if you could advertise, say, a drop in
 3 Heineken six pack, they might say "Well, that's
 4 something that Tesco is going to advertise to get people
 5 to come to Tesco, so that's an exclusive bonus from the
 6 makers of Heineken offered to Tesco that you wouldn't
 7 then expect them to offer to you, although you might
 8 have --
 9 **A.** You may have promotions at different times so you might
 10 agree three promotional slots a year with Heineken, the
 11 three slots in Sainsbury's might be at different times
 12 to those in Tesco's, whatever, and depending on your
 13 relationship with the supplier and the negotiating
 14 stance, you might negotiate greater funding in
 15 Sainsbury's to be able to get down £1.50 on Heineken
 16 whereas somebody else might only go down £1. But
 17 I think also some of the alcohol suppliers, because they
 18 knew people followed -- so ██████ at Christmas was
 19 always a key product. So if ██████ went down to 9.99
 20 in Asda, you knew the next day it would be 9.99 in
 21 Tesco's and probably a couple of days later it would be
 22 9.99 in Sainsbury's, and I think what the supplier
 23 sometimes did was they would fund Asda to go down,
 24 because they would know that Tesco would follow and then
 25 they could say, "We're not funding that", knowing that

1 Tesco and then Sainsbury's would have to follow and
 2 probably fund it themselves, so they could get away with
 3 getting everybody to go down and sell lots more but only
 4 fund one person. But that was always the suspicion
 5 that --
 6 **THE CHAIRMAN:** Because the retailers -- yes, you need to
 7 slow down a little bit, I gather -- couldn't advertise
 8 their own bargains on cigarettes, was that the reason,
 9 at least in part, why promotions of the suppliers tended
 10 to be across all the multiple stores?
 11 **A.** Yes, I think so, a supermarket would never have led on
 12 a -- we put Benson & Hedges down 2p or Richmond down 2p,
 13 because it wasn't really ethical to do that. You hope
 14 that when people came in on the strength of the other
 15 offers you advertised, if they were smokers they would
 16 buy cigarettes while they were there, and I think people
 17 on cigarettes were pretty aware of the prices, and so
 18 you needed to be competitive because if we hadn't been,
 19 that would also have driven the price perception that
 20 Sainsbury's as a whole wasn't competitive.
 21 **MR HOWARD:** Taking the Chairman's example, leaving aside the
 22 Christmas position, I can't remember who the brewery is
 23 who makes Heineken is --
 24 **A.** Heineken.
 25 **Q.** I see. It shows how out of touch barristers are.

1 If Heineken have a special promotion in Tesco, and
 2 you see a can of Heineken coming down 10p, in those sort
 3 of promotions it gets advertised and you can see that
 4 it's a special promotion, and so when you ring up on
 5 behalf of Sainsbury's when you are beer buyer, actually
 6 I don't think you dealt with Heineken but let's just
 7 pursue the example. What you would actually then be
 8 looking for is a similar promotion but probably at some
 9 different time?
 10 **A.** Because the corporate price index was about the ongoing
 11 price. Where you had more difficulty was if the price
 12 just went down 10p but there was no advertising, so if
 13 it was what we call a cross-out, so if it was saying "£4
 14 to £3 special offer", usually somewhere on the bottom it
 15 says how long the offer lasts, that's a different
 16 scenario for the corporate price index. Whereas if the
 17 price on the shelf just went down from £4 to £3 and that
 18 looked like it was the ongoing price ticket, that would
 19 be classed as the ongoing retail and that's what your
 20 retail would be measured against. So it kind of depends
 21 as to how its advertised.
 22 **Q.** If we go back to the position, I think what you are
 23 really telling us about cigarettes is this: if the
 24 manufacturer gives a promotion to Tesco on a brand,
 25 there is absolutely no point if he gives it just to

1 Tesco, because as soon as the Tesco price hits the
 2 shelf, there is no promotion in the national press but
 3 you are looking at the shelf, as soon as it does, you,
 4 Asda, Morrisons and so on, the relevant buyers would be
 5 on the phone saying "Hey, I can't have this, I have to
 6 be at the same price, you are obviously funding them,
 7 you have to give me the same funding"; right?
 8 **A.** Yes.
 9 **Q.** So that's why in fact it was making no sense for
 10 Imperial to differentiate between the supermarkets, the
 11 brands particularly in the supermarkets, they had to
 12 provide the same, if they wanted to reduce the price
 13 they had to give discounts across the board, because
 14 they wouldn't be able to hold the line, they would just
 15 be rung up by you demanding the same thing?
 16 **A.** Yes.
 17 **Q.** We have been talking about Imperial, and I want to now
 18 talk about Gallaher for a moment. Gallaher, if they
 19 wanted to gain a competitive advantage by getting their
 20 products on Sainsbury's shelves cheaper than an Imperial
 21 competing product, were they free to do that?
 22 **A.** Yes.
 23 **Q.** Do you agree with me that Gallaher could seek to get
 24 a price advantage over Imperial if we take the -- I take
 25 it because they are just easy examples, if we take

1 Dorchester, they could try and get a price advantage in
 2 one of three ways. First, they could initially, after
 3 they published the RRP, give you a more generous
 4 discount for selling below RRP than Imperial?
 5 **A.** Yes.
 6 **Q.** Secondly, they could provide you with a tactical or
 7 promotional bonus?
 8 **A.** Yes.
 9 **Q.** Thirdly, what they could do is they could hold their
 10 price in the face of an Imperial manufacturers' price
 11 increase?
 12 **A.** Yes.
 13 **Q.** Each of those is essentially just a device to achieve
 14 exactly the same thing, which is a lower wholesale price
 15 in order to achieve a price advantage which Gallaher
 16 would want reflected in the retail selling price; do you
 17 agree?
 18 **A.** Yes. There would actually have been a fourth way,
 19 because they used price marked packs, particularly on
 20 the multipacks, so you might have a -- say the normal
 21 price would be 17.50, it would have a wrap on that said
 22 16.99, which again was supported by a tactical bonus but
 23 it was a more visual and visible way of promotion.
 24 **Q.** The advantage, as I understand it, of price marked packs
 25 is, in terms of their dealings with you, it works in the

1 same way, which is basically "we are bonusing it down in
 2 order to reduce the wholesale price to allow you to
 3 continue to sell and gain your margin"; correct?
 4 **A.** Correct.
 5 **Q.** But from the consumer's point of view it was a way of,
 6 in effect, advertising, because they can see it very
 7 clearly set out on the pack, it's now 16.99?
 8 **A.** Yeah, and it was a way of ensuring that retailers did
 9 pass a discount on, because you couldn't have a shelf
 10 price saying 17.50 and be selling it at that if the
 11 product was actually marked 16.95.
 12 **Q.** It was a way of ensuring that you didn't do the dirty on
 13 them and take the money for the bonus and, whether by
 14 accident or design, sell at an inappropriate price.
 15 **A.** Yes. I suspect it was more to attract the consumers,
 16 because they could just have withheld the money if we
 17 hadn't put the price down.
 18 **Q.** I am sure you are right. What people are desperately
 19 looking for in this market is a way of attracting the
 20 consumer's attention, and price marked packs were
 21 perceived as a way of attracting the consumer's
 22 attention?

23 **A.** Yes.

24 (Pause)

25 **THE CHAIRMAN:** Sorry. Go on.

1 **MR HOWARD:** Not at all.
 2 So the three mechanisms or perhaps the fourth, which
 3 is the price marked packs, they are all simply
 4 mechanisms to achieve precisely the same thing, which is
 5 a lower wholesale price in order to achieve a price
 6 advantage which Gallaher wants reflected in the retail
 7 selling price?
 8 **A.** Correct.
 9 **Q.** As I understand it, from your perspective, the trading
 10 agreements with Imperial did not in any way whatsoever
 11 restrict you from favouring Gallaher by accepting
 12 a promotion or a lower wholesale price to reduce the
 13 retail selling price of its products?
 14 **A.** Correct, and I think that was reflected in the agreement
 15 by saying that they should have the ability, Imperial
 16 should have the ability to respond if somebody else had
 17 changed their price.
 18 **Q.** Yes, and the point is that of course the way you
 19 understood it was that, in the event that Gallaher, by
 20 any means whatsoever, was able to reduce its wholesale
 21 selling price so that you set a retail selling price at
 22 a lower level than Imperial's, in any of those events it
 23 was up to Imperial whether they wanted to respond?
 24 **A.** Exactly.
 25 **Q.** Yes. As I understand it, insofar as it's suggested in

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1 this case that where you reduced the price of a Gallaher
 2 product you therefore had to reduce the price of the
 3 competing Imperial product, even though Imperial had not
 4 reduced its net wholesale price, you say that again is
 5 nonsense, not least because it would have required you
 6 to lose your margin on Imperial, and that was something
 7 you never agreed to?
 8 **A.** Correct.
 9 **Q.** And any such view would be a wholly uncommercial one and
 10 not one that anyone, as far as you were concerned, to
 11 these agreements ever had?
 12 **A.** Correct.
 13 **Q.** I think it is also fair to say, is it not, that at no
 14 stage whatsoever did Imperial suggest to you that
 15 because you had reduced the price of Gallaher's brand,
 16 say Dorchester, you must reduce the price of Richmond
 17 even though they had not reduced the wholesale price of
 18 Richmond?
 19 **A.** Correct.
 20 **Q.** Again if at any stage, Imperial, Mr Matthews or anyone
 21 else had suggested that to you, you would again have
 22 told them in no uncertain terms firstly to get lost and
 23 secondly if they wanted to reduce the retail selling
 24 price of Richmond in order to make it competitive with
 25 Dorchester they would have to pay for it by reducing the

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1 net wholesale cost of Richmond?
 2 **A.** Correct.
 3 **THE CHAIRMAN:** Would they have to reduce the net wholesale
 4 cost by the same amount as they were expecting you to
 5 reduce the retail price?
 6 **A.** Yeah, it was a set formula, so for a penny reduction on
 7 a packet of 20 cigarettes, it was 43p per thousand
 8 sticks --
 9 **THE CHAIRMAN:** Right. But that --
 10 **A.** And that was the same whether it was Gallaher or BAT or
 11 anybody else.
 12 **THE CHAIRMAN:** Did that result in you then earning the same
 13 margin for that packet of cigarettes sold at that lower
 14 price as you would have earned on that packet before the
 15 bonus?
 16 **A.** Yes.
 17 **MR HOWARD:** I don't think it's controversial, I think we
 18 have seen that on lots of occasions.
 19 **THE CHAIRMAN:** I just wanted to be clear in my own mind.
 20 **MR HOWARD:** I didn't mean to be rude, I am sorry if I was
 21 rude.
 22 **THE CHAIRMAN:** I wonder if that's a convenient moment to
 23 break?
 24 **MR HOWARD:** Yes.
 25 **THE CHAIRMAN:** There are perhaps a couple of matters that we

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1 need to discuss once we have let Mrs Corfield go to her
 2 lunch break.
 3 **MR HOWARD:** Of course.
 4 **THE CHAIRMAN:** We are going to break for lunch in a moment,
 5 Mrs Corfield, so we will probably come back at
 6 2 o'clock. If you would like to just go outside now,
 7 there are some logistical matters that we need to
 8 discuss, but we don't need to detain you. Again, please
 9 don't discuss your evidence with anybody else, but we
 10 will see you back at 2 o'clock.
 11 (In the absence of the witness)
 12 Housekeeping
 13 **THE CHAIRMAN:** Yes, I just want to discuss whether we are
 14 going to be able to complete Mrs Corfield's evidence
 15 during the course of today, and that means I need to
 16 know from you roughly how much longer you are going to
 17 be, and then get a sense from other people present
 18 whether they are going to want to ask questions.
 19 **MR HOWARD:** Right.
 20 **THE CHAIRMAN:** This is on the basis that if we do need her
 21 to come back tomorrow, we need to ascertain how
 22 difficult that is for her and whether there is anything
 23 the Tribunal can do to make that easier for her.
 24 **MR HOWARD:** I am making pretty good progress. I think
 25 I would probably be another hour and a half, I would

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1 guess.

2 **THE CHAIRMAN:** So if we say that you will go to 3.30 ...

3 **MR HOWARD:** Can I say, that is my estimate, I do not want to

4 be, as it were, guillotined bearing in mind this is the

5 only witness the OFT is tendering, so that I will

6 certainly endeavour to finish by then.

7 **THE CHAIRMAN:** Yes. Is there anyone else present who

8 envisages cross-examining Mrs Corfield?

9 **MR FLYNN:** Madam, I may have a question or two, depending on

10 how it goes. It's perhaps unlikely, but one or two

11 things that I've noted, but it's not something that

12 would make us go over, if we end up with Mr Howard

13 finishing at 3.30, so there will be only a question or

14 two at most.

15 **THE CHAIRMAN:** Right. It looks, then, as if we are going to

16 finish today. Would you envisage being long in

17 re-examination, Mr Lasok?

18 **MR LASOK:** Not long.

19 **THE CHAIRMAN:** Well, it's your witness, Mr Lasok, do we need

20 to make arrangements or check whether Mrs Corfield needs

21 to make arrangements for her to come back tomorrow?

22 **MR LASOK:** If Mr Howard finishes at 3.30 and Mr Flynn is,

23 let's say, 15 minutes, and there is nothing else apart

24 from some questions in re-examination, then we should be

25 over by 4.15.

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1 **THE CHAIRMAN:** Good.

2 **MR HOWARD:** Can I just enquire, if we need to sit a little

3 bit late, would that be a possibility?

4 **THE CHAIRMAN:** Yes.

5 **MR HOWARD:** It sounds to me as if we can be tolerably

6 certain of finishing her if we were able to sit say

7 until 5 as an outside bet, I'll try and make sure

8 I speed things up, but just in case I don't envisage

9 being more than two hours, say.

10 **THE CHAIRMAN:** Thank you, everyone.

11 **DR SCOTT:** Just a couple of points, Mr Howard. I think you

12 may be coming back to this, you mentioned instances

13 where either Tesco or Sainsbury's reduced prices on

14 their own accord.

15 **MR HOWARD:** Well, they are not -- we looked at one already,

16 I'll have to check, I can't recall whether they were

17 instances in which Ms Bayley was involved. I should say

18 I don't think it is appropriate for me to cross-examine

19 her about matters which other people dealt with when the

20 OFT took statements from them and have chosen not to

21 call them.

22 **DR SCOTT:** No, my only point was you mentioned you were

23 coming back to it and therefore didn't give us

24 a reference at the time.

25 **MR HOWARD:** We looked at one of the documents. We have

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1 looked at it before. It's 69.

2 **DR SCOTT:** It's just making sure we have it.

3 **MR HOWARD:** 69, you will remember we have looked at it with

4 other witnesses.

5 **DR SCOTT:** That's the Matthews/Davies exchange.

6 **MR HOWARD:** That's right, I passed over it rather quickly

7 simply because it's an example, but exactly what was

8 happening, we can either see on the documents,

9 Mrs Corfield is in no better position, I think, than

10 anyone else in court to deal with it, but one can see

11 what happened.

12 **DR SCOTT:** That's okay, I just wanted to make sure I had

13 a reference for that.

14 **MR HOWARD:** I will check whether there is anything else on

15 that.

16 **DR SCOTT:** The other question is a broader question, I don't

17 think there is anything controversial about this, it's

18 just to help us understand what's going on. As we

19 understand it, this was a period in which, because of

20 the price consciousness that has been mentioned, lower

21 price and ultra lower price cigarettes were being

22 introduced, what's not clear to us as a Tribunal was

23 what or maybe where we find in the evidence, what the

24 overall impact was on the average pricing of cigarettes,

25 in other words what is happening in the overall context

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1 here, and is that covered somewhere in the evidence? We

2 see the market shares changing. What's not obvious to

3 us is in the midst of all the tactical pricing and of

4 various Budget changes and the manufacturers' price

5 increases, what was happening in terms of what consumers

6 were ending up spending. Was the overall impact on

7 consumers that they ended up spending an average of less

8 money on cigarettes, or was the impact that they ended

9 up spending more money on cigarettes? I realise that's

10 a combination of Budget increases and manufacturers'

11 price changes, but it might help us --

12 **MR HOWARD:** I think if you are asking, because the tax is

13 going up constantly.

14 **DR SCOTT:** Absolutely.

15 **MR HOWARD:** I don't have the figures to hand, and we can

16 certainly look at it, but I think I am absolutely

17 confident you will find they are paying more because the

18 tax take -- I don't think there is ever a Budget where

19 the excise duty and so on doesn't go up.

20 **THE CHAIRMAN:** The tax increases are much greater than any

21 underlying increase.

22 **MR HOWARD:** Part of the Government's policy is to have tax

23 increases which are greater than inflation. It's

24 a social policy to discourage smoking and to fill the

25 coffers of the Exchequer.

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1 **DR SCOTT:** Yes, I am just conscious that you were putting to
 2 Mrs Corfield the idea that prices were being squeezed
 3 down, and we talked about the lower price --
 4 **MR HOWARD:** Actually, I wasn't, I was putting to her --
 5 which she agrees -- that the area of competition was the
 6 low priced area, and I don't think I was putting a case,
 7 I am not saying it isn't the case, but I wasn't putting
 8 the case that the net price paid by consumers was
 9 reduced, what I was putting to her was that the
 10 manufacturers were competing in this low price sector
 11 and competing by battling over price.
 12 **DR SCOTT:** Yes, I suppose the underlying question is this:
 13 take out the tax which impacted uniformly across the
 14 sector. Was the overall effect of competition between
 15 the manufacturers tending to reduce the prices that
 16 customers were paying, or was the overall effect taking
 17 into account the MPIs.
 18 **MR HOWARD:** I think what has been investigated is that the
 19 weighted average real price of Imperial's brands
 20 increased more rapidly subsequently than during the
 21 alleged infringing period.
 22 **THE CHAIRMAN:** The complication is that over this period
 23 people were clearly switching from mid priced to
 24 Richmond, which would mean that the amount that the
 25 average person paid for the average cigarette would go

1 down.
 2 **MR HOWARD:** There is no question, you can see an enormous
 3 growth. I've shown you the tables already.
 4 **DR SCOTT:** Absolutely.
 5 **MR HOWARD:** Richmond, Imperial got the strategy right in the
 6 sense that they -- you remember they are
 7 Johnny-come-latelys to the low priced market, they got
 8 their strategy initially wrong. You will see this. One
 9 of the things you haven't seen are the strategy
 10 documents, and you will see there is a lot of discussion
 11 about this in the strategy documents, and now we have
 12 actually seen Gallaher's. Basically, Gallaher stole
 13 a march in that they spotted this point. Imperial
 14 realised they had got left behind and had to do battle.
 15 BAT look as if they completely got it wrong in that they
 16 didn't realise this was something to be coming into. So
 17 they -- they had an alternative strategy. But the net
 18 as a result is that the low priced sector has grown
 19 enormously, and you see that, I think it's in Mr Batty's
 20 table that I've shown you. Richmond in particular goes
 21 from a standing start to having a very large percentage
 22 of the market.
 23 Whether, to answer your question, the consumers of
 24 Richmond are paying less, I don't know is the answer to
 25 that. I'll have to check. I think the answer is if we

1 have not looked into it, nobody has, and so the material
 2 is not there.
 3 **DR SCOTT:** It's just helpful to get the overall picture.
 4 Thank you very much.
 5 **MR HOWARD:** An important part of the picture is the point --
 6 obviously now is not the time for submissions, but there
 7 is this key battlefield and that's really where price
 8 competition is taking place on a very intense basis.
 9 **DR SCOTT:** Thank you.
 10 **THE CHAIRMAN:** Yes, thank you. We will come back at
 11 2 o'clock.
 12 (1.08 pm)
 13 (The short adjournment)
 14 (2.00 pm)
 15 **MR HOWARD:** Mrs Corfield, I asked you some questions this
 16 morning about the situation where Sainsbury's themselves
 17 funded a reduction in the price of a tobacco product,
 18 and I think you told us in your period you don't
 19 remember that happening?
 20 **A.** Correct.
 21 **Q.** We do have some documents which don't relate to your
 22 period, some precede your period and some postdate it.
 23 I imagine that you can't add anything to what the
 24 documents show in relation to the period before you were
 25 involved and the period after you were involved?

1 **A.** Correct.
 2 **Q.** Just so I can give the Tribunal the references to the
 3 relevant documents, it's document 10 in annex 18,
 4 document 64(a) which you will need in order to get
 5 a proper understanding of it [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED] They are all instances of
 10 Sainsbury self-funding price reductions.
 11 Now, we were looking at the situation before lunch
 12 of Gallaher, by one means or another, securing
 13 a position whereby its wholesale price was -- its net
 14 wholesale price to you was lower than the corresponding
 15 Imperial one, and so resulting in a lower selling price
 16 in Sainsbury's stores; okay?
 17 **A.** Mm.
 18 **Q.** I think, as I understand it, in relation to the
 19 opportunity to respond, the way you saw this operating,
 20 and did operate, was you never went to Imperial and said
 21 "Do you want to respond?", you left it to them to spot
 22 what was happening and to come to you and initiate
 23 a response?
 24 **A.** Correct.
 25 **Q.** If they spotted that Gallaher's product was being priced

1 more favourably, they then had to decide whether or not
 2 they wanted to respond by basically reducing their net
 3 wholesale price correspondingly?
 4 **A.** Correct.
 5 **Q.** We can just have a look at, I think in the light of your
 6 evidence there is no real dispute about what's going on,
 7 but let's have a look at a couple of examples in
 8 annex 18, tab 29. {D18/29/82}.
 9 The first bit of the letter under "Lambert & Butler
 10 and JPS", that seems to, is this right, be relating to
 11 a bonus being paid presumably in response to competitor
 12 activity?
 13 **A.** I am not sure from here whether it was in response to
 14 competitor activity or whether they were going first.
 15 **Q.** I see, you are right, this could be a situation where
 16 they are going first, you can't tell, quite right.
 17 Tab 49. {D18/49/121}.
 18 **A.** That's a response.
 19 **Q.** That's a response, and similarly tab 52 is a response;
 20 {D18/52/137} is that right?
 21 **A.** Yes.
 22 **Q.** He is increasing the bonus, isn't he --
 23 **A.** Yes.
 24 **Q.** -- on Drum by way of a response in the price of
 25 Amber Leaf?

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1 **A.** Yes.
 2 **Q.** I'll just ask you a couple of questions about that in
 3 a moment. Just to pick up on the Amber Leaf position,
 4 we spoke before lunch about low price and the ultra low
 5 price being this emerging and growing area and where the
 6 manufacturers were battling it out. There was also,
 7 I think I should have put to you, another sector of the
 8 market, isn't there, which was also growing in
 9 importance and also part of this battle, which is this
 10 roll-your-own end; is that right?
 11 **A.** Yes. Less so, but it was becoming more popular.
 12 **Q.** As I understand it, but you tell me if my understanding
 13 is wrong, historically, if one goes back some years,
 14 roll-your-own was a sort of, you know, very poor end of
 15 the market, but in more recent years roll-your-own has
 16 become much more acceptable and a much broader area of
 17 the market, and that's why it was growing?
 18 **A.** Yes, because the costs were going up so much it was
 19 cheaper, yeah.
 20 **Q.** Because it's cheaper to roll your own, yes.
 21 **A.** Yes.
 22 **Q.** That was another area -- because we see this with Drum
 23 and Amber Leaf -- of the battle between these two
 24 manufacturers, wasn't it?
 25 **A.** Yes.

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1 **Q.** In these examples we were just looking at, and again
 2 I think we have largely agreed this already, one finds
 3 that specific price points are being mentioned by
 4 reference to the bonuses, so in the last one we were
 5 looking at, they talk about -- it's at tab 52, this is
 6 Mr Matthews writes to you, recognising that Amber Leaf's
 7 been priced at 209p, and he says:
 8 "Whilst I think we would both prefer to keep more
 9 cash in the till, this is a semi-permanent position and
 10 I would be grateful if you could move Drum 12.5 grams to
 11 a parity position with Amber Leaf from 212 to 209. This
 12 will necessitate an increase in bonus from 51 to 77."
 13 Now, firstly, one looks at the email. As
 14 I understand it, what you say was being communicated to
 15 you is that Imperial wanted to respond to the competitor
 16 activity; correct?
 17 **A.** Yes.
 18 **Q.** They were prepared to pay, as they had to, in order to
 19 get a response?
 20 **A.** Correct.
 21 **Q.** And what they were seeking to do was to achieve a price
 22 which was competitive with Amber Leaf and therefore
 23 a price which was 209p or less if you were prepared to
 24 go for less, but they were going to pay you to go to
 25 209p?

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1 **A.** Yes.
 2 **Q.** They were not in any way restricting you if you wanted
 3 to go lower, that would be a matter for you, although as
 4 you say you were unlikely to do it because your margins
 5 were so slim?
 6 **A.** Correct.
 7 **Q.** We also see -- again let's see whether you agree -- that
 8 this question of these bonuses, it was actually rather
 9 complicated, wasn't it, because you had lots of
 10 different things going on with different brands for
 11 different periods?
 12 **A.** Yes.
 13 **Q.** So it was actually incumbent upon Imperial to try to be
 14 fairly specific, or specific as to exactly how much they
 15 were paying and what it was they at least intended you
 16 to do for that payment, so there couldn't be any doubt
 17 about it?
 18 **A.** Yes, yes, because it was very complicated on occasions
 19 because you might have had say a 10p ongoing bonus and
 20 then there might have been a penny reduction, and then
 21 if there was a price increase, that might have been 5p,
 22 that they might have decided to hold that. So you could
 23 have a tactical bonus that might have been made up
 24 sometimes as three different elements and that's why
 25 usually on the emails it was broken down for absolute

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1 clarity and that's where we then devised a spreadsheet
 2 to be able to sort of keep track of it all, because
 3 otherwise if it was just all on random emails, trying to
 4 work out what was going on, some positions lasted for
 5 months and then, you know, six months later you might
 6 forget that 11p wasn't 11p, it was 3, plus 4, plus 4 or
 7 something.
 8 **Q.** If anybody had said to you because Mr Matthews in these
 9 various emails expressed himself by reference to a
 10 particular or specific price point of 209p, if anybody
 11 had said, well, what he was seeking to do there was to
 12 dictate to you that the price must be 209p and no less,
 13 if somebody asked you about that, you would have said
 14 no, that's completely ridiculous, I never had that
 15 understanding and no-one involved in this could have had
 16 that understanding?
 17 **A.** My understanding he was prepared to pay to get us down
 18 to 209, if I had wanted to go to something different to
 19 that, I could.
 20 **Q.** He wasn't in any way seeking to restrict or inhibit you
 21 from going lower if you so chose?
 22 **A.** I don't think so, no.
 23 **THE CHAIRMAN:** Can I just ask a supplementary question? You
 24 have said that if you saw Tesco were a penny lower than
 25 you on something you would be on the phone to

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1 Mr Matthews and say "Why are they lower? They must be
 2 getting some bonus that we are not getting". Might
 3 Mr Matthews have preferred you to stick at 209p because
 4 if you went below that he was likely to be getting phone
 5 calls from your competitors saying "Why are Sainsbury's
 6 at 208 rather than 209? They must be getting some extra
 7 bonus and therefore we want that extra bonus?"
 8 **A.** Well, potentially, but I suppose it comes back to the
 9 fact that Sainsbury's was a follower in price rather
 10 than a leader, so it wouldn't really have been in our
 11 interests to fund that penny ourselves, because we would
 12 have been funding it ourselves and then we would have
 13 been driving the market lower, so that wasn't the
 14 strategy. I agree it was probably better for him, if we
 15 had taken the decision to go to 208, Tesco's may well
 16 have rung -- I guess Mr Matthews because he was the
 17 Tesco account manager as well, they may have rung him
 18 and had that conversation with him.
 19 **MR HOWARD:** In fact it doesn't follow at all, let's follow
 20 the sense of the conversation, from Imperial's point of
 21 view they know what bonuses they are paying, don't they?
 22 **A.** Yes.
 23 **Q.** So if you go to 208, and Tesco ring him up and say
 24 "Sainsbury's are at 208", for the sake of argument, he
 25 would simply tell them "that's because Sainsbury's have

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1 chosen to go to 208, I haven't funded it, I haven't
 2 given them any greater bonus than I have given across
 3 the market, they have chosen to do it. Tesco, you may
 4 have to go down yourself but that's something you will
 5 have to pay for", so he can seek to exploit the
 6 competitive dynamic between the supermarkets. So it
 7 doesn't by any means follow that it wouldn't be in his
 8 interests for you to go down?
 9 **A.** Well, I don't think ... where I am saying it wouldn't
 10 have been in his interests for us to go down, then it
 11 would have created more hassle because people like
 12 Tesco's and Asda would ring up and maybe they would
 13 disbelieve the fact that he wasn't funding it down and
 14 there would be pressure from them to get him to fund it.
 15 **Q.** In any event, we are speculating about something that
 16 never happened?
 17 **A.** Yeah.
 18 **Q.** And the more important point is from your understanding
 19 of these communications, you were not in any way
 20 whatsoever restricted as to whether you wanted to price
 21 at a lower level?
 22 **A.** That's correct.
 23 **Q.** The only restriction was, because you had taken the
 24 money to go down at least to 209p, you had to benefit
 25 the consumer by going to 209p or you would have to give

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1 back the money. You couldn't take the money and have
 2 high prices which would damage both Imperial and the
 3 consumer?
 4 **A.** Correct.
 5 **DR SCOTT:** So that we are clear, as I understood your
 6 evidence earlier on, a supermarket chain like Tesco's
 7 would have the clout to say to ITL "we are going down to
 8 208 and you must fund it in that circumstance", that was
 9 what I understood you to be saying earlier, that you did
 10 feel you had the clout?
 11 **A.** Yes, you could try and do that, they didn't have to
 12 agree, but I think in tobacco it wasn't a category where
 13 anybody sought to try and outdo each other like some of
 14 the other categories because there wasn't really any
 15 point.
 16 **DR SCOTT:** So in fact as between you and Tesco and Asda, 209
 17 was okay, you wouldn't want to outdo each other?
 18 **A.** Yeah.
 19 **MR HOWARD:** So in fact what's again interesting about this
 20 market, we have intense competition between the
 21 manufacturers, as we discussed earlier; right?
 22 **A.** Yes.
 23 **Q.** But between the supermarkets, although generally the
 24 supermarkets are very competitive on price, when it came
 25 to tobacco, you felt that because the margins that you

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1 were earning were pretty slim and the same for your
 2 competitors, and because of the ethical considerations
 3 associated with tobacco, that the supermarkets
 4 themselves were unlikely to indulge in a cigarette price
 5 war, but they left that to be fought out between the
 6 manufacturers?
 7 **A.** Yes, I think that's a fair assessment.
 8 **Q.** So there is a very competitive dynamic going on, but you
 9 left it really to be fought out between Imperial and
 10 Gallaher because you and the consumers were the
 11 beneficiaries?
 12 **A.** Yes.
 13 **Q.** Now, going back to this question of the opportunity to
 14 respond, there was of course no obligation on Imperial
 15 to respond, was there?
 16 **A.** No.
 17 **Q.** Indeed, whether it would or would not respond, obviously
 18 depended upon the extent to which it felt it could
 19 afford to let Gallaher gain ground on it and whether it
 20 could afford the cost of bonusing down in order to try
 21 to meet them?
 22 **A.** Correct.
 23 **Q.** You always contemplated, and indeed I think the second
 24 agreement in terms says so, that Imperial might not
 25 respond?

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1 **A.** Yes, it was their choice, but they had set out that they
 2 wanted parity, but if somebody else had gone down, it
 3 was up to them to restore the parity, it wasn't up to us
 4 to do that.
 5 **Q.** Absolutely. Even if Imperial did want to respond, as
 6 far as you saw it, there was no obligation on Sainsbury
 7 to actually take additional funding from Imperial,
 8 although the likelihood was that you would because why
 9 wouldn't you? If they are prepared to throw money at
 10 you, you would take it? That's my feeling, anyway.
 11 **A.** Yeah, I would agree with that.
 12 **Q.** If people throw money at me, I am more than happy to
 13 take it. They don't do it often enough, unfortunately.
 14 We have been looking at the Gallaher position, and
 15 I just wanted to also ask -- and we have been looking at
 16 the position where Gallaher have sought to induce you to
 17 reduce the selling price of their product. Can we look
 18 at a variant on the theme, which is the situation where
 19 you notice that the Gallaher product, a Gallaher
 20 product, is being sold at a cheaper price in Tesco.
 21 I know you say you don't recall that happening, but
 22 I just want to test how you would have approached it.
 23 Okay?
 24 Now, as I understand it, the first thing you would
 25 do if you saw Gallaher at a cheaper price, let's say

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1 Dorchester in Tesco, is you would be on the phone to the
 2 national account manager or whatever the title is they
 3 had at Gallaher, of your counterpart, to ask him whether
 4 there was some sort of funding going on, and if so,
 5 could you have a share of it?
 6 **A.** Yes.
 7 **Q.** If he said, "Yes, there was, and it's just been
 8 an oversight that we have not given it to you", you
 9 would have secured it and then you would have reduced
 10 the price of the Gallaher product?
 11 **A.** Yes.
 12 **Q.** If Imperial were unhappy that they were disadvantaged,
 13 then the opportunity to respond would kick in and it
 14 would be up to them to reduce their price?
 15 **A.** Yes.
 16 **Q.** To take that example of where you observe Tesco having
 17 a lower price for Dorchester, what you regarded yourself
 18 as absolutely entitled to do was to go to Gallaher and
 19 seek to get them to fund you in order that you could
 20 match Tesco?
 21 **A.** If that situation had happened, yes, I would have felt
 22 entitled to do that.
 23 **Q.** You didn't regard the trading agreements with Imperial
 24 as in any way inhibiting or restricting your ability to
 25 go to Gallaher in that situation and induce them to fund

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1 you?
 2 **A.** No, and nor vice versa would Imperial.
 3 **Q.** Could I ask you just to look at tab 9 for a moment.
 4 {D18/9/9}.
 5 It is a document on 17 April 2000 which pre-dates,
 6 I understand, but perhaps you can just help me about
 7 this: when you became involved as the buyer, presumably
 8 you would have seen the file containing the trading
 9 agreement and any other relevant correspondence?
 10 **A.** Yeah.
 11 **Q.** So this letter is about six months before your
 12 involvement. You can see at this stage they are
 13 writing, it's a letter from Mr Matthews, and he is
 14 writing about:
 15 "... attempting to put down in writing some of the
 16 issues we discussed concerning a potential trading
 17 agreement".
 18 I would like you to go to the second page. If you
 19 look at product pricing, you see -- perhaps if you could
 20 read down to just above "Product Merchandising", rather
 21 than my reading it out to you.
 22 (Pause)
 23 You see the paragraph that reads:
 24 "Clearly these criteria have to be applied
 25 pragmatically. Our competitors may want to promote

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1 their brands at lower prices, Sainsbury's may also want
 2 to do the same. Based on the existing price list
 3 differentials we would like the chance of a fully funded
 4 response or a similar period of advantage after the
 5 promotional period."
 6 Looking at the first of those paragraphs, do you
 7 agree that what Mr Matthews is saying there that the
 8 approach to the differentials has to be approached -- it
 9 has to be a pragmatic one, and recognising that the
 10 competitors may want to promote their brands, and/or
 11 Sainsbury's may want also to promote independently the
 12 brands of the competitor?
 13 A. Yes. "Pragmatic" was his favourite word.
 14 Q. I am sorry?
 15 A. I said "pragmatic" was one of his favourite words.
 16 Q. But he was right, wasn't he?
 17 A. Yeah. That's what he is saying, yes.
 18 Q. We can see what he is saying, but the sentiment that
 19 expressing here, was that one which you also understood
 20 once you became involved in the account, which was that
 21 it was all very pragmatic and both Imperial recognised
 22 that Gallaher may have, get their price down and they
 23 would want to respond, but equally for other reasons
 24 Sainsbury's may decide to put the price of Gallaher
 25 down?

1 A. Yes, I think it was unlikely that that would happen, but
 2 it was recognised that we had the ability to do that if
 3 we so wished.
 4 Q. Good, okay. If you then go forward to --
 5 **THE CHAIRMAN:** Can I just ask: in the next paragraph, what
 6 does it mean "a similar period of advantage after the
 7 promotional period"? What would you understand by that?
 8 A. I would understand that to mean if Sainsbury's had said
 9 to him, "No, you can't match Gallaher at the moment",
 10 but after that had finished. So say the Gallaher price
 11 went down for four weeks and then it went back up, that
 12 he should be allowed a similar four-week period. But in
 13 essence if they offered to fund it, we wouldn't have
 14 said no, you will have to wait and do it at a different
 15 time. I think he was just trying to say he would get
 16 a fair chance. So if Gallaher went down for four weeks,
 17 he could also go down for four weeks, ideally it would
 18 be at the same time, but if we said it wasn't to be the
 19 same time, we had to give him a chance to do it later.
 20 **MR HOWARD:** I think I can help you here. This is actually
 21 referring to the type of thing which generally goes on
 22 in supermarkets, where, you were talking about detergent
 23 earlier or alcoholic drinks, it doesn't matter, one
 24 manufacturer will have a promotion for a particular
 25 period, and then a competing manufacturer there, because

1 of all the advertising that's associated with it, will
 2 usually have his promotion in a subsequent period.
 3 That's right, isn't it?
 4 A. Yes.
 5 Q. So in a slightly odd way, outside of tobacco, what you
 6 find is that actually the manufacturers, as a result of
 7 these promotional periods, are very often not competing
 8 head to head at the same time, but they are seeking to
 9 gain promotions and market share by promotions in
 10 different periods?
 11 A. Yes, so for example Persil and Ariel that are owned by
 12 different manufacturers, would be unlikely to be on
 13 offer at the same because where you have only got so
 14 many products you always want there to be something on
 15 offer for the consumer. So other than Christmas and
 16 alcohol where you would get a lot of corresponding
 17 brands on promotion at the same time, that would be the
 18 situation.
 19 Q. But the distinguishing feature in tobacco was that the
 20 competition, the price war, instead of just having these
 21 promotional periods actually goes on head to head the
 22 whole time?
 23 A. Yes.
 24 Q. That's really why it's such intense price competition
 25 going on because they are at it the whole time?

1 A. Yes.
 2 Q. Then if you would go to tab 17, and this is the first
 3 agreement, and if you go to page 37 of that, it's the
 4 heading "Prices". Do you have that? {D18/17/21}.
 5 A. Yes.
 6 Q. The third bullet point on that page reads that:
 7 "ITL to be able to respond to any price promotions
 8 where appropriate within a reasonable timeframe."
 9 As I understand it from your evidence, that meant
 10 any price promotions, whether through Gallaher or
 11 through Sainsbury's own actions?
 12 A. Yes.
 13 Q. Now, in the second agreement, the possibility of
 14 Sainsbury's own actions is not expressly adverted to.
 15 It's at tab 61. Do you have that?
 16 A. Mm.
 17 Q. As I understand your evidence, you can see that in the
 18 penultimate paragraph it talks about competitor activity
 19 and in the last paragraph it also talks about
 20 competitors.
 21 As I understand your evidence, although in the
 22 second agreement you drafted you haven't expressly
 23 referred to the possibility of Sainsbury's, as it were,
 24 own funded promotions, it was always understood between
 25 you and Mr Matthews that although it was an unlikely

1 scenario, if it was something that you considered
 2 appropriate, you were free to do it?
 3 **A.** Yes.
 4 **Q.** Okay. Now, could we turn to consider a price increase
 5 scenario. If a manufacturer --
 6 **DR SCOTT:** Sorry. Was part of that understanding that if
 7 you promoted a Gallaher brand, you would give ITL the
 8 chance to respond?
 9 **A.** Sorry, I didn't quite catch that.
 10 **DR SCOTT:** What I understood the point to be that was being
 11 put to you was that you haven't expressly referred to
 12 the possibility of Sainsbury's, as it were, own funded
 13 promotionings, it was always understood between you and
 14 Mr Matthews that although it was an unlikely scenario,
 15 if it was something that you considered appropriate, you
 16 were free to do it. That's the point that was put to
 17 you by Mr Howard. So that he is putting to you that you
 18 could do your own promotion?
 19 **A.** Yes.
 20 **DR SCOTT:** The point I was putting to you was that if you
 21 did a promotion, self-funded -- which you didn't -- of
 22 a Gallaher brand, would Paul Matthews have understood
 23 that you would give him the opportunity to respond on
 24 behalf of ITL?
 25 **A.** I suppose so. It is difficult because it never

1 occurred.
 2 **DR SCOTT:** Yes, it didn't happen.
 3 **A.** I suppose he would probably see it was self-funded,
 4 because we would be down and nobody else would
 5 initially, but yes, he would have had the chance to
 6 respond to that.
 7 **MR HOWARD:** Yes, and if he wanted to, it was exactly the
 8 same scenario, he would have to pay for it.
 9 **A.** Yes.
 10 **Q.** Or his boss or the company he worked for anyway?
 11 **A.** Yes.
 12 **Q.** Where there is a price increase by one of the
 13 manufacturers, so Imperial puts up its price, for the
 14 sake of argument, Sainsbury's would, as I understand it,
 15 usually then put up the retail selling price of
 16 Imperial's products in order to preserve its margin?
 17 **A.** Correct.
 18 **Q.** You say very clearly in your statement, and you have
 19 said very clearly to us today, that as far as you were
 20 concerned, none of the tobacco companies had any say
 21 about the level at which you priced the brands of
 22 a rival company?
 23 **A.** Correct.
 24 **Q.** So as far as you were concerned, Imperial had no say
 25 whatsoever about the price of Gallaher brands?

1 **A.** Correct.
 2 **Q.** Now, sometimes what happened -- is this right -- when
 3 Imperial had a manufacturers' price increase, they would
 4 either at the same time or soon after seek to hold the
 5 price of certain brands?
 6 **A.** Yes, they did that sometimes, yes.
 7 **Q.** We can see an example of that where you were involved at
 8 tab 26. {D18/26/76}. If you look at paragraph 3, there
 9 is an example:
 10 "Richmond KS Lights and KS multipacks all held at
 11 pre MPI prices. Please claim on previous bonuses."
 12 Let's just try and understand what happens.
 13 Imperial announces a price increase and MPIs would come
 14 in, I think, about twice a year, don't they?
 15 **A.** Once or twice.
 16 **Q.** Once or twice a year, and they usually come in, the
 17 different manufacturers usually announce MPIs at roughly
 18 the same time?
 19 **A.** Yes. One would go first and then within a matter of
 20 days usually somebody else would respond.
 21 **Q.** The one who goes first, he does not know, when he goes,
 22 what his competitors are going to do, so he dips his toe
 23 in the water and has to wait and see what they are going
 24 to do; correct?
 25 **A.** Yes.

1 **Q.** Where we see the price holds, there are two potential
 2 reasons why Imperial having announced an MPI then has
 3 a price hold. One is that, despite its decision
 4 generally to put up its prices, it wants to try and gain
 5 some competitive advantage by holding the price of
 6 a particular brand down. That's one possibility.
 7 **A.** I'd say it was more of not getting a competitive
 8 disadvantage.
 9 **Q.** They would get into a ...
 10 **A.** If you are in the situation with Richmond, if you go up
 11 in price, you are at commercial disadvantage.
 12 **Q.** You have it right and I have it wrong. What they are
 13 fearful of, although they were intending to put up the
 14 price, is that if they do put up the price they will be
 15 at a competitive disadvantage. So in other words they
 16 retract the price increase because they fear that will
 17 put them at a disadvantage?
 18 **A.** Yes. For the premium brand, because of brand loyalty
 19 it's probably not an issue, but for the ones in the
 20 ultra low price sector, yeah, that could have been
 21 an issue.
 22 **Q.** We can look at various examples but I'm not sure --
 23 multiplying them. There were lots of times where they
 24 have an MPI, but at the same time or soon after they are
 25 holding the price of the -- particularly these brands in

1 the low price and ultra low price sector?
 2 **A.** Yes.
 3 **Q.** And the rationale for that is that they don't want to be
 4 at a competitive disadvantage, and they fear
 5 a competitive disadvantage because they fear that their
 6 competitor is not putting up the price of the competing
 7 brand?
 8 **A.** Correct.
 9 **Q.** What I think is obvious, therefore, from this is that
 10 you didn't regard yourself where Imperial put up the
 11 price of its brands as under -- you didn't regard
 12 yourself as under any requirement from Imperial to put
 13 up the price of Gallaher just because Imperial had put
 14 up the price of their brand?
 15 **A.** No, none at all.
 16 **Q.** Again I think if Imperial had suggested to you that that
 17 was the case, you would have told them to take a running
 18 jump?
 19 **A.** Yes, but they never suggested that.
 20 **Q.** They never had the effrontery to do it, and if they had,
 21 you would have told them where to get off, so to speak?
 22 **A.** Yes. Very politely, obviously.
 23 **Q.** Very politely, I am sure.
 24 The reason, you have explained to us, that the holds
 25 are taking place is that Imperial didn't want to be

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1 disadvantaged, so it must have been clear to you that
 2 Imperial full well understood that, if they have put up
 3 their price, they were then running a risk of being at
 4 a competitive disadvantage, and that was a choice for
 5 them, and if they didn't want the competitive
 6 disadvantage, then they have to put the price back down?
 7 **A.** Exactly.
 8 **Q.** From Sainsbury's perspective, the suggestion that you,
 9 by the trading agreements, had agreed somehow that
 10 following a wholesale price increase by one manufacturer
 11 you will increase the retail price of the rival
 12 manufacturer's products as well, such a suggestion would
 13 make no commercial sense whatsoever, because if you did
 14 that you would run the risk of being out of line with
 15 your competitive benchmark, wouldn't you?
 16 **A.** Yes. I don't think there was anything in the trading
 17 agreements that said we would do that.
 18 **Q.** So the essential position, as understood by both you and
 19 Imperial, was that if Imperial put up its prices, that
 20 was a matter for it, and the consequence would be that
 21 through its actions the differentials might not apply
 22 because its putting up the price might cause it to be
 23 out of line and that's its choice?
 24 **A.** Exactly.
 25 **DR SCOTT:** How often did you receive revisions to the

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1 differentials sheets?
 2 **A.** Oh, to the -- never. Not that --
 3 **DR SCOTT:** Never?
 4 **A.** Maybe once. I would say virtually never, but probably
 5 not completely never, if that makes sense. I think when
 6 some of the emails I read through and some of the
 7 information that was sent to me, I think one moved from
 8 a 3p differential to a 2p differential, but in general
 9 in all the time I was in tobacco, those differentials --
 10 because most of them actually were parity, at parity,
 11 and I don't recall them changing.
 12 **Q.** In fact, the point is slightly different, because if we
 13 take a situation: Imperial has an MPI and it puts up the
 14 prices, whether they send you through a revised
 15 differential sheet or not, in that situation you
 16 understood that they were taking action to put up their
 17 wholesale price, and if their wholesale price meant that
 18 they were no longer competitive with Gallaher, then they
 19 would have to suffer the consequence in their retail
 20 selling prices?
 21 **A.** Yes, because the way I viewed the parity sheet was that
 22 was their desired position, but if they did things that
 23 affected that, that was their choice. It was more their
 24 desired position to be parity with Dorchester or
 25 Richmond or whoever, rather than Sainsbury's specific

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1 desire, and it was up to them to implement that through
 2 either offering bonuses or if another manufacturer then
 3 withdrew the bonus but went up, they had the choice to
 4 do the same. So it was them that were really in control
 5 of maintaining the parities or the differentials, more
 6 so than Sainsbury's.
 7 **Q.** Indeed, if one actually thinks about it for a moment,
 8 the suggestion -- let's sort of think about how it would
 9 work. Imperial decides to put up the price of Richmond,
 10 for the sake of argument, by 10p, and so let's say they
 11 have an MPI whereby they do that and you put up the
 12 shelf price of Imperial by 10p. If, as a result of
 13 that, you deigned to put up the price of Dorchester
 14 because somebody said that's what we are going to do, we
 15 have not had any price increase from Dorchester,
 16 Gallaher would be on the phone to you straightaway
 17 saying "What on earth are you doing"; is that right?
 18 **A.** I would expect they would be on the phone.
 19 **Q.** There wouldn't be any way in which you could explain to
 20 them why you were putting up the price of their product?
 21 **A.** I could say that's my prerogative to put the price up,
 22 if that's what I wished to do, but given that I was
 23 benchmarking against the other supermarkets, if they
 24 hadn't done that, I wouldn't have done that because we
 25 were in a following price position rather than a leading

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1 price position.

2 **Q.** Anyway, what I am interested in is the position between

3 you and Imperial, and your understanding was absolutely

4 clear, and I think you say you believe that was true of

5 Imperial as well, that if Imperial put up its prices

6 then that was a matter for them, and as far as you were

7 concerned, that had no effect whatsoever on your pricing

8 decisions in respect of Gallaher?

9 **A.** Correct.

10 **Q.** And if Imperial had suggested otherwise, as you have

11 already made clear to me, you would have told them to

12 get lost?

13 **A.** And the fact that they didn't suggest it makes me think

14 that they were clear to the situation as well.

15 **Q.** Exactly. Not only did they not suggest it, they

16 actually took action in the terms of price holds which

17 showed that they full well understood that if they put

18 up the price of their product and Gallaher didn't put up

19 the price of theirs, they had better react by bringing

20 the price back down or they would be at a competitive

21 disadvantage?

22 **A.** Yes.

23 **THE CHAIRMAN:** Could I just understand a bit more the timing

24 of these MPIs and the price holds? It may be there

25 wasn't a clear pattern. But my understanding is when

1 there was an MPI that wasn't because of the Budget, so

2 didn't have to happen instantly, you got some notice,

3 these MPIs were published in the marketplace in

4 a certain number of weeks before they were due to take

5 effect?

6 **A.** We had four weeks' notice.

7 **THE CHAIRMAN:** Everybody in the market, both on the retailer

8 and the manufacturer side, were they aware when an MPI

9 had been published as due to take place in four weeks'

10 time?

11 **A.** Well, if I explain that we would get a phone call, say

12 Imperial went first, we would get a phone call from

13 Mr Matthews saying "There is going to be an MPI on this

14 date" which would usually be four weeks or four weeks

15 and a couple of days. That would then be confirmed by

16 email with a new price list and a couple of days later

17 a hard copy of the price list. I would say usually

18 within a couple of days, the next manufacturer, Gallaher

19 or BAT, would ring up and say "We are having

20 a manufacturers' price increase in four weeks' time", so

21 it would tend to be two or three days' later

22 implementation than the first one. But they usually

23 went before the impact of the price increase would be

24 seen on shelf. So if we got notice on the 1st of the

25 month there was going to be an ITL MPI on the 29th of

1 the month, probably on the 4th of the month we would get

2 a phone call from Gallaher saying theirs was going to be

3 28 days later.

4 **THE CHAIRMAN:** So if you did get a sort of matching MPI or

5 responsive MPI from Gallaher, would you still expect to

6 get price holds from ITL or would the price holds tend

7 to come from ITL if, for whatever reason, Gallaher

8 didn't four days later --

9 **A.** Yes. I would say the latter.

10 **THE CHAIRMAN:** I've forgotten which --

11 **A.** Okay, if ITL announced a price increase and then two or

12 three days later Gallaher announced, I would say ITL

13 would know that. Somehow it would be out in the market.

14 I wouldn't ring ITL and say "Oh, by the way, I've now

15 had a phone call from Gallaher, they are ..." they would

16 know that. How they knew that I don't know, but they

17 would then know Gallaher were going to have an MPI and

18 the date of it. And it depended on the length of time.

19 So if it was a matter of a few days, it was unlikely

20 that the price hold took effect before the price had

21 gone up. What may have happened was the prices went up

22 and then some period of time after, a couple of days,

23 a couple of weeks, they would then decide to go back

24 down again. But if there was no immediate response and

25 it was maybe going to be two or three weeks between

1 them, then they may come back and say "Actually,

2 although we have told you things are going up 10p, on

3 these brands we would like you to hold", so we wouldn't

4 actually put them up at all and bring them back down,

5 but it did depend.

6 **MR HOWARD:** Actually, in your witness statement, what you

7 actually said there, paragraph 13, was that one

8 manufacturer would start off with an increase in the

9 price and the others would then follow suit within three

10 weeks or so.

11 **A.** Yeah, I do not remember the time when it was over

12 a longer period of time than that, it was usually within

13 quite a short timespan.

14 **Q.** Yes, but then again let's think about how this operates

15 because obviously it depends where you are in the

16 structure. If you are Imperial and you go first, then

17 you may straightaway sometimes, even though you have

18 announced the price increase, say "I am going to have

19 a price hold because on certain brands at least I am

20 worried as to what's going to happen". So in other

21 words you have a pre-emptive price hold, and that

22 happened, didn't it?

23 **A.** Yeah, I don't remember which specific MPI or anything

24 but I'm sure that probably did happen in the time I was

25 there.

1 Q. Equally, sometimes what can happen, and I think did
 2 happen, is Imperial announces a price increase, soon
 3 after Gallaher announces a price increase and then
 4 Imperial, trying to get competitive advantage, says to
 5 you "I am going to have a price hold notwithstanding
 6 what I previously said"; in other words, they reduce the
 7 price?
 8 A. Yeah.
 9 Q. All these things are happening because it's all part of
 10 this price battle and trying to somehow get in,
 11 without -- to steal a march on your competitor?
 12 A. Yeah.
 13 Q. That's what was going on with all these promotions,
 14 price holds, each time somebody is trying to catch the
 15 other one napping and get in at least for a few weeks to
 16 get some advantage. That's right, isn't it?
 17 A. Yes. The only place I would say where it wasn't right
 18 was where as soon as somebody went back up, so they then
 19 withdrew the bonus and you went back up, the other
 20 person responded straightaway and with hindsight,
 21 I think: I don't know why we couldn't wait for a couple
 22 of weeks because then they would have got probably
 23 a better competitive advantage by doing that.
 24 Q. Of course that's an interesting point. Where the price
 25 goes up, let's just think about that for a moment, it

1 depends upon the strategy of the particular company. So
 2 if we take Richmond, if Imperial believes that as long
 3 as Richmond is no more expensive than Dorchester, it
 4 will sell like hot cakes in this ultra low price market.
 5 If they see the price of Dorchester goes up, they no
 6 longer need to spend a vast amount of money paying you
 7 a bonus to keep Richmond a long way below, they can
 8 satisfy their strategy by withdrawing part or all of the
 9 bonus to allow you to price at no more expensive than
 10 Dorchester?
 11 A. But if both people had done that nobody would have ever
 12 have offered you a bonus.
 13 Q. Mm?
 14 A. If both people had taken that view, once they were at
 15 parity, there would have been no point in them offering
 16 you a bonus to go down, so they must have believed they
 17 could get a competitive advantage by being lower price.
 18 Q. Each one of them may have had a different view. So
 19 Dorchester, for reasons no doubt Gallaher -- I don't
 20 know whether Gallaher shared their perception with you
 21 of what price they needed to have Dorchester at in order
 22 to make it competitive.
 23 A. They had -- the brands that were parity brands for
 24 Imperial were parity brands for Gallaher, but they just
 25 didn't note it down in their trading agreement.

1 Q. The thing was, what each of them was doing, as you saw
 2 it, was moving the price down at different stages in
 3 order to try and steal a march on the other; isn't that
 4 right?
 5 A. Yes.
 6 Q. And the other would then respond by moving his price
 7 down, and then from time to time because it's costing so
 8 much money, one of them would give up and put his price
 9 back up, and the other would follow because he didn't
 10 perceive the need to continue himself to pay the bonus.
 11 Is that right?
 12 A. Correct.
 13 Q. A price increase by Imperial which is not followed by
 14 a price increase by Gallaher is, I think we have already
 15 agreed, essentially the same position as that where
 16 Gallaher reduces its price, in both situations Gallaher
 17 has a lower wholesale price which you are then
 18 reflecting in a lower retail selling price?
 19 A. Yes.
 20 Q. In both those cases, as far as you were concerned, if
 21 Imperial wanted to respond, it could do so but it would
 22 have to reduce its wholesale selling price?
 23 A. Yes.
 24 Q. Just to be clear, as far as you were concerned, there
 25 was absolutely nothing in the trading agreements to

1 restrict your entitlement to reflect Gallaher's lower
 2 wholesale prices in your retail selling prices and it
 3 didn't matter whether those lower wholesale prices arose
 4 through a tactical or promotional bonus or any other
 5 bonus, or a decision of Gallaher to hold its price when
 6 Imperial put its price up?
 7 A. Correct.
 8 Q. And Imperial never suggested to you otherwise?
 9 A. No.
 10 Q. We have already discussed this afternoon that the way in
 11 which MPi came in is that you got a period of at least
 12 four weeks' notice and it was usually around four weeks,
 13 give or take an extra few days?
 14 A. Yes.
 15 Q. The manufacturers' price increases, the way in which
 16 they operated in this market, do you know whether that
 17 was something which had been going on for years and
 18 years, which is that the three manufacturers' price
 19 increases were more or less published at the same time?
 20 A. I think so from the price lists that were in the folder,
 21 you know, in the various files were all similar times.
 22 Q. I am sorry?
 23 A. The price lists that were in the files were all from
 24 similar dates, I don't know how many years that would
 25 have gone back, I don't recall checking that exactly.

1 Q. If Imperial had paid you a tactical bonus in order to
 2 reduce the price of a particular product and it ended
 3 the promotion, was Sainsbury's required to put up the
 4 retail selling price, as opposed to putting up the
 5 retail selling price because it wanted to preserve its
 6 margin?
 7 A. No, we didn't have to put the price up, but we had
 8 notification that the bonus was ending and therefore if
 9 we hadn't put the price up, we would have lost margin.
 10 Q. If I can summarise what I think you have said in various
 11 interviews and in your evidence, your position was that
 12 "If a bonus was withdrawn, we were free to continue to
 13 self-fund but the reality was, because the margins were
 14 so slim, it was very highly unlikely that we would do
 15 so."
 16 A. Correct.
 17 Q. So Imperial would be entitled to assume that if the
 18 bonus was withdrawn, that the consequence would be that
 19 your retail selling price would be adjusted upwards to
 20 allow you to earn your margin because that's how you
 21 were choosing to operate your business?
 22 A. Correct.
 23 Q. So when we see -- we can have a look at one or two
 24 documents -- if we look in annex 18 at document 53, for
 25 example, would you like to just read that to yourself.

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1 {D18/53/138}.
 2 (Pause)
 3 So here we have, as I understand it -- is this
 4 right -- the price of certain cigars is moving up and
 5 the bonus is being withdrawn; is that right?
 6 A. Yes.
 7 Q. A number of witnesses have said that this sort of
 8 correspondence is commercial shorthand in the sense that
 9 what is understood here is that Imperial is withdrawing
 10 a bonus and it's just, when it refers to the shelf
 11 price, the new shelf price, it's simply informing you,
 12 bearing in mind what it understands is the margin that
 13 you want to earn, what the new retail selling price
 14 would be on the assumption that you want to earn that
 15 margin; do you agree with that?
 16 A. Yeah, yes. In fact it's probably going back to where it
 17 started off before the reduction.
 18 Q. Would you agree that these sort of communications we
 19 should understand very much as commercial shorthand in
 20 dealings between people who full well understood what
 21 was going on, and it wasn't a direction to you to set
 22 a particular price as opposed to simply saying "We are
 23 no longer paying the bonus, the implications of this for
 24 you are as follows and it's up to you whether you want
 25 to follow that or not"?

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1 A. Yeah, I would agree with that.
 2 Q. Good. What we see and no doubt you will confirm you
 3 recall this type of event happening, Gallaher seeks to
 4 reduce the price of, let's say, Dorchester, they are
 5 paying a bonus and they take it down to £3.29. Then
 6 Imperial follows by paying its bonus to -- and you price
 7 Richmond also at 3.29. You recall that sort of
 8 situation?
 9 A. Yes.
 10 Q. These bonuses were obviously costing the manufacturers
 11 a lot of money, weren't they?
 12 A. Yes.
 13 Q. If we consider a situation where Imperial decides it
 14 just can't afford this any more, to keep on bonusing, so
 15 it says "I am going to withdraw my bonus" or "I am going
 16 to withdraw part of it". So in my example they say
 17 "I am withdrawing 5p or its equivalent of the bonus, so
 18 the result of that is that if you want your margin the
 19 price goes to £3.34". That sort of scenario happened,
 20 didn't it?
 21 A. Yes, because it happened in that cigar scenario, because
 22 the tactical bonus there was ■■■, and 2.55, and then when
 23 it went up to 2.65, there was still a ■■■ tactical bonus
 24 on there, so that was quite a common scenario.
 25 Q. The thing that I am interested in is where Imperial

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1 decided to give up, as it were, that they couldn't
 2 stomach the fight any longer, and they therefore
 3 withdraw part of their bonus, assuming Gallaher are
 4 still bonusing you to keep your brand down, presumably
 5 just because Imperial has given up, that doesn't affect
 6 Gallaher, if Gallaher want to carry on with the bonus so
 7 be it and you continue to enjoy the benefit and they
 8 enjoy the benefit of the lower price?
 9 A. Exactly.
 10 Q. So if Gallaher did nothing to its price, you would not
 11 regard yourself as under any requirement or obligation
 12 or anything of that sort to Imperial to alter the price
 13 of the Gallaher product?
 14 A. No.
 15 Q. And Imperial never suggested otherwise, did they?
 16 A. No.
 17 Q. If we go to document 65, would you like to read it to
 18 yourself? It's one you deal with in your witness
 19 statement.
 20 (Pause)
 21 This was an instance, wasn't it, as one can see,
 22 I think, that Imperial were concerned that it was just
 23 too expensive to keep the bottom end at such low prices,
 24 that was their concern, wasn't it?
 25 A. I imagine so, this is an email to Tim Davies.

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1 Q. Yes, I beg your pardon. Actually, sorry, yes, I'm
 2 asking you about one that you hadn't seen, although
 3 I think you do comment on this one in your witness
 4 statement. That's why I was asking you about it. You
 5 dealt with it at paragraph 63 of your witness statement.
 6 You have commented on it --
 7 A. Yeah.
 8 Q. -- so I will carry on asking you about it. I think you
 9 are just commenting on it, somebody has shown it to you
 10 and asked you what you think is going on?
 11 A. Yes.
 12 Q. What one can see is that, or at least what appears to be
 13 going on is that Imperial's withdrawing a bonus in
 14 respect of Richmond and looking, because they believe
 15 there is going to be upward movement in the bottom end
 16 of the market. That sort of thing, where Imperial might
 17 have decided: well, we cannot afford to keep these
 18 prices down for so long and pay all this money per pack
 19 of cigarettes, that's obviously something that happened
 20 in your time as well where they would withdraw a bonus
 21 for that reason?
 22 A. Yeah.
 23 Q. When they did that, they might hope that Gallaher would
 24 follow suit, but they would actually have no idea
 25 whether they would or would not?

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1 A. Theoretically we would have no idea.
 2 Q. Mm?
 3 A. They shouldn't have had any idea?
 4 Q. No, they didn't.
 5 A. Whether they did or they didn't I can't categorically
 6 say.
 7 Q. No, but what I think you say about this email was that
 8 you regard it as a rhetorical point where he says
 9 "Wouldn't it be good if Dorchester and Mayfair followed
 10 us", and obviously it would be good from his point of
 11 view, that if Dorchester and Mayfair decided that in the
 12 light of his withdrawing from the battle they were going
 13 to put up the price of Dorchester and Mayfair as well,
 14 then he wouldn't suffer a competitive disadvantage. Of
 15 course, if they chose to see him off, then he would face
 16 a competitive disadvantage?
 17 A. I think it was quite a strange email because actually
 18 when you dissect it and he says "I believe there is
 19 going to be some upward movement at the bottom end of
 20 the market", that's implying that he knows that the
 21 competitor products are going up, because otherwise he
 22 would just say "I would be grateful if you would move
 23 our prices up".
 24 Q. Of course.
 25 A. And the fact that he then named other people's brands

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1 and says "Wouldn't it be good if Dorchester and
 2 Mayfair", you could look at that and imply that he knew
 3 they were going up and he would getting into the time
 4 lag. I think that was quite a strange email.
 5 Q. First will you, you didn't see it at the time, it was
 6 not addressed to you?
 7 A. No, because it was --
 8 Q. One of the things no doubt you have found in your
 9 experience as a buyer at the supermarket is that when
 10 dealing with suppliers of all different sorts, they will
 11 sometimes give you misinformation and you will sometimes
 12 give them misinformation. That's how it works, isn't
 13 it? That's the reality, isn't it?
 14 A. Potentially.
 15 Q. Mm?
 16 A. There is the potential.
 17 Q. There is nothing to be embarrassed about, that's the
 18 hurly burly of this tough world in which the
 19 supermarkets work and the tough world of the suppliers,
 20 that sometimes suppliers tell you things which may not
 21 actually be true because they are trying to influence
 22 behaviour, and sometimes you tell them things that are
 23 not true because you are trying to influence their
 24 behaviour; that's right, isn't it?
 25 A. Yes.

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1 Q. And this looks like a classic example of Mr Matthews
 2 trying to influence behaviour, hoping that Mr Davies
 3 will -- and of course we are not going to hear from
 4 Mr Davies unfortunately -- go back and try and induce
 5 Gallaher to do something?
 6 A. Well, all he is asking him to do is put the price of
 7 Richmond down or up which would be a normal thing to do.
 8 I think when you read it, it implies that Paul already
 9 knows that Dorchester and Mayfair are going up.
 10 Q. Why did you say it was a rhetorical question?
 11 A. I can't remember if I did, actually.
 12 Q. Yes, you did.
 13 A. Because I think it's implying that he knows they are
 14 going up.
 15 Q. What do you mean by a rhetorical question? What does
 16 that mean to you? That's not what "rhetorical" means to
 17 me.
 18 A. I am saying I think it sounds to me like he knew they
 19 were going up.
 20 Q. What's a rhetorical question? What's rhetorical about
 21 it?
 22 A. That's probably the wrong phrase, but I am saying what
 23 I look and see now is that email suggests to me that he
 24 already knew they were going up.
 25 Q. Right. In any event, that wasn't what you said in 2005

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1 in your witness statement, when you chose to address
 2 this.
 3 **A.** Well, what I said then was I think it's a bit strange
 4 that he has referred to that at the bottom and I still
 5 think that's strange.
 6 **Q.** Why was it appropriate for you to comment on this
 7 document in any event, since it wasn't something you saw
 8 at the time?
 9 **A.** Because somebody put it in front of me and asked me if
 10 I thought that was a standard sort of email.
 11 **Q.** Who did that, the Office of Fair Trading?
 12 **A.** I suppose it must have been.
 13 **Q.** Okay. Can we move to consider --
 14 **THE CHAIRMAN:** If you are moving off that document, can
 15 I ask a supplementary question?
 16 In paragraph 63, you say:
 17 "It was a fairly typical request to increase the
 18 shelf price."
 19 Whereas in answer to Mr Howard's questions, you
 20 agreed that this was shorthand from Mr Matthews saying
 21 "We are going to reduce the bonus and if you want to
 22 retain your margin this is what you will have to move
 23 your shelf price to". Is there a difference between
 24 that interpretation of the email and an interpretation
 25 that Mr Matthews was asking you to increase the shelf

1 price to a particular point? It may be that that's
 2 a distinction that's rather too subtle for what was
 3 intended in this email?
 4 **A.** It was typical in terms of asking to increase the price
 5 and saying the bonus was going to be reduced. I think
 6 the bit that was not particularly typical was saying --
 7 because you would be either going first and saying
 8 "I would like you to increase" and you don't know
 9 whether somebody else is going to follow, or you are
 10 following. So somebody else has gone up already and you
 11 decide to follow.
 12 The bit that wasn't really typical is "I believe
 13 there is going to be some upward movement at the bottom
 14 end of the market".
 15 **THE CHAIRMAN:** We have had that discussion, but at the
 16 moment I am just trying to ascertain if there is any
 17 difference between what you say in paragraph 63,
 18 describing this as a typical request to increase the
 19 shelf price and what you were saying to Mr Howard, that
 20 actually you would read this not as Mr Matthews asking
 21 Mr Davies to increase the shelf price, but rather him
 22 saying "We are now reducing our bonus, so if you want to
 23 reflect that in your shelf price, this is how you would
 24 price this". Do you see the difference there?
 25 **A.** Not really. I think he is asking him to increase the

1 price and saying the bonus was reducing. I cannot
 2 understand what the --
 3 **MR HOWARD:** I think the point is this: what you have already
 4 told me is that the shelf prices that are being referred
 5 to here are, you have always understood them to be
 6 maximum prices; correct?
 7 **A.** Yes.
 8 **Q.** So as I understand your evidence, when we look at these
 9 emails, what is actually happening, both in the emails
 10 where the price is going down and the emails where the
 11 price is going up, that -- and here if we talk about one
 12 where it's going up -- what you are being given notice
 13 of is a withdrawal of the bonus?
 14 **A.** Yes.
 15 **Q.** Correct? And the consequence of the withdrawal of the
 16 bonus is that if you want to retain your margin, it has
 17 a consequential effect on the shelf price; correct?
 18 **A.** Yes.
 19 **Q.** When Mr Matthews, in the correspondence we see him
 20 referring to "the shelf price", it's not that he has
 21 an instruction to you or a request that you should
 22 increase the shelf price to a specific point, he is
 23 telling you that "I am withdrawing the bonus and the
 24 consequence of my withdrawing the bonus is that if you
 25 want to earn your margin, this is the shelf price, the

1 maximum shelf price, that you should have". That's
 2 right, isn't it?
 3 **A.** Yes.
 4 **Q.** Perhaps if we look back at tab 22, and just before we
 5 look at that, I think you would agree with me that it
 6 would be a mistake for anybody to approach this daily
 7 correspondence via emails as if this was, as it were,
 8 a statutory instrument where each word must be
 9 scrutinised with care. What one needs to really do is
 10 set it in the commercial setting and the to and fro
 11 between you and Mr Matthews, and you well understood
 12 what he was communicating to you when he was withdrawing
 13 a bonus was not an instruction to go to a specific price
 14 point but what the consequence was of the withdrawing of
 15 the bonus on the assumption you wanted to retain your
 16 margin?
 17 **A.** Yes.
 18 **Q.** We can see that very clearly at tab --
 19 **DR SCOTT:** Sorry, just before you leave 65, just to
 20 understand what was happening at this stage. My
 21 recollection was we had an MPI from Gallaher; is that
 22 right? Then there was a delay and then an ITL MPI.
 23 **MR HOWARD:** I can't remember.
 24 **DR SCOTT:** So that both were being held down and the context
 25 for "wouldn't it be good if Dorchester and Mayfair

1 followed us", that appears to be people actually put in
 2 the MPis that they have already announced.
 3 **MR HOWARD:** I think that might be right.
 4 **DR SCOTT:** That's the context of it for the remark.
 5 **MR HOWARD:** Yes, and that in fact shows that it's -- well,
 6 I am not going to argue, it's what it shows fairly
 7 simply.
 8 **THE CHAIRMAN:** This rhetorical question business, what
 9 I would understand that you meant in paragraph 63, and
 10 let's see if you agree with this, is that when
 11 Paul Matthews wrote that, he wasn't expecting Mr Davies
 12 to answer that question, what he's really saying is
 13 "I think it would be good if Dorchester and Mayfair
 14 followed us".
 15 **A.** Yes.
 16 **MR HOWARD:** So what he is doing, again we are only arguing
 17 with you about something which you had not seen at the
 18 time and don't actually know anything about, so this is
 19 about a million miles from evidence, but since we are
 20 there I am happy to do it. What you are recognising is
 21 when he says "I think it would be a good idea if they
 22 followed us", he doesn't know if they will, expressing
 23 hope that they will because he is in a bit of a fix,
 24 because having kept the price down so much it's costing
 25 him money, he would like to push the price up, but he

1 knows that if Dorchester and Mayfair don't come with
 2 him, he will be back in his fix and he has to come down
 3 and that's the competitive environment that he was in
 4 and that's actually right, isn't it?
 5 **A.** Yes.
 6 **Q.** Then if we go back to tab 22, just again, we have
 7 already established the commercial shorthand, but this
 8 is one where he makes it quite explicit, doesn't he, in
 9 the middle of this letter:
 10 "Having spoken about increasing the shelf price of
 11 Richmond, in order to maintain your cash margins the
 12 bonus level should be as follows ..."
 13 **A.** Yes.
 14 **MR HOWARD:** I have one more topic. I am happy to carry on
 15 or we could take our break.
 16 **THE CHAIRMAN:** Let's have a break, then. We will have
 17 another break for ten minutes, and the same rules apply
 18 as over lunch, thank you. We will come back at 25 past
 19 3.
 20 (3.19 pm)
 21 (A short break)
 22 (3.30 pm)
 23 **MR HOWARD:** Mrs Corfield, just a few more points.
 24 We have already discussed that the position which
 25 is, I think, fairly obvious, that if Imperial went first

1 and sought via reducing its wholesale price to reduce
 2 the price of its particular brand, it was thereby
 3 seeking to gain a competitive advantage?
 4 **A.** Yes.
 5 **Q.** We have already also agreed that the idea, or the
 6 suggestion that in that situation Imperial would expect
 7 Sainsbury to put down the price of Gallaher's competing
 8 product would be contrary to the interests of Sainsbury
 9 and of Imperial and contrary to any view of commercial
 10 or common sense; correct?
 11 **A.** (Witness nods).
 12 **Q.** Now, I would like to then consider a related situation
 13 where Gallaher puts up the price of its product but
 14 Imperial does not follow with its own price increase.
 15 Okay?
 16 **A.** Mm.
 17 **Q.** In that scenario, so where Gallaher has put up the price
 18 and Imperial doesn't, I think we have agreed that
 19 Imperial stands to gain precisely the same commercial
 20 advantage from holding its price down as it does in the
 21 situation where it pays a specific bonus to bring the
 22 price down?
 23 **A.** Yes.
 24 **Q.** In both situations what it's trying to do is to keep its
 25 net wholesale price down to induce, to influence you to

1 set a competitive retail selling price?
 2 **A.** Yes.
 3 **Q.** Right. So in the situation where Gallaher puts up its
 4 price and Imperial does not put up its price, would you
 5 agree with me it makes no sense at all for anyone to
 6 suggest that in that scenario Imperial wanted you to put
 7 up the retail selling price of its cigarettes simply
 8 because you were putting up the price of Gallaher's
 9 following some form of Gallaher price increase?
 10 **A.** Correct.
 11 **Q.** I am sorry?
 12 **A.** Correct.
 13 **Q.** There was absolutely nothing, as far as you were
 14 concerned, in the trading agreements or in your
 15 relationship with Imperial which suggested that Imperial
 16 expected you to put up the price of their products
 17 because you were putting up the price of the Gallaher
 18 product?
 19 **A.** There was nothing in the agreement to suggest that.
 20 **Q.** No, and they never ever suggested that to you?
 21 **A.** No.
 22 **Q.** And the reason it would be obvious to you that that
 23 couldn't be what they would expect or want is because it
 24 would be contrary to their commercial interests for the
 25 price of their products to be put up where Gallaher had

1 put up the price of their product?
 2 **A.** Yes.
 3 **Q.** There was in fact, as I think you tell us in your
 4 witness statement, a specific example of this in action.
 5 You deal with it at paragraph 56 of your witness
 6 statement. {C6/69/439}. It starts at paragraph 56.
 7 Perhaps if we look in 55:
 8 "It was their ideal strategy to have price
 9 relativities. Probably for 99 per cent of the time
 10 those relativities were in place, but there would be the
 11 odd couple of weeks between MPIs where they would be out
 12 of parity. If say, imperial had an MPI and they were
 13 the first one to go and they put Marlboro up 5p, I would
 14 not stick Benson & Hedges up 5p if Gallaher had not
 15 announced a price increase, even though Imperial 's
 16 strategy was to have parity between Marlboro and Benson
 17 & Hedges. It was Imperial 's decision to go first and
 18 they would expect somebody to follow them. They would
 19 not come to me and say 'Gallaher have not had a price
 20 increase but we expect you to increase all their shelf
 21 prices', if Gallaher or Rothmans did not follow
 22 Imperial's MPI, imperial would have to reduce its own
 23 prices to realign the price differential -- but it would
 24 be up to Imperial to do so.
 25 "This would apply equally to Gallaher and Rothmans.

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1 For example, when Gallaher went early with its MPI in
 2 2002, imperial did not follow as quickly as they usually
 3 did. I think Imperial did some of the brands at one
 4 time and then a couple of weeks later they did some of
 5 their other brands. So that meant there was a slightly
 6 longer period of time when there was no parity of the
 7 price relativities. But Imperial were responding in
 8 that situation so it was their choice not to respond as
 9 quickly: perhaps they hoped to gain something, probably
 10 in market share, by being a lower price for
 11 a few weeks."
 12 As I understand it, how you expected it to operate
 13 was if one manufacturer had an MPI that was their risk
 14 and if that was Imperial, if that put them out of line,
 15 that was their problem. If Gallaher went first --
 16 that's right, stopping there?
 17 **A.** Yes.
 18 **Q.** If Gallaher went first, Imperial could gain
 19 a competitive advantage if it chose, and there was no
 20 way you were going to move the price of Imperial's
 21 products just because Gallaher had moved their prices?
 22 **A.** Correct.
 23 **Q.** Even if you had chosen to do so, because you were free,
 24 if you wanted, to move the price of Imperial's products,
 25 because you could price them where you wanted, there was

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1 certainly not something that you understood that
 2 Imperial wanted you to do?
 3 **A.** Sorry, could you say that again, please?
 4 **Q.** Yes. You have told us already that ultimately whether
 5 or not you priced, how you priced Imperial's brands was
 6 a matter for you, and so in a situation where Gallaher
 7 puts up its price it would actually be I imagine you
 8 would say, "Ultimately a matter for me whether at that
 9 stage I chose to put up Imperial's price, even if
 10 Imperial hadn't had a price increase?"
 11 **A.** Yes, it would have been a matter for Sainsbury's to
 12 decide that, yes.
 13 **Q.** Pardon?
 14 **A.** Yes, it would have been, I could have decided to do
 15 that.
 16 **Q.** But you understood that that was not something that
 17 Imperial was expecting you to do or wanted you to do?
 18 **A.** Correct.
 19 **Q.** Indeed, they wanted the precise opposite, because there
 20 was a competitive advantage to them in not having
 21 a price increase and their price not going up when their
 22 competitors' prices had gone up?
 23 **A.** Correct.
 24 **Q.** In the June 2002 episode, which you refer to, do you
 25 recall whether you received any correspondence from

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1 Imperial whereby --
 2 **DR SCOTT:** I think she had left in May.
 3 **A.** Yeah.
 4 **MR HOWARD:** I am sorry, you had left in May.
 5 In paragraph 56, what are you referring to, then?
 6 **A.** I think that probably would have been a January MPI.
 7 **Q.** I see, so this was a different MPI, an earlier one?
 8 **A.** I think so.
 9 **Q.** That's extremely helpful. So this was an earlier
 10 episode, and what happened, you recall an episode where
 11 this very thing happened?
 12 **A.** Yes.
 13 **Q.** The effect of Gallaher putting up, having an MPI and
 14 Imperial not following meant, as far as you were
 15 concerned, that Imperial got a competitive advantage and
 16 that's exactly what they were seeking to achieve?
 17 **A.** Yes.
 18 **MR SUMMERS:** May I just ask: I mean, in that situation, if
 19 you had actually put your prices up at that point, you
 20 would presumably have increased your margin because you
 21 would have been selling on old stock, as it were, at the
 22 lower price, would you not then have imagined that your
 23 competitors might just have followed you?
 24 **A.** They may have done, but as I say, because the strategy
 25 was about following what other people were doing, we

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1 weren't seeking to lead the market, so I don't recall
 2 that ever being a discussion that we had internally as
 3 to whether we should put up the prices, because it was
 4 actually very time-consuming putting all the prices up
 5 and then all the store labour, and then if somebody --
 6 so to do everybody's at the same time would have been
 7 a tremendous amount of work and there was always a kind
 8 of a programme for how many changes a store could cope
 9 with at any one time.

10 So you wouldn't have wanted to make a situation
 11 worse and then actually if Imperial then had their MPI
 12 and had gone by different amounts, you would have had to
 13 change the prices all again and you would have just made
 14 such a muddle of everything, and in actual fact you had
 15 got to buy stock ahead. So when they announced it, and
 16 that was actually one of the reasons you got four week'
 17 notice, was you were then able to negotiate with the
 18 manufacturers to buy a quantity of stock in, which meant
 19 you made some stock profit because you bought maybe
 20 a month or six weeks' stock at the old prices and then
 21 you were selling it at the new prices. So we didn't
 22 ever really have the discussion around manufacturers'
 23 price increases of moving somebody else's up who hadn't
 24 announced an increase.

25 **MR SUMMERS:** Thank you.

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1 **DR SCOTT:** And presumably when it came to a Budget, you knew
 2 when the Budget was going to be, so you could do
 3 a similar thing, pre-buying before the Budget.

4 **A.** Yes, the rules on that changed, I think when I started,
 5 you were able to buy a significant quantity, but you
 6 were taking a bit of a gamble because you didn't know at
 7 that stage whether they were going to go up, although it
 8 was highly likely or by how much, and so you had to --
 9 there was a lot of calculation done as to, if you were
 10 going to -- because you had to pay P&H up front for the
 11 stock if they were getting that in for you and it was
 12 millions and millions of pounds, so you had to weigh up
 13 whether it was worth doing that if it was only going up
 14 1 or 2p. If it went up 6 or 10p, potentially you could
 15 make a lot of money, but obviously you were laying out
 16 all that money.

17 Then the rules changed and there was only a certain
 18 amount you were allowed to buy forward, so it didn't
 19 become perhaps as lucrative because I think there was
 20 an allocation that each supermarket had, and if in your
 21 business of increasing you had already had most of that
 22 allocation, there was then less for you to be able to
 23 buy, because obviously they were trying to reduce people
 24 making stock profit.

25 **DR SCOTT:** Thank you.

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1 **MR HOWARD:** Just so we are entirely clear about it, focusing
 2 on this position where Gallaher puts up its price, and
 3 for this purpose it doesn't, I think, matter, does it,
 4 whether Gallaher is putting up its price as a result of
 5 a manufacturers' price increase or withdrawing a bonus
 6 or anything of that sort? If they put up their
 7 wholesale price by one means or another, as far as you
 8 were concerned, it never occurred to you that in that
 9 situation Imperial expected you to put up the price of
 10 their products when they hadn't put up the wholesale
 11 price?

12 **A.** Correct.

13 **Q.** Well, that's perhaps good enough.

14 Now, I think we can conclude really by just not
 15 seeking to summarise everything but just picking up
 16 a couple of particular points.

17 I think we have agreed that the period in which you
 18 were the Sainsbury's tobacco buyer was one characterised
 19 by this marked shift in the market towards lower priced
 20 cigarettes and an intense price war by Imperial and
 21 Gallaher to gain market share in that category?

22 **A.** Well, there was quite a lot -- I can't comment on how
 23 it, compared to what went before me or what came after
 24 me, but there was a lot of tactical bonus and changing
 25 of the position during the time I was a buyer, yes.

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1 **Q.** As you perceived it, it was to gain market share in the
 2 low price and ultra low price cigarette market and the
 3 roll-your-own emerging market?

4 **A.** Yes. I don't recall there being as much activity on
 5 roll-your-own, I think there was some, having looked at
 6 some emails, but it was primarily Dorchester and
 7 Richmond and then Sterling.

8 **Q.** The thing about all of this is because the manufacturers
 9 had no tools available to them essentially other than
 10 price, you must have realised that they could not afford
 11 to let the other get a price advantage?

12 **A.** The only other weapon they had, really, was the display
 13 and the planning because the equipment in Sainsbury's
 14 was supplied by Gallaher, so they were allowed to
 15 advertise a brand of theirs across the top, and that was
 16 allowed. And also as part of that agreement, they got
 17 their products on the two eye level levels --

18 **Q.** Absolutely.

19 **A.** So that could be slightly better and in terms of doing
 20 the regional planograms, I suppose when we had that
 21 equipment it was more biased to Gallaher because they
 22 got the better positions and no matter what the regional
 23 buyers wanted, you weren't allowed to put other
 24 manufacturers' products on those two shelves. When the
 25 equipment changed and was still supplied by Gallaher but

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1 it was more of a peg board with cassettes slotted on so
 2 you didn't get straight shelves, then the planograms
 3 were able to be more flexible to the regionality,
 4 because surprisingly there was quite a lot of
 5 regionality within cigarettes, and so the planogram
 6 could be more -- so if Marlboro was a better seller,
 7 there could be more fascias of Marlboro as opposed to
 8 Benson & Hedges or vice versa, and it was easier to do
 9 that in the new style of equipment. So really the only
 10 other thing they had other than price was visibility.
 11 **Q.** You are quite right and that's a point we have all
 12 understood. If we are looking at it from Imperial's
 13 perspective, in Sainsbury, there is a battle that goes
 14 on, isn't there, to see who can essentially outbid the
 15 other to get control of the planogram? That's
 16 a different battle, but that goes on, doesn't it?
 17 Gallaher, in Sainsbury's, had won that battle?
 18 **A.** Yes.
 19 **Q.** So that the result of that was Imperial, in Sainsbury's,
 20 was already at a commercial disadvantage because
 21 Gallaher for better or worse had control over the
 22 furniture and planograms?
 23 **A.** Didn't have control -- well, I worked on the
 24 planograms --
 25 **Q.** They had a preferential position.

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1 **A.** Yes, they had a preferential position. But I worked
 2 with Imperial on the planograms so to make sure they got
 3 their fair representation, but yes, they couldn't have
 4 a step on the two shelves.
 5 **Q.** So from Imperial's perspective, of course, they are
 6 already at a disadvantage and the only tool that they
 7 really have available in Sainsbury's to fight back is
 8 price?
 9 **A.** Yes.
 10 **Q.** What we have already seen you have said was happening
 11 was that the two manufacturers were continuously making
 12 moves to try and get an advantage over the other, which
 13 would very often be followed by a counter move by the
 14 other?
 15 **A.** Yes.
 16 **Q.** So when you say, as you do, that throughout your time,
 17 whenever you put the price for a pack of cigarettes up
 18 or down, the price differentials were usually in
 19 a relatively short timespan brought into alignment, the
 20 reason for that was that the manufacturers perceived
 21 that they could not afford to be out of line and so
 22 shifted their wholesale prices in order to try to
 23 prevent their rival getting commercial advantage?
 24 **A.** Yes.
 25 **Q.** This, as you must have seen it at the time, was

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1 competition in action as its most vivid, some would say
 2 most ugly, but the beneficiary was, as you saw it, the
 3 consumer who got lower prices for his cigarettes?
 4 **A.** Yes.
 5 **Q.** One thing I should just make clear: the document that we
 6 were having some discussion about was, you remember the
 7 4 October 2002, [REDACTED]
 8 [REDACTED] and so it was
 9 shown to her by Addleshaws. [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 Actually, there is one other point I might just ask
 14 you. You also say in your witness statement that
 15 99 per cent of the time relativities were in place.
 16 Now, the experts have done an exercise to see the extent
 17 to which the relativities were in place, and I assume
 18 you yourself hadn't done any investigation, and when you
 19 say 99 per cent of the time, that's --
 20 **A.** It might have been 95 or 90, but it wasn't something,
 21 I didn't sit with that piece of paper on my desk and
 22 think that's a -- mark down that that's a week when the
 23 prices have been out of position, because to me it was
 24 up to the manufacturers. That was their desired
 25 position, and it was up to them to seek to maintain it.

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1 It wasn't up to me to go out of my way to maintain those
 2 differentials.
 3 **Q.** My point was: the extent to which it was or wasn't
 4 maintained, no doubt you would say you don't actually
 5 know, and insofar as there is expert evidence about it,
 6 the Tribunal should pay attention to that and in the
 7 your figure of 99 per cent?
 8 **A.** Yeah, I am not saying that's an accurate 100 per cent or
 9 a 99 per cent accurate figure.
 10 **Q.** It's an impression is I think what you are saying --
 11 **A.** Yes.
 12 **Q.** -- that a lot of the time the differentials were
 13 observed?
 14 **A.** There would be some weeks where Gallaher were more
 15 expensive and there would be some weeks where Imperial
 16 were more expensive so in the scheme of things, they
 17 probably cancelled each other out. So nobody came along
 18 to me and said to me that "As part of the trading
 19 agreement you had to have these differentials, and there
 20 is three weeks out of 52 where those differentials
 21 weren't in our favour, therefore we are taking three
 22 fifty-two'ths of the override agreement away from you".
 23 **Q.** Just to conclude, whether you say it was for the
 24 manufacturers, what you mean by that, as I think we have
 25 gone over today, is: if they wanted to influence you to

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1 price on your shelves at a level that suited whatever
 2 their individual aims were, the only way they could do
 3 that would be by setting their wholesale prices at
 4 suitable levels which would allow you to earn your
 5 margin, in which case you were likely to price at the
 6 level which might suit them and might suit you?
 7 **A.** Yes.
 8 **Q.** But as far as you were concerned you were not under any
 9 obligation to Imperial to do anything -- well, we have
 10 gone over all of that.
 11 **A.** Yes.
 12 **MR HOWARD:** Thank you very much indeed.
 13 **THE CHAIRMAN:** Mr Flynn, do you want to ask any questions?
 14 **MR FLYNN:** Madam, on a couple of occasions Mrs Corfield gave
 15 answers phrased generally in terms of "no supermarket
 16 would" or "supermarkets would do this" and that answer
 17 might be true in the case of a price follower like
 18 Sainsbury, but it isn't in the case of a price leader
 19 like Asda, and indeed is contrary to the evidence. So
 20 I think I can deal with it by way of submission rather
 21 than putting that to the witness. So on that basis,
 22 I have no questions.
 23 **THE CHAIRMAN:** Thank you.
 24 Questioned by THE TRIBUNAL
 25 **MR SUMMERS:** Mrs Corfield, when you had these promotions

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1 such as the Richmond and Dorchester, were they
 2 accompanied by any stocking requirements? Did you have
 3 to undertake to accompany the probation by taking in
 4 certain quantities of stock?
 5 **A.** No.
 6 **MR SUMMERS:** When these promotions were in place, and you
 7 had both priced at the same level, did you expect them
 8 to sell in equal quantities?
 9 **A.** I think when they were priced the same they would sell
 10 in the proportions they had sold before. I can't
 11 remember if there was a 50/50 split between the market
 12 share of Dorchester or Richmond. But the only way it
 13 would change, so say it had been a 50/50 split and one
 14 of them went down, I would have expected that one then
 15 to maybe sell 55 versus 45. But I don't know that they
 16 sold 50/50, you know, equal amounts, even though they
 17 were priced the same.
 18 **MR SUMMERS:** So what, in your view, was the advantage
 19 therefore of having a promotion of that type, if it
 20 didn't appear to lead to an increase in market share by
 21 one over the other?
 22 **A.** Well, I think for the first one to go down, there
 23 probably was an increase in market share, but as soon as
 24 the other person matched it, it probably would have gone
 25 back to what it did before. I suppose what the brands

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1 were probably hoping was that once somebody had tried
 2 Richmond because that had gone down in price, even when
 3 Dorchester went down they might stick with Richmond
 4 because they found they liked it. So it might be a way
 5 of getting people to switch. People might switch
 6 because the price was lower and once they had switched
 7 they might stay there. So I guess that would be the aim
 8 of it.
 9 **MR SUMMERS:** We have heard a lot of evidence that even
 10 a penny off the price, as it were, would make a big
 11 difference to certain consumers.
 12 **A.** Yeah, it probably would.
 13 **MR SUMMERS:** I am also a non-smoker. In a situation where
 14 both are priced at the same point, as it were, is there
 15 something else that is likely to swing a consumer
 16 towards one brand rather than the other?
 17 **A.** It may just be personal preference or somebody they know
 18 might smoke that, so they go for that, you know, or it
 19 might even be a simple thing that we had that in stock
 20 and the other one was out of stock. I can't think there
 21 was anything, you know, fundamental that would ...
 22 **MR SUMMERS:** May I just then ask about this question of
 23 stocking, because clearly when you were talking to us
 24 about margin, I could perhaps concede that in certain
 25 circumstances there might be some brands that you might

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1 quite like not to have available for a period of time,
 2 because perhaps the margins on them weren't so good as
 3 other brands. Was that the case? Did you deliberately,
 4 as it were, go out of stock or not have stock available
 5 or anything like that?
 6 **A.** No. No. That wouldn't be a very customer focused thing
 7 to do. If you agreed to stock the product in the first
 8 place and stores had measures on availability and
 9 actually one of my targets as well was shelf
 10 availability so we would never have deliberately done
 11 that. That isn't to say that things didn't go out of
 12 stock because most stores only got a delivery of tobacco
 13 once a week. There was never any instructions to
 14 deliberately --
 15 **THE CHAIRMAN:** Yes, you need to slow down a little bit.
 16 **A.** There was never any instructions for stores to
 17 deliberately go out of stock, and I think we wouldn't
 18 have stocked something in the first place if we felt the
 19 margin wasn't sufficient.
 20 **MR SUMMERS:** Right. With regard, then, to the strategic
 21 requirements on stocking, was it up to you to decide
 22 which stores would stock which range, which elements of
 23 the range?
 24 **A.** Yes, and it was the system was really done on size, so
 25 there was different size kiosks, so they might have

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1 a 3-metre delay, a 4-metre display, a 5-metre display,
 2 and the way the ranging worked it was built up from
 3 that, so you would have your core products. Say the
 4 smallish range was 50 products, we would have I guess
 5 your core 50 in that range, but had to include some
 6 cigars, some pipe tobaccos and papers, because it had to
 7 be a kind of composite range. Then the next metre on
 8 would get another 20 or 30 products, and then another
 9 metre. So I would decide and sometimes we would move
 10 products so we might start something off in 300 stores
 11 which might be 3-metre kiosks, and if it was doing
 12 really well, we might extend that to full distribution
 13 to the 400 and whatever stores that was the maximum.
 14 Because you knew -- must have had some information that
 15 said there are so many stores that have this size kiosk
 16 and so many stores that have that size. So yes, I did
 17 decide the ranging, and people would pay for an increase
 18 in distribution, so if you started off in 300 stores and
 19 then it went to being 400 or 500 stores, I would expect
 20 you to pay me more money to get that increase in
 21 distribution.
 22 **MR SUMMERS:** That is another of the levers you were able to
 23 pull to help your margin?
 24 **A.** Yes.
 25 **MR SUMMERS:** How often were you able to see your margin, was

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1 that on a weekly basis or a monthly? You have talked
 2 about being aware of the margin at a gross level but
 3 then, as you say, there were these other factors that
 4 weighed in, and presumably in the accounts it was not
 5 until the accounts were produced that you would see what
 6 your working margin actually was?
 7 **A.** I guess you would see it coming through from the stores
 8 because with the margin on what you would buy in, so you
 9 would pay for a product but then it depended on the mix
 10 of the products that you sold out, because the more high
 11 margin products that you sold out, that would affect
 12 your margin in a positive way. So we would get store
 13 sales every week and we would have a meeting on a Monday
 14 where we would discuss what had happened the previous
 15 week.
 16 As I say, more of the focus was on, because I was in
 17 the department including beers, wines and spirits as
 18 well as tobacco, and tobacco, although it was the
 19 biggest taker of the department, it was kind of the poor
 20 relation in terms of interest. So people wanted to know
 21 that they had taken £300,000 on a Chablis that was on
 22 the plinth, but nobody really wanted to know I had saved
 23 £500,000 on 200 Benson & Hedges. So we did -- every
 24 week we had to report on our performance.
 25 **MR SUMMERS:** So every week you would have a good sense of

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1 what your margin was and when you might need to pull
 2 levers to put it up.
 3 **A.** It's quite difficult to do that on a weekly basis in
 4 terms of pulling levers because it's up to what
 5 customers wanted to come in and buy, and you couldn't
 6 change somebody from being a Richmond consumer to being
 7 a Benson & Hedges consumer. I didn't have the power to
 8 do that. The things I had in my power were making sure
 9 that the range was right in each, you know, within the
 10 planogram so the more popular products were going into
 11 the smaller stores and so into bigger distribution and
 12 that the availability was there, and where we changed
 13 over from one price marked pack to another, you know, so
 14 I spent a lot of time on the phone to Palmer & Harvey
 15 who were delivering for us, and I probably spent as much
 16 time talking to them as I did the cigarette companies.
 17 **MR SUMMERS:** I see.
 18 My final question, if I may, is: we have had
 19 evidence from people who have clearly worked in the
 20 industry for long periods of time, and I just wonder
 21 whether there was any policy within Sainsbury's as to
 22 how long a buyer would stay in post, whether there was
 23 a maximum period of time in which a buyer was thought to
 24 be effective?
 25 **A.** I don't think there was anything written in stone.

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1 Tobacco buyers tended to change quite frequently.
 2 Although it was a very big department in terms of money
 3 it was felt -- and I think actually this was
 4 incorrect -- it was more of a junior buyer role. So
 5 I came in having worked in stores but having not been a
 6 buyer and I got that post straight away as a designate
 7 buyer, straight into a post rather than having to be
 8 a trainee buyer because of the store experience I had
 9 had.
 10 I think after, you know, various enquiries were
 11 obviously underway, the profile of tobacco was raised
 12 and so somebody more senior -- it wasn't then seen as
 13 being as junior a job as perhaps it had been seen when
 14 I started. But I mean, I did that job for 20 months,
 15 I did beer for three and a half years, so there was
 16 nothing that said, you know, once somebody has done two
 17 years they must move on. I would say on average people
 18 probably did around two years but it depended on the
 19 category and people within wine tended to be recruited
 20 and stay within wine because of the specialist
 21 knowledge. Some categories it takes probably a good six
 22 months to get to grips with an area, and you know, a lot
 23 of the time you spent planning Christmas on other
 24 categories other than cigarettes, and really it's not
 25 ideal to have a different buyer doing Christmas. You

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1 need to do at least two Christmases on ... just to get
 2 to grips with all the things that are going on and all
 3 the product knowledge you need.
 4 **MR SUMMERS:** I see, thank you very much indeed. So a move
 5 from detergent to tobacco, would that have been
 6 exciting?
 7 **A.** Detergents was more exciting than it sounded, to be
 8 fair, but it was just -- I think in terms of the level
 9 of job I had, detergent to me wasn't a promotion, it
 10 could have been done by Wednesday --
 11 **MR SUMMERS:** Thank you very much, I am washed up.
 12 **DR SCOTT:** Yes, Mrs Corfield, can I take you back to the
 13 documents for a moment and to the annex 18, and document
 14 9 {D18/9/10}, a page which in my copy is marked 11 in
 15 the bottom right-hand corner. It starts "Product
 16 pricing, Imperial Tobacco agree ..."
 17 **A.** Annex 18?
 18 **DR SCOTT:** 18.
 19 **THE CHAIRMAN:** The second page of that document.
 20 **A.** Oh, sorry, yes, okay. Sorry.
 21 **DR SCOTT:** It starts:
 22 "Imperial Tobacco agree to pay bonuses ..."
 23 Then it says:
 24 "As has been custom and practice for many years,
 25 bonus contributions are based on two fundamental

1 criteria."
 2 And then it explains. Mr Howard represents
 3 Imperial, and inevitably we spent a lot of time on this
 4 bundle which is all about Imperial, but you were also
 5 relating, as your witness statement explains, to
 6 Gallaher.
 7 **A.** Mm.
 8 **DR SCOTT:** I wanted to turn to Gallaher for a moment, but
 9 this seemed to be a sensible place to start as we
 10 consider how far was the Gallaher situation similar to
 11 the Imperial situation.
 12 **A.** Okay.
 13 **DR SCOTT:** As I understand it, there were overrides being
 14 paid by Gallaher, not necessarily at the same level, we
 15 don't need to go into the quantitative value, because
 16 that's probably confidential. If you had received
 17 a document which looked more or less like this from
 18 Gallaher, would you have recognised it as having the
 19 same sort of custom and practice from Gallaher?
 20 **A.** Yes, their agreement from memory didn't actually detail
 21 it out, but they had the same --
 22 **DR SCOTT:** Strategy?
 23 **A.** Strategy, yes.
 24 **DR SCOTT:** As you said earlier on, I think, in response to
 25 Mr Howard, I think in relation to Imperial, it didn't

1 need to be put in writing, it was similar.
 2 **A.** Yes.
 3 **DR SCOTT:** So if we go to your witness statement, and
 4 I think we are at paragraph 67 to 71, you explain in
 5 paragraph 70 that:
 6 "Our relationship with their account manager
 7 improved after I started because they changed account
 8 managers and the new one was more efficient."
 9 So things were warming up with Gallaher and we have
 10 seen that they were about to supply a new range of
 11 display equipment and so on.
 12 In paragraph 69 you explain:
 13 "Gallaher had a similar strategy to Imperial in that
 14 they benchmarked themselves against particular brands or
 15 wanted us to sell at a certain price and they then paid
 16 us a bonus to achieve that. They just did not have it
 17 down in black and white like Imperial had it but it was
 18 implicit in the agreement and the way we did business
 19 together."
 20 **A.** Yes.
 21 **DR SCOTT:** If we take a pair like Richmond and Dorchester,
 22 about which we have seen quite a lot, as I understand it
 23 from the Imperial point of view, Imperial believed that
 24 if Richmond and Dorchester were priced at parity or, as
 25 Mr Howard puts it, at better than parity, ITL would win

1 out, people would prefer Richmond and, as you said just
 2 now, they might even stick with it. If we look at that
 3 from the other side, what do you think Gallaher were
 4 wanting in relation to Richmond and Dorchester?
 5 **A.** Well, they wanted the same, they wanted parity or
 6 better.
 7 **DR SCOTT:** In what way could you please both ITL and
 8 Gallaher?
 9 **A.** Most of the time they did have parity and then one would
 10 decide to go down and the other one had the opportunity
 11 to follow. So I suppose that was the way you pleased
 12 them. To me it would have been unfair to allow one to
 13 go down and not give the other the opportunity to
 14 respond, then after a period of time one decided they
 15 didn't want to fund it any more so they would go up and
 16 probably very soon afterwards the other would go up. So
 17 it was their desire, both parties -- both ITL and
 18 Gallaher's desire to have parity or better on those
 19 brands, and when one changed, the other had the
 20 opportunity to respond.
 21 **DR SCOTT:** So that in fact if you had a situation in which
 22 one was better than the other, then one party would be
 23 unhappy?
 24 **A.** Yes.
 25 **DR SCOTT:** And if you had a situation of parity, you got

1 both reasonably happy?
 2 **A.** Yes.
 3 **DR SCOTT:** Your understanding was that even if that was not
 4 written down by Gallaher, that's what this new account
 5 manager would be aiming for?
 6 **A.** Which was the same as the old account manager.
 7 **DR SCOTT:** So --
 8 **A.** So their actions in terms of, if they saw Richmond go
 9 down, they would ring and say "We will offer you a bonus
 10 so we can move the price down of Dorchester", so their
 11 actions indicated, even though it was not written in
 12 black and white in their agreement, that that's what
 13 they were doing. And the RRP's in the price list were
 14 the same and probably the invoice prices were the same.
 15 **DR SCOTT:** Thank you very much indeed.
 16 **THE CHAIRMAN:** Just one question from me, Mrs Corfield.
 17 Just going to tab 61 for a moment, and looking at the
 18 sheet with the price differentials on, we have been
 19 talking a lot about -- that's appendix 5. Do you have
 20 that? {D18/61/157}.
 21 **A.** Yeah.
 22 **THE CHAIRMAN:** We have been talking a lot about Richmond and
 23 Dorchester because in the period that we are looking at
 24 that seems to have been the brands which were doing
 25 battle, as Mr Howard has put it. What you have said,

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1 both today and in your witness statement, would that
 2 apply, so far as your understanding of how the
 3 relationship between you and ITL worked, would that
 4 apply to all the pairings that we see here? Or was
 5 there some difference with some of them compared to
 6 Dorchester and Richmond that we have been mostly talking
 7 about?
 8 **A.** I think the things like Marlboro Lights and Silk Cut and
 9 Marlboro Kingsize and Benson & Hedges, where the desire
 10 was for parity, I don't recall there being any tactical
 11 activity on those, because as we said at that end of the
 12 spectrum people were brand loyal and so I guess both
 13 companies had an amount of money to spend to increase
 14 their market share and they felt it was better to spend
 15 it at that bottom end which was increasing in size and
 16 importance and where there was less brand loyalty. So
 17 although potentially there could have been the same
 18 activity going on on any of these pairs, the vast
 19 majority of it was on Richmond and Dorchester and then
 20 Sterling, when Sterling came into the mix. I think
 21 there was a little bit on Superkings, but I don't
 22 remember there being any really on Marlboro or Bensons,
 23 or -- so there would have been activity on quite
 24 a number of those pairs, but not necessarily in all of
 25 them, and to the greatest extent it was on Dorchester

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1 and Richmond.
 2 **THE CHAIRMAN:** Would it still be the case, even on those
 3 pairs where there wasn't so much activity over this
 4 period, that your pricing in Sainsbury's on the shelf
 5 would reflect the cost price to you from the
 6 manufacturer and, if they wanted to achieve certain
 7 relativities between their brand and the competing
 8 brand, they would have to alter their bonuses and their
 9 net cost price to you in order to achieve --

10 **A.** It would have been exactly the same.

11 **THE CHAIRMAN:** Thank you.

12 Mr Lasok?

13 Re-examination by MR LASOK

14 **MR LASOK:** Yes.

15 Mrs Corfield, I wonder whether we could look back at
 16 your witness statement, please. When you were being
 17 cross-examined, you were asked to look at paragraph 55.

18 **A.** Yes.

19 **Q.** Your attention was drawn to the first couple of
 20 sentences, where you talk about the ideal strategy to
 21 have price relativities, and you give the figure of
 22 99 per cent for the compliance rate, as it were, for the
 23 relativities.

24 My learned friend Mr Howard asked you some questions
 25 about the 99 per cent figure. I am not going to ask you

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1 questions about the 99 per cent figure. What I would
 2 like to do is, bearing that in mind, could we look at
 3 paragraph 5 of the witness statement. In the last two
 4 lines of the first page of the witness statement -- do
 5 you have those?

6 **A.** Mm.

7 **Q.** You say:

8 "Throughout my time as a tobacco buyer, whenever
 9 Sainsbury's put the price for a packet of cigarettes up
 10 or down, these price differentials were usually in
 11 a relatively short timespan brought into alignment."

12 I wondered whether you could tell us in your own
 13 words how it happened that the relativities were
 14 respected at the high rate -- I am not talking about
 15 whether it's 99 per cent or 98 per cent or whatever, but
 16 at a high rate -- as you have stated in your witness
 17 statement? So in your own words, how was it done?

18 **A.** Well, if you started off with a position that two brands
 19 were the same price, so Dorchester and Richmond, one
 20 manufacturer would phone up and say "We would like to
 21 reduce -- we would like to offer you a bonus in order to
 22 reduce the shelf price, are you willing to do that?
 23 When would you be able to do that from?" That would
 24 then be followed up by an email. Depending on what day
 25 they rang I might say, okay, if it's a Monday, I can do

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1 it in a price meeting this week, it can apply from next
 2 Wednesday or next Tuesday, whatever, our company
 3 timescales were, the day we changed prices.
 4 So they would email and say "This is what we would
 5 like to do, the bonus will change from this to this",
 6 they would sometimes state the ongoing bonus as well
 7 just to be clear. So the price would change in store.
 8 The competitor manufacturer would phone up and say
 9 "I see Richmond's gone down, I would like to respond,
 10 I'll offer you a bonus to go down 1p or 2p. When can
 11 you do it?" and that would probably be the next week
 12 that you would do that.
 13 **Q.** What about brands that weren't on promotion, how did it
 14 work in relation to them?
 15 **A.** Probably nothing happened on those. I suppose you had
 16 brands like Benson & Hedges and Marlboro where you had
 17 a deferred bonus to enable you to sell at 10p below the
 18 RRP or whatever that was, they tended to just stay as
 19 they were, so other brands we may look at where there
 20 was no deferred bonus so there was no link between us
 21 having to sell a certain rate below RRP, we might decide
 22 to just increase the price of those ourselves. I know
 23 like on 10s of cigarettes I took a decision that we
 24 would price and be more -- quite a bit more than the 20.
 25 So two packs of 10 would be more than a pack of 20, and

1 they are considerably like that in convenience outlets
 2 and places. So we took a decision because there was no
 3 bonus on 10s that we would add 2 or 3p to a packet of
 4 10s, and that was our decision to do that, there was no
 5 loss of bonus implications or anything.
 6 But in general the price of those products that the
 7 manufacturers weren't offering bonuses on only changed
 8 at MPI or Budget times.
 9 **Q.** These non-promoted brands, or brands during periods when
 10 they weren't promoted, are they in your 99 per cent
 11 compliance rate, or are they outside it?
 12 **A.** I would say if you looked at the compliance list across
 13 all the brands, and said: how often did they deviate
 14 from that position?, then 99 might have been
 15 an off-the-cuff figure, but I would say that the vast
 16 majority of the time they adhered to the relativities,
 17 and if you took it to a further level to say the amount
 18 of time that Gallaher were above or Imperial were above
 19 the relativities, that would probably cancel each other
 20 out, my perception would be. Somebody could go and do
 21 it to a piece of work and say, no actually, if you count
 22 all the brands up and the number of weeks, Gallaher were
 23 more expensive on six weeks out of 52 and Imperial were
 24 more expensive on three weeks. My perception is it was
 25 kind of swings and roundabouts.

1 **Q.** I think at an earlier stage you were talking about the
 2 relativities as being in terms of, for example, parity
 3 or better?
 4 **A.** Yes.
 5 **Q.** How did that work out when you had both Gallaher and ITL
 6 and you are reaching a sort of compliance rate of, into
 7 the 90 per cents?
 8 **A.** Their ideal position, going back to Dorchester and
 9 Richmond, was parity, but at times if one or other had
 10 offered you a bonus and they went first, they would be
 11 cheaper. I suppose their overall position was parity.
 12 I don't think either of them got as hung up to be saying
 13 in the trading agreement it says it's parity and
 14 therefore we will only pay you any other sums of money
 15 if we are at parity 100 per cent of the time, because it
 16 was sometimes their decision to move away from parity --
 17 **THE CHAIRMAN:** Please slow down a little bit, we are trying
 18 to catch what you say on the transcript.
 19 **A.** The manufacturers would be responsible for moving away
 20 from parity, whoever had the MPI first, if they decided
 21 not to price hold, potentially were not parity, but it
 22 was their decision by putting that increase through,
 23 just as it was their decision if they decided to offer
 24 you a bonus to go down, they would probably be happy
 25 being less than parity because there was more chance for

1 them to get an increase in market share, when they
 2 decided to go up, and you know, presumably the other
 3 person had matched them in coming down, the first one
 4 that decided to go up, it was their decision that caused
 5 them to be out of parity.
 6 So although this was in the trading agreements,
 7 nobody ever came and said to me "Oh, you haven't been
 8 parity on all these SKUs or 10p more or whatever our
 9 desired intention is, you haven't done that, you have
 10 not fulfilled your part of the bargain, therefore we are
 11 not paying you this money". I don't know if that's
 12 answered the question.
 13 **MR LASOK:** What I was trying to get at in rather an obscure
 14 way was: in your 99 per cent figure, you have taken it
 15 as a guide figure, are we talking about parities and
 16 differentials that have ended up as being the parity or
 17 the differential, or is there among that 99 per cent
 18 a bunch of parities and differentials that are the "or
 19 better" type?
 20 **A.** I think what I meant when I said that most of the time
 21 they would be the desired position so they would either
 22 be the same price or 10p above or 10p below, the only
 23 time it would be better was where somebody had gone
 24 first or somebody had finished earlier. I don't know if
 25 that answers the question.

1 Q. I want to move on to a document you have been asked to
 2 look at, which is in annex 18, and it's at tab 22.
 3 {D18/22/69}.

4 This is the letter of 15 November 2000 to you.
 5 I wonder whether you could refresh your memory by just
 6 reading to yourself the second paragraph. It's the one
 7 beginning:
 8 "You may remember ..."
 9 (Pause)

10 Did that paragraph tell you anything about ITL's
 11 pricing strategy for shelf prices?
 12 A. Their strategy is parity with Dorchester.
 13 Q. That's what they wanted to achieve?
 14 A. Yes.
 15 Q. If you go to tab 45, it ought to be a letter dated
 16 2 October 2001. (D18/45/115). Again, it's a letter to
 17 you. If you go to the second page, there is a bit in
 18 bold, but underneath it there is a heading "Richmond
 19 Pricing", and could you read to yourself the
 20 paragraph after "Richmond Pricing" and then just have
 21 a look at the two lines of prices that they have set out
 22 in the letter, please.
 23 (Pause)
 24 A. Okay.
 25 Q. Did that passage tell you anything about what ITL wanted

1 to achieve in terms of shelf prices?
 2 A. (Pause). I think they were looking at being 5p more
 3 expensive than Sterling.
 4 Q. I am sorry?
 5 A. I think they were looking at being 5p more expensive
 6 than Sterling.
 7 Q. I asked you to look at those two because they are in the
 8 period before we get to the trading agreement which you
 9 negotiated. That's at tab 61. {D18/61/171}. If you go
 10 to the last page of the tab, we have the appendix 5 with
 11 the price list differentials, and I think you have
 12 already told us today that you read that as telling you
 13 what ITL wanted to achieve in terms of shelf prices?
 14 A. Yes.
 15 Q. Could you turn back, in this contract, and look at the
 16 second page, please. This should be the page which has
 17 at the top of it a listing of new product development.
 18 Do you have that?
 19 A. Yes.
 20 Q. The second half of it is under the heading "Pricing".
 21 I wonder whether you could just read the whole of the
 22 second half to yourself so that you have refreshed your
 23 memory of the document.
 24 (Pause)
 25 Now, in this bit we have a third paragraph which is

1 under a bit in italics which says "See appendix 5 for
 2 price list differentials", so if you look at that third
 3 paragraph which starts off with the words "based on
 4 SSL's current shelf prices", what did you understand
 5 that paragraph to mean?
 6 A. That ITL would pay bonuses.
 7 Q. Would just pay the bonuses?
 8 A. No, it's saying for the achievement of the price list
 9 differentials.
 10 Q. Was it the case that Sainsbury's had to do something?
 11 A. Yes and no. Yes in that the idea was we would have to
 12 hit those differentials, but if when you go further down
 13 and it says that, "From time to time ITL's competitors
 14 may reduce the shelf price of their brands, SSL should
 15 allow ITL the opportunity to respond. Should ITL choose
 16 not to respond, these differentials may widen", so they
 17 were recognising the fact that they had a choice to
 18 respond, if they didn't and if the differential changed,
 19 that was kind of down to them, not us, and my
 20 interpretation of that would have meant that we would
 21 fill up an entitlement.
 22 Q. Thank you very much. You can close that up, I will ask
 23 you I think one more question. Could you go back to
 24 your witness statement, please, and go to paragraph 90.
 25 It may actually be better if you start at 89. Could

1 I ask you therefore to read to yourself paragraphs 89
 2 and 90.
 3 (Pause)
 4 A. Okay.
 5 Q. What was your view of the trustworthiness of
 6 Mr Matthews?
 7 A. I would have said he was pretty trustworthy. There was
 8 that one occasion, and I think it was -- I had maybe
 9 been a bit naive, I think, because what had happened,
 10 there was a price hold on Superkings that had been in
 11 place for ages, I think it was like 6p, and then when
 12 the Budget came along the price was going up 5p, and
 13 Imperial decided that they wanted to remove the 6p price
 14 hold from ages ago and put the increase through. But of
 15 course all the consumers had seen on the news that
 16 cigarettes were going up by 5p, so when we suddenly put
 17 up 11p, there was a bit of an outcry because it was very
 18 hard to put a notice up and say: hang on a minute,
 19 because it was six months ago we put the price down by
 20 6p. They didn't have all these spreadsheets and records
 21 that I had to know that that had been the case.
 22 So it looked really bad, and maybe some of my
 23 counterparts either deliberately said "No, we are not
 24 prepared to do that" or they just didn't put it up as
 25 much as they should have done and it caused a bit of

1 a problem, which made me say that in future, around the
 2 time of a Budget, we shouldn't do this, and if you have
 3 any big price holds, you either put them up a couple of
 4 weeks before the Budget and then the Budget increase can
 5 go on top, or you just put the Budget increase through,
 6 and put that other bit later on. We should never do it
 7 at the same time when it's that amount, because it just
 8 looks to the consumer like we are ripping them off, even
 9 though we weren't.

10 **Q.** Thank you very much. Unfortunately I have just been
 11 passed a note and it relates to something that you said
 12 a moment ago about, I think, hitting the differentials.
 13 Where was it in the transcript? (Pause). I apologise
 14 for this. I'll read it out. It's at page 190, line 12,
 15 and I had said to you:

16 "Was it the case that Sainsbury's had to do
 17 something", this is about the pricing provision in the
 18 trading agreement, and you said:

19 "Yes and no. Yes, in that the idea was that we
 20 would have to hit those differentials."

21 I am just wondering what you meant by "hitting the
 22 differentials"?

23 **A.** I suppose the idea was that the prices mirrored their
 24 desired differentials.

25 **Q.** Yes.

1 **A.** But I don't ever recall a time where they came along and
 2 said "We are due to give you X number of pence per
 3 thousand sticks, however because on X number of weeks
 4 the differentials weren't in place that we have in this
 5 list, we are not giving you that money", so the
 6 agreement kind of implies that we had to do something
 7 for the money, but equally in practice that wasn't
 8 really the case, because as I say, they were more in
 9 control of the differentials by either deciding to drop
 10 the price or to follow or to not follow, so if they
 11 decided not to follow somebody else going down, they
 12 couldn't come back and said "Well, you haven't
 13 maintained the differentials" because it was their
 14 choice not to respond. So that's why I said yes and no,
 15 in that it does on face value look like you have to do
 16 something, but I think when you saw how the agreement
 17 operated and that they had the chance to respond and
 18 because it said they had the chance to respond and they
 19 recognised that if they didn't respond, the
 20 differentials would widen, to me that's then clear that
 21 Sainsbury's didn't have to move the prices if they
 22 weren't funding it, just to maintain the differentials
 23 in order to get the overrider money.

24 **Q.** But that was downwards?

25 **A.** Yes, because the tactical bonuses were about moving the

1 prices down, then when they withdrew that the price went
 2 back up to what it originally had been.

3 **MR LASOK:** Thank you very much. I have no further
 4 questions.

5 **THE CHAIRMAN:** I know it's been a long day, Mrs Corfield,
 6 but just following on from what Mr Lasok said, that's
 7 rather the puzzle in this case that we are having to
 8 look at, that the agreement looks as if it's paying you
 9 to do something, but yet your evidence seems to be that
 10 you would only actually do it if they paid you again in
 11 the sense of giving you a bonus to reduce the price,
 12 even though they have, under the trading agreement,
 13 offered you some money that appears to be to get you to
 14 make that move in any event?

15 **A.** I don't really see the link between us getting the
 16 overrider money and the price differentials, because
 17 I don't think anywhere it actually says "If you do not
 18 maintain these differentials at all times we will not
 19 pay you the volume money", because there was a whole
 20 bunch of other things, and it was like the new product
 21 development, you know, "You will list new products if
 22 suitable commercial arrangements are made."

23 So yes, they wanted us to list all their MPD, but if
 24 they came along and said, "Well, we will only give you
 25 £500 to this range of products when normally we might

1 have had £100,000", then that wouldn't have been
 2 a suitable commercial arrangement. And so I think where
 3 it perhaps was actually having it in black and white
 4 that these are the differentials so come people could
 5 imply that if those differentials aren't maintained you
 6 don't get the money, but that wasn't how I read the
 7 agreement, that wasn't how the agreement operated in
 8 practice.

9 **THE CHAIRMAN:** Because you thought "As long as my prices
 10 reflect the net cost prices I am being charged as they
 11 go up and down, then I am effectively following what the
 12 manufacturers are pointing me to do, and if that doesn't
 13 result in me hitting those differentials, then that's
 14 their fault, not my fault". Is that a fair summary?

15 **A.** Yes, I have to say I never recall a conversation where
 16 we actually got the trading agreement back out, when
 17 somebody was wanting to put a price down and them saying
 18 "No, you have to do that". There certainly was never
 19 any conversation about moving anybody else's prices, it
 20 was a kind of a statement of desire of where they
 21 benchmarked and saw their brands being, and then it was
 22 up to them through offering bonuses to change those
 23 positions and they had the opportunity to respond if
 24 their competitor had gone first. So as I say, there was
 25 a case or a discussion around "Oh, no, you can't have

1 the overrider money because you haven't done this or the
 2 differentials haven't been in place" because it was
 3 their choice whether they responded and if they went
 4 first and the differential wasn't there, then that
 5 wasn't ...
 6 **THE CHAIRMAN:** I understand.
 7 **DR SCOTT:** Can I follow that up? You said both in response
 8 to Mr Howard and in response to Mr Lasok that
 9 essentially the manufacturers were in control of
 10 maintaining parities and differentials more than
 11 Sainsbury's.
 12 **A.** Yes.
 13 **DR SCOTT:** Do I understand from that that the essence of
 14 your understanding of what the manufacturers were doing
 15 was that if they moved the bonuses in and out, the
 16 prices would track up and down and Sainsbury's in that
 17 sense wouldn't interfere with what the manufacturers
 18 were trying to achieve?
 19 **A.** Yes, to some extent, because if nobody had ever offered
 20 you a bonus and the prices in the first place would just
 21 have stayed at parity and there wouldn't have been --
 22 but they were seeking to gain competitive advantage and
 23 so one would decide to drop the price, the other had the
 24 ability to follow, but while one had moved and the other
 25 hadn't, the parities weren't there. It was better for

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1 one but it was out of parity for the other, but they
 2 accepted that, and I think by their behaviour and the
 3 fact we never had a conversation around not being at
 4 parity for a number of weeks of the year and then that
 5 having an impact on other money they would pay us, makes
 6 you think they didn't see the agreement as being how --
 7 and I didn't see the agreement as being like that.
 8 **THE CHAIRMAN:** Yes. Thank you. That's been very helpful,
 9 thank you very much for attending today, Mrs Corfield,
 10 and I can release you from the witness box. Thank you
 11 very much.
 12 (The witness withdrew)
 13 Housekeeping
 14 **THE CHAIRMAN:** Tomorrow we have Mr Matthews back again; is
 15 that right?
 16 **MR HOWARD:** We do indeed.
 17 **THE CHAIRMAN:** Whilst we have everybody here in court, can
 18 I refer to the indication we gave yesterday morning
 19 about the possible scenarios of different factual
 20 matrices to be put to the experts. I am not going to go
 21 through it again now, but just point people who are here
 22 today who were not in court yesterday morning to have
 23 a look at the opening of yesterday's transcript and see
 24 what we said there, and tomorrow we might have a further
 25 discussion about how to take that forward.

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1 **MR HOWARD:** Yes. I imagine everybody has read your comments
 2 on the transcript. As I indicated, on Monday I am
 3 proposing to say something about the general approach,
 4 and it's not so much responding to those points but just
 5 about where we have got to, particularly in relation to
 6 the theory of harm and what was said about it the other
 7 day.
 8 **THE CHAIRMAN:** Yes. Next week is an entirely factual
 9 witnesses week, isn't it?
 10 **MR HOWARD:** It is, but it's a slightly odd week in the sense
 11 that these are --
 12 **THE CHAIRMAN:** That's all the non-appellant retailers.
 13 **MR HOWARD:** Yes, so we don't have the benefit of the OFT
 14 calling anybody from the non-appellant retailers, nor do
 15 we have them calling anybody from Gallaher, so the only
 16 witnesses will be the ITL witnesses.
 17 **THE CHAIRMAN:** If we start at 10.30 tomorrow are we likely
 18 to get through Mr Matthews? Is there anything else
 19 happening tomorrow as well? Mr Thompson?
 20 **MR THOMPSON:** I am sorry, it's simply the indication that if
 21 there might be some debate tomorrow, simply to say I'm
 22 not available tomorrow but I was intending to come along
 23 Monday morning. So I don't know whether the suggestion
 24 that Mr Howard may make some more general comments at
 25 that point might mean that that was a suitable time at

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1 which we could discuss what is in fact, particularly for
 2 the Co-op, a very important question of when exactly we
 3 are debating before the experts given the state of the
 4 evidence that's actually being put before the Tribunal,
 5 which is obviously something that we have quite strong
 6 views on.
 7 **THE CHAIRMAN:** Perhaps we can leave it like this: if
 8 everyone can be aware of what I said first thing
 9 yesterday morning, if there is anything that you wish to
 10 discuss amongst yourselves as to the best way to
 11 approach that, that might be helpful for you to do so.
 12 **MR HOWARD:** I think the question is whether Monday morning
 13 will be the best time to have the debate.
 14 **THE CHAIRMAN:** Monday morning will be the best time to deal
 15 with that, if people were expecting to be here on Monday
 16 morning rather than tomorrow.
 17 **MR HOWARD:** It sounds as if Mr Thompson is no doubt ...
 18 **THE CHAIRMAN:** Mr Kennelly?
 19 **MR KENNELLY:** If I could echo what Mr Thompson said, it
 20 would definitely suit Shell better if we had this
 21 discussion on Monday morning rather than tomorrow
 22 morning.
 23 **MR HOWARD:** So it's only Mr Saini is not here.
 24 **THE CHAIRMAN:** Mr Jones?
 25 **MR JONES:** Mr Saini will also be here on Monday and not

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1 tomorrow.
 2 **THE CHAIRMAN:** That looks like a clean sweep, then, as we
 3 will be here both tomorrow and Monday.
 4 **MR HOWARD:** Regretfully, so will I.
 5 **THE CHAIRMAN:** We will have this discussion, whatever it's
 6 going to be --
 7 **MR HOWARD:** I am being asked to confirm that Mr Matthews is
 8 available only tomorrow, but Mr Lasok has said he is
 9 going to finish him tomorrow.
 10 **THE CHAIRMAN:** Yes. I think we are starting at 10.30
 11 tomorrow. We will see those of you who are here
 12 tomorrow at 10.30. Thank you.

13 (4.45 pm)
 14 (The court adjourned until 10.30 am on
 15 Friday, 28 October 2011)

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