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**IN THE COMPETITION**

**APPEAL TRIBUNAL**

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

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

10 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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*Transcribed using LiveNote by Opus 2 International  
1 Bell Yard, London, WC2A 2JR  
Tel: +44 (0)20 3008 5900  
[info@opus2international.com](mailto:info@opus2international.com)*

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**HEARING (DAY 11)**

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.

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1 Monday, 10 October 2011  
 2 (10.00 am)  
 3 **THE CHAIRMAN:** Good morning everybody.  
 4 **MS ROSE:** Good morning. Madam, I believe we are continuing  
 5 with Annie Parker's evidence, if she could return.  
 6 **THE CHAIRMAN:** Yes, that's as I understand it.  
 7 **MS ROSE:** I should say I am alone today, Mr Kennelly having  
 8 become a father on Saturday afternoon: James Patrick,  
 9 8 lbs 2 oz.  
 10 **THE CHAIRMAN:** Well, we send our warmest congratulations to  
 11 Mr and Mrs Kennelly and we hope in due course to see  
 12 little Kennelly appearing before us, not necessarily the  
 13 same three, but please pass on our best wishes.  
 14 **MS ROSE:** I think it's for Mr Howard.  
 15 **MR HOWARD:** Of course, his submissions may be more coherent  
 16 than ours.  
 17 MS JUDITH ANN PARKER (continued)  
 18 Cross-examination by MR HOWARD  
 19 **THE CHAIRMAN:** Yes, Ms Parker, now, you are still on oath  
 20 from the previous occasion.  
 21 **MR HOWARD:** Good morning, Ms Parker, and thank you for  
 22 coming back, and I apologise for the inconvenience.  
 23 Could you please take again the old friend annex 19,  
 24 and could we first just turn to tab 27, {D19/27} which  
 25 is the 2001 trading agreement. What I would like you to

1

1 just explain to us in your own words is this: the Office  
 2 of Fair Trading alleges by reference to this agreement  
 3 and the 2002 agreement, and the way in which Shell dealt  
 4 with Imperial, that Shell was under an obligation to  
 5 observe the relative RRP's, ie that the prices that you  
 6 recommended, let's use that for the moment, should be no  
 7 worse than the relative RRP's.  
 8 We can see that if you complied, Shell would get [an  
 9 amount] but could you tell us in your own words what you  
 10 understood to be the position as to your obligation to  
 11 do this, Shell's obligation?  
 12 **A.** Of course. In entering into the agreements, or the  
 13 business plan, I felt -- and we felt as a team -- that  
 14 pieces within the business plan were optional,  
 15 effectively, so we could elect to take part in  
 16 particular promotions, work with ITL in particular  
 17 marketing or what have you, but if we didn't want to  
 18 there was no obligation to us to do anything we didn't  
 19 want to do.  
 20 **Q.** What about as to the position in relation to adhering to  
 21 the position of pricing the products no worse than the  
 22 relative RRP, how did you regard that in term of whether  
 23 or not it was an obligation?  
 24 **A.** Sometimes recommendation from a manufacturer would be in  
 25 line with something we wanted to do in order to achieve

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1 our margin or to be in a particular position  
 2 competitively, so there would be times when our prices  
 3 might well be doing what manufacturers had requested or  
 4 recommended that we do. And I was relaxed about that,  
 5 because we didn't spend an awful lot of time thinking  
 6 about it, as discussed last week.  
 7 **Q.** In the event that they didn't correspond, what did you  
 8 understand that the position was in regard to, say, any  
 9 liability that Shell would have for failing to do that?  
 10 **A.** None whatsoever.  
 11 **Q.** Good. Now, the other point that the OFT makes about  
 12 this is, we can see that the words here, it says that  
 13 you are to set the price no worse than relative RRP and  
 14 the annual payment, but the OFT says that although it  
 15 says "no worse than relative RRP", and on the next page  
 16 we can see how it's expressed, that in fact the way in  
 17 which the agreement, or the true agreement as operated,  
 18 was for the differentials to be fixed; in other words,  
 19 if we take Embassy No 1, instead of it being at least  
 20 a 3p differential, it had to be an exact 3p  
 21 differential. You understand the point?  
 22 **A.** Yes.  
 23 **Q.** I would just like you to comment on that allegation as  
 24 to how you understood this agreement was to operate.  
 25 **A.** (Pause). I didn't interpret the business plan to mean

3

1 that it was a fixed difference, it could be at least 3p  
 2 as opposed to being 3p.  
 3 **Q.** If we turn to look, for instance, at -- if we take the  
 4 very first one, so we see Embassy No 1 was to be at  
 5 least 3p less than the price of Benson & Hedges. So if  
 6 we turn to tab 34(a), this is the Shell product master  
 7 file list for RBA sites dated 1 October. So this is the  
 8 period when you were involved; is that right?  
 9 **A.** If we are in 2001 October, that was me, yes.  
 10 **Q.** So if we look, for instance, the details relating to  
 11 Embassy No 1 are on the second page, and they are the  
 12 third one down, and we can see that what's described as  
 13 the Shell invoice cost was [an amount] and then what  
 14 I think is the recommended retail price and the maximum  
 15 retail price of 4.47 and 4.51.  
 16 **A.** I am sorry, I am obviously on the same -- in tab 34  
 17 I have something that's got --  
 18 **Q.** It's my fault, 34(a).  
 19 **A.** Got it.  
 20 **Q.** Thank you very much. I am going to take one example; we  
 21 could take many but I want to take one for the moment.  
 22 If you look on the second page, at the very top you see  
 23 three Embassy brands and the third one is Embassy No 1,  
 24 and we can see that the recommended price for that was  
 25 £4.47, and the maximum recommended maximum retail price

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1 was £4.51.  
 2 If you go back to the first page, we can see  
 3 Benson & Hedges Kingsize 20 is about 10 to 12 down or  
 4 so; do you see that?  
 5 **A.** I have Benson & Hedges -- ah, yes, Kingsize.  
 6 **Q.** I think that's the one we are interested in. If you  
 7 look across, you can see that's £4.51 and £4.55, in  
 8 other words a 4p differential.  
 9 Now, firstly, can you tell me, as far as you were  
 10 concerned, was a 4p differential complying with what ITL  
 11 had set out, which was at least 3p?  
 12 **A.** You are talking about the differential between Shell's  
 13 recommended and our maximum?  
 14 **Q.** You can take either one, I think the difference is 4p.  
 15 **MR LASOK:** Could I just interrupt to say that one of the  
 16 problems is we don't actually know whether the pricing  
 17 requirements in 27 are the ones that are relevant to  
 18 this document, so I think we need to establish that  
 19 first.  
 20 **MR HOWARD:** Okay. Did the pricing requirements in tab 27,  
 21 so far as you know, change? We know that they were the  
 22 correct -- as at July 2001, because that's what the  
 23 document says. Do you know whether they changed between  
 24 July and the beginning of October?  
 25 **A.** I don't recall.

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1 **Q.** Let's proceed on the basis that they didn't. The point  
 2 is if you take Benson & Hedges Kingsize, the recommended  
 3 retail price was £4.51, Embassy the recommended retail  
 4 price was £4.47, that's a difference of 4p?  
 5 **A.** Yes.  
 6 **Q.** And the maximum retail price for Bensons was £4.55 and  
 7 the maximum for Embassy was £4.51; in other words, a 4p  
 8 difference in both cases. I am just asking you a simple  
 9 question, whether that 4p difference, as far as you were  
 10 concerned, would comply with the requirement of being at  
 11 least 3p difference.  
 12 **A.** Yes, it would.  
 13 **Q.** What I would like to then ask you is this: we can also  
 14 see, and I would like you to explain to us how one gets  
 15 to the prices, is the Shell invoice cost; do you see?  
 16 The Shell invoice cost, can you explain to us, we have  
 17 heard from another witness but why don't you explain to  
 18 us what the Shell invoice cost is?  
 19 **A.** I will have to try and remember whether this includes  
 20 distribution or not on this file, and I think it does.  
 21 So this is the price that the retailer ... (Pause).  
 22 I am trying to remember whether or not this is the  
 23 document the retailer gets his information on in terms  
 24 of cost price, and therefore has distribution in it, and  
 25 I believe it is that document, and therefore this is the

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1 price the retailer would pay and therefore includes the  
 2 distribution element.  
 3 **Q.** Okay. That's consistent with what we understood to be  
 4 the position.  
 5 **A.** Okay.  
 6 **Q.** What we see is that Benson & Hedges, in this example,  
 7 the invoice cost is [redacted], and compared to Embassy  
 8 that's [redacted]. In other words, we can see that the  
 9 invoice cost of Benson & Hedges is greater than Embassy.  
 10 So in the light of that, can you then explain to us  
 11 how -- I mean, obviously I am not asking you to recreate  
 12 the maths, exactly what you did -- by reference to that  
 13 sort of example, how you went about setting the prices  
 14 of these two brands, by way of example, what are you  
 15 doing when you are setting the recommended retail price?  
 16 **A.** We will have had a margin target for the group that  
 17 these products sit in, and as an average the bundle of  
 18 products within that group must achieve that margin for  
 19 the retailer in order that he makes his target income.  
 20 So that's our prime concern when doing that. So some  
 21 products will meet the average, and others won't.  
 22 **THE CHAIRMAN:** So how do you decide which ones are going to  
 23 be at the average, which ones are going to be above and  
 24 which below?  
 25 **A.** In a very simplistic -- the higher volume ones need to

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1 be hitting the average, and if we had a lower volume  
 2 product, then, you know, this is very, very simplistic  
 3 because obviously an individual site might not follow  
 4 the rest of the network, for instance, so you had to be  
 5 very careful not to disadvantage, so this is why  
 6 retailers were able to do what they needed to do,  
 7 because you can create an average in theory in your  
 8 recommended price file and that's what we did, so we --  
 9 but on site if a retailer finds themselves with  
 10 a product that's low volume across the network that's  
 11 high volume in their particular area and they are not  
 12 making adequate margin, they would be wanting to adjust  
 13 their price in order to make the margin on site.  
 14 **DR SCOTT:** My recollection from last week was of three  
 15 groups, if we take cigarettes, of cigarettes with three  
 16 different basic margins on them. That's right?  
 17 **A.** Yes, broadly speaking, yes.  
 18 **DR SCOTT:** So again my recollection was that, I think it was  
 19 an [redacted] per cent margin at the bottom end.  
 20 **A.** Yeah.  
 21 **DR SCOTT:** And a lower level at the top end. Is that ...  
 22 **A.** I actually can't remember. I think [redacted] per cent  
 23 sounds -- I think for the overall tobacco category we  
 24 are looking at sort of [redacted] per cent. But some of  
 25 the tobacco products would make [redacted] per cent, but

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Confidential Shell

Confidential Shell

1 some of the real -- when you got to those real economy  
 2 ones, you know, you were on a [REDACTED] per cent margin.  
 3 But they were divided into three groups, yes.  
 4 **DR SCOTT:** Okay.  
 5 **THE CHAIRMAN:** You are on [REDACTED] per cent margin even  
 6 though, as we have heard, Shell was a premium pricer,  
 7 and adding substantial amounts above the manufacturers'  
 8 recommended price when arriving at its recommended  
 9 price.  
 10 **A.** We were still, some of us, some of the prices were still  
 11 only [REDACTED] per cent on some of those economy -- you  
 12 were barely making any money on them. You know, our  
 13 distribution costs for someone like Shell were higher  
 14 because we had lots of little sites doing small volumes  
 15 versus a few sites doing massive volumes like the  
 16 multiples which is why it may look like we are making  
 17 lots more margin but we have greater costs and therefore  
 18 we can't compete with those retailers that have a few  
 19 drops and doing massive volumes out of massive sites.  
 20 **MR HOWARD:** Presumably one can see if one just compares you  
 21 with one of the multiple retailers, the distinctions are  
 22 firstly the volume that a multiple retailer is selling  
 23 is likely to be much greater therefore they are getting  
 24 a bigger volume discount; is that right?  
 25 **A.** Yes, quite.

1 **Q.** And secondly I think you are saying in respect of  
 2 distribution costs, distributing from a major depot to  
 3 the supermarkets may be less expensive than you  
 4 distributing to whatever number of service stations you  
 5 have?  
 6 **A.** Significantly, because they are going out with big  
 7 trunks to a massive store, and we were sending out  
 8 little lorries that did frozen, ambient and chilled all  
 9 on one lorry, so it's a different ballgame altogether.  
 10 **Q.** I think you are saying the fact that Shell's margin is  
 11 higher, the prices are higher, doesn't necessarily --  
 12 it's not really an important issue here -- mean that  
 13 Shell is profiteering, it's partly because they may have  
 14 higher costs?  
 15 **A.** (Witness nods).  
 16 **Q.** If I can just say to the Tribunal, I am not going to --  
 17 because it would be a very tedious and time consuming  
 18 exercise -- go through all the areas where there are  
 19 discrepancies. For instance, in this price list one  
 20 could do this exercise and demonstrate about 20 cases  
 21 where there are differences but that we can set out in  
 22 a document.  
 23 **THE CHAIRMAN:** Yes, but as I understand Ms Parker's  
 24 evidence, correct me if I am wrong, this question of  
 25 whether the differential was 4p or 3p and whether that

1 complied or didn't comply with the schedule to the  
 2 business plan, to what extent was that a factor that you  
 3 took into account or double checked for your own peace  
 4 of mind when you were setting these prices?  
 5 **A.** We did use it as part of the decision process but  
 6 delivering the margin for the retailer was our primary  
 7 concern, and as we have just talked about in answering  
 8 the previous question, the retailer then needs to make  
 9 their own decision for their own mix of products within  
 10 their site, and that's why the shelf prices didn't  
 11 necessarily reflect what I was recommending.  
 12 **MR HOWARD:** Conversely we were just looking at a situation  
 13 where the schedule prepared by Imperial says at least 3p  
 14 and sometimes it was 4p, but we can go to other examples  
 15 where it might say 3p and the differential is less than  
 16 3p, 2p or something of that sort, and what would be the  
 17 explanation for that?  
 18 **A.** It may have been that we just weren't -- it was a high  
 19 volume product and I wasn't prepared to put the price as  
 20 recommended by the manufacturer, we needed to drive the  
 21 price a bit higher, for instance.  
 22 **Q.** Okay. As I say, we will set those out, it would be  
 23 tedious to go through it all.  
 24 **DR SCOTT:** Mr Howard, can we stay with this for a second.  
 25 **MR HOWARD:** Of course.

1 **DR SCOTT:** This tells us who the suppliers are, and as we  
 2 understand from the evidence last week, there were  
 3 occasions when the RBA contractors, for one reason or  
 4 another, went to other suppliers.  
 5 **A.** Yeah.  
 6 **DR SCOTT:** Would they then do their own margin calculations  
 7 or did you help them with the margin calculations? What  
 8 happened to the pricing when they chose to go to  
 9 another --  
 10 **A.** The retailer should not have gone to another supplier.  
 11 Within their retail agreement with Shell, they had to  
 12 buy their products from where we asked to buy them from  
 13 and they had to stock the products that we wished them  
 14 to stock and they had to locate them in store where we  
 15 wished them to locate them but they could do what they  
 16 liked on price. A retailer was very unlikely to get  
 17 tobacco elsewhere because Palmer & Harvey distribute  
 18 over 90 per cent of tobacco in the UK and are the most  
 19 cost-effective means by -- and also there is a massive  
 20 amount of security around tobacco, as an aside. So very  
 21 unlikely to do it. And we certainly wouldn't give them  
 22 any help, in fact we would have been -- that was  
 23 something that we would have brought a retailer back on  
 24 board and had discussions with had we found them buying  
 25 stock from elsewhere, not least of which not only is it

1 part of the agreement, but buying tobacco outside this  
 2 would take them into what we call grey markets, and it's  
 3 not something we would condone at all.  
 4 **DR SCOTT:** Thank you.  
 5 **MR HOWARD:** I think the example that Dr Scott was alluding  
 6 to was a situation where there were price marked packs  
 7 which were available from Palmer & Harvey, I think, and  
 8 I think what was explained to us was that there were  
 9 other packs available either from them or from  
 10 elsewhere, and the discount was by reference to selling  
 11 the price marked packs. Does that help you in being  
 12 able to explain, ie whether there were situations where  
 13 there were different times of packs, ie price marked  
 14 packs, as opposed to non-price marked packs?  
 15 **A.** A retailer might have seen Palmer & Harvey offering  
 16 a particular price marked pack but they still should  
 17 have stayed within our range as dictated by Shell.  
 18 **DR SCOTT:** That's under article 5 of the RBA which says they  
 19 have to stick to --  
 20 **A.** Yes. They are allowed a local element, but that local  
 21 element shouldn't compete with the core, which probably  
 22 this would have done.  
 23 **DR SCOTT:** Thank you.  
 24 **MR HOWARD:** Now, could I just ask you, then, some other  
 25 questions about how this was operated or understood to

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1 be operated? I was just asking you some questions  
 2 initially about the trading agreement at tab 27, perhaps  
 3 I ought to just make clear there is another trading  
 4 agreement at tab 40. In terms of your understanding of  
 5 how things were to operate, what was the position under  
 6 this agreement? Was it any different to the earlier  
 7 agreement?  
 8 **A.** Well, I can see that I have had removed the third  
 9 paragraph under "Prices" where it actually states what  
 10 percentage of the network would follow the official --  
 11 and -- because I knew they wouldn't be, as they could do  
 12 what they wanted to do.  
 13 **Q.** Right.  
 14 **A.** In terms of anything different, I just need a couple of  
 15 minutes to --  
 16 **Q.** No, no, absolutely, take your time.  
 17 (Pause)  
 18 **A.** I think that's the only change.  
 19 **Q.** In terms of your understanding of how it was to operate,  
 20 was there any difference between this agreement and the  
 21 earlier agreement?  
 22 **A.** No.  
 23 **Q.** Okay. In relation to these trading agreements, you have  
 24 explained to us what you understood the position was  
 25 vis-a-vis Imperial's products. Can you just tell me:

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1 what did you understand as a result of these agreements  
 2 your obligations were as to -- or any requirements  
 3 were -- the pricing of Gallaher products or indeed BAT  
 4 products or Philip Morris products?  
 5 **A.** I didn't differentiate between the manufacturers'  
 6 business plans, they were, you know, I regarded all  
 7 business plans, whether it was tobacco or confectionery,  
 8 to have optional elements.  
 9 **Q.** I understand that. This is an agreement with Imperial,  
 10 and I am just asking you, if we just take another  
 11 manufacturer other than Imperial --  
 12 **A.** Yes.  
 13 **Q.** -- did you understand that you were, that there were  
 14 any requirements here relating to the pricing of the  
 15 other manufacturers' products?  
 16 **A.** Only in that Gallaher would lay out their  
 17 recommendations, and you know, they weren't necessarily  
 18 the same, and I would make a call alongside the margin  
 19 call that we have discussed about as to what we were  
 20 going to do.  
 21 **Q.** Right. Now, can I ask you about promotional or tactical  
 22 bonuses?  
 23 **A.** Yes.  
 24 **Q.** And focusing on Imperial offering those. What did you  
 25 understand the purpose was of Imperial trying to

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1 persuade you to accept money from them for a promotional  
 2 or tactical bonus?  
 3 **A.** So tactical bonuses would be an amount of money off each  
 4 case that went out onto site in order to enable us to  
 5 offer it to the consumer at a lower price, and basically  
 6 it was a supplier funded price reduction. Then  
 7 sometimes there was also a charge for creation of point  
 8 of sale, and we made an admin charge, so every promotion  
 9 that we run means that Shell point of sale has to be  
 10 created, and we used to charge -- there was a rack rate  
 11 card and suppliers paid for a shelf talker, for the  
 12 administration to let retailers know about the  
 13 promotion.  
 14 **Q.** This is, what, something that says "Embassy 10p off" or  
 15 something?  
 16 **A.** Yes, quite.  
 17 **Q.** Is that what people mean by a "shelf talker"?  
 18 **A.** A shelf talker, yes.  
 19 **Q.** I suppose it does talk, in a way.  
 20 **THE CHAIRMAN:** They also bark, don't they? Isn't it  
 21 referred to as "shelf barkers"?  
 22 **MR HOWARD:** One has a picture of somebody standing there  
 23 shouting things, but I don't imagine that's what goes  
 24 on.  
 25 What is a shelf barker?

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1 A. I am desperately trying to remember, but I have  
 2 a horrible feeling it has sort of a bendy elastic thing  
 3 and it wobbles around. But the technical term is it  
 4 sort of wobbles about.  
 5 Q. The mind boggles, but anyway, it's to catch somebody's  
 6 attention?  
 7 A. (Witness nods).  
 8 Q. You just told us that if Imperial has a promotion, they  
 9 have to pay for that?  
 10 A. Yes.  
 11 Q. Okay.  
 12 A. Okay.  
 13 Q. Now, if you took a promotion from Imperial, explain to  
 14 us what you understood to be the purpose. So let's say  
 15 they have a promotion for Richmond and they are asking  
 16 you to reduce the price of Richmond by 5p because they  
 17 are paying you 5p and you do that --  
 18 A. Yes.  
 19 Q. -- you have told us it was to get a competitive  
 20 advantage. What did you understand that Imperial  
 21 required you to do in that event in relation to the  
 22 competing Gallaher product, Dorchester?  
 23 A. I wasn't obligated to do anything.  
 24 Q. Right. If Imperial -- we know, such is the way of the  
 25 world, that wholesale prices, as with any prices, go up

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1 from time to time. Now, if Imperial chose to increase  
 2 its wholesale price, what would be the effect on your  
 3 margins, if they do that?  
 4 A. If they increase the price it would mean that the margin  
 5 would be squeezed unless we had a price increase  
 6 alongside it, which we usually did.  
 7 Q. Unless you had a what, sorry?  
 8 A. We increased price. So if we had an increase in cost we  
 9 would then want to implement a change in the recommended  
 10 price out to retailers in order that they didn't find  
 11 themselves not making enough money.  
 12 Q. Right. So Imperial increases their price then because  
 13 your margin or the RBA contractors' margins are  
 14 squeezed, you recommend an increase in the selling  
 15 price. If that occurred and you recommended an increase  
 16 in the price of an Imperial product, or products, as  
 17 a result of Imperial's MPI, can you tell us whether you  
 18 regarded yourself as under any requirement or obligation  
 19 imposed by Imperial to also recommend a corresponding  
 20 increase in the price of other manufacturers' products?  
 21 A. No, I didn't, not at all.  
 22 DR SCOTT: Mr Howard.  
 23 MR HOWARD: Yes.  
 24 DR SCOTT: Are you coming to pre-buy agreements at all?  
 25 MR HOWARD: No, I wasn't, so please ask any questions you

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1 want.  
 2 DR SCOTT: We understand that when there was an MPI or  
 3 a Budget coming up, that there were the possibilities of  
 4 pre-buying?  
 5 A. Yes.  
 6 DR SCOTT: And certainly in times when, I think it's times  
 7 when you weren't there there were pre-buy agreements.  
 8 Do you recall any pre-buy agreements when you were --  
 9 A. No, the pre-buys, and the reason they weren't there when  
 10 I was managing cigarettes was that by then we had moved  
 11 to Palmer & Harvey as part of this whole RBA agreement  
 12 being implemented, so Palmer & Harvey managed all of  
 13 that, because we weren't buying the stock any more, the  
 14 retailers were buying the stock, so Shell couldn't  
 15 pre-buy stock in the way that we had done previously  
 16 when we owned the stock in our own warehouse. So no, we  
 17 weren't able to do that.  
 18 DR SCOTT: That's a help, thank you.  
 19 MR HOWARD: Now, I've asked you about Imperial price  
 20 promotions. Did Gallaher also indulge in price  
 21 promotions in order to make themselves more competitive?  
 22 A. Yes, they did.  
 23 Q. How did that operate in the case of Gallaher, what were  
 24 they doing then?  
 25 A. In exactly the same way, they would offer a case bonus

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1 per case that had gone out to site, as a kind of  
 2 retrospective discount.  
 3 Q. Right. Now, where Gallaher was reducing the price,  
 4 let's say, of Benson & Hedges, one we were looking at,  
 5 so that they said "Right, we will pay you 5p per pack of  
 6 Benson & Hedges", so that now becomes cheaper than  
 7 Embassy No 1, which you had previously had at 4p  
 8 differential. In that event, what did you understand  
 9 your arrangements with Imperial required you to do about  
 10 Imperial's Embassy No 1?  
 11 A. Nothing.  
 12 Q. If Imperial in that event wanted the price of Embassy  
 13 No 1 to come down because they didn't like the fact that  
 14 they were no longer in a competitive advantage, what  
 15 would they have to do, as far as you were concerned?  
 16 A. They would have to offer a case bonus to enable us to do  
 17 it.  
 18 Q. Right.  
 19 Conversely, if Gallaher put up its price of a brand,  
 20 either by increasing its wholesale price or by ending  
 21 a promotion, just explain -- I think we already know the  
 22 answer -- in your own words how that would affect your  
 23 margins vis-a-vis the Gallaher products and what you  
 24 would do?  
 25 A. sorry, I missed the very beginning of the sentence,

20

1 I do apologise.  
 2 **Q.** Gallaher put up their price either on an MPI or by  
 3 withdrawing a bonus; how would that affect your margins  
 4 and what would you do in relation to the Gallaher  
 5 product?  
 6 **A.** We would recommend that our retailers put their prices  
 7 up, we would have changed our recommended and maybe even  
 8 the maximum.  
 9 **Q.** In that event, so you are recommending Gallaher's price  
 10 to go up, absent Imperial doing anything, did you regard  
 11 yourself as under any requirement to do anything to the  
 12 Imperial competing product?  
 13 **A.** No.  
 14 **MR HOWARD:** Okay, thank you very much, those are all of my  
 15 questions.  
 16 Questioned by THE TRIBUNAL  
 17 **MR SUMMERS:** May I just ask: when you put your price up, did  
 18 you need to be reminded to put your price up to  
 19 a particular level or was that at your initiative?  
 20 **A.** No, we didn't need to be reminded. The thing on our  
 21 minds constantly was about retailers not losing money,  
 22 so at the same time as we were communicating a change in  
 23 cost, we need to let them know about the change in cost  
 24 and we had to give them a period of time, I think it was  
 25 two weeks' notice. Automatically as a buyer you would

1 instantly go to: how does this affect the prices?  
 2 **MR SUMMERS:** What would your reaction have been to  
 3 a manufacturer's note suggesting that you put the price  
 4 up to a particular level?  
 5 **A.** Well, in the same way that we would when they were doing  
 6 it, either randomly or as part of other activities, you  
 7 take on board all manufacturers' recommendations with  
 8 regard to their products, but the key thing is whether  
 9 or not we were delivering that margin that we have  
 10 promised to the retailer.  
 11 **MR SUMMERS:** Thank you.  
 12 **DR SCOTT:** One question: it relates to the activity of the  
 13 sales representatives from the manufacturers.  
 14 **A.** Yes.  
 15 **DR SCOTT:** In the context of the RBA, we understand that for  
 16 Shell owned and operated sites, merchandisers would go  
 17 round and report back.  
 18 **A.** Yes.  
 19 **DR SCOTT:** But that once the independent contractors were  
 20 operating under the RBA, sales representatives would  
 21 call. What do you recollect about the activities of the  
 22 sales representatives in relation to pricing?  
 23 **A.** I don't know that actually made any differentiation  
 24 between merchandisers and sales representatives.  
 25 I assume it is something that -- maybe it's been

1 discussed on one of the days I haven't been here, but  
 2 I don't recall their being any great difference, but  
 3 then I wasn't managing tobacco in the non-RBA world.  
 4 But the job that CPM calling -- for us was to see that  
 5 we had the right brands stocked on those gantries, and  
 6 that they were in the right place and that they were  
 7 actually in stock.  
 8 **DR SCOTT:** So as you said earlier, you saw their prime task  
 9 related to the non-pricing promotion --  
 10 **A.** Absolutely.  
 11 **DR SCOTT:** -- for marketing, rather, and the pricing.  
 12 **A.** Yes.  
 13 **THE CHAIRMAN:** Just a couple of questions: how were  
 14 Palmer & Harvey remunerated for their distribution work?  
 15 **A.** So the price that we charged the retailer on the  
 16 Palmer & Harvey invoice, which was directly to the  
 17 retailer and paid by the retailer, included the cost of  
 18 getting the product into the van and driven to the  
 19 sites, so it was a cost price plus the distribution  
 20 element of it.  
 21 **THE CHAIRMAN:** Even though you think it was included in the  
 22 invoice cost, it wasn't that Shell centrally was paying  
 23 the --  
 24 **A.** No.  
 25 **THE CHAIRMAN:** Palmer & Harvey.

1 **A.** No. In the whole set-up of retail business agreement  
 2 one of the big savings was for us not to be handling any  
 3 inventory or having anything to do with stock, which is  
 4 why the retailer took on the ownership of the stock.  
 5 **THE CHAIRMAN:** Right.  
 6 **A.** It's his money he was spending on stock.  
 7 **THE CHAIRMAN:** As regards the payment of the bonus or for  
 8 the compliance with the parities and differentials --  
 9 **A.** Yes.  
 10 **THE CHAIRMAN:** -- I think we have seen some cases where  
 11 somebody's memory was jogged by ITL to send an invoice,  
 12 but do you remember sending invoices to ITL for the  
 13 amount that's mentioned in the business plan investment?  
 14 **A.** I don't remember the actual amounts, I remember the  
 15 process.  
 16 **THE CHAIRMAN:** Yes, what was the process?  
 17 **A.** Basically I would -- we had a system called SAP, and  
 18 I would generate an invoice or I would have somebody  
 19 within the team, we had an administrator at a later date  
 20 who would generate an invoice for the marketing funds or  
 21 the business plan agreement funds.  
 22 **THE CHAIRMAN:** Would you check or would you get somebody to  
 23 check to what extent the prices on the price files had  
 24 in fact complied with the parities and differentials  
 25 before you decided how much to invoice?

1 A. No. We just didn't have time to go back and haul  
 2 through that sort of thing.  
 3 **THE CHAIRMAN:** So how did you decide what to invoice then?  
 4 A. The manufacturer and I would have a conversation around  
 5 "This is what we have done this year, this is the budget  
 6 I had to spend on Shell", and you know, they would say  
 7 "I feel that we have done eight-tenths of it or  
 8 nine-tenths of it or none of it, and therefore we feel  
 9 this is what you are owed". We would have that sort of  
 10 conversation and then I would raise -- I wouldn't raise  
 11 it without a conversation with them first.  
 12 **THE CHAIRMAN:** And you would then have a discussion as to  
 13 what extent you had complied with the requirements?  
 14 A. Yeah.  
 15 **THE CHAIRMAN:** And then invoiced them on a basis that you  
 16 had agreed as to what proportion of that total amount  
 17 you were entitled to?  
 18 A. Yes, it was generally around activities and, know,  
 19 around kind of the state of the relationship if you  
 20 like, really. I don't recall ever getting into  
 21 a conversation about whether or not I had complied  
 22 because I wouldn't use that terminology.  
 23 **THE CHAIRMAN:** No.  
 24 A. I would have been talking about: what activities did we  
 25 run, did we carry out the number of promotions and then

1 in this respect I -- you know, the manufacturer would  
 2 come back and say, "Well, in terms of pricing" and make  
 3 a recommendation to what they felt they were prepared to  
 4 pay.  
 5 **THE CHAIRMAN:** So did you understand from that that they  
 6 were monitoring how far you were complying with --  
 7 A. They certainly looked at the price files and I think  
 8 they used their salespeople to be out on site looking at  
 9 the price, you know, to record it. I don't recall any  
 10 great conversations about it. The conversation will  
 11 have been had around how much they thought we were owed.  
 12 I never raised a challenge to it. I always accepted  
 13 what they said.  
 14 **THE CHAIRMAN:** Did you get any sense from those  
 15 conversations whether they regarded, for example, a 4p  
 16 differential between Embassy and Benson & Hedges as  
 17 being -- I hesitate to use the word "compliance" because  
 18 I know that's not the word you use, but let me just use  
 19 that in a neutral sense -- as being in accordance,  
 20 perhaps, with the agreement, or did it not get into that  
 21 level?  
 22 A. I never had that level of detailed conversation with  
 23 them about it. We spent a lot of time talking about how  
 24 effective we had been in delivering the plans, the  
 25 planograms on site, but I never had detailed

1 conversations about parities and differentials, and what  
 2 have you.  
 3 **THE CHAIRMAN:** Thank you. Yes.  
 4 **MR SUMMERS:** Am I right in remembering that you took over  
 5 from Mr Culham?  
 6 A. No, Mr Culham works for ITL.  
 7 **MR SUMMERS:** I am sorry, Mr --  
 8 A. Mr Conrad works for Shell, I did take over from Alex,  
 9 yes.  
 10 **MR SUMMERS:** Mr Conrad, that's right.  
 11 A. Yes, I did.  
 12 **MR SUMMERS:** That would have been about -- was it September?  
 13 A. Early September, yes.  
 14 **MR SUMMERS:** Did you have a long takeover period, did you  
 15 work together with him for a period before he finally  
 16 handed over?  
 17 A. No, we had a couple of meetings and it was a reasonable  
 18 handover with Alex, so we talked through the  
 19 manufacturer -- we talked about tobacco, because I had  
 20 not managed anything to do with it, so I did have  
 21 a handover from Alex, yes.  
 22 **MR SUMMERS:** He explained the policy he had been following  
 23 with regard to the setting of prices and relationship  
 24 with the manufacturers?  
 25 A. I don't recall ever having a conversation, certainly not

1 about setting prices because we can't set the prices, we  
 2 let the retailer manage their own price, but he drew my  
 3 attention to the business plan that there was with the  
 4 manufacturers, I think there was only one with ITL at  
 5 that point. It's no great conversation, because we were  
 6 part of the core team that delivered the new retail  
 7 business agreement, so we both understood how pricing  
 8 worked on Shell sites, so we didn't have a lengthy  
 9 conversation about how you managed that within tobacco.  
 10 **MR SUMMERS:** So you actually have no real idea as to whether  
 11 you were following the same policy as he was following  
 12 or not?  
 13 A. I knew that we both worked in the same way to manage  
 14 price in the same way in terms of using the price file  
 15 and we all knew as a team that we had to make sure the  
 16 retailers delivered their margin, and Alex and I had  
 17 worked together as that was implemented across the  
 18 estate, so that's just how the price worked within  
 19 Shell. It didn't matter whether it was a tobacco  
 20 manufacturer or whether it was Mars purveying  
 21 confectionery. So there was no detailed discussion  
 22 around that.  
 23 **MR SUMMERS:** Who did you hand over to?  
 24 A. I then took Daryl Barry on within the team when I was  
 25 promoted to manage the team and I recruited him, and he

1 took up responsibility for the tobacco element.  
 2 **MR SUMMERS:** Did you have a handover period with him?  
 3 **A.** Again he had an induction that incorporated the retail  
 4 business agreement principles and how we worked in the  
 5 same way.  
 6 **MR SUMMERS:** I mean, you explained to him again how you  
 7 handled matters relating to margin and --  
 8 **A.** Yes.  
 9 **MR SUMMERS:** -- price offers ...  
 10 **A.** Yes.  
 11 **MR SUMMERS:** So there would be a continuity?  
 12 **A.** The continuity was in the way we managed the retailers  
 13 -- the relationship with Palmer & Harvey and the cost  
 14 price and, yes, how you put together your recommended  
 15 retailer for the price so that your recommended  
 16 retailers were our retailers.  
 17 **MR SUMMERS:** So you would have expected, based on that, that  
 18 there might have been some degree of continuity --  
 19 **A.** Yes.  
 20 **MR SUMMERS:** -- of adherence to pricing policy; yes?  
 21 **A.** Well, in relation to the RBA, yes.  
 22 **MR SUMMERS:** Yes.  
 23 **A.** Yes.  
 24 **MR SUMMERS:** Thank you very much.  
 25 **THE CHAIRMAN:** Ms Rose, any re-examination?

1 Re-examination by MS ROSE  
 2 **MS ROSE:** Yes, madam.  
 3 Just to pick up those last two points, you have  
 4 explained that Mr Barry came in to take over the  
 5 tobacco, but were you continuing to supervise him?  
 6 **A.** Yes.  
 7 **Q.** So were you responsible for appraising his performance?  
 8 **A.** Yes, I was.  
 9 **Q.** What sort of factors would you consider with him in  
 10 appraising his performance?  
 11 **A.** Some of it would be around whether or not his categories  
 12 had delivered the margin to the retailers or whether we  
 13 had issues, whether or not we were effectively  
 14 delivering the planograms on sites, so whether or not we  
 15 got bonuses for planogram compliance and the main one  
 16 would be whether or not he had driven sales on the  
 17 category.  
 18 **Q.** Are you able to say from supervising him whether or not  
 19 there was continuity in the approach to pricing on site?  
 20 **A.** Yes.  
 21 **Q.** What's the answer?  
 22 **A.** Yes, he did, he understood the RBA, he grasped it very  
 23 quickly, he was a very -- he understood his numbers, and  
 24 he grasped it all very quickly, yes.  
 25 **Q.** You have also explained the conversations that you had

1 with the manufacturers about the annual bonus?  
 2 **A.** Yes.  
 3 **Q.** And you have explained that you didn't go into the  
 4 minutiae of the parities and differentials on individual  
 5 products?  
 6 **A.** Yes.  
 7 **Q.** How important was this to the ITL representative that  
 8 you were complying with each parity and differential  
 9 from your experience --  
 10 **A.** We didn't go through them line by line or -- we really  
 11 didn't discuss them.  
 12 **Q.** Was there any serious attempt by ITL to link that bonus  
 13 with any evidence that you had complied in each price  
 14 file with --  
 15 **A.** No. No.  
 16 **Q.** So what was your understanding about that bonus?  
 17 **A.** I actually felt that because we had had a reasonable  
 18 amount of contact in that year that they actually felt  
 19 there was a better relationship with us and they were  
 20 understanding our business better, and therefore they  
 21 were happy to pay the amount of budget they put aside  
 22 for Shell.  
 23 **Q.** I ought to come back, if we can all put our minds back  
 24 to last week, and take up annex 19, tab 33.  
 25 {D19/33/124} You may remember this document, it's the

1 document that was just after you had taken over the  
 2 category, and the second page, in relation to the price  
 3 file, there is the reference to the meeting in relation  
 4 to the Richmond Kingsize at the end of the promotion on  
 5 the Richmond Kingsize?  
 6 **A.** Yes.  
 7 **Q.** And it was suggested to you that there had been  
 8 agreement at that meeting that Richmond Kingsize would  
 9 move from 3.64 and 3.65 to their natural prices of 3.70  
 10 and 3.71. Was there agreement with you, between you and  
 11 ITL, to move the price of Richmond at that meeting?  
 12 **A.** I didn't agree prices in meetings because I knew I had  
 13 to go back and check the margin and how it looked versus  
 14 the competition and other products. So I would not have  
 15 agreed it in the meeting.  
 16 **Q.** Do you see any indication in this statement here as to  
 17 whether it was actually agreed or not, in this  
 18 paragraph?  
 19 **A.** I mean, the first sentence reads that Breda may have  
 20 understood that I had agreed to change the price, or  
 21 return the price, I don't know whether it was at that  
 22 price before, that's possible, because it's obviously  
 23 a move from a promotion, so she may well have been left  
 24 with that impression, but I wasn't in the habit of  
 25 agreeing prices with manufacturers in meetings.

1 Q. What do you understand to be meant by the second  
 2 sentence?  
 3 A. (Pause). I think that I will have said to -- or  
 4 indicated that I may move price around in any case so  
 5 there were likely to be some future changes, in any  
 6 case.  
 7 Q. In fact, did you move the price of Richmond to £3.70 and  
 8 £3.71?  
 9 A. Certainly not in the next, in the October or the  
 10 November price file, there was no change.  
 11 Q. If we can just take those documents up, if you take up  
 12 volume 2 attached to Shell's notice of appeal, if you go  
 13 to annex G, it's perhaps easier to do this by page  
 14 reference, it's not that easy to find the page numbers.  
 15 It's annex G, tab 12, which is in fact page 521 of the  
 16 bundle.  
 17 If you go, unfortunately you have to turn them  
 18 around backwards, to page 524, this is the price file  
 19 for October of 2001, 1 October 2001, do you see that at  
 20 page 523?  
 21 A. I don't seem to have --  
 22 Q. Do you have page 523?  
 23 A. I have got 523, yes.  
 24 Q. Do you see it says "Shelf product master file list for  
 25 RBA sites, 1 October 2001"?

33

1 A. Yes.  
 2 Q. So that's a month after the letter from Ms Canavan. If  
 3 you then go to page 524, do you see "Richmond Kingsize"  
 4 three lines from the bottom?  
 5 A. Yes.  
 6 Q. So we can see there that it has a recommended retail  
 7 price of £3.65 and a maximum price of £3.79?  
 8 A. Yes.  
 9 Q. If we go on in this same tab, turn over to page 527, the  
 10 price file for 1 November 2001, do you see that?  
 11 A. Yes.  
 12 Q. Again if you turn the page to page 528, again do you see  
 13 "Richmond Kingsize" about ten lines from the bottom?  
 14 A. Yes.  
 15 Q. We see the price, "£3.65 recommended, £3.79 maximum"?  
 16 A. Yes.  
 17 Q. Now, if we just go back to the page we were just on, at  
 18 tab 33, the second sentence is:  
 19 "Can you please ensure the differentials reflect  
 20 those of Dorchester and are no more expensive than  
 21 Dorchester in these tiers."  
 22 A. Yes.  
 23 Q. If we look at the pricing of Dorchester in tab 12,  
 24 Dorchester, page 523, is recommended retail price £3.71,  
 25 maximum retail price £3.91. Then in November, page 527,

34

1 again the same, £3.71 recommended, £3.91 maximum.  
 2 A. (Witness nods).  
 3 Q. Can we now take up annex 9? {D9/3}. These are the  
 4 documents that relate to Gallaher. You were asked some  
 5 questions about the document at tab 3 of annex 9.  
 6 DR SCOTT: Sorry, are we ...  
 7 MS ROSE: Sorry.  
 8 DR SCOTT: We are moving away from annex 19/33?  
 9 MS ROSE: Yes, we are.  
 10 DR SCOTT: There was just one question I had while we were  
 11 in that area, and it was simply this: it seems that this  
 12 letter records you mentioning that the natural price may  
 13 move to a greater minimum and maximum differential, and  
 14 presumably that's the implication of that.  
 15 Can you just confirm that your understanding was  
 16 that ITL's concern was more with the relativities than  
 17 with the absolute prices? We have some absolute prices  
 18 in the letter.  
 19 A. Yes.  
 20 DR SCOTT: But in the light of the discussion that you had  
 21 had, the two of you, Breda writes this letter realising  
 22 that you have said things may change, but reflecting on  
 23 the differentials; would that be your understanding of  
 24 her position?  
 25 A. I am sorry, I think I've lost track slightly. I do

35

1 apologise.  
 2 DR SCOTT: Let me go back.  
 3 A. Yes.  
 4 DR SCOTT: In this paragraph on page 124 in annex 19/33 --  
 5 A. Yes.  
 6 DR SCOTT: -- {D19/33/124} we have in the first sentence  
 7 some very specific numbers.  
 8 A. Yes.  
 9 DR SCOTT: But then it seems that you had mentioned that it  
 10 might not be those actual numbers.  
 11 A. Yes.  
 12 DR SCOTT: To which Breda comes back saying:  
 13 "If this is the case, can you please ensure that the  
 14 differentials reflect those of Dorchester and are no  
 15 more expensive than Dorchester in these tiers."  
 16 A. Yes.  
 17 DR SCOTT: Did you understand that to mean that she was more  
 18 concerned about the differentials --  
 19 A. Yes.  
 20 DR SCOTT: -- than about the absolute level of pricing.  
 21 A. Yes, yes, I do, yes.  
 22 DR SCOTT: Thank you.  
 23 MS ROSE: If we go to annex 9 now, tab 3 -- do you have  
 24 that? {D9/3}.  
 25 A. I do.

36

1 Q. Do you recall that's the email from Wes Feeney from  
 2 Gallaher of 1 October 2001:  
 3 "Please find attached my comments re: your current  
 4 prices."  
 5 And he is asking for them to be remedied where there  
 6 are discrepancies with the price list differential, and  
 7 you were asked some questions about this.  
 8 If you can turn the page that's numbered 533  
 9 {D9/3/533} at the bottom, here his comment is:  
 10 "Old Holborn and Golden Virginia should be the same  
 11 price as per RRP price lists, currently overpriced by  
 12 3p, and maximum prices should reflect the prices  
 13 parities and differentials."  
 14 Then there is some handwriting. Whose handwriting  
 15 is that?  
 16 A. That's my handwriting.  
 17 Q. Can you read to us what the whole passage says on that  
 18 page?  
 19 A. It says:  
 20 "Action, Bernie [who was our administrator] to  
 21 reduce RRP on recommended retail by 3p, leave max as is  
 22 [and I struck that out, and then had a look at it or  
 23 something and said] and max by 3p. Let me know the cost  
 24 to site [which is the invoice price to sites,  
 25 effectively] and will sense check the margin."

1 Q. Can you explain what that last sentence means, "Let me  
 2 know the cost to site and will sense check the margin"?  
 3 A. It means we do the changes and then have a look to see  
 4 what impact that has, or have a look at the changes but  
 5 have a look and see what impact that has on that margin  
 6 that we would be enabling our retailers to make out of  
 7 selling the product.  
 8 Q. So was this an automatic change to comply with Gallaher  
 9 or was it something where you were taking an independent  
 10 decision depending on the margin to the site?  
 11 A. The key thing was to make sure the site made their  
 12 money, so you would take views from everybody as part of  
 13 that process.  
 14 Q. Going on in this document to page 535 {D9/3/535} --  
 15 **THE CHAIRMAN:** Could I just ask this: if it had occurred  
 16 that that did affect the margin, you mentioned earlier  
 17 on that the margin was something that was across the  
 18 group.  
 19 A. Yes.  
 20 **THE CHAIRMAN:** So if there had been that effect, would that  
 21 have caused you to change these prices or might you have  
 22 dealt with that by altering another price to counteract  
 23 the effect on the margin?  
 24 A. We could have, but then it starts to change the whole  
 25 dynamic of your mix. It is one of the things you could

1 do, I don't recall doing that, but that is an option,  
 2 yes.  
 3 **MS ROSE:** If you go to 535 in this document, you were asked  
 4 some questions by Mr Lasok about the Mayfair; do you  
 5 recall that?  
 6 A. I do.  
 7 Q. Where you have written "Action: reduce Mayfair 10s by  
 8 RSP to £2.04, and CTSI by 1p"?  
 9 A. Yes.  
 10 Q. That's in response to the comment "Mayfair 10s should be  
 11 7p under L&B Ks, therefore price should be £2.04". Do  
 12 you know whether you implemented this recommendation or  
 13 not?  
 14 A. I think actually on this one in the end we didn't from  
 15 recollection.  
 16 Q. If we can go back to volume 2 attached to the notice of  
 17 appeal, it's back to annex G, tab 12, so we are looking  
 18 at the price of Mayfair 10s. It's at page 529, we can  
 19 see "Mayfair 10s" in November. Do you see that, about  
 20 eight lines from the bottom, "Mayfair Kingsize 10s"?  
 21 A. I do.  
 22 Q. They are between £2.06, and £2.10, so the request to  
 23 reduce the price to £2.04 does not appear to have been  
 24 acceded to?  
 25 A. Yes.

1 Q. If we continue going back to annex 9, tab 3, page 536,  
 2 {D9/3/536}, I think, although it's been cut off on mine,  
 3 there is a comment here that Dorchester should be the  
 4 same price as Richmond, £3.65. You have suggested "Put  
 5 Dorchester down to £3.69 and Richmond up to £3.69, leave  
 6 maxes".  
 7 Again, do you know whether that is something that  
 8 you implemented?  
 9 A. I don't recall, actually, that one.  
 10 Q. Page 538, {D9/3/538}, there is a table that says  
 11 "Forecourt Price Comparisons", which appears to be  
 12 a comparison of the prices of particular cigarettes on  
 13 different forecourts. Again, there is some handwriting  
 14 on this page. Whose handwriting is that?  
 15 A. The numerals, the struck out prices isn't mine, but the  
 16 scrawled top right-hand side is mine.  
 17 Q. Can you read us what that says?  
 18 A. "Be aware that we provide the retailers with a band of  
 19 prices to work with".  
 20 Q. Do you remember why you wrote that comment on this page?  
 21 A. This is a document produced by a manufacturer, I think  
 22 it's Gallaher, and although we didn't -- as I've said,  
 23 we didn't constantly remind them of our pricing policy  
 24 and the fact that we had a recommended price and the  
 25 maximum, and the retailers go up to the maximum, I think

1 here I've scrawled a note back to Wes just to remind  
 2 him.  
 3 **Q.** Why did you feel the need to do that on the basis of  
 4 this page?  
 5 **A.** Because it gives the impression there is an absolute  
 6 price, and of course Shell's retailers, you know, across  
 7 600 sites, could be at any price they liked, so they  
 8 were having a forecourt price comparison for Shell, you  
 9 know, it's virtually pointless really, because it could  
 10 only be a number of sites at any time that would be on  
 11 any price recorded.  
 12 **Q.** Do you recall whether that was a message that you  
 13 communicated to Mr Feeney?  
 14 **A.** I will have probably picked up -- I don't recall  
 15 actually physically doing it, but I will have written  
 16 that note to myself, either to talk to him about  
 17 a subsequent meeting or to have had a telephone  
 18 conversation.  
 19 **THE CHAIRMAN:** So you wouldn't have sent back this document  
 20 knowing that he would read that?  
 21 **A.** No, I think he may have been coming in for a meeting, so  
 22 I may have then gone through it or -- I don't think we  
 23 ever used the post at all, so I would have --  
 24 I generally would have picked up the phone.  
 25 **THE CHAIRMAN:** With the notes that you have written on the

1 previous pages that we have looked at, are those notes  
 2 that you made on those pages during meetings with ITL,  
 3 or when you were looking at these by yourself?  
 4 **A.** No, I'll have done this alone, just while -- so that  
 5 I can consider things. I wouldn't have decided to do  
 6 things in meetings like that. I think this was sent in  
 7 an email. Was this not attached ... I think there was  
 8 a header. I honestly couldn't decide in meetings, it's  
 9 just too much to consider while you sitting there with  
 10 them in front of you.  
 11 **MS ROSE:** Could you go still in annex 9 to tab 15.  
 12 {D9/15/379}. You were asked some questions about your  
 13 email of 13 December 2001, which is at the page numbered  
 14 379 here, the second page, where you referred to "min  
 15 and max retails"?  
 16 **A.** Yes.  
 17 **Q.** I think you explained that the reason you had used the  
 18 term "min" was because that was the minimum that the  
 19 retailers had to charge to obtain the appropriate  
 20 margin, but it was then up to then whether they wanted  
 21 to trading?  
 22 **A.** That's correct, yes.  
 23 **Q.** We can see, I don't believe you were shown the reply of  
 24 Mr Feeney of Gallaher on 20 December, where he says,  
 25 right at the bottom of 378, this is actually to Bernie,

1 that's your administrator?  
 2 **A.** Yes.  
 3 **Q.** Copied to you:  
 4 "Please find attached the price file you recently  
 5 sent me. I have noted down the right-hand side where  
 6 prices still need amending as per the agreement.  
 7 I would appreciate these amendments could be made as  
 8 soon as possible", et cetera, et cetera.  
 9 "I would also add that parities and differentials  
 10 apply to both rec and max prices."  
 11 **A.** Yes.  
 12 **THE CHAIRMAN:** When you referred to "as per the agreement"  
 13 there, you would know that he meant the price -- the  
 14 parities and differentials?  
 15 **A.** Yes. Yes.  
 16 **MS ROSE:** Tab 21, this may not be a document that you can  
 17 help us with, but it appears to be a joint presentation  
 18 made by Mr Feeney and Mr Barry together in April of  
 19 2002. Is this something that you know anything about?  
 20 Are you able to comment on it?  
 21 **A.** I knew they were doing these, and I was happy for them  
 22 to go to our field teams and talk about tobacco and why  
 23 it's important. So I was aware that it was going on,  
 24 yes.  
 25 **Q.** If we now go back to annex 19, tab 61, {D19/61}, this is

1 an email from Breda Hughes as she then was,  
 2 13 August 2003, to Mr Barry. It was repeatedly put to  
 3 you by Mr Lasok that this email indicated that  
 4 Breda Hughes believed that the Shell price file set out  
 5 a minimum price and a maximum price on the basis of  
 6 this. Do you recall those questions?  
 7 **A.** Yes.  
 8 **Q.** Do you believe that was Breda's understanding?  
 9 **A.** No, I don't.  
 10 **Q.** Why not?  
 11 **A.** (Pause). Because she knew that our retailers could  
 12 price as they wanted to, the manufacturers did.  
 13 **Q.** Can I ask you in the same bundle to go to tab 44.  
 14 {D19/44/208}. This is an ITL document, and we see it's  
 15 signed by Breda Hughes, dated 7 January 2002, so that's  
 16 significantly before the document at tab 61. Just  
 17 opposite the second holepunch:  
 18 "Up until two years ago, Select sites were run by  
 19 Shell employed managers. However, a new scheme was  
 20 introduced that has reduced the number of direct managed  
 21 sites to nearly zero. Shell Select sites are now run by  
 22 self-employed agents, agents own all shop stock but are  
 23 given guidance by Shell with regard to range  
 24 merchandising pricing and source of supply. Ultimately,  
 25 the final decision is that of the agent. The RBA is

1 aimed to provide the agents with a higher share of the  
 2 shop profits than what other schemes have delivered in  
 3 the past."  
 4 Does that reflect what you thought Breda understood?  
 5 **A.** Yes.  
 6 **Q.** Then at 209 over the page --  
 7 **THE CHAIRMAN:** That wasn't quite right, though, was it, what  
 8 she said there, because as regards to range,  
 9 merchandising and source of supply, I understood that  
 10 the RBA is much more prescriptive than it is in relation  
 11 to pricing, or that's Shell's understanding.  
 12 **A.** Which sentence are we on?  
 13 **THE CHAIRMAN:** She says:  
 14 "... given guidance by Shell with regard to range,  
 15 merchandising, pricing and source of supply, ultimately  
 16 the final decision is that of the agent."  
 17 The final decision with regards to range is not  
 18 really that of the ...  
 19 **A.** No.  
 20 **MS ROSE:** Then over the page at 209, {D19/44/209}, Shell  
 21 recommends a pricing policy to all Select sites:  
 22 "The price file consists of a Shell recommended  
 23 price and a maximum price for each product. A copy of  
 24 the price file is provided to ITL. In the main,  
 25 differentials between manufacturers' comparable brands

1 are maintained. However, since the changeover of  
 2 category managers, some shoulder brands such as  
 3 Superkings, Lights, are showing incorrect  
 4 differentials."  
 5 Are you the category manager that she is talking  
 6 about there, this is January 2002?  
 7 **A.** So yes, I have been in situ for three months there, so  
 8 she is saying shoulder brands aren't quite as they were.  
 9 **Q.** We also see at 210 under the heading "Strengths", the  
 10 statement:  
 11 "Generally good compliance at site level."  
 12 And that's January 2002. Can you now go forward in  
 13 this same bundle to tab 57 --  
 14 **DR SCOTT:** Sorry, while we are on that, the shoulder brands,  
 15 if we are thinking of three tiers, are the ones in the  
 16 middle?  
 17 **A.** I am not sure, genuinely. I don't know whether I knew  
 18 at the time what she meant. I don't know what she means  
 19 by shoulder brands at all. It must be -- it's not  
 20 a term I would have used.  
 21 **DR SCOTT:** Right, okay.  
 22 **MS ROSE:** It's been pointed out to me that this document is  
 23 actually updated April 2002. Although it says  
 24 January 2002, it then says "Updated April 2002". So you  
 25 would have been in place for six, seven months by that

1 time?  
 2 **A.** Yes.  
 3 **Q.** So we have just noted that it says "Generally good  
 4 compliance at site level", and if we go to February  
 5 2003, this is tab 57, page 222, {D19/57/222}, which is  
 6 page 4 of the document, so here --  
 7 **MR HOWARD:** Can I help by saying I think shoulder brands are  
 8 where you have one brand such as Superkings with  
 9 different variants in it, so you have Superkings  
 10 menthol, say, and opposed to Superkings and Superkings  
 11 Light. That's a shoulder brand.  
 12 **THE CHAIRMAN:** Which is the shoulder brand? The menthol or  
 13 the Light?  
 14 **MR HOWARD:** The menthol would be the shoulder brand to the  
 15 main Superkings. So I don't know, but I am guessing,  
 16 I imagine the expression comes because you have the main  
 17 brand and then on the back of that, or on the shoulder,  
 18 you carry along the other brands, but people who want  
 19 a lighter one or menthol, or whatever it may be.  
 20 **MS ROSE:** Page 222:  
 21 "Shell recommends a pricing policy to all Select  
 22 sites. The price file consists of a Shell recommended  
 23 price and a maximum price for each product. A copy of  
 24 the price file is provided to ITL. Under the previous  
 25 category manager, the price file was in a state of

1 disrepair with many differentials out of line."  
 2 This is February 2003 so by this stage Daryl Barry  
 3 would have taken over?  
 4 **A.** Yes.  
 5 **Q.** So the reference to the previous category manager is  
 6 you?  
 7 **A.** It is indeed.  
 8 **Q.** So having said in April 2002 that there was good  
 9 compliance at site level she is now retrospectively  
 10 giving a somewhat different picture?  
 11 **A.** Yes, she is.  
 12 **MR LASOK:** Well, with respect, I am not sure that this is  
 13 getting us anywhere, because this is re-examination of  
 14 a witness by reading to her bits of a document written  
 15 by somebody else that she has not seen before.  
 16 **MS ROSE:** I entirely agree, but she was of course  
 17 cross-examined on the basis of documents that she had  
 18 never seen before, so I am afraid my learned friend has  
 19 made his bed and must lie in it.  
 20 You explained in response to questions from the  
 21 Tribunal a few moments ago that the retailers were  
 22 buying the stock with their own money?  
 23 **A.** Yes.  
 24 **Q.** Can you just explain that point?  
 25 **A.** Yes. So in order to ensure we didn't have capital tied

1 up in stock, which was millions of pounds, when we were  
 2 looking at becoming a much lower cost business, the  
 3 retailer was empowered to manage the shop, effectively,  
 4 so it's his stock. The only restriction on it really is  
 5 that we don't want him to insult our customers and  
 6 damage our brand through overpricing, and we want to  
 7 ensure that the shop products support our fuels  
 8 business, so it's the sorts of products that motorists  
 9 on the move expect to see, and therefore we determined  
 10 the range that they stocked and from whom they buy, they  
 11 bought it.  
 12 **Q.** But they are putting their own capital at risk, is that  
 13 right?  
 14 **A.** Yes, yes.  
 15 **Q.** We have seen that there is a safety net?  
 16 **A.** There was a cap and a floor but after a couple of years,  
 17 that actually disappeared as well, because at that point  
 18 there was a cap and a floor to protect them.  
 19 **Q.** At this date, between 70 per cent and 140 per cent?  
 20 **A.** Correct.  
 21 **Q.** Within that range, they are risking their own capital;  
 22 is that right?  
 23 **A.** They are, yes.  
 24 **Q.** While you were the category manager, did you or anyone  
 25 else at Shell to your knowledge ever take any action

1 seeking to require the contractors to price on the shelf  
 2 either at the recommended price or the maximum price?  
 3 **A.** No, never.  
 4 **Q.** Did you or anyone else at Shell take any action at any  
 5 time to require the contractors to price in accordance  
 6 with the parities and differentials set out in the  
 7 trading agreements with Gallaher or ITL?  
 8 **A.** No.  
 9 **Q.** Did you or anyone else at Shell ever seek to persuade  
 10 the contractors to do so?  
 11 **A.** No.  
 12 **Q.** Or to influence them to do so?  
 13 **A.** No.  
 14 **Q.** Did you believe that you had the power to take any such  
 15 action?  
 16 **A.** No, we didn't. We let the retailers have their --  
 17 become entrepreneurs and manage their business.  
 18 **Q.** Had you tried to do that, do you think you would have  
 19 had any reaction from the contractors?  
 20 **A.** We would have had reaction both from the contractors but  
 21 also from the operational team, so our own team that  
 22 reported into David Moss, so communication would have  
 23 been done through themselves, so both the contractors  
 24 and our own ops team.  
 25 **Q.** What reaction would you have expected to get if you had

1 sought to persuade a particular retailer to price the  
 2 cigarettes in accordance with fixed parities and  
 3 differentials?  
 4 **A.** I think probably disciplinary action.  
 5 **Q.** Sorry, I don't mean from Shell, I mean from that  
 6 individual contractor.  
 7 **A.** We would have expected him to report the individual that  
 8 had been seeking to influence them to his area sales  
 9 manager, who would then send it up the line to the sales  
 10 and operations manager.  
 11 **Q.** Why do you think the contractor would have reported it?  
 12 **A.** Because it's his money, his stock, and it's his stall.  
 13 **Q.** To your knowledge, when Daryl Barry was operating under  
 14 your supervision, did he ever seek to require any of the  
 15 Shell contractors to price in accordance with the  
 16 recommended or maximum retail prices?  
 17 **A.** Not that I'm aware of.  
 18 **Q.** To your knowledge, did he ever seek to require them to  
 19 price in accordance with Gallaher or ITL parities and  
 20 differentials?  
 21 **A.** No, never.  
 22 **Q.** To your knowledge, did he ever seek to persuade or  
 23 influence the contractors to do so?  
 24 **A.** No.  
 25 **Q.** If he had sought to do any of those things, do you think

1 you would have found out about it?  
 2 **A.** Absolutely, because either the retailer or the team  
 3 managing the retailers would have escalated it to me as  
 4 the team leader.  
 5 **Q.** Did you ever give Gallaher or ITL any cause to think  
 6 that Shell either would or could take any action to  
 7 require the contractors to price at their fixed parities  
 8 and differentials?  
 9 **A.** No.  
 10 **Q.** Do you think that ITL or Gallaher ever believed you had  
 11 agreed to do so?  
 12 **A.** No, I don't.  
 13 **Q.** Did you ever agree to do so?  
 14 **A.** No.  
 15 **MS ROSE:** I've no further questions.  
 16 **THE CHAIRMAN:** Thank you very much, Ms Parker, that's your  
 17 evidence completed now, and you are released from the  
 18 witness box.  
 19 **A.** Thank you.  
 20 (The witness withdrew)  
 21 **THE CHAIRMAN:** Now, are we having the opening for the Co-op?  
 22 **MS ROSE:** Madam, might I suggest that it might be  
 23 a convenient moment, because we will be wishing to leave  
 24 at this point, fascinated though we are.  
 25 **THE CHAIRMAN:** I was going to take a break but I just wanted

1 to ascertain what was happening after the break, in case  
 2 there was going to be some reorganisation of the  
 3 courtroom.  
 4 **MR HOWARD:** Yes.  
 5 **THE CHAIRMAN:** You will be opening about the Co-op.  
 6 **MR HOWARD:** We are going to go into the Co-op and then we  
 7 will call Mr Goodall.  
 8 **THE CHAIRMAN:** Very well, we will come back at 11.30.  
 9 (11.20 am)  
 10 (A short break)  
 11 (11.30 am)  
 12 Further opening submissions by MR HOWARD  
 13 **THE CHAIRMAN:** Yes.  
 14 **MR HOWARD:** As I said last week when addressing you in  
 15 relation to Shell, in each case what we are or you need  
 16 to consider is whether there was an agreement or  
 17 concerted practice of the type alleged.  
 18 It is important just to, again, focus on what we are  
 19 looking for, because we are actually looking for  
 20 an agreement or concerted practice which, as a matter of  
 21 fact, did restrict the respective retailer from  
 22 favouring Gallaher.  
 23 Now, it's actually quite important to bear that in  
 24 mind, because when I was opening last week Dr Scott  
 25 suggested that that formulation was relevant to effects

1 and not to object, and I would say that one actually has  
 2 to break -- whether I have misunderstood what Dr Scott  
 3 was saying is not really the important point. What  
 4 I want to make clear is there are two different things  
 5 which the Tribunal has to consider. The first is what,  
 6 in fact, was the agreement or concerted practice. The  
 7 second is: is that an agreement or concerted practice  
 8 whose object is anticompetitive? So before you get to  
 9 consider the anticompetitive object, you first have to  
 10 consider whether the agreement or concerted practice has  
 11 the characteristics alleged by the Office of Fair  
 12 Trading. If they fail at that hurdle, you never get to  
 13 the debate about whether this is by object  
 14 anticompetitive and the interesting debate or not about  
 15 that.  
 16 So, now, what, therefore, we are looking for in fact  
 17 is whether there was a restriction on the retailers, and  
 18 that is part of the first question, because the OFT's  
 19 case is that a feature or characteristic of the  
 20 agreement or practice is that it imposed such  
 21 a restriction, and that -- we don't I think need to turn  
 22 it up, but the reference is paragraph 1.12 and 1.13 of  
 23 the decision.  
 24 The next thing again I would respectfully say is  
 25 very important to bear in mind in relation to all of

1 this is: what is the relevant restriction that the OFT  
 2 are talking about? That's where the analysis at,  
 3 I think it's at paragraph 6.216 of the decision, is  
 4 important because that's where you will remember they  
 5 talk about a requirement, but again I think at this  
 6 stage we don't need to turn it up.  
 7 If one actually thinks about it for a moment, what  
 8 they are doing -- this is not a criticism, it's just  
 9 analysing what the decision is saying -- the requirement  
 10 is what gives rise to the restriction. In other words,  
 11 the restriction is the flipside of the requirement.  
 12 That's why of course some of my questions have been  
 13 very keen to explore whether there was any requirement  
 14 and so any restriction on the retailers. Now, what this  
 15 case is about, and this is why again it's very important  
 16 to come back to it, it's about whether or not there was  
 17 an agreement or concerted practice which prevented or  
 18 inhibited the retailer from favouring Gallaher, and  
 19 there are four senses in which it is said they were  
 20 restricted from favouring Gallaher.  
 21 Now, the four arise out of the debate about fixed.  
 22 If one actually wonders: why are we having this debate  
 23 about whether or not differentials which were expressed  
 24 to be maxima were fixed, or sometimes whether, in the  
 25 Sainsbury's case, they are expressed -- they are not

1 expressed in terms of being maxima, but where it is  
 2 said: why is the OFT so keen to say that Imperial would  
 3 not want its price to be anything other than on this  
 4 fixed basis, that's because -- that's what gives rise on  
 5 their case to four alleged restrictions.  
 6 Those are that if Gallaher puts its price down, and  
 7 the retailer alters the price of the Gallaher products,  
 8 it's also thereby obliged to put the price of the  
 9 Imperial product down.  
 10 The second is if Gallaher puts its price up and the  
 11 retailer puts up the price of Gallaher, it's obliged to  
 12 put up the Imperial price.  
 13 The third is -- really looking at it from the other  
 14 side -- if Imperial puts its price down and the retailer  
 15 alters the price of the Imperial product, it must put  
 16 Gallaher's price down, and if Imperial puts its price up  
 17 and the retailer puts up the price of the Imperial  
 18 product, the retailer must put up the price of the  
 19 Gallaher product.  
 20 So these are the respects in which it is being said  
 21 that the retailer cannot favour Gallaher and is  
 22 restricted.  
 23 Now, the purpose of the case on fixed is to say it  
 24 applies to all four. The fallback position is: even if  
 25 it's maxima, it's said, well, two of these

1 characteristics are present, but if the retail price of  
 2 Imperial increases, then the retail price of Gallaher  
 3 must increase, and if the retail price of Gallaher  
 4 decreases, the retail price of Imperial must decrease.  
 5 I apologise for saying this, but a lot of the time,  
 6 particularly in the cross-examination, we lose sight  
 7 that that is actually the case that's being run.  
 8 **THE CHAIRMAN:** I understand what you say, but in relation to  
 9 Shell, of course, there are other issues in relation to  
 10 the Shell case which need to be explored.  
 11 **MR HOWARD:** Don't get me wrong, I understand that in  
 12 relation to the Shell case, before they get to these  
 13 points they have other hurdles which they have to cross.  
 14 In the Shell case of course potentially they can fall at  
 15 anterior hurdles. So I am not criticising people for  
 16 going into that, but what one has to remember is that  
 17 even once you have crossed that, and what are we  
 18 actually supposed to be debating.  
 19 The reason it is important is that what this hearing  
 20 is not about, it is not, as it were, some general  
 21 inquiry into this market, as it were, where you have --  
 22 it's not actually a market with just two manufacturers,  
 23 it's with two dominant manufacturers, but there are at  
 24 least two others, we know, BAT and Philip Morris. But  
 25 it's not an issue, you are not here concerned with

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1 an inquiry as to whether or not this market operates in  
 2 the most efficient way or something of that sort.  
 3 That's a different type of inquiry. In other words,  
 4 what is the effect, saying, one could see, one could  
 5 have an interesting inquiry, what is the effect of  
 6 having RRP's, one could say is that a good idea to the  
 7 Government when it makes greater transparency than you  
 8 might get elsewhere? That's an interesting economic  
 9 debate of course, but that's not what of course -- and  
 10 you are aware -- this is about. We are looking at the  
 11 decision, which is by reference to an allegation that  
 12 these particular agreements or practices imposed  
 13 restrictions which, you have to decide whether there  
 14 were, and we say there weren't the restrictions of the  
 15 type that are being alleged, and then we get onto the  
 16 object analysis --  
 17 **THE CHAIRMAN:** There is a middle way between those two  
 18 extremes, of, on the one hand, looking at the way the  
 19 market works because of the market structure, and on the  
 20 other hand, looking at the infringement as expressly  
 21 found by the OFT as they described it in the decision,  
 22 and that other in between way is whether we consider  
 23 that the evidence that we have seen indicates that there  
 24 has been an infringement, albeit not the infringement  
 25 that the OFT has found.

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1 Now, we may not ever get into this debate, but that  
 2 is a debate that has arisen in some other tribunal  
 3 appeals, and it may be something on which we need to be  
 4 addressed at a later stage. But I certainly accept  
 5 that, as far as how this market works absent any  
 6 infringing conduct is not something for this Tribunal.  
 7 **MR HOWARD:** Obviously I am not going to address you now on  
 8 whether -- I mean, however you look at it, I think the  
 9 OFT has to establish an infringing agreement or  
 10 practice. I think your point raises a question as to  
 11 whether it is open to them to put forward a different  
 12 practice or agreement. I won't be giving anything away  
 13 by saying we say they are not entitled to do that, and  
 14 there are all sorts of reasons why they are not entitled  
 15 to do it. But we will address that if we have to. We  
 16 can only address the case that has been put, and that's  
 17 one of the reasons we are in week 3 or 4 and we are  
 18 approaching the case on the basis of -- and I am  
 19 preparing my questions on the basis the case that the  
 20 OFT has put forward, and obviously if they had  
 21 a different case, I might ask quite different questions.  
 22 But the important thing is -- I am sorry.  
 23 **THE CHAIRMAN:** No.  
 24 **MR HOWARD:** What is important, and this is why actually in  
 25 the course of Mr Lasok's opening -- perhaps rudely, but

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1 I hope not -- I sought identification of what was said  
 2 to be the requirement. You may remember, this was in  
 3 the course of, I think, towards the end of his  
 4 submissions where we had quite a long explanation of why  
 5 all of this was anticompetitive, and basically Mr Lasok  
 6 dismissed me by saying "It's all in the decision, it's  
 7 written in English, not in Arabic or Greek or Cyrillic  
 8 or whatever", something like that was his expression,  
 9 "Chinese", fine, he put me down, but what he is doing is  
 10 pinning his case and the OFT's case to what they have  
 11 said in that decision.  
 12 **THE CHAIRMAN:** Yes.  
 13 **MR HOWARD:** That was the first point I think I wanted to  
 14 just focus on, and of course when you come to consider  
 15 Co-op, and we will come and look at the specific  
 16 agreements in a moment, and also what was going on,  
 17 that's the question you have to consider: does it give  
 18 rise to this restriction?  
 19 The other point I wanted to make clear at this stage  
 20 is, when we are considering this question, namely: what  
 21 is the agreement?, one needs to be somewhat careful,  
 22 particularly in the light of the way the Office of Fair  
 23 Trading has approached this, in that the Office of Fair  
 24 Trading has said that Imperial has misunderstood the  
 25 decision when they focus on the terms of the trading

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1 agreements, ie the written documents. They say "No, no,  
 2 that's not the right way of looking at it because that's  
 3 not what we're talking about". They say the agreements  
 4 are to be found not simply in the written trading  
 5 agreements but in the conduct.  
 6 Now, a good reference to that is the defence,  
 7 paragraphs 18 to 20, where they specifically make that  
 8 point. The reason I draw attention to that is that  
 9 therefore when considering this question of what was  
 10 the -- was there an infringing agreement, it is  
 11 appropriate -- or a concerted practice, it's appropriate  
 12 for you, because that's what the OFT are asking you to  
 13 do, to look at both the agreements and the way in which  
 14 they were in fact operated to see what the agreement  
 15 was.  
 16 **THE CHAIRMAN:** Well, I wonder whether there is a jump there  
 17 which is not a jump that the OFT is making, that when  
 18 they are talking about conduct, they are not talking  
 19 about the extent of implementation, they are talking  
 20 about other contacts at the time the agreement was made  
 21 or subsequently, which may have given rise to  
 22 expectations, even though those expectations were not  
 23 ultimately fulfilled.  
 24 **MR HOWARD:** Don't get me wrong, I am not talking about  
 25 implementation, I fully understand the point that can be

1 made, if you enter into an infringing agreement, then you  
 2 have entered into the infringing agreements, and whether  
 3 you have implemented it may or may not matter. It could  
 4 go no doubt to fines and things like that. If what you  
 5 are then saying is: well, your agreement is evidenced by  
 6 your subsequent conduct, in other words I can derive the  
 7 agreement from not only the trading agreement but also  
 8 from your contacts, if that's the approach that has to  
 9 be taken, then you have to look at those subsequent  
 10 conducts to see overall what the agreement was.  
 11 All I am saying is what you can't do is blow hot and  
 12 cold. What you can't do, for instance, in one of the  
 13 trading agreements it says I think something like, it's  
 14 not this case in fact but in one of them is says the  
 15 differences must be maintained. So Mr Lasok focused  
 16 particularly on that in his opening. So if he wants to  
 17 say, "Well, look, this agreement says 'maintained', and  
 18 that must mean that the differentials apply even when  
 19 Imperial puts up its price", we say in answer to that  
 20 that is not actually by reference to the true factual  
 21 matrix what the agreement means. But we also say, in  
 22 understanding what the actual agreement is, you are  
 23 seeking for your fixed point to look at the subsequent  
 24 contacts. If you look at the subsequent contacts they  
 25 will also show you that neither party understood this

1 agreement to be one where it applied when Imperial or  
 2 Gallaher changed their prices. That's simply all I am  
 3 saying.  
 4 **DR SCOTT:** Just sticking with this maintained point, what we  
 5 have seen so far, and of course we have only seen some  
 6 of it so far, is a situation in which, as I think I've  
 7 characterised it, we have a period of calm, then we have  
 8 a period of turbulence, and then we have another period  
 9 of calm again. Those periods of calm may or may not  
 10 represent infringements, leave that on one side for  
 11 a moment, but we have in the last case, the Shell case,  
 12 had the words "maintained/restored" used.  
 13 **MR HOWARD:** Yes.  
 14 **DR SCOTT:** When we are looking at what is going on, we are  
 15 faced with the difficulty that economists looking at it  
 16 from a theoretical perspective envisage a situation in  
 17 which your four tests are applied by what we might  
 18 describe as automatons. What's been very clear from the  
 19 evidence so far is that they are not applied by ought  
 20 mat ons, there is not an automatic process that we have  
 21 heard about in which everything rushes through  
 22 a Microsoft Excel spreadsheet and produces instant  
 23 answers, we have human interventions which change  
 24 things, sometimes make errors, and then there is  
 25 a period quite often in which contacts take place in

1 various forms, and then we seem to reach another period  
 2 of peace again, or something like that.  
 3 **MR HOWARD:** I actually think the way you are putting it is  
 4 actually slightly misleading, if you don't mind my  
 5 saying, which is that what you actually have -- and  
 6 I suspect you would see this in practically every  
 7 market -- you have periods of price -- a price war,  
 8 actually, you may not get that in lots of markets, but  
 9 in this market for instance Richmond and Dorchester in  
 10 particular where I think we were looking on the  
 11 evidence, you get a price war, but obviously what  
 12 happens is that after a while people run out of money.  
 13 Because if you just carry on, all that happens is you  
 14 are going to go bust. So it stops. And then you  
 15 basically get back to a situation which is similar or  
 16 the same as the RRP's, until one of them decides to have  
 17 a go again afterwards.  
 18 I am not really sure that one can -- well, the  
 19 question is: ultimately you are going to have to decide  
 20 whether, how this fits in with the OFT's case. Of  
 21 course we say, well, when there is a price war and then  
 22 Imperial, for instance let's say they have thrown money  
 23 at Richmond, so they reduce the price by 5 or 10p, and  
 24 then they say the promotion is ending so the price goes  
 25 back up, they are not imposing any restriction of the

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1 type that's being alleged on the retailer, in that  
 2 situation.  
 3 I think the point I was making, I think you are  
 4 correct to say it's clear on the evidence so far that  
 5 the idea there was some, anything automatic going on  
 6 simply is illusory. There is a danger in saying "Ah,  
 7 well, it's because people are not automatons". Actually  
 8 the point is: was there any expectation or requirement  
 9 in the first place, and that is actually what you have  
 10 to come back to, and that's where we say the evidence  
 11 also shows that there wasn't.  
 12 Obviously we will focus on the Co-op case, but  
 13 I think another point that's come out of that exchange  
 14 is this question about: were Imperial -- it's a point  
 15 I think that, Dr Scott, you have asked a few times --  
 16 interested in absolute prices as opposed to  
 17 differentials?  
 18 I think again one needs to be slightly careful as to  
 19 at what stage that enquiry is being asked, and Co-op is  
 20 a good example, and actually in the case of all the  
 21 other major supermarkets. The first stage is the  
 22 manufacturers set their RRP. In setting the RRP, of  
 23 course they are concerned with absolute prices of their  
 24 products, in the sense that they are recommending what  
 25 they across the market think is a suitable price. In

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1 doing that, of course, they have in mind, one,  
 2 obviously, the competition, but secondly, as with any  
 3 product, you can't price it at any level you like  
 4 because all you do is destroy the market. Although we  
 5 are dealing with a product where, as it were, you have  
 6 to some extent a captive market, if you like, because  
 7 smoking is an unusual product, they are interested, and  
 8 that's what you will see in the Co-op, in the absolute  
 9 price. Then of course the price promotions are very  
 10 much about absolute price. But of course the point that  
 11 they are making, and I would suggest that's what one  
 12 needs to bear in mind, is that the setting of the  
 13 absolute price is something -- as one saw in Shell and  
 14 you will see in Co-op -- which is at the discretion of  
 15 the retailer. So what they were trying to do is to set  
 16 differentials to get a competitive advantage.  
 17 Now, those are points which apply to Co-op but also  
 18 across the board. Turning to Co-op in particular,  
 19 obviously you have seen the evidence about what Co-op  
 20 is, and I won't go into that, and I think we are  
 21 probably all familiar anyway with the Co-op's structure  
 22 and also that there are three different types of  
 23 Co-operative store, and you will hear about that. Could  
 24 I ask you to take the Co-op bundle, which is bundle 15.  
 25 **THE CHAIRMAN:** You mean the three tiers of Co-op?

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1 **MR HOWARD:** The three tiers, that's right. You have the  
 2 first tier is [REDACTED] and [REDACTED].  
 3 **THE CHAIRMAN:** I understand that, I was just checking.  
 4 **MR HOWARD:** That's right. It's bundle 15.  
 5 ITL's strategy in respect of Imperial(sic) was to  
 6 try to increase its market share of products being sold  
 7 through Co-op, and to ensure that et cetera products  
 8 were priced competitively. Indeed, if you go to tab 8,  
 9 {D15/8/103} what comes very clearly out of this  
 10 document, which is a document in 2001 which relates to  
 11 an Imperial Tobacco and Co-op meeting and it's one of  
 12 these slides. If I can show you a few pages which show  
 13 you what the strategy was.  
 14 If you go to page 103, you see that -- I'm not going  
 15 to read it all out -- the second bullet point is  
 16 "Strengthening the UK share position", and at least  
 17 I think what that means, it's not the share price of  
 18 Imperial but it's their market share, and again what you  
 19 have to ask yourself when you look at this: well, how  
 20 are you trying to increase market share? And it's by  
 21 price. By getting your prices below your competitor's.  
 22 At page 104, {D15/8/103}, the same point at the  
 23 second bullet point there, "Maximise ITL's share of each  
 24 category segment".  
 25 105, the second bullet point, "Pragmatic approach to

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1 pricing to achieve RRP differentials that exist between  
 2 competitor brands".  
 3 Now, we are looking in a moment at the trading  
 4 agreements with Co-op. They refer to -- I can't  
 5 remember the exact words -- some sort of differential  
 6 schedule. The agreements that we have do not have  
 7 a differential schedule, and I think all the witnesses  
 8 say they don't believe there was a differential  
 9 schedule, at least certainly on Imperial's side, we  
 10 recognise that they were seeking to incentivise Co-op to  
 11 achieve the RRP differentials.  
 12 I think that's all I wanted out of that document for  
 13 the moment.  
 14 Now, the trading agreements, there are four of them.  
 15 The first one is at tab 4. Just for your note, the  
 16 others are at tabs 7, 14 and 24. What you can see from  
 17 the first agreement, and I think you looked at it the  
 18 other day, there are a number of things going on, but  
 19 one of the objectives of the plan was that the products  
 20 are priced at all times in line with the agreed  
 21 strategic price differentials. That's in the first  
 22 bullet point.  
 23 I think this one refers to, it's on the first page,  
 24 under "Pricing Strategy":  
 25 "Pricing at all times in line with the agreed

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1 strategic pricing differentials. A copy of the agreed  
 2 differentials is attached. The payment is agreed to  
 3 reward the consistent price control within the four  
 4 bands that are currently operated."  
 5 Now, in the first three trading agreements, you have  
 6 something similar. As I say, it seems reasonably clear  
 7 that the differential strategy was an RRP one, but that  
 8 although that's what is said in the letter, that a copy  
 9 is attached, it doesn't appear that it was. I mean, we  
 10 will obviously have to hear from the evidence, there are  
 11 two possibilities: either it wasn't or there was  
 12 something that basically just reflected, as I think  
 13 really was the case in Shell, whatever was the current  
 14 differentials.  
 15 Now --  
 16 **THE CHAIRMAN:** Can I just be clear, over the page where it  
 17 says, "All Imperial brands must achieve this strategy  
 18 across the complete CRTG group for the payment to be  
 19 made", that goes back I think to a question we asked  
 20 Mr Thomas to the scope of the decision, and as  
 21 I recalled, his answer was that actually the decision  
 22 and the fine were based only on CGL, not on the whole of  
 23 the CRTG group. Is that your recollection as well?  
 24 **MR HOWARD:** I think that's right, but he is in a better  
 25 position than I am to answer that.

1 Now, there are certain familiar issues about these  
 2 arrangements. One is whether this gave rise to any  
 3 obligation, or was it just an incentive. Obviously at  
 4 the end of the day you will have to decide what the  
 5 impact of that point is. In fact, it's perfectly clear  
 6 on the first agreement that these are incentive  
 7 payments, because that's what it says.  
 8 In relation to this case, and indeed all the other  
 9 cases, a point that you will need to consider is, when  
 10 you come to construe what the agreement is (a) was it  
 11 actually intended, did the parties understand that it  
 12 was imposing any obligation at all, but that also then  
 13 leads into the point, insofar as it's imposing either  
 14 a legal or an economic obligation, and most of these  
 15 cases you will see the argument that it's an economic  
 16 obligation is a very difficult one bearing in mind the  
 17 sums involved, but once you come to the question: was  
 18 there an obligation?, you come to the next question  
 19 which is: is it an obligation that applies even when  
 20 there are changes in the wholesale prices by the  
 21 manufacturers? That I've already alluded to this  
 22 morning.  
 23 Now, you will hear evidence, and there is no point  
 24 my rehearsing it now, that in this case both the  
 25 Imperial witness and the witnesses from the Co-op say

1 that basically they were free and did price as they saw  
 2 fit. Basically Co-op's position was particularly that  
 3 what took precedence was their desired pricing position,  
 4 particularly vis-a-vis the people with whom they were  
 5 competing, ie it depends on which store you are in but  
 6 whether it was a rival supermarket or whatever.  
 7 The next familiar point is the size of the RMS  
 8 payments. Although the overall investment during this  
 9 period by ITL in the Co-op group, I think for instance  
 10 in 2002, was £[REDACTED], but the share that was  
 11 attributable to RMS payments was relatively small.  
 12 **DR SCOTT:** Sorry, can you show me where it says relative  
 13 maximum schedule of payments? Because in my copy it  
 14 refers to strategic price differentials.  
 15 **MR HOWARD:** Let me knock this point on the head  
 16 straightaway. That is a term that has been used in the  
 17 case. The OFT talks about P&Ds, and Imperial have been  
 18 talking about RMSs, but you have different terms being  
 19 used in the different agreements, so to some extent  
 20 these are expressions, whether they were expressions --  
 21 I'll check -- that were in common currency during these  
 22 agreements I am not either, I don't think that they  
 23 were, I think that it's more -- I mean, the strategy was  
 24 to achieve differentials in pricing, but Imperial's  
 25 strategy was always, we say, to increase, to achieve at

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1 least the RRP differentials, there would never be any  
 2 objection to the differentials being greater, that's  
 3 part of the debate.  
 4 **DR SCOTT:** Oh, no, I think we understand that that's ITL's  
 5 case. The difficulty that we are in is that the term  
 6 "relative price maxima" and "relative price schedule"  
 7 has not so far been shown to us in a contemporary  
 8 document, and our concern is that we shouldn't prejudge  
 9 the issue that Mr Lasok is concerned with about whether  
 10 it was fixed or relative, it's not that we have taken  
 11 any view on it, it's just that you are using a phrase  
 12 which isn't being used --  
 13 **MR HOWARD:** No, no, and I was hoping to make that clear to  
 14 you just now. If you are saying, well, is that the term  
 15 that's used in the document, one can see that's not the  
 16 term. Here they talk about strategic pricing  
 17 differentials. So you will see slightly different  
 18 expressions might be being used in different cases. The  
 19 expression RMS is, I think, something which is as  
 20 a result of the discussions in this case. Whether it  
 21 was -- that's what I need to check -- term used by  
 22 Imperial contemporaneously, I am for the moment not  
 23 sure.  
 24 So you will see the different expressions used in  
 25 the document. Ultimately you have to decide what it was

1 that was agreed or the practice was.  
 2 **DR SCOTT:** Absolutely, which is why the term is a dangerous  
 3 one to use, particularly in examining witnesses.  
 4 **MR HOWARD:** Yes, although I think the witness --  
 5 **DR SCOTT:** If it occurs in the witness's statement -- well,  
 6 I think we have made the point.  
 7 **MR HOWARD:** Yes. I think we need to all be clear as to what  
 8 it is we are asking, and if one is using that term one  
 9 needs to define it.  
 10 Anyway, the point I was making is: in relation to  
 11 the size of these payments, what is important is, in our  
 12 submission, that the payments were part of what are  
 13 called trade development payments, and that is important  
 14 in that it was all about ITL seeking to develop its  
 15 business. This is one of the things that again one  
 16 mustn't lose sight of things, if we take things like  
 17 payments being made for -- whether this is part of the  
 18 planogram or part of the gantries, obviously part of  
 19 what you are trying to do to get the competitive  
 20 position is to get your products in the gantry at a more  
 21 favourable position, no doubt. If the consumer who  
 22 walks up to the cashier, if your brands are at his or  
 23 her eye level, then more likely to get a purchase;  
 24 whereas if they are down below, where you can hardly see  
 25 them, you lose out.

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1 Of course that's where the battle is taking place,  
 2 and large sums of money are being paid to try and get  
 3 your brands in the favourable position. Of course if  
 4 you get your brands in the favourable position, you have  
 5 paid more than your competitor, then your competitor's  
 6 brands will be in the less favourable position. Again,  
 7 this is all just how the market operates.  
 8 Again you probably don't need to turn it up because  
 9 you will hear from Mr Goodall but he sets out at  
 10 paragraph 73 of his witness statement what the payments  
 11 between 1999 and 2004 related to, and what percentage  
 12 related to RMSs.  
 13 A point again which is important in relation to the  
 14 case that the OFT has run on the restrictions is, if one  
 15 is considering: did the parties enter into an agreement  
 16 of the type alleged by the OFT, does it make any  
 17 economic sense for the Co-op to have tied its hands in  
 18 this way?, and that's where the analysis of the value of  
 19 the payments fits in, and that is set out in table 2 in  
 20 Mr Ridyard's second report, which is core 3, tab 26. It  
 21 shows that the payments are --  
 22 **THE CHAIRMAN:** Is that based on an assumption that in order  
 23 for something to be a restriction in a context of  
 24 an infringement, the person has to be agreeing to do  
 25 something that would otherwise be against their

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1 interests?  
 2 **MR HOWARD:** No, no. It's not based upon any legal analysis.  
 3 The question is: what is being said is that there was  
 4 a requirement, for instance, particularly if we take  
 5 a price increase, where if you put up the price of  
 6 Imperial, there is then a requirement, whether you say  
 7 it's a legal requirement or just an expectation, but  
 8 that the price of Gallaher's product will go up.  
 9 **THE CHAIRMAN:** I see.  
 10 **MR HOWARD:** In that event, if you take Co-op, if they do  
 11 that, then the price in their stores of the Gallaher  
 12 product will be out of line, with, say, Tesco or whoever  
 13 it is they happen to be benchmarking. You then have to  
 14 consider: does it make sense to think that Co-op was  
 15 prepared to put itself in that position for this sum of  
 16 money? Both Co-op and ITL say no, no, that wasn't what  
 17 was happening. That's why we say this is relevant, to  
 18 think were they -- to take an extreme, is it really  
 19 plausible to think that Co-op was accepting tuppence  
 20 ha'penny, to put itself in a position where if the  
 21 agreement were to operate, lose potentially a fortune.  
 22 That's where that part of the economic analysis has  
 23 come in in response to Professor Shaffer and the OFT's  
 24 about prices marching up and down, simply because one  
 25 manufacturer has put up its price or put down its price

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1 and the other hasn't done anything at all.  
 2 **DR SCOTT:** Am I right in thinking that from my reading of  
 3 the evidence only Cynthia Williams did any modelling of  
 4 what was actually going on, and that none of them were  
 5 actually advised by expert economists before they  
 6 entered into a trading agreement, so that the niceties  
 7 of the economics were being dealt with at an intuitive  
 8 level rather than --  
 9 **MR HOWARD:** None of them are saying "We did this analysis",  
 10 but actually they are looking at it, you don't need to  
 11 do the analysis, in fact. A lot of -- I am not  
 12 an economist, as probably is evident, but a lot of what  
 13 is being said actually about these sort of points is  
 14 pretty much common sense. If I am benchmarking myself  
 15 against Tesco, if Imperial put up the price, then it's  
 16 okay, I am okay because I can put up -- I expect they  
 17 are putting up prices across the board. But if I tie  
 18 myself to put up the price of Gallaher in my stores and  
 19 Gallaher aren't putting up their prices, then I can see  
 20 I'll be out of line, or that's the likelihood, with my  
 21 rivals, and you have to then think about: is the sum of  
 22 money just on its face, I mean, Shell is obviously a --  
 23 but they are not quite in the same market, but if you  
 24 look at these sums of money, are they likely to be  
 25 enough to compensate? That's one issue.

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1 The other is, bearing in mind where we talk about  
 2 the supermarkets, you will hear from all of the  
 3 supermarkets which we are now going into that they had  
 4 their own strategy, and look at what we have just read  
 5 over this weekend about Tesco and Sainsbury's, you know,  
 6 we are about to have some sort of, as far as I can  
 7 follow it, price war, and everybody trying to say "No,  
 8 no, my prices are the lowest". But it's not just as  
 9 a result of the current economic climate, this has been  
 10 going on for a long time. So you have to ask yourself:  
 11 were people prepared to put themselves in a position  
 12 where they might no longer be able to claim Every Day  
 13 Low Prices or whatever it is, because they are required  
 14 independently to put up the prices of a product. We say  
 15 that just doesn't make any economic sense.

16 It's part of the argument, and we say it's part of  
 17 the factual matrix, if you like, as to what it was that  
 18 was being agreed.

19 The next point, which arises in a slightly odd way  
 20 in the case of Co-op, which is that were the  
 21 differentials maxima or fixed. The reason it arises in  
 22 a slightly bizarre way in the case of Co-op, of course  
 23 we don't have a schedule, so we were looking this  
 24 morning at Shell, we can see the schedule, the schedule  
 25 is perfectly clear, but the OFT's case is it was

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1 operated in some different way. So what do we have  
 2 here? Well, you have the differential strategy which is  
 3 by reference to RRP's, so then we will have to see with  
 4 the witnesses and you will have to consider, was that  
 5 fixed so that it has to be precisely what the difference  
 6 in the RRP's were, or is it meant to be at least that.  
 7 Again we say common sense tells you that from Imperial's  
 8 point of view it's at least.

9 One of the things is you also have to come back to:  
 10 what was Imperial's strategy, and that strategy document  
 11 is very helpful, and other strategy documents, because  
 12 what they want is the maximum competitive advantage they  
 13 can get, not a minimum or fixed one. The OFT's, if you  
 14 like, fixed theory, one has to ask: why on earth would  
 15 Imperial want this absolutely fixed relationship?

16 I think what was suggested the other day,  
 17 interestingly, I think, of one witness -- I can't  
 18 remember which one it was -- no, it was of Mr Culham,  
 19 and he was cross-examined, and it was suggested to him,  
 20 "The reason you were concerned about this is because you  
 21 would not want, if, for instance, you had a luxury  
 22 brand, to get that moved down to become a cheap brand".  
 23 Now, he actually was quite unequivocal that, "No, we  
 24 didn't have any concern about that at all".

25 Of course one of the reasons I suspect there is not

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1 any concern about that is that the likelihood that  
 2 a retailer is going to be taking your luxury brand,  
 3 Embassy No 1, and pricing that at the level that he's  
 4 going to price Dorchester, is pretty unlikely because it  
 5 will be squeezing his margin so much so you don't need  
 6 to say "Don't do it", and if he chooses to do it and you  
 7 get some enormous competitive advantage where more  
 8 people start buying Embassy No 1, well, then, you don't  
 9 really care.

10 **THE CHAIRMAN:** Well, in the Competition sphere there is  
 11 a big debate about luxury brands and the extent to which  
 12 they want to retain the luxury image, and for that  
 13 reason they don't supply or they try to avoid supplying  
 14 price cutters. You may say, well, that's against their  
 15 interests, because they would sell much more if the  
 16 price of Chanel No 5 was the same as something --

17 **MR HOWARD:** I understand that.

18 **THE CHAIRMAN:** But you are not saying we are not really in  
 19 that situation with these --

20 **MR HOWARD:** One of the reasons we are not really in that  
 21 situation is that the cachet about the Hermes handbag or  
 22 whatever it is, that people choose to pay however much  
 23 -- I shouldn't say Hermes, but, you know, the expensive  
 24 branded handbag or watch that people pay a lot of money  
 25 for because they want to be seen that they have that

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1 handbag and that watch, you obviously don't want to lose  
 2 that by having people discounting and it being sold,  
 3 instead of for £2,000, for £100, because then everybody  
 4 would buy it and it won't be ...

5 But applying that to cigarettes is quite different.  
 6 I don't say there isn't a luxury end, and we heard that,  
 7 I think, from one of the witnesses who said that  
 8 essentially one has the same product being wrapped up in  
 9 slightly better packaging, I suppose, and also you have  
 10 products which one can see where there is a residual  
 11 awareness of advertising, so, you know, particularly  
 12 I suppose, you know, most people here remember, as  
 13 I think I said the other day, Benson & Hedges'  
 14 advertising and there will be a residual drag-on effect  
 15 of that for no doubt a time. But that's not what these  
 16 differential strategies were about. But particularly,  
 17 and this is the important thing, from Imperial's point  
 18 of view, because from Imperial's point of view, they  
 19 were actually in essentially the lower end, and that's  
 20 what they were always trying to do, to increase their  
 21 market share, and the only way of doing it was by price  
 22 cutting.

23 But where we got onto this is: were they maxima or  
 24 fixed? The case that they were fixed is actually rather  
 25 an odd one bearing in mind that you have not got at the

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1 agreements, and the evidence is that Imperial -- you  
 2 will hear from Mr Goodall how it was to operate. But  
 3 both he and Mr Messom, for instance, said that --  
 4 Mr Messom says that Imperial wouldn't complain if their  
 5 brand was being priced lower.

6 As well as the RMSs, a very important feature of the  
 7 Co-op case -- it is not only the Co-op but particularly  
 8 in Co-op -- is there were other bonuses, particularly  
 9 for being below RRP. Then there were the tactical or  
 10 promotional bonuses with which we are familiar.

11 The reason that is important is that we then -- and  
 12 I imagine you have had a chance to look through the  
 13 file, and what you will have seen is that what we have  
 14 in a number of places in the file are the Co-op matrix,  
 15 which -- and examples of that are at tab 1 and tab 2.

16 These matrices were -- one can see the one at  
 17 tab 2 -- an important part of the trading relationship,  
 18 in that they were sent every month. But they are not  
 19 doing what the OFT is suggesting. Of course, these  
 20 price matrices are limited to the prices of Imperial's  
 21 products. This isn't a situation where Imperial is  
 22 commenting on something by reference to the proposed  
 23 pricing of the Gallaher brand.

24 What basically -- if you turn to tab 2, which is --  
 25 the only reason I take that one is because on the first

1 page you can see there are, if you take -- if you look  
 2 at the columns of "Cost structure", you have the list  
 3 price, then you have an off-invoice, then you have  
 4 a bulk discount, then a retro, which is the  
 5 retrospective bonus, and then you have the different  
 6 tiers that Co-op's operating, and that's why you get  
 7 a different RSP in those tiers. That's, I think, the  
 8 Co-op's RSP there.

9 What is happening here is the off-invoice sum is the  
 10 bonuses for being below RRP, the bulk discount, its name  
 11 speaks for itself, and the retros are the promotion  
 12 bonuses, so what they are around that's where they  
 13 feature.

14 So the reason this is all being sent through is in  
 15 order for Co-op having done its calculations of what it  
 16 thinks it's due and then calculated the RSPs, it's  
 17 asking Imperial to check that its calculations are  
 18 correct.

19 **DR SCOTT:** Hold on, is that right? Because the promotional  
 20 pricing is in the next block, and it has the retro  
 21 bonuses. So if we look down to Drum, without going into  
 22 the actual numbers, there is no bonuses in the retro  
 23 column under "Cost structure", there is only a retro  
 24 bonuses in the additional retro, and promotional  
 25 pricing. So it looks as though the promotional retros

1 are in the promotional pricing bit rather than in the  
 2 first part.

3 **THE CHAIRMAN:** We may need to ask the witness.

4 **MR HOWARD:** I think the retro is in fact always  
 5 a promotional bonus, but this will no doubt be gone into  
 6 with the witnesses.

7 What this is not about is perhaps more importantly,  
 8 obviously you will need to understand exactly what is  
 9 going on, but what I would suggest is clearly not going  
 10 on is actually -- firstly what it's not is Imperial  
 11 micromanaging insofar as that allegation goes anywhere,  
 12 but it's not about Imperial saying, "This price must be  
 13 at this level in order to accord with our  
 14 differentials". It's actually achieving -- not least  
 15 because you can't look at this document and see whether  
 16 or not they are at the differentials or not, because  
 17 unless you have the schedule that was being prepared for  
 18 Gallaher products, you are neither here nor there. You  
 19 don't know. It's not telling you that.

20 Mr Messom says, at paragraph 5.5, that the schedules  
 21 only referred to each manufacturer's product, and so you  
 22 couldn't see from this whether Co-op was intending to  
 23 price in accordance with the parity/differentials.

24 In fact, and I won't go into it now, there is a lot  
 25 of evidence about the fact that suggestions come in from

1 Imperial on this and actually they are ignored anyway.  
 2 But one of the things is, we say, and I think CGL say,  
 3 that there is just a complete misunderstanding of what  
 4 these documents say.

5 The other aspect of the case we are highlighting for  
 6 a moment is -- for this purpose you will need to take  
 7 the decision and to turn to the section on Co-op.  
 8 I just want to draw attention to the way this works. At  
 9 page 212 is where they start with Co-op. At page 214  
 10 you have a section which is on Imperial's strategy, and  
 11 you can see they refer at paragraph 6.516 to the  
 12 presentation document that I was just referring you to.  
 13 They then refer -- and I'll come back to this -- to  
 14 another document from later. The next section is  
 15 dealing with the trading agreements, and we have seen  
 16 those.

17 Then section 3 on page 220 deals with the contacts,  
 18 and what you will see is the contacts that they refer to  
 19 in this section are either contacts which refer to the  
 20 matrices, in other words, so what? Got nothing to do  
 21 with their case, or to situations which are promotional.  
 22 In fact, in the body of this, there are just four  
 23 communications that they refer to as the contacts, and  
 24 you can see -- it might be just worth turning them up --  
 25 the one at 6.543 is an email of 2 March 2000, which is

1 document number 1 in our bundle. Sorry, it's document  
 2 number 2. Sorry, it is document number 1.  
 3 So this is a feature, I know you have been told this  
 4 before, but this is looking at the Co-op, it's a very  
 5 graphic example of something where again I would  
 6 respectfully say the Tribunal needs to be very, very  
 7 careful of really analysing: what am I actually looking  
 8 at this correspondence for? What's the point that's  
 9 sought to be made? Because on its face, you can see  
 10 what it is, it's the period 3 matrix and asking for  
 11 confirmation that all is okay.  
 12 One has to ask: what's that got to do with the  
 13 allegation that the OFT is making relating to  
 14 an agreement, an infringing agreement or practice? That  
 15 is a point that does apply across the board, with all  
 16 the retailers, that one sort of gets the kitchen sink  
 17 thrown in. Very often, one asks: well, what's the point  
 18 on this letter?  
 19 That's one that is referred to at 6.543. Then at  
 20 the next paragraph, 6.544, they refer to document number  
 21 5. Again, that's another matrix.  
 22 **THE CHAIRMAN:** I suppose that why this is being drawn to our  
 23 attention is the underlying assumption that there is  
 24 something which is okay or correct as between ITL and  
 25 the Co-op in relation to these prices, and when would

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1 the prices be okay or correct in their collective  
 2 respective views, and when would they be not okay or  
 3 incorrect?  
 4 **MR HOWARD:** Yes. The answer to that here is -- it's the  
 5 point I've already made, it has nothing to do with what  
 6 the price is by reference to Gallaher, it has to do with  
 7 what is the bonus that we are entitled to on these  
 8 products. Based upon that, are we correctly calculating  
 9 things? Are these the bonuses, and have we correctly  
 10 calculated tax and so on where there have been tax  
 11 changes? Are we correctly recording your selling price  
 12 to us? Are we correctly recording your bonuses? Are we  
 13 correctly recording the tax? You will see in the Co-op  
 14 evidence they have explained -- and it's actually again  
 15 common sense -- that small mistakes here cost a lot of  
 16 money because the margins are very small but because of  
 17 the tax and so on, you sell in overall financial terms  
 18 the value of your sales is high, but of course an awful  
 19 lot of that is going to the Treasury, and if you get  
 20 these things wrong, then because your margins are slim,  
 21 for instance if you think you are entitled to a bonus  
 22 when you are not, and you priced on that basis, then you  
 23 catch a cold.  
 24 That's also why, in all these cases, very often you  
 25 get Imperial making it clear that you should be moving

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1 your price back. The reason for that is yes they could  
 2 simply say "Mr Retailer, the bonus has come to an end",  
 3 but the reason we say that it makes sense for them to  
 4 say "You need to put the price now back to 3.66" or  
 5 whatever it was, is to make it clear that if you want to  
 6 keep your margin, that's where you need to get to.  
 7 One of the reasons for all this again, it's part of  
 8 the context which is quite important, they are sending  
 9 these through because here these RRP bonuses and so on  
 10 play a very important part in their pricing. There is  
 11 nothing, the thing is, the reason it's being referred to  
 12 is supposedly to support the case that there was  
 13 an agreement or practice which gave rise to  
 14 a restriction, and that's what we say. It simply  
 15 doesn't do anything of the sort.  
 16 The next one is tab 5, which is again just a price  
 17 matrix. I think the other two that are exclusively  
 18 referred to are 6 and 12. What actually is happening,  
 19 if you look at 6, on the face of the email in 2001, he  
 20 says:  
 21 "I notice you have increased the Richmond family  
 22 prices for this period. I am concerned you will move  
 23 a long way from the market price which will remain at  
 24 3.44 for Kingsize, 3.45 for Superkings. With a large  
 25 amount of price marked packs in the independent trade at

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1 3.44/3.45, I suggest you remain at your current prices."  
 2 So he is saying you, Co-op, appear to be putting up  
 3 your prices for the Richmond family, you will be more  
 4 expensive than other people in the market, he is  
 5 basically giving them a bit of advice to say that  
 6 doesn't seem very sensible because you are going to  
 7 price yourself at an unattractive level.  
 8 One has to ask: why is that anticompetitive, for  
 9 a manufacturer to be saying to a retailer in relation to  
 10 his products "I think you look like you are pricing my  
 11 products too high, which will damage you", and  
 12 ultimately it may or may not damage Imperial, but  
 13 difficult to see what's wrong with that.  
 14 Tab 12 is -- again you will hear from Mr Goodall --  
 15 but the part that's referred to is where he says, having  
 16 looked at the price matrix or file he notes that:  
 17 "Regal Filter has returned to the same price as  
 18 Regal Kingsize, not 2p below as we agreed. Raffles 10p  
 19 cost is 6p out as BDD has not been added to your  
 20 matrix."  
 21 I think it's the first point they are adding, but  
 22 note this is about two brands of Imperial, regal Filter  
 23 and Regal Kingsize. This has nothing to do with  
 24 differentials with Gallaher, it's that Imperial believes  
 25 that Regal Filter should be cheaper than Regal Kingsize.

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1 I assume that Regal Filter, by the name, is a shorter  
 2 cigarette than the Kingsize. I assume; I am only  
 3 guessing. But that's all that that's about.  
 4 Those are the four, what I've shown you, explicit  
 5 examples of contacts which are referred to in this  
 6 section. There are others footnoted, but those are the  
 7 ones that the OFT actually draws attention to. So one  
 8 is entitled to look at that and shrug one's shoulders  
 9 and say "And? What am I supposed to draw from this when  
 10 you properly read them?" We say they certainly don't  
 11 support the case on some sort of anticompetitive  
 12 agreement.

13 A fair amount of time actually is spent, and no  
 14 doubt we will hear about it so I will not make  
 15 submissions on it now, but there is a particular letter  
 16 at tab 17, of 9 July 2002, which the OFT relies on. You  
 17 see it's from Mr Goulthorp to Mr Batty, where he says he  
 18 confirms that:

19 "... with regard to price positioning the following  
 20 general guidelines will be adopted in establishing  
 21 retail prices across the various store brands.

22 "In terms of the price differentials we are  
 23 currently putting together a price matrix for [Co-op]  
 24 which defines our strategic pricing position. This  
 25 document will recognise the need to maintain price

1 differentials across the competing segments of the  
 2 tobacco industry.  
 3 "In addition the price guidelines will ensure  
 4 consistent price disciplines are applied ... across the  
 5 price bands currently operated.  
 6 "The price matrix will recognise pricing  
 7 opportunities, in particular within the convenience  
 8 sector, and may result in certain retail prices moving  
 9 closer or equal to the current manufacturer's retail  
 10 price. However, within our superstore and market town  
 11 trading outlets our pricing policy will ensure that we  
 12 remain competitively positioned against our competitive  
 13 set, which means that in both these sectors of our  
 14 business we will be discounting against the MRP."

15 Now, there is a debate which you will have seen as  
 16 to what this is referring to. What one can see  
 17 perfectly clearly, we would suggest, is it's referring  
 18 to Co-op actually saying that they will have their own  
 19 strategy, but in particular there is a debate about the  
 20 second paragraph, last sentence, as to what is meant by  
 21 recognising the need to maintain price differentials  
 22 across the competing segments of the tobacco industry.

23 The evidence will be that that is actually not  
 24 talking about the parity/differentials between Imperial  
 25 and Gallaher brands, it's dealing with the segments,

1 which as I think the Chairman said to me earlier, that's  
 2 the premium, mid, low and own brand segments and that's  
 3 what was being spoken about. That's an area where you  
 4 will have to consider the evidence of the various,  
 5 particularly the Co-op witnesses, Mr Goulthorp in  
 6 particular.

7 Mr Goulthorp, if you see in his statement, is  
 8 absolutely indignant that his veracity on this is being  
 9 challenged, but we will have to see where we get to when  
 10 he gives evidence.

11 Variability data, again this is a theme that runs  
 12 through the case, the differentials in prices for the  
 13 ITL and Gallaher brands were more volatile during the  
 14 alleged infringement period than they have been since.  
 15 Again, that's set out, it's not controversial, in  
 16 table 8 of Mr Ridyard's second report.

17 Again, variability, the thing about this case, we  
 18 will be talking about a lot of things, but we must not  
 19 lose sight, as it were, of hard data that we have and  
 20 that is hard data as to what actually has happened in  
 21 this market subsequently, and subsequently the prices  
 22 actually goes back I think to a point that Dr Scott has  
 23 raised a number of times. The prices since this ended  
 24 have been more stable, not less. That's again a very  
 25 important point.

1 Now, finally, parallel and symmetrical. I won't  
 2 rehearse a number of the points that we have seen. What  
 3 you should know is that in the decision, it is probably  
 4 just worth looking at that. Slightly bizarrely, the  
 5 decision at paragraphs 6.154 dealt with the parallel and  
 6 symmetrical point, and although -- this is why it's  
 7 slightly odd -- they didn't have a schedule for Co-op,  
 8 but they said, "Well, there must be parallel and  
 9 symmetrical requirements because", you see if you go to  
 10 paragraph 6.163, they refer to a national accounts  
 11 business development plan prepared by Mr Goodall, which  
 12 is at document 11 where he says:

13 "I expect CWS Retail to challenge the strategy  
 14 pricing differentials this year. They believe that the  
 15 manufacturers are restricting promotional activity by  
 16 demanding strategic differentials. This will affect all  
 17 manufacturers over the coming year."

18 Now, obviously you will hear from Mr Goodall, but  
 19 all that quote shows and that document shows is that,  
 20 I mean, at the highest, Mr Goodall may have recognised  
 21 that the other manufacturers also may have had sought to  
 22 have their differentials embodied in the selling prices.  
 23 You know about the differentials. You don't know what  
 24 people's strategy is, but you know from the RRP's what --  
 25 for instance, you can see what the differential is. You

1 don't know whether somebody has a strategy to try and  
2 get that into the -- whether there is a strategy to have  
3 an agreement with the retailer in some particular way or  
4 anything of that sort. But you know, in the same way  
5 you do today, you know what people have priced at on  
6 an RRP basis and what differential they are hoping for.

7 Other than that evidence, the OFT, in its defence at  
8 paragraphs 90 to 91, accepts that it doesn't have, in  
9 its possession, any direct evidence of parity and  
10 differential requirements for CGL, but basically it says  
11 it infers that there were requirements which did create  
12 significant symmetry between ITL's and Gallaher's parity  
13 requirements. You might think this is building one  
14 inference on another.

15 For present purposes, one of the things that we say  
16 is that we say Imperial did not know what Gallaher's  
17 strategy was in relation to the Co-op or elsewhere, and  
18 what's more, the Tribunal does not know -- this is  
19 a very important point in relation to a lot of argument  
20 that may be made about Gallaher's position -- what  
21 Gallaher's understanding was of Imperial's position, nor  
22 in fact are we going to have any evidence as to what  
23 Gallaher's strategy was at all.

24 It's a very odd position, bearing in mind the OFT is  
25 in a position, as a result of its early resolution

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1 agreement with Gallaher, to call witnesses to explain  
2 both its internal strategy and what it understood was  
3 Imperial's strategy. We suggest it is entirely wrong  
4 for the OFT to be seeking to make allegations as to what  
5 Gallaher's thinking was about anything without calling  
6 the witnesses. It's one thing to say, "Well, there it  
7 is, there is an agreement they actually had, and that  
8 may be in black and white and that may speak for  
9 itself". But beyond that, insofar as one needs actually  
10 any point where one needs to understand what Gallaher's  
11 perspective was, we should have had an opportunity and  
12 the Tribunal more importantly should have an opportunity  
13 to hear the Gallaher witnesses, and you are not.

14 So I hope that's helpful, that's what I wanted to  
15 say at this stage.

16 Mr Goodall, you will see he has two witness  
17 statements, he has one witness statement which  
18 particularly relates to the Co-op. He has a second  
19 witness statement which actually relates to what the  
20 position has been since the investigation by the OFT,  
21 and the effect on what he says is on Imperial's business  
22 and its ability to compete effectively and so on. So  
23 that's the second statement. So that's why it's said  
24 there is a general statement as well as a Co-op  
25 statement.

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1 **THE CHAIRMAN:** Yes. You are going to call him now?

2 **MR HOWARD:** Yes, we will call him.

3 **THE CHAIRMAN:** Wait a minute.

4 **MR THOMPSON:** Can I make a very brief interjection at this  
5 point. First of all, the point that was raised about  
6 CGL and the addressee, that's addressed at 220 to 226 of  
7 the decision in footnote 8, just to put that on the  
8 record.

9 The second thing, I think Mr Summers asked for  
10 an organogram of the various Co-op employees. We do  
11 have that, so if I can provide that over the short  
12 adjournment, I hope that would be useful.

13 The third question is Mr Goulthorp's availability,  
14 but perhaps we can deal with that at the end of the day.

15 **THE CHAIRMAN:** Would you like to come further forward,  
16 Mr Thompson? I know it will mean Mr Lasok ...

17 **MR THOMPSON:** Perhaps if we move over the short adjournment,  
18 would that be helpful?

19 **THE CHAIRMAN:** Yes. Let's have Mr Goodall in, then, please.

20 **MR HOWARD:** I should have said there are three statements,  
21 actually.

22 MR MARTIN GOODALL (sworn)

23 Examination-in-chief by MR HOWARD

24 **THE CHAIRMAN:** Please sit down, Mr Goodall.

25 **MR HOWARD:** Mr Goodall, firstly could you just tell us your

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1 full name and address for the record.

2 **A.** My name is Martin John Goodall and I live at [address  
3 given].

4 **Q.** Then could you be given, if you haven't got it already,  
5 core bundle volume 3, so we can identify your witness  
6 statements.

7 There are three witness statements, at tabs 38, 39  
8 and 40. Would you look through those to confirm they  
9 are your statements?

10 **A.** (Pause). Yes, they are.

11 **Q.** Could you confirm that they are true?

12 **A.** They are true.

13 **MR HOWARD:** Thank you very much.

14 Cross-examination by MR LASOK

15 **MR LASOK:** Mr Goodall, have you read any of the transcripts  
16 of the proceeding in this case so far?

17 **A.** No, just my witness statements.

18 **Q.** When was the last time that you read your witness  
19 statements?

20 **A.** On the train this morning.

21 **Q.** Could you turn to the second witness statement, which is  
22 at tab 39, please. {C3/39} Am I right in thinking that  
23 in this witness statement, which is at tab 39, you were  
24 basically responding to certain points that had been  
25 made by the OFT and you are focusing on the

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1 justification for ITL's pricing strategy?  
 2 **A.** Yes.  
 3 **Q.** Now, you weren't yourself, as I understand it,  
 4 responsible for drawing up the pricing strategy, were  
 5 you?  
 6 **A.** No, I wasn't.  
 7 **Q.** No, and what did you do, you implemented it in relation  
 8 to the Co-op; is that correct?  
 9 **A.** Yes.  
 10 **Q.** But this statement here refers to, I think, the period  
 11 after the OFT's decision -- sorry, not after the OFT's  
 12 decision, but the period after 2003?  
 13 **A.** Yes.  
 14 **Q.** Right. If we go to paragraph 8, and just look at the  
 15 first sentence, you are referring to what you describe  
 16 as the OFT's claims that -- we will call them not ITL's  
 17 RMSs but ITL's pricing strategy, was not necessary to  
 18 ensure that bonuses or wholesale price reductions were  
 19 passed on to consumers in the form of lower retail  
 20 prices, and then you identify certain specific points  
 21 made by the OFT that you are going to comment on.  
 22 That's the context of the second witness statement;  
 23 am I correct?  
 24 **A.** Yes.  
 25 **Q.** Now, can I just pause for a moment at this question of

1 the necessity to ensure that bonuses or wholesale price  
 2 reductions were passed on to consumers in the form of  
 3 lower retail prices, because would you agree with me  
 4 that the ITL pricing strategy which was based around  
 5 these relative prices between selected ITL brands and  
 6 selected Gallaher brands for present purposes, that  
 7 strategy wasn't about passing price reductions on to  
 8 consumers, was it?  
 9 **A.** I think it's appropriate to say that we were trying to  
 10 sell prices as cheaply as possible. The benchmark  
 11 position was the RRP differentials. Wherever possible,  
 12 we would like the brands to be cheaper than the RRP  
 13 differentials, and I think before Geoff Good started his  
 14 strategy, the RRP differentials weren't being  
 15 representative(?) in the trade or the retail price.  
 16 **Q.** Are you simply basing yourself on what you understand  
 17 was Mr Good's policy?  
 18 **A.** No, I'm basing my comment on the view that at every  
 19 occasion, with every brand, I would try and position it  
 20 as cheaply as possible. I would use the differentials  
 21 as the starting position, and if I could get the brand  
 22 cheaper I felt I would sell more product because --  
 23 **Q.** If you had a differential that was expressed as ITL  
 24 brand X to be no more than Gallaher brand Y, and you had  
 25 signed the retailer up to that, how could you be sure

1 that you could get the price of the ITL brand below that  
 2 of the Gallaher brand?  
 3 **A.** Well, the outcome of pricing is dependent on the  
 4 investment put behind the brand, and that was the worst  
 5 position I was looking for, was to be a big RRP  
 6 differentials. Quite often, if I go to get a short-term  
 7 activity on price, then I felt that the lower price of  
 8 the product would generate more sales and more market  
 9 share, which I think we did very successfully during the  
 10 period.  
 11 **Q.** The point I am getting at is this: if you have signed up  
 12 the retailer to price ITL brand X at no more than  
 13 Gallaher brand Y, and ITL reduces the wholesale price of  
 14 its brand X, there are no guarantees that the retailer  
 15 is going to reduce the price of brand X because you have  
 16 signed him up to an agreement in which he is free to  
 17 price at the parity with the Gallaher brand, so how is  
 18 this strategy related to passing on price reductions to  
 19 the consumers?  
 20 **A.** I am sorry, I don't really understand the question. Can  
 21 you --  
 22 **Q.** Let's suppose that you have two brands, we will call  
 23 them Richmond and Dorchester, and let's suppose that the  
 24 RRPs are the same for Richmond and the same for  
 25 Dorchester. Let's suppose that you have signed the

1 retailer up to pricing Richmond at no higher than  
 2 Dorchester. Right?  
 3 **A.** I think your term "signing up" is not one that I would  
 4 recognise.  
 5 **Q.** Get the retailer to agree.  
 6 **A.** I think that the retailer -- are we talking about the  
 7 Co-op specifically?  
 8 **Q.** No, this is the general part of your evidence at the  
 9 moment, I am just focusing on what you say in the second  
 10 witness statement.  
 11 **A.** I think the RRP differentials was the strategy, and  
 12 continued to be the strategy, and we found that if we  
 13 didn't offer a short-term promotion, then the discount  
 14 wasn't passed from wholesale through to retail.  
 15 **Q.** Yes?  
 16 **A.** Sorry, I am --  
 17 **Q.** How does that get you to passing the wholesale price  
 18 reduction to the retail price reduction using a pricing  
 19 strategy of this nature?  
 20 **A.** By the very -- I think, unless I am confused, I think  
 21 you are answering my point, which is if I just reduce  
 22 the wholesale price, I have no guarantee of an impact on  
 23 the retail price. If I do a short-term activity, where  
 24 I ask for a reduction in price of 6p, I can normally  
 25 guarantee that I will get a reduction of 6p, because

1 what we are trying to do is pass the value through to  
 2 the smoker or the shopper. By just reducing wholesale  
 3 price by the equivalent of 6p, it would be 54p excluding  
 4 VAT, quite often that price didn't show itself through  
 5 the retail price, which is I think the point I was  
 6 trying to make.  
 7 **Q.** I understand that point, because, can I express it in my  
 8 own way?  
 9 **A.** Yes.  
 10 **Q.** As I understand it, what you have just been saying is  
 11 it's a deal where you say to the retailer, "Look, I'll  
 12 drop the wholesale price by 6p on the basis that you  
 13 drop your retail price commensurately". I'm using the  
 14 word "commensurately" because I might have said, well,  
 15 on condition that you drop the retail price 6p, but  
 16 actually I don't know whether it works exactly like  
 17 that, sort of the linear thing. Do you understand that  
 18 the point I am putting to you is that I understand what  
 19 you have said as being the situation where you say to  
 20 the retailer "I'll drop the wholesale price if you drop  
 21 the retail price"? Was that what you were saying?  
 22 **A.** Yes.  
 23 **Q.** Well, where do relativities come into this?  
 24 **A.** Do you mean the RRP differentials?  
 25 **Q.** I am talking about the pricing strategy based around RRP

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1 differentials.  
 2 **A.** I think the pricing strategy was something that we  
 3 continued to use, we looked at all our brands, and  
 4 positioned our brands through our price list at a price  
 5 that we felt would grow sales. So a brand against  
 6 a competitor brand might be a penny less or 2p less,  
 7 extraordinarily as it seems even a product today at £7,  
 8 a penny makes a difference as to whether people will try  
 9 the brand or not try the brand. So we had an RRP  
 10 differential structure which meant that we were trying  
 11 to ensure that the consumer or the shopper was getting  
 12 the position of the brand we were looking for. Against  
 13 that, and also within that, we would try and grow share  
 14 and sales by having short-term activity.  
 15 So I was always trying to achieve a better than the  
 16 price list differential. That's the only way, along  
 17 with distribution, with visibility and with  
 18 availability, was one of the key mechanics. So if  
 19 I could get to a point where I had a better than RRP  
 20 differential, then I would be very pleased.  
 21 **THE CHAIRMAN:** But the point, if I may try and clarify for  
 22 my own purposes, yes, you have described short-term  
 23 bonuses bring the wholesale price down, and you try and  
 24 ensure that the retail price is brought down so that you  
 25 get the benefit of that in greater sales; that's one

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1 aspect of what you do. The other aspect is positioning  
 2 your brands in the market by linking them with your  
 3 competitors' brands.  
 4 Now, I think what Mr Lasok is saying is in your  
 5 paragraph 8 you seem to be saying that that second  
 6 aspect of the linkage of the brands is also something to  
 7 do with trying to get reductions in the wholesale price  
 8 fed through to reductions in retail prices, and what he  
 9 is trying to explore is: well, how does that work  
 10 exactly?  
 11 **A.** If I can try and explain it a little bit. Wholesale  
 12 price is our price list price, and you can buy products  
 13 at a price depending on the quantity of product that you  
 14 buy. It's a publicly available document with our terms  
 15 of trade attached. Some retailers where we had had  
 16 a long-term below RRP relationship, they were  
 17 continually cutting price, we reduced our wholesale  
 18 prices. One of the debates that we continually had was:  
 19 was the discount that we were offering off the wholesale  
 20 price being offered to the shopper or the smoker?  
 21 Because it was an off-invoice discount. Does that ...  
 22 **THE CHAIRMAN:** Well, is that something different from these  
 23 tactical bonuses?  
 24 **A.** That's a long-term reduction. So if I could take you to  
 25 the Co-op, for example, the Co-op would have a discount

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1 off Lambert & Butler because historically the Co-op were  
 2 below RRP. The dynamics of the market changed and as  
 3 the Co-op would buy differing stores with different  
 4 sizes, the retail prices would move accordingly.  
 5 A convenience offering tends to mean that the price  
 6 isn't as competitive as a superstore price. The  
 7 challenge we had is that the discounts were given  
 8 against all of the volume regardless of what price it's  
 9 being sold at.  
 10 So my statement says that by cutting wholesale price  
 11 I had very little control over what the retail price  
 12 would end up being, because the retail margin would just  
 13 increase.  
 14 Is that ...  
 15 **THE CHAIRMAN:** Well, I am still slightly struggling to see  
 16 how you are assisted in achieving that by linking one of  
 17 your products with one of Gallaher's products.  
 18 **A.** I don't think I am linking them, I don't think I am  
 19 intending to link them.  
 20 **THE CHAIRMAN:** It seems to be accepted that the Co-op did  
 21 enter into some kind of arrangement with ITL to reflect  
 22 respective RRPs in the pricing, so how does that achieve  
 23 this feeding through of wholesale price reductions,  
 24 I think is what we are trying to understand.  
 25 **A.** I am slightly confused, I am sorry to be unhelpful, I am

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1 not wishing to be. How can I --

2 **MR LASOK:** Can I put an illustration? If it doesn't work as

3 an illustration, if you don't understand it, let us

4 know.

5 Let's suppose you have Richmond and Dorchester, and

6 they have the same RRP, and let's suppose that you have

7 agreed with the retailer, it doesn't have to be the

8 Co-op, that the retailer is going to price Richmond at

9 no more than Dorchester. Let's suppose that at the

10 moment the price of Richmond and Dorchester is 3.44.

11 Then you go along to the retailer and you say "What ITL

12 would like to do is to reduce the wholesale price that

13 you are paying for Richmond and we will drop it by X

14 pence".

15 Now, how could the pricing strategy based around

16 Richmond being no more than Dorchester have enabled you

17 to ensure that the wholesale price reduction was passed

18 onto the consumer, by the retailer reducing his shelf

19 price for Richmond?

20 **A.** I couldn't ensure that.

21 **Q.** No, because isn't it the position that the retailer

22 could turn round and say "Thank you very much, margins

23 are extremely thin, we are extremely grateful for you,

24 Imperial, reducing the wholesale price but we don't

25 intend to reduce the shelf price of Richmond because we

1 have agreed that Richmond is to be priced no more than

2 Dorchester and we are going to comply with our

3 agreement"?

4 **A.** That's true, my only thought would be: why would I offer

5 to reduce the wholesale price if I accept the comment

6 that you have just made?

7 **Q.** No, because I am putting it the other way round, because

8 I am asking you the question how the relativity strategy

9 enabled you to ensure pass-through of a reduced

10 wholesale price in the form of lower retail prices?

11 That's the question that I am focusing on.

12 **A.** Right. The price list with the RRP margin was

13 structured so that the brands in RRP position would be

14 aligned. If I was doing a short-term activity,

15 I wouldn't reduce the wholesale price on invoice, it

16 would be done retrospectively, so I could see the retail

17 prices in store. So the likelihood of me moving

18 wholesale prices up and down was very infrequent.

19 I mention in one of my witness statements about the

20 repositioning of Windsor Blue that we did post the event

21 and that's a prime example of where we reduced and

22 repositioned the brand but were unable to convince the

23 retailers that the -- although the cost price had come

24 down or the wholesale price, that the retail price

25 should come down as well, and it took many months to

1 move the brand down. I think what I was trying to

2 demonstrate is how difficult it is to reduce a wholesale

3 price and have an impact over a retail price.

4 **MR LASOK:** I see that it's ten past 1.

5 **THE CHAIRMAN:** Perhaps we will break there, yes. Thank you

6 very much, Mr Goodall. We are going to take our lunch

7 break now. You are in the middle of giving your

8 evidence, so that means that you mustn't speak to

9 anybody about the case over that period, and we will see

10 everybody back here at ten past 2.

11 (1.10 pm)

12 (The short adjournment)

13 (2.10 pm)

14 **MR LASOK:** Mr Goodall, could you go back to your second

15 witness statement, please, I just want to pick up

16 a couple of points. The first concerns paragraphs 12 to

17 13. In paragraph 12 you say:

18 "Even historically it was difficult for ITL to

19 encourage retailers to promote ITL's brands at low

20 prices simply by cutting wholesale prices. This is for

21 a number of reasons which I explain below."

22 Am I right in thinking that paragraph 13, which

23 deals with the retailers, goes back into the past?

24 **A.** Yes.

25 **Q.** Do you know what period of time paragraph 13 relates to?

1 **A.** In my opinion, at least 15 years, as long as I could

2 remember.

3 **Q.** As long as you can remember. Could you just read

4 paragraph 13 to yourself, please.

5 (Pause)

6 Could you turn to your third witness statement and

7 to paragraph 9. Do you have paragraph 9?

8 **A.** Yes.

9 **Q.** I'll just read the first two sentences, you say in that

10 paragraph:

11 "There are several reasons why using absolute price

12 maxima as the OFT suggests would be impractical. As

13 I have emphasised above as well as in my second appeal

14 witness statement, the retail market is extremely

15 competitive and complex."

16 So is what you are saying that it was difficult for

17 ITL to encourage retailers to promote ITL's brands at

18 low prices by cutting wholesale prices because the

19 retail market was extremely competitive?

20 **A.** What I was saying, what I am saying is that the driver

21 of the retail price was the retailer's desire to be seen

22 in the marketplace. Each retailer had its own benchmark

23 position at which to take, and tobacco was quite often

24 used as a value indicator within the store, it was known

25 as the known value item, so people would pick up sugar,

1 perhaps, they might pick up bananas, and they would pick  
2 up tobacco as a product where the retailers felt the  
3 shoppers would associate value by the price of certain  
4 items within the store. So the requirement for the  
5 retailer to set his own price position was the  
6 fundamental driver of the absolute retail price.

7 **Q.** Okay. Could we turn to paragraph 20 of your second  
8 witness statement, please, and just read paragraph 20 to  
9 yourself.

10 (Pause)

11 Are you saying here that retailers are no longer as  
12 docile as they were before these arrangements were  
13 terminated?

14 **A.** In my opinion, retailers have never been docile. The  
15 tobacco relationship has always been competitive, and  
16 I think that the retail prices of tobacco have flexed,  
17 as I've put here, since they have been terminated.

18 **Q.** "Flexed", what do you mean by that?

19 **A.** They have increased, and the amount of discount offered  
20 to the smoker or the consumer has reduced.

21 **DR SCOTT:** Sorry, you said that tobacco has always been  
22 competitive. Can you tell us bit more about the nature  
23 of that competition? What sort of competition are you  
24 talking about?

25 **A.** I am talking -- I think there is two levels of

1 competition, there is the extreme competition between  
2 the manufacturers, of which there are three, and in some  
3 instances four manufacturers where you have Imperial  
4 Tobacco, you have Gallaher -- or JTI, as they are now --  
5 you have BAT, but also at that time you had a lot of  
6 retailers who had their own label brand, so in some ways  
7 the retailer were a competitor to the branded suppliers  
8 at the same time. So you have a competitive dynamic  
9 there. As I was just mentioning earlier, you have  
10 a competitive dynamic amongst the retailers who are  
11 using tobacco or some use tobacco as an indicator of the  
12 value offering they have in their store.

13 So tobacco range, tobacco availability, tobacco  
14 activity around promotions are all key mechanics that  
15 the retailers would use, and I would say less so now  
16 perhaps because of legislation, or they might pick  
17 another product, but it's always been a cornerstone  
18 because they were very aware that people would move  
19 prices. So if I looked at a retailer such as Asda, they  
20 would wish to be the cheapest retailer within the  
21 grocery sector. I was never very clear of other  
22 retailers' strategies because I think they hold those  
23 fairly close depending on what position they were  
24 looking to take, and it's wrong to think that there is  
25 one strategy per retailer, it will more often be one

1 strategy per format, so each retailer would have  
2 a grocery strategy, it might have a convenience  
3 strategy, it would have a forecourt strategy, and all of  
4 the range of products listed, the pricing in those  
5 products and the activity behind it would be different.

6 **THE CHAIRMAN:** So how has that changed since the RMSs were  
7 terminated?

8 **A.** Because some of the retailers would not have  
9 a discussion around price.

10 **THE CHAIRMAN:** With ITL?

11 **A.** With ITL. I think that they have moved away from using  
12 tobacco in the way it was used before, in my opinion,  
13 and when trying to offer short-term activity, we don't  
14 get an indication whether that promotion has been  
15 accepted or not accepted, when it's going to start. The  
16 only way we see whether it has been accepted is when the  
17 retail prices move.

18 So the ability to offer the consumer a cheaper price  
19 in my opinion has been impacted.

20 **MR LASOK:** Could I draw your attention to paragraphs 21 to  
21 22 of your witness statement, and could you read those  
22 to yourself, please.

23 (Pause)

24 Now, in those two paragraphs you mention a number of  
25 reasons why you say it isn't practical for ITL to agree

1 absolute maximum retail prices with individual national  
2 tobacco retailers. Wasn't it the case that, at the  
3 time, that's to say 2000 to 2003, ITL would actually  
4 agree individual retail prices with particular retailers  
5 across a certain number of its brands, even where the  
6 retailer had a number of different stores and tiers and  
7 different pricing policies?

8 **A.** The answer to that is yes and no. I am sorry to give  
9 a confusing answer. I'll try to expand. As I've just  
10 explained with the retailer, if I use the Co-op for  
11 example, they had three different price tiers and before  
12 that, during this period, they had four different price  
13 tiers.

14 The number of stores in each price tier and the  
15 location of those stores would move greatly depending on  
16 the competition. So an example might be that a Co-op  
17 was in a market town and had a monopoly, so they would  
18 therefore have prices that were reasonably high. If  
19 Tesco Express or another retailer moved in and built  
20 another store, it would change its pricing strategy, so  
21 these were fairly fluid. But it is right to say that  
22 during a short-term promotion, we would agree a retail  
23 price which would be discounted from the normal price,  
24 and at that point we would agree a maximum price for the  
25 investment to be made. We would be very happy if it was

1 much cheaper, but in reality we did set a maximum price,  
 2 because that was a promotional activity. And the  
 3 challenge with the retail market is to understand which  
 4 stores are pushing which promotional package at which  
 5 time. That's why, in my opinion, it was impractical to  
 6 try and do that.

7 **THE CHAIRMAN:** To try and do what?

8 **A.** To try and have a maximum retail price for a retailer,  
 9 because they themselves had many maximum retail prices.

10 **MR LASOK:** Well, can I get this clear. From what you have  
 11 said in answer to the question I put to you, I think it  
 12 is practical for ITL to agree absolute maximum retail  
 13 prices with an individual national tobacco retailer,  
 14 even when it has a wide range of differing prices in  
 15 differing stores, because that's what you actually did  
 16 at the time?

17 **A.** I have to disagree. What we did was short-term priced  
 18 activity, and that was a specific price which would  
 19 normally be a reduction away from their natural price.  
 20 What we didn't do is set an actual price for the  
 21 retailer stores in a non-promotional period.

22 **Q.** I am slightly puzzled about this. It may be that the  
 23 position can be clarified fairly easily. Could you look  
 24 at annex 29, please. Could you go to tab 29, please.  
 25 Do you have 29? It should be a letter dated

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1 12 March 2001. {D29/29}.

2 **A.** It is.

3 **Q.** It's a letter from Mr Culham, who was the national  
 4 account manager for, here, T&S Stores. If you look at  
 5 the beginning of the letter, he's starting off dealing  
 6 with retail prices for the Richmond family and this is  
 7 post MPI, and perhaps you should just read the whole  
 8 letter to yourself.

9 (Pause)

10 Have you read it all?

11 **A.** I've read it all, I have to say it's the first time I've  
 12 seen this document, because obviously it wasn't one  
 13 that I -- wasn't on an account I knew, it's not a letter  
 14 I've written.

15 **Q.** Yes, but I think in your second witness statement you  
 16 have been asked to give evidence on matters that relate  
 17 both to the period of the infringement and the period  
 18 after it, and this arises from your paragraphs 21 and  
 19 22, when you were talking about the impracticability of  
 20 agreeing absolute retail prices, and you had actually  
 21 specifically referred to the period 2000/2003 in  
 22 paragraph 22 of your letter (sic), and that's the  
 23 reason. I fully understand that you were not the  
 24 national account manager for T&S Stores at the time, but  
 25 you would agree, I would suppose, that what we see here

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1 is ITL putting to T&S Stores specific prices following  
 2 the implement of the January MPI increase, and we have  
 3 three groups of stores: we have Supercigs, we have  
 4 I think it was the original T&S Stores -- C-Stores  
 5 I think. Then I'm not quite sure now what CTNs is.

6 **A.** Confectionery, Tobacco and Newsagents.

7 **Q.** Right. Then we have nine pricing tiers for each of  
 8 them. At the bottom of the page, it says, and I'll just  
 9 read that:

10 "The above prices are in effect the natural  
 11 pre-Budget prices after the ending of the MPI support.  
 12 In return for maintaining the above until further notice  
 13 ITL will pay a retro allowance of [REDACTED] per outer on all  
 14 20s. This post-Budget support will start from ITL  
 15 invoice date 8 March and will continue until further  
 16 notice."

17 Just reading that, does that cause you to alter the  
 18 views that you have expressed in paragraphs 21 and 22 of  
 19 your second witness statement?

20 **A.** No, I think it supports it. What I think the letter  
 21 shows in a lot of clarity is the complexity of pricing,  
 22 one retailer here has three different store types and  
 23 nine different pricing positions, so I think that helps  
 24 to illustrate the point I just made. What I think --  
 25 and it's only my opinion, I have to say, the point

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1 that's happening here is we have had an MPI, the  
 2 retailer has his natural price position, and it looks to  
 3 me as if Ken is helping to show what the new price will  
 4 be post the MPI.

5 The reason they do that is two-fold, in my opinion.  
 6 One is to make sure that there isn't a claim --

7 **THE CHAIRMAN:** That may be a topic that we come on to. At  
 8 the moment, can you just focus on why you are being  
 9 shown this letter at the moment, which is that you say  
 10 in your witness statement that it's impractical to set  
 11 maximum retail prices for retailers which have a large  
 12 number of tiers, and yet here it seems that ITL is doing  
 13 just that. It's that you are being asked to comment on  
 14 at the moment.

15 **A.** Okay. In my view, that's not what they are doing. What  
 16 they are showing is the impact of an MPI. There has  
 17 been a 5p MPI, the retail prices were in store before  
 18 the MPI, what's being shown here is what the old price  
 19 plus the MPI equals.

20 **MR LASOK:** I'll put it another way. Even if that  
 21 explanation is correct, and we can always ask Mr Culham  
 22 about it, the fact remains that ITL have worked out  
 23 specific prices per type of store and per tier, and on  
 24 the face of it, that shows that this kind of exercise is  
 25 perfectly practical?

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1 A. I can't agree.  
 2 Q. Why don't you agree?  
 3 A. Because what I've got here is an example of a flat MPI  
 4 increase being added to current prices. That isn't  
 5 about setting a retail price strategy for a retailer,  
 6 which is what I think you say, a maximum price. This  
 7 is: you were selling at 3.34, the MPI is 5p, so it will  
 8 go to 3.39, is how I read this letter.  
 9 Q. Isn't that exactly the same as if you were seeking to  
 10 agree an absolute maximum retail price with a retailer?  
 11 A. No, because you wouldn't know exactly what margin he  
 12 wanted to make, you wouldn't know which stores he wanted  
 13 into which cluster, so the things aren't aligned, in my  
 14 mind.  
 15 Q. We can ask Mr Culham about this, but on the face of it  
 16 this letter must have been written on the basis that  
 17 Mr Culham had knowledge of the factors that you have  
 18 just mentioned, and was therefore capable of working out  
 19 a series of prices that took into account the desiderata  
 20 of T&S Stores?  
 21 A. Obviously I can't comment on what Ken's view was, all  
 22 I can say is I think this was much more simplistic in my  
 23 mind what the current retail prices, and the increase  
 24 has gone up 5p so that's naturally where they would  
 25 land. I am not sure whether these prices were actually

1 used in the store or whether the retailer took a  
 2 different pricing position. But that's how I see this  
 3 table being used.  
 4 Q. Okay. I think you can put away annex 29. I would like  
 5 now to turn to your third witness statement, which  
 6 starts at tab 40. Could you turn to paragraph 15,  
 7 please. Part of paragraph 15 is, I think, confidential.  
 8 Could you read to yourself the first three sentences,  
 9 please. You can read the whole of the paragraph, if you  
 10 prefer.  
 11 (Pause)  
 12 Now, if you sort of move that file to one side so at  
 13 least you have that page open if you need to refer back  
 14 to that paragraph. Could we have a look at annex 15,  
 15 please. If you turn to tab 11, you should have  
 16 an internal ITL report dealing with the CWS Retail  
 17 account. Is that what you have?  
 18 A. I do have.  
 19 Q. The date of preparation is January 2002. Do you  
 20 remember preparing this document?  
 21 A. It was prepared by myself, yes.  
 22 Q. Right. Could you turn to -- there are page numbers  
 23 stamped on the bottom right-hand corner -- page 211,  
 24 please, and look under the heading "General" at the  
 25 first three lines of the page.

1 (Pause)  
 2 What I am slightly puzzled about is in your third  
 3 witness statement you say that you weren't aware of  
 4 Gallaher's position, but in this report it seems to me  
 5 that you do indicate that you were aware that  
 6 manufacturers had strategic pricing differentials; is  
 7 that not so?  
 8 A. No. Let me give you some context to this document.  
 9 This was -- we called this document the "hit by a bus  
 10 document", because it was the Imperial business  
 11 development plan for the Co-op, and the idea being that  
 12 I downloaded all the information that I had around the  
 13 Co-op, the structure of the Co-op, who was buying  
 14 product, how it operated. So that if I left the  
 15 business, somebody else could pick it up with an element  
 16 of understanding. I also used it to explain or explore  
 17 my opinions on the challenges in the Co-op, in some ways  
 18 to explain my lack of achievement in certain areas, and  
 19 also to give -- to add colour to how the business was  
 20 operating. The Co-op was perhaps the most complicated  
 21 retailer that we had in national accounts at the time,  
 22 mainly because of its structure.  
 23 What I'm doing here, if -- at 211, is I am showing  
 24 the difference between or the challenge between the  
 25 tobacco industry trying to have promotional activity and

1 the Co-op having its own promotional calendar. The two  
 2 things were hardly ever aligned.  
 3 So if -- can I expand a little further?  
 4 Q. I don't think anybody is stopping you.  
 5 A. Right, okay. The Co-op had a promotional calendar that  
 6 it used for all of its stores across all tobacco --  
 7 sorry, not just tobacco products, across every product.  
 8 During this period that changed from 13 per year to 17  
 9 per year, so it ended up as a three-week promotional  
 10 calendar. Depending on the product that would have  
 11 a poster, it might even have some TV advertisement,  
 12 whatever they wanted to do, and for tobacco it would  
 13 have a shelf barker and we would have an activity around  
 14 the brand.  
 15 Quite often these needed to be planned quite a long  
 16 way ahead because of production of point of sale  
 17 material needed to be printed and made ready. If we  
 18 decided within Imperial to do a short-term promotion,  
 19 the two promotion mechanics quite often didn't align.  
 20 So the challenge to us trying to have our own Imperial  
 21 promotional tool as the vehicle to use at all times was  
 22 being challenged because they wanted to use the Co-op  
 23 promotional tool.  
 24 So the challenge, as I am listing here, is that they  
 25 think our promotional mechanic was getting in the way of

1 their promotional mechanic. It's as simple as that. So  
 2 I would try and have a -- let's talk about a 6p  
 3 promotion on Lambert & Butler but if I wanted to start  
 4 on 1 April and their promotional period didn't start  
 5 until 1 May, or the last week of April, then it wouldn't  
 6 start until then.  
 7 **DR SCOTT:** Sorry, I understand that, but the paragraph which  
 8 we have just been reading doesn't appear on the face of  
 9 it to be about that. It appears to be:  
 10 "I expect CWS Retailer to challenge the strategy of  
 11 pricing differentials during the year."  
 12 That's referring to differentials:  
 13 "They believe that the manufacturer is restricting  
 14 promotional activity by demanding strategic  
 15 differentials."  
 16 I don't quite see how that relates to what you have  
 17 just told us about the differential calendar which we  
 18 understand from our reading of the evidence?  
 19 **A.** I think I've tried to explain it as clearly as I could,  
 20 it was the contradiction of the two activities.  
 21 **THE CHAIRMAN:** So were you aware, then, that Gallaher were  
 22 also having difficulties with this timing, lack of  
 23 synchronicity with the Co-op's way of dividing up the  
 24 year into promotional periods?  
 25 **A.** I wasn't aware, all I knew I was having problems because

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1 when there was an activity on a competitor's product,  
 2 there wasn't an activity on my product or the chance to  
 3 respond.  
 4 **THE CHAIRMAN:** It's just that you refer in the paragraph to  
 5 "manufacturers" rather than just to ITL, so which other  
 6 manufacturers were you meaning there?  
 7 **A.** My assumption would have been that we were all suffering  
 8 because there was activity on different brands at  
 9 different time, I could have a 6p advantage on brands  
 10 for one period, and then be 6p away on the next period,  
 11 without any reference to exactly the promotional  
 12 activity I was trying to invest inside the Co-op. So it  
 13 was -- perhaps I haven't worded it very well -- the  
 14 challenge of the two different promotional mechanics  
 15 coming together.  
 16 **THE CHAIRMAN:** But when you say here manufacturers are  
 17 demanding strategic differentials, that wasn't because  
 18 you thought that people other than ITL were setting  
 19 parity and differential requirements with the Co-op?  
 20 **A.** I am sure that all manufacturers did, but I didn't know  
 21 what they were. I am sure that everybody had a mechanic  
 22 to try and make sure their brands were priced at  
 23 a competitive price.  
 24 **THE CHAIRMAN:** Well, it's not at -- here it seems to be not  
 25 just referring to a competitive price, but a strategic

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1 differential. Why did you use the word "differential"  
 2 there, or what did you understand to be a strategic  
 3 differential?  
 4 **A.** I think to me it's an RRP differential, which is  
 5 a published price. I can be accused of using flowery  
 6 words to -- and I think I've used "strategic  
 7 differentials" quite regularly, it seemed to be a phrase  
 8 that we used to replicate RRP differentials.  
 9 **THE CHAIRMAN:** Yes. RRP differentials between an ITL brand  
 10 and a Gallaher brand?  
 11 **A.** I would be always looking to ensure that the RRP  
 12 differential between myself and any competing brand,  
 13 I was at worst placed in that position, if not better  
 14 because I knew then I could grow share.  
 15 **MR LASOK:** I would like to take you back to page 211 at the  
 16 top there.  
 17 **A.** Yes.  
 18 **Q.** We agree, don't we, that the phrase "strategy pricing  
 19 differentials" or "strategic differentials" is  
 20 a reference to these relative pricing strategies that  
 21 were based around the published RRPs?  
 22 **A.** Yes.  
 23 **Q.** So what you are recording here is an expectation that  
 24 CWS is going to challenge those differential strategies,  
 25 and you are saying that you anticipate this will affect

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1 all manufacturers?  
 2 **A.** That's what I said, yes.  
 3 **Q.** So then you must have known that other manufacturers had  
 4 strategy pricing differentials?  
 5 **A.** What I said is I would be surprised if they didn't have,  
 6 because they all have published RRPs, so I can't think  
 7 of a branded product that you would have with an RRP  
 8 that you didn't have an ambition to be priced against  
 9 another product. What I was trying to make clear is  
 10 I didn't know what they were, because I also had Co-op's  
 11 own label product which had a position against our  
 12 products as well. This isn't -- this is a four  
 13 manufacturer position within the tobacco industry at the  
 14 time. BAT with own label, JTI ...  
 15 **THE CHAIRMAN:** So are you saying that because of the  
 16 structure of the market with very few manufacturers, by  
 17 publishing your RRP you were signalling where you saw  
 18 your brand sitting as against the other brands of the  
 19 other manufacturers?  
 20 **A.** I think in simple terms, if a competitor's brand was  
 21 selling at £1 and had an RRP that was 5p more expensive  
 22 than my brand, I would be trying to achieve at least  
 23 a 5p differential. Now, the impact on that is obviously  
 24 the wholesale price and the relevant margin. And also  
 25 the size of the brand, because I think that retailers

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1 will price different brands in different ways, depending  
 2 on the consumer pull for the brand, and I'll refer --  
 3 there is some documents around Regal Filter which was  
 4 a very big brand in Northern Ireland, but the way that  
 5 the Co-op was structured meant that the Northern Ireland  
 6 stores were actually included in the Scottish cluster,  
 7 and Regal Filter, although they are the number three  
 8 brand, never achieved a differential as its RRP  
 9 differential, because the Co-op didn't see it as a big  
 10 brand.  
 11 **THE CHAIRMAN:** "Achieved it"? What do you mean "achieved  
 12 it", as against what?  
 13 **A.** As against the difference between its RRP and its retail  
 14 price, so they saw it as a brand that they didn't need  
 15 to support through price because they didn't see it as  
 16 a big brand across that part of the market, whereas in  
 17 Northern Ireland it was their number three brand.  
 18 The point I am probably not making very well is that  
 19 the size -- the consumer pull of the brand does have  
 20 an impact on the focus the retailer gives to that brand.  
 21 **THE CHAIRMAN:** Just to be clear, if it has more consumer  
 22 pull, does that mean that the retailer is likely to  
 23 price it above or below or at the recommended price?  
 24 **A.** I think it's more likely to be keenly priced, is my  
 25 opinion, so lower price, because as I said earlier it

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1 relates back to being a known value item. So as you  
 2 shop the store, if you have a brand that has  
 3 a 15 per cent market share, the price of that brand is  
 4 much more important to the retailer than one that's got  
 5 a 0.5 per cent share because the number of consumer  
 6 interactions, or the number of times it's put in the  
 7 basket, is much less.  
 8 **MR LASOK:** Coming back to page 211 and at the top, in the  
 9 third line, you say:  
 10 "This will affect all manufacturers over the coming  
 11 year."  
 12 You don't say "This might affect some manufacturers  
 13 over the coming year", you say "This will affect all  
 14 manufacturers". So I put it to you that you knew that  
 15 the other manufacturers had strategic pricing  
 16 requirements?  
 17 **A.** I think I said I am pretty sure that they did, I didn't  
 18 know, my opinion was that they did have, but I felt sure  
 19 that it would affect all of us in the coming year,  
 20 because of this correlation between the promotional  
 21 calendar of the Co-op and the activity from Imperial.  
 22 **Q.** But I take it now that you are no longer holding to the  
 23 interpretation of the first three lines of page 211 that  
 24 you expressed previously, which was that it was about  
 25 a promotional calendar issue?

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1 **A.** No, I think that the way I wrote this piece, and  
 2 accepting that it was quite a little period of time ago,  
 3 CWS Retail was redeveloping its promotional calendar, it  
 4 had been less willing to take promotional activity that  
 5 we had, and was keen to show the CRTG membership, so  
 6 that's the societies that are a member of the larger  
 7 buying group, that it was able to offer promotions  
 8 through its store estate, and tobacco was part of that,  
 9 and sometimes there was a challenge, and I don't take  
 10 back anything that's written here, and I thought I had  
 11 got the point across.  
 12 **Q.** Well, can I just -- it won't take too long to deal with  
 13 this -- go back to page 207 and look just below halfway  
 14 down the page. You have a paragraph there beginning  
 15 with the words "Although a promotion calendar"; do you  
 16 have that?  
 17 **A.** I have indeed.  
 18 **Q.** If you just read I think probably the first two  
 19 sentences of that paragraph.  
 20 (Pause)  
 21 I put it to you, it's very simple, that you would  
 22 discuss the promotion calendar on page 207, and on  
 23 page 211 at the top you are discussing the strategic  
 24 pricing differentials; the answer to that question is  
 25 either yes or no?

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1 **A.** It's a no, because what I am talking about here is the  
 2 fact that -- and I am explaining -- the promotional  
 3 calendar has changed. With reference to the point  
 4 I made a little earlier, historically before this period  
 5 CWS would actually promote tobacco, but because of CWS's  
 6 ethical stance they decided not to promote tobacco any  
 7 more, so their promotional activity was a flattening of  
 8 price.  
 9 Before this period, when there were 13 promotional  
 10 periods, they used to reduce the price, the retail  
 11 price, across the stores. When they moved to 17 three  
 12 week periods, as I've written here, tobacco promotions  
 13 are usually limited to flattening the price bands. so if  
 14 I can explain that, in price band 6 there is probably  
 15 a Co-op matrix and price band 6 would be the cheapest  
 16 price, and let's say it's £1, and then price band 1 it  
 17 would be £1.10, in price band 2 it would be £1.20.  
 18 They had moved away from having a promotional  
 19 calendar that said "We will take 10p off every price  
 20 across the tier" and move to a point where the lowest  
 21 price was a price they would run across the stores.  
 22 This was a fundamental and important change to the  
 23 support they were giving to pricing on tobacco, and  
 24 that's why it's separated here.  
 25 **Q.** The main point I am trying to get across is that you

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1 refer to the promotional calendar on page 207 and you  
 2 don't refer to it in this part of page 211. You refer  
 3 to something quite specific, which you accepted a few  
 4 moments ago is a reference to the pricing relativities,  
 5 because I asked you the question: what did the words  
 6 "strategy pricing differentials" mean, and I think that  
 7 you accepted that it's a reference to these pricing  
 8 relativities.

9 So I put it to you again: on page 211 at the very  
 10 top you are not talking about the promotion calendar,  
 11 you are talking about a potential challenge to the  
 12 different strategic pricing differentials that the  
 13 manufacturers were operating at the time?

14 **A.** I can't agree, as I've -- for the reasons I've already  
 15 explained.

16 **Q.** An attentive national account manager who was paying  
 17 attention to what a rival manufacturer was doing would  
 18 figure out, wouldn't he, that a rival manufacturer had  
 19 strategic differentials?

20 **A.** I think that RRP's are strategic differentials, so to  
 21 answer your point, then yes, I would know the RRP of  
 22 Benson & Hedges, I would know the RRP of every brand  
 23 because it was a published recommended retail price.

24 **Q.** And you would work out what the rival manufacturer was  
 25 doing based on that and on also their behaviour?

1 **A.** No, I would see -- it's very, very difficult for even  
 2 an attentive national account manager to understand why  
 3 a retail price ends up where it ends up, because --

4 **THE CHAIRMAN:** Just concentrating on the RRP's at the moment,  
 5 you say in paragraph 15 that you were aware of  
 6 Gallaher's RRP's and they were aware of ITL's RRP's,  
 7 I think what we are trying to establish is whether you  
 8 realised that one of the factors that Gallaher would  
 9 take into account when setting its RRP's was where they  
 10 regarded that particular brand as being placed vis-a-vis  
 11 one of your ITL brands; or did you think that Gallaher  
 12 set their RRP's without any regard to ITL's RRP's?

13 **A.** My -- I don't know -- view would be they set their RRP's  
 14 to try and grow share, so they would have researched  
 15 their products against other competitors' products and  
 16 tried to work out what a smoker would pay, and when it  
 17 was appropriate for it to be more expensive they would  
 18 put a higher RRP and if they felt the brand wasn't  
 19 strong enough, in my opinion they would reduce RRP to  
 20 give it a chance to grow share. My aim was always, and  
 21 continues to be, to grow market share.

22 **THE CHAIRMAN:** Yes, but let me just press you a little bit:  
 23 what role, if any, did you think it likely that ITL's  
 24 RRP's would play in Gallaher's calculations as to where  
 25 it should put the RRP for its brands?

1 **A.** I am unsure. I am unsure how Gallaher actually go about  
 2 whether they take profit decision, whether they take  
 3 a share decision, whether they take a brand decision,  
 4 I am unsure.

5 **MR LASOK:** Could we turn to paragraph 17 of your third  
 6 witness statement, please. We have previously been  
 7 looking at -- you can close that but don't put it away  
 8 because we will come back to the annex.

9 We had been looking at paragraph 15. Could you look  
 10 at paragraph 17, and I am interested in the first two  
 11 sentences.

12 (Pause)

13 **A.** Paragraph 17?

14 **Q.** Paragraph 17.

15 (Pause)

16 What period of time does this refer to?

17 **A.** I think it was during the period of 1998 all the way  
 18 through to 2002.

19 **Q.** I don't understand, because in paragraph 3 of your first  
 20 witness statement, and you might want to look at it, you  
 21 said that it wasn't part of your role to take a decision  
 22 relating to promotions.

23 **A.** It wasn't.

24 **Q.** So I do not understand how you can say in paragraph 17  
 25 that your lack of knowledge of Gallaher's strategy could

1 lead to various outcomes, and then you give an example  
 2 concerning promotions.

3 **A.** I think the point I was trying to make is that if you  
 4 are looking to grow market share, then you will take  
 5 a proactive pricing strategy. The point I am trying to  
 6 make here is I was unaware of what Gallaher's activity  
 7 was until I saw it on the shelf. So I could be agreeing  
 8 with the Co-op a promotional mechanic for a period of  
 9 time where we would reduce by 6p or 10p, not knowing  
 10 that my competitors could be doing something different  
 11 or more valuable at the same time or a different time,  
 12 because it wasn't in the Co-op's interest to share  
 13 information.

14 **Q.** But the problem, I think, is that if you weren't in  
 15 charge of promotions -- because you say in paragraph 3  
 16 of your first witness statement that you weren't -- then  
 17 your lack of knowledge of Gallaher's strategy couldn't  
 18 possibly lead to any kind of outcome at all regarding  
 19 promotions?

20 **A.** I think the point I've just made is one I would come  
 21 back to. The point I am making here is that  
 22 a promotional activity, a reduction in price is aimed to  
 23 grow share.

24 **THE CHAIRMAN:** Yes, but just focus on the point that  
 25 Mr Lasok is putting to you, which is that in paragraph 3

1 of your first appeal witness statement you say that you  
 2 are not responsible for taking the decision that  
 3 a particular promotion would be implemented and it  
 4 wasn't part of your role to determine pricing strategy  
 5 and promotions; but reading paragraph 17 of your third  
 6 witness statement, one might read that to say, "Well,  
 7 because I didn't know about Gallaher's strategy, this  
 8 led to us slipping up sometimes, for example by having  
 9 a promotion which it then became apparent wasn't useful  
 10 because Gallaher had a better countervailing one".

11 **A.** Mm.

12 **THE CHAIRMAN:** What's being put to you is that if you are  
 13 right that you weren't responsible for promotions, then  
 14 your lack of knowledge of Gallaher's strategy couldn't  
 15 make any difference one way or the other as to the  
 16 success of ITL's strategy, because whoever decided on  
 17 the ITL promotions might have known about Gallaher's  
 18 strategy; do you see? I don't know whether they did or  
 19 not.

20 **A.** No --

21 **THE CHAIRMAN:** But there is a question over whether the  
 22 implication in paragraph 17 is that you were responsible  
 23 for promotions and hence your lack of knowledge affected  
 24 those, which seems to be contrary to what you said  
 25 earlier.

1 **A.** No, I wasn't responsible for setting up the promotions,  
 2 the senior management team were at that time. The point  
 3 I am trying to illustrate here is that I don't think  
 4 anybody knew what promotion was coming, because  
 5 sometimes we would do a promotion and then it would be  
 6 in completely not the same way as our competitors, is  
 7 the point I was rather clumsily trying to make.

8 **MR LASOK:** Let's move to paragraph 18. There is a bit here  
 9 which, in my copy at any rate, is confidential, in the  
 10 last four lines of the page. Could you read the  
 11 sentence beginning "Additionally", please.

12 (Pause)

13 Where do you get the idea from concerning the  
 14 relative bargaining position of the retailer and ITL and  
 15 Gallaher?

16 **A.** From a retailer who continually asked for more margin  
 17 support, who will quite often say to you that your  
 18 brands are the lowest margin brand in his category, who  
 19 will use every negotiation tool they have available to  
 20 them to increase the profit they make from our products.

21 **Q.** This retailer is not Asda, though?

22 **A.** This was -- I think that all retailers do things very  
 23 nearly the same, Asda have a slightly different  
 24 position, and not -- they are still talking to each  
 25 other.

1 **Q.** Asda doesn't think that it did have a good bargaining  
 2 position vis-a-vis ITL.

3 **A.** I think most retailers feel that they are getting the  
 4 worst deal, and they always feel another retailer is  
 5 doing better. As a manufacturer, I always felt I had  
 6 the worst deal, and I always thought that my competitors  
 7 were getting much more for much less.

8 **Q.** Sainsbury didn't think that they had a superior  
 9 bargaining position either.

10 **A.** I can't comment on Sainsbury's view.

11 **Q.** Who can you comment on, the Co-op?

12 **A.** I can comment on the Co-op, I can comment on Alldays at  
 13 the time, most -- as a generalisation, most retailers  
 14 will use a negotiation to increase their margin or  
 15 listing fees. Most suppliers will be under intense  
 16 pressure to add more money into the margin at every  
 17 occasion. And if a small tobacco manufacturer such as  
 18 BAT at the time come along and pay a listing fee, which  
 19 is a huge listing fee to buy share of space for a brand,  
 20 then the Co-op or another retailer will use that as its  
 21 standard new measure. They won't tell you exactly what  
 22 it is, but they will pool -- it's a negotiation stance,  
 23 you are looking for the biggest opportunity to make more  
 24 money from tobacco, and the Co-op or Asda or Sainsbury's  
 25 had huge negotiating power to decide whether a brand is

1 listed, to decide how many stores it is available in, to  
 2 make sure to decide where it will be visible, and lastly  
 3 they will decide their pricing position.

4 So the relationship between the retailers and myself  
 5 has always been very, very challenging. I don't get  
 6 very many Christmas cards. It's that sort of  
 7 relationship.

8 **Q.** Are you saying that the retailers had a superior  
 9 bargaining position in relation to bargaining over  
 10 wholesale prices with ITL?

11 **A.** Which retailers?

12 **Q.** Well, you say here "a retailer".

13 **A.** Every retailer would like to have a lower cost price  
 14 every day, and then they can make a decision about  
 15 whether they hand that over as a lower retail price or  
 16 they make more margin. So every time there is an MPI or  
 17 every time there is a Budget increase, it starts the  
 18 debate about your margins aren't high enough on your  
 19 products, we demand X or Y, which I understand as normal  
 20 commercial practice. The bigger the retailer becomes,  
 21 the more bargaining power it has. The Co-op could  
 22 decide -- one man in the Co-op decided whether a new  
 23 brand went into 2,500 stores. That's quite a powerful  
 24 negotiation to have.

25 **Q.** It remains the case that neither Asda nor Sainsbury

1 considered that they had a superior bargaining position  
 2 vis-a-vis ITL.  
 3 **A.** I can't comment.  
 4 **Q.** Right. Let's move on, now. Moving on in this instance  
 5 means moving backwards to your first witness statement,  
 6 and we are moving on now to the position regarding the  
 7 Co-op.  
 8 Do you accept that ITL agreed with the Co-op that  
 9 ITL would make trade development payments to the Co-op  
 10 in return for the Co-op benchmarking the shelf price of  
 11 certain ITL brands against certain rival brands?  
 12 **A.** I agree that we had a trade development payment that  
 13 covered four aspects of our business, one of which was  
 14 prying, one of which was availability, merchandising,  
 15 promotion and pricing and what I was trying to achieve  
 16 was nothing worse than the RRP differentials.  
 17 **Q.** So the answer is yes?  
 18 **THE CHAIRMAN:** Well, he has given what his answer is.  
 19 **MR LASOK:** Okay.  
 20 Now, let's consider the question of the benchmarked  
 21 prices, because I think you say in your witness  
 22 statement that these were maxima. I wonder whether we  
 23 could therefore turn to annex 15, and go to tab 4. 15  
 24 is the one you already have. {D15/4}  
 25 **A.** Thank you.

1 **Q.** This should be a letter dated 14 August 2000 --  
 2 **A.** It is.  
 3 **Q.** -- concerning the 2000 trading agreement. It was  
 4 a letter written by you to Mr Newton, who was the  
 5 category buyer for CWS Retail. Could you just read  
 6 through this letter to yourself, please.  
 7 (Pause)  
 8 I am just wondering, do you happen to know who added  
 9 in the bits in handwriting on the first page?  
 10 **A.** I am not sure, it's certainly not my handwriting, I am  
 11 not sure whether it's an Imperial document, version, or  
 12 a Co-op version.  
 13 **Q.** I am not sure. It tends to suggest that round about  
 14 25 January 2001, there was a variation on the amounts  
 15 that were to be paid. Does that ring any bells?  
 16 **A.** I am sorry, I can't remember.  
 17 **Q.** You can't remember. Now, when we look at this, on the  
 18 first page at the bottom, under the heading "Pricing  
 19 Strategy", we have the first bullet that says:  
 20 "Price at all times in line with the agreed  
 21 strategic pricing differentials."  
 22 Then there is a sentence that indicates that a copy  
 23 of the agreed differentials was attached. Can you  
 24 remember whether -- we don't have a copy of this trading  
 25 agreement that does have the agreed differentials

1 attached -- there was a list of agreed differentials  
 2 that was attached?  
 3 **A.** I don't think there was one attached, and I don't think  
 4 I ever used one.  
 5 **Q.** So there wasn't one at all?  
 6 **A.** I don't think so.  
 7 **Q.** Can you cast your mind back? Was there a list of agreed  
 8 differentials, so far as you remember?  
 9 **A.** There was a list of differentials against RRP using the  
 10 Co-op matrix, and my ambition -- if I can take you  
 11 a little bit further down the letter, the four main  
 12 objectives of the plan, and I think the key word here is  
 13 "objectives", this is what I was trying to do as part of  
 14 my business development, I was trying to make sure that  
 15 the RRPs of my competitors' products were in line with  
 16 mine or mine were cheaper, because that's how I knew  
 17 I would grow, and the market share I had in the Co-op  
 18 was way below the national average, so it was a -- I had  
 19 a huge responsibility to try and ensure that we grew  
 20 from a very strong base. We had -- my memory is  
 21 a little hazy -- between a 5 and 6 per cent higher  
 22 national market share than we had across the rest of the  
 23 market, so it was a very important account for us. So  
 24 my objectives were to make sure the RRPs were the worst  
 25 position I was going to be at as a differential against

1 my competitive products.  
 2 **THE CHAIRMAN:** I don't quite understand the reference there  
 3 to the RRP using the Co-op matrix.  
 4 **A.** The Co-op pricing matrix was our contract for invoicing,  
 5 and I am unsure, I have so many tabs, it was --  
 6 **THE CHAIRMAN:** It may be that Mr Lasok will take you there.  
 7 **MR LASOK:** If you look at tab 1, is that what you are  
 8 talking about? It's the same file.  
 9 **A.** Yes. So this was a Co-op document that listed out the  
 10 product, its Co-op code, which was very important, the  
 11 number of packs in an outer, the manufacturer's retail  
 12 price, the list price and then any discounts it had  
 13 off-invoice, so reducing the wholesale price, any volume  
 14 related purchase price of a bulk drop discount so if you  
 15 bought tobacco products in pallets, you got  
 16 an additional discount which led to a net price.  
 17 **DR SCOTT:** This is just Imperial, isn't it?  
 18 **A.** Just Imperial.  
 19 **DR SCOTT:** And presumably you had some way of seeing how  
 20 these looked against the prices they were charging for  
 21 your competitors' products?  
 22 **A.** We never saw all of these. This is the complete margin  
 23 chain for our competitors' product. There is no way  
 24 that a Co-op individual would let you see this, because  
 25 then you understood exactly the investments that were

1 being made. I saw the retail prices, this also shows  
2 the retail prices further along. But this was --  
3 **DR SCOTT:** You had the retail prices that they were  
4 charging?  
5 **A.** I could see the retail prices in store, but I knew where  
6 our retail prices would end up because I had had  
7 a matrix. This was their document they sent to me.  
8 **THE CHAIRMAN:** So when you were using this to check the  
9 differentials, you were checking this against what you  
10 could see in the stores, but did the Co-op ever send you  
11 something saying what they were charging?  
12 **A.** No.  
13 **THE CHAIRMAN:** Not the whole detail of this, but simply  
14 something that showed you what they were charging for  
15 the corresponding product?  
16 **A.** I don't think they would want to do that, because if  
17 they did that they would be explaining the strategy, and  
18 if they explained the strategy it takes away the  
19 confusion as to whether Co-op are taking an activity,  
20 whether Gallaher are taking an activity or it's just  
21 a mistake. The more confusion that the Co-op can create  
22 between the manufacturers, the more investment they can  
23 get.  
24 **THE CHAIRMAN:** Oh, I see.  
25 **A.** So the chance of me -- I mean, I would wish to see

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1 one -- ever seeing one was zero.  
2 **DR SCOTT:** But you had your merchandisers out checking the  
3 actual shelf prices?  
4 **A.** We had our merchandisers going round the Co-op stores  
5 looking at our prices and looking at our competitors'  
6 prices, and that was for two reasons: one, because quite  
7 often we did a specific promotion on price, and I wanted  
8 to see that was being delivered through store; and, two,  
9 the Co-op at that time didn't have an understanding of  
10 what retail prices were being sold in the individual  
11 societies. So the information was very useful to the  
12 Co-op as well. So the Co-op, if you think about CWS  
13 being the centre of the Co-op, they couldn't be sure  
14 whether Plymouth Co-op were adhering to the structure of  
15 their promotions or were selling them at 10 or 15 or  
16 20p. So you had a lot of individual societies who were  
17 doing different things. So the Co-op saw us being very  
18 supportive and helping them understand where the  
19 retail -- they set retail prices in Manchester; by the  
20 time they got to Colchester or to Plymouth, they ended  
21 up looking something different.  
22 **DR SCOTT:** So you would then feed back what your  
23 merchandisers had found, presumably, back to Co-op  
24 headquarters.  
25 **A.** Because what the Co-op were trying to offer us was

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1 a retail estate that could deliver distribution  
2 visibility, merchandising and pricing promotion, in  
3 reality that was only as strong as their disciplines  
4 within their own stores stayed. Most retailers -- we  
5 discussed Asda -- have a fairly simple system where it's  
6 linked by computer. At that time the Co-op was working  
7 from the pricing matrix -- and don't forget this wasn't  
8 just a tobacco matrix, this was for every promotional  
9 item, so the complexity that the retailers had in  
10 Plymouth Co-op or Colchester or Oxford and Swindon were  
11 massive.  
12 **MR LASOK:** I wonder whether you could look at another  
13 trading agreement that ITL entered into, round about the  
14 same time as the date of this letter. This letter is  
15 dated to 14 August 2000. If you look in annex 17, and  
16 turn to tab 4, {D17/4}, tab 4 is the trading agreement  
17 with Morrison that was signed on 26 June 2000. So about  
18 a month and a half before the date of your letter to  
19 CWS.  
20 If you look at the fifth page, you have a document  
21 that is headed "ITL's Strategy Pricing Sheet". Do you  
22 have that?  
23 **A.** Yes.  
24 **Q.** Were the differentials in the trading agreements with  
25 the Co-op in a form like this?

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1 **A.** No. No.  
2 **Q.** What form did they take?  
3 **A.** They took a discount against the RRP, using the Co-op  
4 matrix as I've just described.  
5 **Q.** How were they identified?  
6 **A.** Sorry, could you explain?  
7 **Q.** Well, yes. If you look at this page here, the ITL  
8 strategy pricing sheet, it deals with a number of  
9 brands, so in the case of the Co-op, if you didn't have  
10 a piece of paper like this, what did you have that  
11 enabled you and the Co-op to identify which brands you  
12 were talking about?  
13 **A.** I was targeting the RRP differential for my brands, for  
14 the Imperial brands, and then I would wait to see the  
15 retail prices come through the stores.  
16 **THE CHAIRMAN:** Yes, but the question you are being asked is:  
17 with the Co-op matrix, there are many, many ITL brands.  
18 **A.** Mm.  
19 **THE CHAIRMAN:** And here is only a few which are picked out  
20 from the whole ITL product range as being matched  
21 against a Gallaher brand. Now, are you saying that as  
22 far as the Co-op was concerned, the agreement related to  
23 every ITL brand was supposed to be matched against every  
24 Gallaher brand in some way, and if it was like this,  
25 only a few brands that you were interested in, how had

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1 those been identified as being of interest to you?

2 **A.** They were -- the brands using the matrix were set out as

3 a discount to the RRP. The only way that I could see

4 whether I had a differential -- and don't forget the

5 differential are RRP, whether it's -- and every brand

6 has an RRP differential. Whether you are focusing on

7 all of them or not is the question you are asking me.

8 The Co-op would not let me give them or see

9 a differential schedule, because it weakens their

10 negotiation. They would like to, and have done to me

11 previously, they will increase the price of one product

12 or reduce the price of a product, looking for additional

13 investment or support.

14 **DR SCOTT:** So trying to clarify: as we understand it, you

15 were a recipient of decisions made elsewhere in ITL as

16 to both the required differentials, the RRP's and on

17 occasion, promotions?

18 **A.** Mm.

19 **DR SCOTT:** What you are saying to us is that, despite the

20 terms of the agreement that we have looked at, the Co-op

21 did not want to see the schedule to which they were

22 agreeing?

23 **A.** The Co-op -- all the Co-op wanted was a large lump of

24 money, because they historically had been paid a large

25 lump of money for three or four business development

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1 areas, and they would run their own pricing strategy,

2 and I was trying to get the differentials against RRP.

3 If I knew I had the differentials --

4 **THE CHAIRMAN:** What do you mean the differentials against

5 RRP? Because we are not talking here, as I understand

6 it, about the money that you are paying them for pricing

7 below RRP, that's a different sum of money, as

8 I understand it; here we are talking about the sum of

9 money that's paid to them for pricing linkages with

10 Gallaher brands.

11 **A.** The pricing and the linkages were RRP. By their very

12 nature of the Co-op structure they were never in line,

13 they couldn't be in line because of the promotional

14 calendar, so --

15 **THE CHAIRMAN:** Yes, but how did they know, when they signed

16 up to the agreement -- I know you don't like the term

17 "signed up", but how did they know which of the brands

18 you wanted to be linked to which Gallaher brands?

19 **A.** They didn't know and nor were they interested, because

20 all they wanted for me to do was pay them the money.

21 They wanted an additional investment in their business

22 because of the size of their retail operation. So

23 I structured it under business development, under

24 availability, merchandising, and the way they saw it as

25 a lump of investment. And I have to admit [REDACTED]

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1 [REDACTED]. Now, if I was doing as you say, then

2 every time the pricing moved out of the strategy, which

3 is against RRP, they wouldn't have got paid.

4 **THE CHAIRMAN:** That's a different question. We are just

5 looking as at the day that this agreement was entered

6 into ...

7 **MR SUMMERS:** Forgive me, I am just a little uncertain about

8 the impact of the change from the 13 to the 17 week

9 calendar, because you have said just now that the prices

10 couldn't be in line because of the promotional calendar.

11 Are you saying that that was as a result of the

12 introduction of the 17 week calendar, but they could

13 have been in line previously under the 13 week calendar,

14 or was it always the case that they could never be in

15 line because they had promotional calendars?

16 **A.** It was always the case. The difference, there was

17 a different impact that they, by the activity, you would

18 also have price tiers where the pricing was out of line.

19 So if we had a schedule that was agreed to by the Co-op,

20 and by myself on this, they wouldn't have been paid the

21 business development monies.

22 **MR LASOK:** Mr Goodall, could you turn to tab 7, {D15/7}

23 please.

24 **A.** In which ... I have three open.

25 **Q.** Sorry, this is in 15. You can put 17 away. Could you

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1 move to tab 7? Now, this is a letter dated 21 May 2001,

2 and it's from you to Mr Newton again, and it's titled

3 "The 2001 Trading Agreement". It's virtually identical

4 to the one we have just been looking at. It also has,

5 at the bottom of the page, the reference to "price at

6 all times in line with the agreed strategic pricing

7 differentials", and at the top of the second page we

8 have a reference to "a copy of the agreed differentials

9 is attached", and in the second paragraph we have

10 a reference to the fact that "all Imperial brands had to

11 achieve the strategy across the complete CRTG group for

12 the payments to be made", which appears also in the

13 previous agreement.

14 Now, are you saying that no copy of the agreed

15 differentials was attached to that agreement?

16 **A.** There was no copy attached.

17 **Q.** And the agreed differentials were not set out in any

18 other document?

19 **A.** No.

20 **Q.** No. Could you now look at tab 10, please. Do you have

21 that? This should be a national accounts brief.

22 **A.** Yes.

23 **Q.** The NAM is stated to be yourself. It's for CRTG. If

24 you look at the box on the first column on the left

25 headed "Price and Availability Survey"; do you have

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1 that?  
 2 **A.** Yes.  
 3 **Q.** And look to the right, in the second paragraph there is  
 4 a reference to the Ipswich and Norwich Co-op branches.  
 5 There is a bit which is confidential in the second  
 6 sentence, the sentence beginning "Please report in call  
 7 messaging if ..."  
 8 **A.** Yes.  
 9 **Q.** Have you read that?  
 10 **A.** Yes.  
 11 **Q.** Can you please explain to me how the Co-op or CWS or  
 12 CRTG was supposed to know that they were supposed to be  
 13 pricing in line with that if they hadn't been told?  
 14 **A.** Can I explain the document?  
 15 **Q.** Yes.  
 16 **A.** This is an internal multiple accounts brief, so we  
 17 employed agency people to go round and visit multiple  
 18 account retailers' stores with a little handheld  
 19 terminal, and they would look at the availability, look  
 20 at the pricing, help with codes. As I explained  
 21 a little earlier, it was something that the Co-op were  
 22 very keen for us to do, because it was a huge  
 23 investment. You know, if you did that independently it  
 24 would cost you quite a bit of money per call. What we  
 25 have here is a brief to help the merchandiser understand

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1 what exactly they are trying to do in that very call,  
 2 and the price and availability survey element, that has  
 3 just been lifted to me, was something that came directly  
 4 from the Co-op themselves, because they knew within CRTG  
 5 they had some societies that weren't working in the way  
 6 that they wanted them to work. So they gave us this  
 7 information so that when we reported the data back to  
 8 them it was cleaner than if it had just been a general  
 9 breadth.

10 So they told us that if -- I can't read the bits in  
 11 red, is that ...? Can I read the bits in red?

12 **Q.** I think it's the reference to the brand --

13 **MR HOWARD:** I think if it's Imperial's confidentiality, it's  
 14 waived.

15 **A.** So what this was really saying, and I think it  
 16 illustrates a couple of points that I've made earlier,  
 17 is that the Co-op was trying very hard to get Ipswich  
 18 and Norwich, Yorkshire, Plymouth and at that moment  
 19 worth to follow their matrix, and if we look down at  
 20 Yorkshire:

21 "This society will now be following all CRTG price  
 22 bands."

23 So they had actually got an independent society to  
 24 join the bigger CRTG and follow the Co-op's pricing  
 25 disciplines. So if you look at Ipswich and Norwich:

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1 "Branches in price band 2 sell premium brands at RRP  
 2 less 2p."

3 So they are doing something slightly different than  
 4 the CRTG in Manchester wished them to do. And rather  
 5 than just not say anything to us, they are saying "Look,  
 6 you will find these differences when you go and see, but  
 7 can you report for us".

8 So if I look at Chelmsford --

9 **THE CHAIRMAN:** Just look at the second sentence of Ipswich  
 10 and Norwich, which is the one that is relevant for our  
 11 consideration. So what you are being asked is: is that  
 12 reference to a correct differential between the ITL  
 13 brand family and the Gallaher brand family, where does  
 14 that correct differential come from?

15 **A.** That's an RRP differential.

16 **THE CHAIRMAN:** Yes, but what's being suggested to you is  
 17 that that is checking up whether the Co-op is -- whether  
 18 the Ipswich and Norwich Co-op is abiding by  
 19 a differential that stems from the agreement between the  
 20 Co-op and ITL, that that's how Co-op should price those  
 21 two brands. Now, do you accept that that's how that  
 22 request came about?

23 **A.** No. I understand the question, and I think that the  
 24 point I made about the vagaries of the independent  
 25 societies was at play here, and the reason that Embassy

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1 family was mentioned in comparison was an RRP  
 2 differential against -- and I mentioned it earlier --  
 3 two very strong brands.

4 **THE CHAIRMAN:** But whose RRP?

5 **A.** The RRP of Embassy.

6 **THE CHAIRMAN:** But ITL's RRP for Embassy or the Co-op's RRP  
 7 for Embassy?

8 **A.** It would be Imperial's RRP.

9 **THE CHAIRMAN:** Right.

10 **A.** And what you have here is two very strong southeast  
 11 products, Benson & Hedges with over a 12 share and  
 12 Silk Cut very strong, and the Embassy family,  
 13 unfortunately an Imperial brand, a much weaker  
 14 performer.

15 So the point I made earlier is that they might be  
 16 more supportive of a B&H price because of the number of  
 17 times it goes in the pocket rather than Embassy.

18 But all this work here was driven by the Co-op's  
 19 need to understand what its members were doing. We were  
 20 assisting them with an understanding.

21 **DR SCOTT:** Sorry, this may not be a question for you, it may  
 22 be a question for the Co-op witnesses, but why would it  
 23 matter to the Co-op centrally what Ipswich and Norwich  
 24 were doing?

25 **A.** Because tobacco was only part of the promotional

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1 package. Let's imagine, and let's make something up,  
 2 they have a Coca-Cola offer on at the same time. They  
 3 would look at the compliance to all the offers that were  
 4 being made, and if they weren't following the tobacco  
 5 prices that they wanted them to do, they might not be  
 6 following the Coca-Cola offer or the fish and chip offer  
 7 or whatever offer. It was more about their ability to  
 8 work with the Co-op on a promotional package.  
 9 **DR SCOTT:** But this appears to be not on promotion, because  
 10 it's explaining what happens unless they are on  
 11 promotion. So what they are to expect is 2p less than  
 12 RRP, and if they are just 2p less than RRP, then  
 13 necessarily, as I understand it, they would be at the  
 14 RRP differential.  
 15 **A.** Mm.  
 16 **DR SCOTT:** So we are looking at a situation where they are  
 17 not on promotion, the merchandiser goes in, and they  
 18 have a look, is it at that normal differential, RRP  
 19 differential, or is something else going on? Is that --  
 20 **A.** That's fair, yes.  
 21 **DR SCOTT:** That's fair, yes?  
 22 **A.** I don't think I explained it perfectly, but the  
 23 compliance of society was important to Manchester and  
 24 the Co-op generally, because, as I said, if you take  
 25 a differing product, to have a whole estate deliver upon

1 that promotional activity is very powerful to  
 2 a manufacturer.  
 3 **THE CHAIRMAN:** But I think the question is, this idea that  
 4 Embassy should be in this less than 2p relationship with  
 5 Benson & Hedges, is that an idea that the Co-op came up  
 6 with off its own bat, or is that an idea they got from  
 7 their agreement with you as to price linkages between  
 8 brands?  
 9 **A.** I think that will have come directly from the RRP's.  
 10 **THE CHAIRMAN:** That I don't think quite answers my question.  
 11 **A.** I am sorry, it's not supposed to not answer your  
 12 question.  
 13 **THE CHAIRMAN:** What we are trying to ascertain is whether  
 14 this sentence whereby you are instructing your  
 15 merchandisers to check up on the differential between  
 16 Embassy and Benson & Hedges, whether that has anything  
 17 to do with checking whether the agreement between ITL  
 18 and the Co-op is having some effect on the shelf price  
 19 of the stores, or whether it's something entirely  
 20 separate from that?  
 21 **A.** It's an unusual comment, it's not a comment that is in  
 22 any other of the societies, and my -- without wishing to  
 23 frustrate, the RRP differential between Embassy, B&H and  
 24 Silk Cut would have I think been 2p at the time. The  
 25 size of the brands would be different. So what you

1 would find is that the matrix that the Co-op had given  
 2 in stores was not being followed. That's why they  
 3 wanted it reported. Am I helping?  
 4 **THE CHAIRMAN:** Well, I can understand that ITL and  
 5 Gallaher's RRP's show a 2p difference between Embassy and  
 6 Benson & Hedges, the question is whether, picking out  
 7 from all the different RRP differentials, the RRP  
 8 differential between Embassy and B&H is that focusing on  
 9 that particular RRP differential, is that because that  
 10 was one of the differentials that the Co-op and ITL had  
 11 agreed should be adhered to as part of the agreement?  
 12 **A.** I can't remember. I'll give you my best opinion, and  
 13 it's that it's unlikely to be anything more than the  
 14 Co-op were trying to find out prices, because you are  
 15 comparing non-aligned or competing products. You have  
 16 a filter product and a Kingsize product. I can't  
 17 remember whether they had an issue -- it is a little  
 18 while ago -- whether Ipswich and Norwich hadn't listed  
 19 some of the Embassy family for a period of time, or I am  
 20 unsure of the reason for the question. But I am not  
 21 even sure whether it's my question or the Co-op's  
 22 question.  
 23 **DR SCOTT:** It seems, looking at it, that there are two  
 24 distinct things going on here. One, in the first  
 25 sentence "Branches in price band X sell premium brands

1 at RRP less 2p unless they are on promotion", and that's  
 2 concerned with the absolute price of cigarettes, in  
 3 other words if you are going out there you should expect  
 4 them to be 2p off the RRP. And that enables you to  
 5 check whether, for example, the Embassy family are  
 6 correctly priced according to the Ipswich and Norwich  
 7 strategy. That's different to what's happening in the  
 8 second sentence. In the second sentence the  
 9 merchandiser is being asked to report in if what they  
 10 find when they look on the shelf and compare the price  
 11 of the ITL product and the Gallaher product, regardless  
 12 of whether it's 2p off or not, the differential between  
 13 them is the correct differential; in other words  
 14 reflects the differential between the RRP's. Now, that  
 15 looks as though that's what is being asked of the  
 16 merchandiser.  
 17 Do I have that right?  
 18 **A.** I agree 100 per cent. The answer I gave was I was  
 19 unsure whether that was a request for data from the  
 20 Co-op because of something that was happening in that  
 21 specific society or not, and I'm unsure.  
 22 **THE CHAIRMAN:** Perhaps that's a good moment for us to take  
 23 a ten minute break. We will come back at ten to 4.  
 24 (3.40 pm)  
 25 (A short break)

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1 (3.50 pm)  
 2 **MR LASOK:** Mr Goodall, I want to move on to a slightly  
 3 different aspect of the trading agreements. I think  
 4 that you said earlier that basically there was  
 5 a [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]. Is that a correct understanding  
 8 of what you said?  
 9 **A.** No, not totally. What I said was that the Co-op saw it  
 10 as a payment for us doing business with them. I tried  
 11 very hard to use the payment for distribution,  
 12 availability, visibility, but the structure of the deal  
 13 had been in place for quite a long time. So they saw it  
 14 as our cost of doing business, might be a term. So  
 15 I tried very hard to shape it so that I felt I was  
 16 getting a return. [REDACTED]  
 17 **Q.** But from ITL's perspective, it was a situation in which,  
 18 so far as pricing is concerned, you did expect to get  
 19 results from the Co-op?  
 20 **A.** I would be disappointed if I didn't have a better than  
 21 RRP differential as often as I could possibly get one.  
 22 **Q.** So, for example, if we go back to annex 15, at tab 7,  
 23 and go to page 2, {D15/7/2} and the second paragraph  
 24 from the top, the one that says:  
 25 "All Imperial brands must achieve this strategy

1 across the complete CRTG group for the payment to be  
 2 made."  
 3 That was seriously intended by ITL?  
 4 **A.** My intention -- it was my objective -- if I take you  
 5 back to page 1, the main four objectives for investing  
 6 the money was that I would be at RRP differential or  
 7 less, I would have had advertising material at the point  
 8 of purchase, and my products would be displayed  
 9 prominently on the tobacco units, plus we would be  
 10 promoting in line with national brand activity. So  
 11 that's why I was making the payment of the sum that we  
 12 have below.  
 13 **Q.** If we look at tab 17, {D15/17}, this is a letter dated  
 14 9 July 2002 to Mr Batty, and comes from Mr Goulthorp.  
 15 You were copied in on this. Did you actually read this  
 16 letter?  
 17 **A.** I did read it at the time, yes. Yeah.  
 18 **Q.** Could you read it now, please, just to yourself.  
 19 (Pause)  
 20 **A.** Yes.  
 21 **Q.** Now, if you look at the penultimate paragraph, the one  
 22 beginning "Therefore, based on the above", did you read  
 23 that at the time as indicating that the Co-op accepted  
 24 that requirements had to be satisfied in order to ensure  
 25 the payment of the ongoing off-invoice support?

1 **A.** I read this paragraph as the crucial paragraph, the  
 2 context of this letter is that the Co-operative group  
 3 had just bought Alldays, who are -- who were  
 4 a convenience retailer. And with Alldays we had  
 5 an off-invoice arrangement where we paid an additional  
 6 discount for the stores that sold below RRP. That was  
 7 only 5 per cent of their stores. The Co-op had  
 8 an off-invoice arrangement, paid a discount against  
 9 100 per cent of their volume. So what the Co-op were  
 10 trying to do is, as soon as they moved the Alldays  
 11 stores into the Co-op RDCs, so the regional distribution  
 12 network, they wanted us to pay the additional volume at  
 13 the total discounted wholesale price.  
 14 So what Mr Goulthorp is doing here is trying to  
 15 ensure that his profitability on anything he sells  
 16 through Alldays at the price that he wants to sell it,  
 17 whether above RRP or below, gets the maximum discount  
 18 support. All the words above are leading to the point  
 19 where he thinks he's now confident that we will continue  
 20 to pay the discount. Because up to that point, I had  
 21 said that we would only pay discount on 5 per cent of  
 22 the volume, because they are so far away from RRP.  
 23 That's my understanding and context of the letter.  
 24 **Q.** In addition to the reference to the ongoing off-invoice  
 25 support discounts, he also says that they have satisfied

1 the requirements to ensure the negotiated central  
 2 payments in respect of pricing and promotion. His  
 3 recollection is that this all relates to the 2002  
 4 trading terms which are at tab 16.  
 5 **A.** I think this letter perfectly illustrates the difference  
 6 between a Co-op view of a trading terms and my business  
 7 development plan, because this here -- this just has  
 8 lumps of money attached to a single line. As I said  
 9 earlier, what the Co-op were trying to do is improve  
 10 their terms against the increased estate through store  
 11 and volume. So what he is asking for is the  
 12 continuation of the support we paid against the Co-op,  
 13 original Co-op volume, using the best terms. Every  
 14 retailer who buys another retailer is looking to improve  
 15 his terms because of their weight of importance to us.  
 16 So there would have been many negotiations around  
 17 "We are now 12 per cent bigger so you must improve your  
 18 terms with us because we are so much more important".  
 19 Our debate, his response would be "We were selling that  
 20 volume before to a different retailer, so we must have  
 21 better terms", but this was quite a difficult debate  
 22 because of the off-invoice support was being paid on all  
 23 of the Co-op volume and only 5 per cent of the Alldays.  
 24 What Mr Goulthorp is trying to do here is have his  
 25 eggs -- not have his eggs, he is trying to have

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1 everything that he wants. So he wants the best of  
2 terms, he wants an increase in support, and obviously he  
3 doesn't want to sell below RRP. So he's using a form of  
4 words to give comfort that don't actually say anything  
5 at all, in my opinion.

6 **Q.** Could you look, if you have tab 16 open still, it  
7 consists of two documents, the first is a letter of just  
8 under a page to yourself and Mark Owen, and the second  
9 is the CRTG trading agreement 2002. Do you have the  
10 second document, the CRTG trading agreement 2002?

11 **A.** I do have that.

12 **Q.** Could you turn to the third page, which has a heading  
13 "Pricing and Promotion"?

14 **A.** Mm.

15 **Q.** Could you just read the pricing and promotion bit,  
16 please.

17 (Pause)

18 You will have seen that in the third paragraph after  
19 the heading "Pricing and Promotion" it says:

20 "All Imperial brands must achieve this strategy  
21 across the complete CRTG group for the payments to be  
22 made."

23 Then if you move to the bottom of the page, after  
24 the reference to "a payment of [redacted]", I think the  
25 figure is confidential, you have a sentence that says:

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1 "If the pricing is not to strategy, then  
2 [a specified amount] will be withdrawn from the period  
3 payment."

4 So on a fair reading, what's happening in the letter  
5 at tab 17 is that Mr Goulthorp is reassuring you that  
6 CRTG's pricing is in line with the requirements set by  
7 ITL, so that they should get the complete payment  
8 without the deduction referred to; is that not a fair  
9 reading of his letter?

10 **A.** No, I don't believe it is. If I take you to paragraph 2  
11 of the pricing promotion, starting "This payment", this  
12 here is -- it says "consistent price disciplines", and  
13 that's about the Co-op societies being able to deliver  
14 what the Co-op are asking them to do. I think that the  
15 RRP strategy that we said that we operated, which was in  
16 place, the interesting thing is [redacted]

17 [redacted] although the brands would  
18 have to be not in line with RRP's, because of their  
19 promotional calendar.

20 So I understand the point you are making, but the  
21 point I am making in return is that if this was acted  
22 out as it's written, then there would be a reduction at  
23 every period because of the lack of positioning.

24 **DR SCOTT:** Except that this document does acknowledge that  
25 there would be [redacted]

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1 [redacted]  
2 sorry, I am probably not meant to say this.

3 Mr Thompson, I am referring to the red boxed paragraph.

4 **MR THOMPSON:** I think that's an Imperial document, sir.

5 **DR SCOTT:** It says "Confidential, Co-op" at the top.

6 **MR THOMPSON:** I am the only person here, so I can't take  
7 instructions. I can't imagine why it's particularly  
8 confidential, but I had better not waive it.

9 **DR SCOTT:** Let me put it to you this way, Mr Goodall: there  
10 is an explanation in this document which suggests that  
11 between the two of you, you were acknowledging that  
12 there would be exceptions to the normal run of pricing  
13 during certain periods of the year in relation to  
14 certain brands.

15 **A.** Can I -- I feel I would like to disagree again a little,  
16 if I may. This red box to support this pricing is  
17 talking about point of sale material. One of the  
18 challenges for retailers is to actually place the  
19 material they said they would place, and if you think  
20 about a tobacco gantry, there is very little occasion to  
21 promote a price. One of the ways we used to do it was  
22 with the shelf barker, so a small piece of point of sale  
23 material that would sit below the product, and we found  
24 that having that larger price would bring the smoker's  
25 attention to the brand. So part of this development

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1 strategy was to not only promote the activity but also  
2 stick the shelf barker, as we would call it, or point of  
3 sale material underneath.

4 What we are talking about here is: the Co-op will  
5 provide the point of sale material to support that  
6 activity. And the point, the last bit, which starts:  
7 "If the point of sale advertisement is placed" to  
8 a percentage minimum, then a payment will be made.

9 **DR SCOTT:** Ah, so you mean this isn't necessarily  
10 a promotion of a different price, this could be the  
11 promotion of --

12 **A.** The calendar.

13 **DR SCOTT:** -- of the ordinary price?

14 **A.** Yes, which is why I felt I couldn't agree with the  
15 comment made earlier. Because the one thing that the  
16 retailer needs to convince the manufacturer is that they  
17 can deliver the promotional barkers that they say they  
18 can do, because part of the pricing and promotion fee  
19 was to have our brands highlighted on the shelf, because  
20 we couldn't use another tool. That's now changed.

21 **MR LASOK:** But I would revert to the point I made earlier:  
22 ITL, throughout, was concerned to get CWS or CRTG or  
23 however you call it, to comply with its strategic  
24 pricing differentials, and it regarded the payments that  
25 it was making or this part of the payment as being for

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1 that?  
 2 **A.** For the differentials against RRP and the placement of  
 3 point of sale material, yes.  
 4 **Q.** Yes. For an example of that, if you go to 15/21, this  
 5 is a letter that you sent to Mr Owen dated 12 May 2003,  
 6 and it's about the Alldays business, or at least it  
 7 starts off, and then you have a heading "2003 Trading  
 8 Terms", and if you look at the bottom of that page, you  
 9 have a reference to the maximum amount payable for 2002,  
 10 and you write that "this covered all elements of the  
 11 plan, range, planograms, compliance, pricing" and  
 12 an additional factor that I think is confidential.  
 13 You then propose an increase for 2003, and the  
 14 increase will cover the inclusion of the Alldays estate.  
 15 Then in the first full paragraph on the second page,  
 16 you say:  
 17 "The elements behind this payment will need to be  
 18 agreed, but must cover all the disciplines as covered in  
 19 the 2002 agreement."  
 20 So this again is an indication that the payment was  
 21 subject to compliance with, among others things, the  
 22 pricing discipline?  
 23 **A.** This is an example of what I tried to verbalise a second  
 24 ago, which is the Alldays estate swelling the CRTG  
 25 importance, and therefore the negotiations around

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1 improving their trading terms, and in the little red box  
 2 you can see how well they did, and quite rightly I was  
 3 still pushing to ensure that the RRP differentials or  
 4 better are achieved as part of that business development  
 5 plan.  
 6 **THE CHAIRMAN:** What do you mean by "RRP differentials",  
 7 then?  
 8 **A.** What I mean is if my brand is at £1, as a recommended  
 9 retail price in the price list, and a competitor's brand  
 10 is at £1.10, I would want to see a 10p differential, or  
 11 11, or if I was very lucky, 15. The further I got in  
 12 a competitive position, the more market share I gained.  
 13 I think this raises -- this covers the point I was  
 14 making about how the importance of the retailer grows  
 15 with the more volume and the more stores they have.  
 16 **MR LASOK:** I think that we have now reached the point at  
 17 which it's agreed that the agreements between ITL and  
 18 the Co-op envisaged that the Co-op would price in  
 19 accordance with the differences, if any, between the  
 20 RRP's published by ITL and, amongst others, Gallaher?  
 21 **A.** We know that not to be the case.  
 22 **Q.** No, no, no. Are you saying that it didn't happen or  
 23 that it wasn't what was agreed?  
 24 **A.** What was agreed was the difference between the retail  
 25 price and the RRP of Imperial brands which would bring

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1 a natural differential to the RRP of competitor brands,  
 2 and that's agreed. The difference and a lot of this  
 3 debate is about how the Co-op wanted to receive their  
 4 money. So let's imagine that I decided to change the  
 5 deal completely, then that would have an impact on how  
 6 they received the money historically. Because they  
 7 would build their --  
 8 **THE CHAIRMAN:** I think at the moment -- sorry to  
 9 interrupt -- what I am not clear about is when you talk  
 10 about "RRP differentials", whether you are talking about  
 11 how the Co-op prices on the shelves for, say, Embassy  
 12 No 1 relate to the ITL RRP for Embassy No 1, so that's  
 13 a differential between the shelf price for your brand  
 14 and the ITL recommended price for your brand; that's one  
 15 kind of differential, call it that, against a different  
 16 kind of differential, which is whether the price for  
 17 an ITL brand is at a particular differential or no worse  
 18 than a Gallaher or other manufacturer's brand.  
 19 Now, when you use the term "RRP differentials", are  
 20 you referring to one or other of those?  
 21 **A.** I am referring to both, but I am going to try and make  
 22 it much clearer. The RRP differential, so that's the  
 23 recommended retail price and the Co-op's selling price,  
 24 is of interest to me because I am paying an off-invoice  
 25 bonus that reduces the wholesale price. So I have

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1 a fundamental interest to see whether my discounted  
 2 price is being reflected on the shelf in store. So I am  
 3 very concerned about that, which is the debate about  
 4 Alldays because a lot of their products are above RRP.  
 5 **THE CHAIRMAN:** Yes.  
 6 **A.** My other interest is to make sure that the retail prices  
 7 the Co-op sell at, our brands are no worse than the RRP  
 8 differential against our competitors' brands.  
 9 **THE CHAIRMAN:** And this letter at 21, and the earlier letter  
 10 of Mr Goulthorp, do those relate to both those aspects  
 11 of pricing or only one or only the other?  
 12 **A.** In my mind they are all about the first element, which  
 13 is the investment that we make, which is unusual because  
 14 when they purchased Alldays --  
 15 **THE CHAIRMAN:** Yes, but just stop there, so in your mind it  
 16 relates to the extent to which they are pricing on the  
 17 shelves ITL brands lower than ITL's RRP for that brand?  
 18 **A.** Yes. Can I just add one little bit of flavour?  
 19 **THE CHAIRMAN:** Yes.  
 20 **A.** They wouldn't have realised that they had a better  
 21 buying price until they had purchased Alldays, and the  
 22 first thing they will do is go through all their terms  
 23 of trade, and then they will have noticed that there is  
 24 a difference between the two net cost prices.  
 25 **THE CHAIRMAN:** But were you also trying to get the second

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1 kind of differential, that is between the ITL product  
 2 and the Gallaher product, were you also trying to extend  
 3 that to the Alldays shops?  
 4 **A.** Yes.  
 5 **DR SCOTT:** Mr Goodall, in paragraph 22 of your own first  
 6 witness statement, you set out what I might describe as  
 7 your ideal. You say:  
 8 "With regard to our differentials, we ideally wanted  
 9 our products to be on the shelves at prices which were  
 10 no higher than given differentials in comparison with  
 11 the benchmarked products of our customers" --  
 12 **A.** I am terribly sorry, I think I am in the wrong file.  
 13 **DR SCOTT:** You need to be in core bundle 3, tab 38. {C3/38}.  
 14 **A.** My apologies, I am there.  
 15 **DR SCOTT:** We know what it's like.  
 16 **A.** I am sorry.  
 17 **DR SCOTT:** And paragraph 22.  
 18 **A.** Yes.  
 19 **DR SCOTT:** So you explain your ideal in the first sentence,  
 20 and that's in keeping with what you have been saying to  
 21 us.  
 22 Then you have a hypothetical example, in which you  
 23 encourage the Co-op to price an ITL brand at least, say,  
 24 3p cheaper than the equivalent product of a competitor,  
 25 though of course you say if they wanted to set their

1 shelf prices above or below that benchmark, that was of  
 2 course ultimately a matter for them.  
 3 That shows, it seems to me, your concern with  
 4 differentials as your ideal in terms of meeting your  
 5 objectives with the different Co-op stores.  
 6 Is that a correct interpretation of paragraph 22?  
 7 **A.** Can I just read it through?  
 8 **DR SCOTT:** Yes, of course.  
 9 (Pause)  
 10 **A.** Yes. It was my belief that if I had the correct  
 11 differentials against competitor products, my brand  
 12 would grow. I would like a bigger differential. It was  
 13 a very complicated thing to achieve. I understood my  
 14 own cost base, I understood the retailer's margin  
 15 requirement on my products, but I didn't have any  
 16 understanding of the net cost base of my competitors,  
 17 nor the retailer's margin requirements, and it's a huge  
 18 assumption to assume that they wanted the same across  
 19 the category. So the retailer sometimes, I felt, would  
 20 move my brand a penny closer to the -- so a penny less  
 21 than the differential I was looking for, and then wait  
 22 for me to then add more investment to move the price  
 23 back down. So my friends at the Co-op were very  
 24 challenging because in the end they had no interest --  
 25 in my personal view, they didn't worry which brand they

1 sold, they wanted to sell the product that made the most  
 2 margin. That took us into conflict. I only wanted to  
 3 sell Imperial products. They didn't mind whether it was  
 4 one of my products or a JTI product or a BAT product or  
 5 even one of their own.  
 6 **DR SCOTT:** So you then entered into agreements with them  
 7 which agreements seek to achieve your differential  
 8 objectives?  
 9 **A.** Yes.  
 10 **DR SCOTT:** And then, as we understand it, despite what it  
 11 says in the agreements, you didn't attach a schedule  
 12 explaining what you wanted.  
 13 **A.** Because there were simple RRP differentials.  
 14 **DR SCOTT:** There were simple RRP differentials.  
 15 **A.** But there wasn't anything -- I used the word  
 16 "strategic", it wasn't very strategic. The strategic  
 17 thought I think was made when the brand was positioned  
 18 at RRP. But the retailer would use his purchasing power  
 19 to create margins as he went along. Yes.  
 20 **DR SCOTT:** Thank you.  
 21 **MR LASOK:** Can we take an example of this? Let's go back to  
 22 Richmond and Dorchester. Let's suppose that the  
 23 recommended retail price for each of them was the same.  
 24 **A.** Okay.  
 25 **Q.** Okay? So what was your understanding of the effect of

1 the trading agreements with the Co-op so far as the  
 2 pricing of Richmond and Dorchester was?  
 3 **A.** I would be keen for it to be the same price or cheaper,  
 4 during promotional periods it would change.  
 5 **Q.** How did you communicate this to the Co-op?  
 6 **A.** I didn't.  
 7 **Q.** Now, I'm using Richmond and Dorchester as an example.  
 8 Are you saying that ITL and the Co-op negotiated and  
 9 signed these agreements which refer to ITL's pricing  
 10 differentials without ITL telling the Co-op what those  
 11 differentials were?  
 12 **A.** The first point I would like to make is that it was  
 13 a trade development agreement that covered four  
 14 different elements, focusing in on pricing and  
 15 promotion. The RRP differentials were published. They  
 16 were a published fact. So, as we spoke earlier, I had  
 17 two issues: One was the discount away from RRP, and the  
 18 other was the RRP differentials. There was no need for  
 19 a schedule, because the RRPs were in the common domain.  
 20 So if the brands were the same RRP ...  
 21 **Q.** If the brands were at different RRPs, what was your  
 22 understanding of the deal with the Co-op?  
 23 **A.** The differential would be the RRP differential, unless  
 24 we took some short-term promotional activity.  
 25 **Q.** So in other words, your understanding of these contracts

1 was that if Richmond and Dorchester had the same RRP,  
 2 then they had to be priced the same on the shelves in  
 3 Co-op stores?  
 4 **A.** Not -- they didn't have to be, it was -- the price was  
 5 an outcome of the margin evaluation, as I explained  
 6 earlier I had no understanding of my competitors' margin  
 7 chain, nor did I have any understanding of the  
 8 retailer's demand for margin on the product. I was  
 9 fully aware of my own. If the brands ended up in  
 10 a different position, then I would invest more money, as  
 11 I tried to explain a little earlier. I think  
 12 I explained that.  
 13 **Q.** I don't actually follow that. What does the margin have  
 14 to do with it?  
 15 **A.** The retailer selling tobacco is selling it to make  
 16 a profit, so the more margin that he makes, the more  
 17 profit that he makes. So to suggest that a pricing  
 18 schedule comes in front of a retailer's margin to me is  
 19 not a world that I understand.  
 20 **Q.** Why would it?  
 21 **A.** Because what you are saying is that, the point -- if  
 22 I -- the point you are making to me is that if the RRP  
 23 is the same, then the outcome price will have to be the  
 24 same. I'm saying to you that will only happen if the  
 25 margin the Co-op wants to make is appropriate to their

1 expectation.  
 2 **Q.** Let's suppose that the Co-op was making an appropriate  
 3 margin on Dorchester at £3.44. As I understand it, you  
 4 are saying that your expectation was that the Co-op  
 5 would price Richmond at £3.44 as well?  
 6 **A.** Or less.  
 7 **Q.** Well, let's take it in stages. Your expectation was  
 8 that it would price Richmond at £3.44, the same as  
 9 Dorchester?  
 10 **A.** As long as the RRP differential was the same, yes.  
 11 **Q.** Yes, and if the RRP differential changed then the Co-op  
 12 would have to change the shelf price of the two  
 13 products?  
 14 **A.** No.  
 15 **Q.** Why not?  
 16 **A.** That would be their choice.  
 17 **Q.** But I think that you so far have agreed with me that,  
 18 under these agreements, the way you understood them the  
 19 Co-op was to maintain the differentials reflected in the  
 20 RRP's?  
 21 **A.** It's exactly as we have just discussed, but the one big  
 22 element that proves that in reality it didn't happen is  
 23 the promotional periods. For every promotional period,  
 24 there were brands out of kilter. There was [REDACTED]  
 25 [REDACTED] for not

1 achieving the differentials that you are suggesting to  
 2 me are fundamental.  
 3 **Q.** Now, let's move on to this question of maxima, when you  
 4 say, in the case of the Richmond/Dorchester example they  
 5 should be priced at the same, but Richmond could be  
 6 less.  
 7 We don't see that in the agreements that we have.  
 8 Did you ever communicate this to the Co-op?  
 9 **A.** That it should be ...  
 10 **Q.** That it could be less.  
 11 **A.** The promotional periods would suggest that that's what  
 12 I spent a lot of time doing.  
 13 **Q.** That was what I was quite interested about, because if  
 14 you turn to paragraph 30 of your first witness  
 15 statement, it's the third sentence, last couple of lines  
 16 on page 9. Do you have it?  
 17 **A.** Mm.  
 18 **Q.** So there you are saying that the bonuses could  
 19 necessitate divergence from differentials since they  
 20 were paid to reduce the price of one manufacturer's  
 21 price as against another. I read that as indicating  
 22 that you regarded the bonuses as instances where ITL was  
 23 effectively paying the Co-op to move away from the  
 24 differential that had been agreed in the trading  
 25 agreement would be followed by the Co-op?

1 **A.** Right.  
 2 **Q.** Is that what you meant?  
 3 **A.** No, I don't think it is what I meant. What I meant was  
 4 that the Co-op had promotional periods all the way  
 5 through the year, some of which we would support with  
 6 point of sale material, which meant just a flattening of  
 7 price, and occasionally -- more than occasionally -- we  
 8 would support a proactive price move to give us  
 9 additional competitive advantage to grow share. What  
 10 I am trying to explain here is that the RRP  
 11 differentials would therefore be out of kilter most of  
 12 the time, and if I understand correctly, it's being  
 13 suggested that my differentials ran the way of the  
 14 structure of the pricing. If that was the case,  
 15 I wouldn't do short-term activity. If I did short-term  
 16 activity I couldn't pay on strategic differentials,  
 17 which I've paid in full. So the two things in my mind  
 18 don't line up.  
 19 **Q.** What I am puzzled about is this: if the differential was  
 20 agreed between you and the Co-op to be a maximum only,  
 21 so that the Co-op could go lower, I don't understand why  
 22 you would say that when bonuses were paid there would be  
 23 a divergence from the differentials?  
 24 **A.** I think that's because the reality is the retailer would  
 25 never reduce the price much lower than the promotional

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1 price set because of the low margins on the product. We  
 2 are not talking about a product where they could take  
 3 an additional, 3, 4, 5, 6p off.  
 4 **Q.** I am sorry, perhaps I'm being a bit obscure. Let's  
 5 suppose that the RRP differential is 3p. That's to say  
 6 you have ITL brand X is 3p lower than Gallaher brand Y,  
 7 in the RRP's.  
 8 **A.** Yes.  
 9 **Q.** Right. Now, I think you have been saying that the deal  
 10 with the Co-op was that that meant that the Co-op had to  
 11 keep ITL's brand X 3p below the price of the Gallaher  
 12 brand Y, but ITL -- sorry, but the Co-op could price  
 13 even lower, it could move the ITL brand X to a 4p or 5p  
 14 or something differential.  
 15 **A.** Yes.  
 16 **Q.** Is that correct?  
 17 **A.** Yes.  
 18 **Q.** But why, therefore, if ITL, for example, paid a bonus to  
 19 achieve that, you would talk about a divergence from  
 20 differential, if we were just dealing with maxima?  
 21 There wouldn't be a divergence from the differential.  
 22 The payment of the bonus would be entirely in accordance  
 23 with the understanding between the Co-op and ITL because  
 24 the differential was understood to be a differential of  
 25 no less than 3p, but it could be a lot more; so why

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1 would you, in your witness statement, have described  
 2 this scenario as a divergence from the differential?  
 3 **A.** I am losing your context. I think the point I have been  
 4 making is that the differentials we were trying to work  
 5 with were the RRP differentials, because we felt that if  
 6 that was the case our brand would grow. If we had more  
 7 of a differential, that helped us. If we did  
 8 a short-term activity, of course the differentials would  
 9 not be there, because of a proactive piece of pricing,  
 10 either by ourselves or by our competitors. I do not  
 11 understand your -- the point. I am sorry, I must be  
 12 missing it.  
 13 **Q.** It's simply that your evidence tends to suggest that  
 14 these differentials were fixed and not maxima.  
 15 **A.** I can't agree with that.  
 16 **Q.** Did you tell the Co-op this?  
 17 **A.** Did I tell them --  
 18 **Q.** Did you tell the Co-op that differentials were maxima  
 19 only?  
 20 **A.** The differentials are the RRP differentials. The  
 21 pricing within the stores, excepting our confusion  
 22 element about away from RRP because of the investment,  
 23 was completely the control of the Co-op. So if they  
 24 sold them at £1 or £5, that was their business decision.  
 25 What I was trying to make sure is that within that

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1 store, if a smoker walked in with a £10 note he would  
 2 buy one of my products more readily than somebody else's  
 3 because of the price relativity. I wasn't concerned  
 4 about the actual price, unless it was where I was  
 5 investing money to get below RRP. The belief was that  
 6 our positioning of our brands would grow our business.  
 7 I would be happy if it was a bigger gap but as a general  
 8 statement of intent, that's how we worked.  
 9 **Q.** Could you turn to, in annex 15, tab 8, please.  
 10 **THE CHAIRMAN:** I notice the time, Mr Lasok.  
 11 **MR LASOK:** I am terribly sorry.  
 12 **THE CHAIRMAN:** Is that a convenient point to break for the  
 13 day, or how much longer do you have to go, do you think?  
 14 **MR LASOK:** This is going much more slowly than I had  
 15 anticipated, and I think it is necessary to spend  
 16 perhaps five minutes in a kind of stocktaking exercise.  
 17 If the Tribunal is content to stop now, I would have  
 18 thought that Mr Goodall can leave while we get on with  
 19 this.  
 20 **THE CHAIRMAN:** Yes. So that's where we have got to today,  
 21 Mr Goodall, and can you come back tomorrow morning and  
 22 continue your evidence, please.  
 23 Let me repeat that, as you are in the middle of your  
 24 evidence, you mustn't, as I said, discuss it with  
 25 anybody on your team. You can stand down now and

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1 perhaps it's best if you go out of the court.  
 2 **A.** What time tomorrow?  
 3 **THE CHAIRMAN:** I think it's 10.30 tomorrow.  
 4 **A.** Thank you.  
 5 (The witness withdrew)  
 6 Discussion re timetable  
 7 **MR LASOK:** I think there is a suggestion that 10 o'clock  
 8 might, if it's possible --  
 9 **THE CHAIRMAN:** I think we are in difficulties starting at  
 10 10 o'clock tomorrow.  
 11 **MR LASOK:** Well, now, the position is that, as a sort of  
 12 finger in the air exercise, I would hope that I would  
 13 finish cross-examination of Mr Goodall after an hour.  
 14 I would hope to do that. I had obviously hoped to do it  
 15 much more quickly than that, and I will use my best  
 16 endeavours to do that.  
 17 I can't say that at this stage the hour is  
 18 an entirely accurate prediction, because sometimes when  
 19 you ask a question you get a speech in response, and  
 20 it's not good manners to interrupt, because the witness  
 21 ought to say what he has to say. But that's what I have  
 22 tried to do.  
 23 After that we would get the Co-op witnesses.  
 24 I understand that Mr Goulthorp needs to be -- I am  
 25 trying to think of the right word, "sorted out" is

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1 probably a fairly neutral one, on Tuesday. I am quite  
2 happy to deal with Mr Goulthorp first and I would have  
3 thought that the cross-examination of him and Mr Messom  
4 would be relatively short, certainly nothing like the  
5 cross-examination of Mr Goodall or indeed, I suspect,  
6 the cross-examination of Ms Parker.

7 Then that leaves Mr Owen. He will take a little  
8 longer, but again it's perfectly possible that his  
9 cross-examination is going to be relatively short but  
10 a little longer than Mr Goulthorp and Mr Messom.

11 What I haven't factored in is the question of other  
12 cross-examination by ITL and re-examination. I would  
13 have thought that we could probably expect to get  
14 through Mr Goodall, Mr Goulthorp and Mr Messom tomorrow.

15 We might, if it were at all possible, have to sit  
16 a little after 4.15, but that's just my estimate from my  
17 perspective.

18 I need also to reveal this: I unfortunately am  
19 supposed to be in the European Court on Thursday, and  
20 this arrangement had been finalised at a time when we  
21 thought that even if there was a bit of delay on  
22 Thursday, we would not still be dealing with the Co-op  
23 witnesses, we would have moved on to Morrisons. So my  
24 difficulty is that I cannot now withdraw from the  
25 hearing in the European Court on Thursday, and therefore

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1 I would ask the Tribunal's indulgence in allowing me to  
2 disappear off the scene. But that does have  
3 a consequence for the Co-op case if we haven't finished  
4 it off by the end of tomorrow.

5 **THE CHAIRMAN:** Well, who comes after the Co-op?

6 **MR LASOK:** I think it's Morrisons.

7 **THE CHAIRMAN:** And who was going to be leading, then, in  
8 relation to Morrisons?

9 **MR LASOK:** Mr Williams was going to do the cross-examination  
10 of the Morrisons witnesses in any event.

11 **THE CHAIRMAN:** Well, it may be that, wherever we get to by  
12 the end of Tuesday, tomorrow, because we are not sitting  
13 on Wednesday, that we will have to move on to the  
14 Morrisons witnesses on Thursday and then, if we are not  
15 finished with the -- is it Mr Owen?, we might have to  
16 come back to him after the Morrisons witness.

17 **MR THOMPSON:** I must confess, I think I am the only person  
18 here, and I suspect that the Co-op will react with some  
19 dismay to what's happened. Mr Goulthorp has been here  
20 for over a week and has to leave to return to Spain and  
21 won't be back until the end of the month. I think we  
22 were set down to have two days clear on Friday and  
23 Monday. I know my witnesses may be relatively short,  
24 but I have listened and read quite a lot of what has  
25 been said, and particularly in relation to the Gallaher

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1 side of affairs, it does appear to me that the Tribunal  
2 does require some form of opening in relation to  
3 Gallaher, because Mr Howard has set out ITL's stalls on  
4 more than one occasion, and Shell has its own particular  
5 case in relation to the whole case, and so it does seem  
6 to me to fall to me to give some form of introduction of  
7 the Gallaher side of affairs, and it is rather  
8 unsatisfactory for one witness to start tomorrow and  
9 then for Mr Lasok at this stage to say that the OFT is  
10 not in a position to continue on Thursday, when this  
11 must have been perfectly obvious by the end of last  
12 week, given the speed at which things were going, and  
13 this issue was raised I think by the OFT some six weeks  
14 ago or perhaps longer. So the question of this Thursday  
15 has been very much in the OFT's mind and it has a strong  
16 team.

17 So I do question whether it's really reasonable for  
18 me to have one witness called tomorrow and then possibly  
19 make an opening on Friday, and then have another witness  
20 appear on Friday and then possibly go over to Monday in  
21 order to get the two days.

22 **THE CHAIRMAN:** I think Mr Lasok was saying that he hoped  
23 that both Mr Goulthorp and Mr Messom's evidence would be  
24 finished tomorrow, with a reasonable wind behind them,  
25 and it would just be Mr Owen who might be put over until

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1 Friday.

2 **MR THOMPSON:** I have some concern, I have one or two  
3 questions for Mr Goodall arising from issues that have  
4 come up today, and I am sure Mr Howard does, as to  
5 whether we will actually start with my witnesses until  
6 the afternoon, given the speed we have been moving  
7 today.

8 (Pause)

9 **THE CHAIRMAN:** We do see the force of what Mr Thompson says,  
10 and we were thinking we might just rise briefly, both  
11 for us to have a discussion and for you to have  
12 a discussion, and in particular whether it would be  
13 possible between now and Thursday for someone on your  
14 team other than you, if you have to be in Luxembourg to  
15 take over the cross-examination of Mr Owen, or whoever  
16 else is left. It does seem rather unsatisfactory for  
17 the Co-op case to be interrupted in that way. We  
18 remember that you did raise the question of your  
19 commitment in Luxembourg apropos of whether we could  
20 move the day, and that's not possible, unfortunately.  
21 We can -- if I rearrange things -- start tomorrow at 10  
22 or as close to 10 as possible, but perhaps you could  
23 discuss it amongst yourselves, we will just have  
24 a discussion outside and come back in a few minutes.  
25 Thank you.

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1 (4.45 pm)  
 2 (A short break)  
 3 (4.50 pm)  
 4 **MR LASOK:** Madam, we had a discussion amongst ourselves and  
 5 because of the way that we have prepared this case,  
 6 Mr Williams is not familiar with the Co-op documents.  
 7 He will want to focus on Morrisons, he has prepared his  
 8 cross-examination for that, but after a passage of time,  
 9 you begin to forget, and you need to refresh your memory  
 10 again.  
 11 We don't have anybody in the team really with  
 12 sufficient seniority and experience to fill that  
 13 particular gap. If the Tribunal directs that we have to  
 14 carry on with Co-op on Thursday, so be it. It did occur  
 15 to us, however, that having second opening from the  
 16 Co-op was a bit of icing on the cake, because we have  
 17 already had one opening on the Co-op situation, and at  
 18 the moment we are a bit unclear as to why there is  
 19 a need for another one.  
 20 **THE CHAIRMAN:** My understanding is that is going to cover  
 21 the Gallaher side of things, whereas of course Mr Howard  
 22 covered the ITL side of things.  
 23 **MR LASOK:** I think the original opening covered the Co-op  
 24 generally.  
 25 **THE CHAIRMAN:** Yes. Well, what we would ordinarily have, as

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1 I understand it, is that tomorrow we would finish off  
 2 with Mr Goodall, we would then have Mr Goulthorp and  
 3 Mr Messom, and on current going it seems rather  
 4 optimistic to consider that we would necessarily get  
 5 through all of them. We are reluctant to then split the  
 6 Co-op witnesses by then interposing a Morrisons witness  
 7 and then that would involve both splitting the Co-op  
 8 witnesses and splitting the Morrisons witnesses. So our  
 9 current view is that we should continue with the Co-op  
 10 on Thursday, and if that means a late night for  
 11 Mr Williams, then I am afraid that might have to be how  
 12 it works.  
 13 Was there something you wanted to say, Mr Thompson?  
 14 **MR THOMPSON:** No, I think that the Tribunal made the point  
 15 I was going to make, which was that the Gallaher side  
 16 has been barely covered, there was a reference to the  
 17 first Gallaher agreement, but there are somewhat more  
 18 documents in relation to Gallaher than in relation to  
 19 ITL, and at the moment I don't think there has been any  
 20 discussion on them at all.  
 21 I suppose the only other point -- I didn't want to  
 22 make it as a jury point -- that the timing has not kept  
 23 up, I don't really see why, on behalf of the Co-op, the  
 24 fact that the two days that were set aside for the Co-op  
 25 to present its factual case should be curtailed or

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1 chopped and changed because until now everybody else has  
 2 had more time.  
 3 **THE CHAIRMAN:** Well, we are not a jury, Mr Thompson.  
 4 **MR THOMPSON:** Sometimes jury points are good points.  
 5 **THE CHAIRMAN:** Well, yes, sometimes. Well, our decision is  
 6 that we will continue in the order that was set, and  
 7 I am afraid your team will have to cover for you in your  
 8 absence in Luxembourg, Mr Lasok.  
 9 Mr Thompson, if you could reduce the amount of time  
 10 that you will take in your opening about Gallaher by  
 11 preparing a note that we could perhaps read over the  
 12 short adjournment tomorrow, then that might be helpful  
 13 as well.  
 14 **MR THOMPSON:** Yes, or if, as I suspect, Mr Goulthorp's  
 15 evidence is almost entirely to do with ITL and the  
 16 letter, it may be appropriate simply to go straight  
 17 through with Mr Goulthorp, because some of these issues  
 18 have already been raised. I don't think there is  
 19 anything distinctive he can add on the Gallaher  
 20 documents, as it were, because he is too senior anyway.  
 21 So it may be appropriate to go through with Mr Goulthorp  
 22 anyway, just to make sure he is finished tomorrow, if  
 23 that would be convenient, and then we can see where we  
 24 are at the end of his evidence. I can say something at  
 25 the close tomorrow or if there is time we can deal with

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1 Mr Messom as well.  
 2 **THE CHAIRMAN:** Yes. Is everyone clear, then, as to what we  
 3 are doing tomorrow? So we will start at 10 o'clock to  
 4 give us a fighting chance of getting through everything,  
 5 but there is a limit to how long in the afternoon we can  
 6 go, for everyone's sake, not least the transcribers. So  
 7 we will meet, then, at 10 o'clock tomorrow.

8 (5.00 pm)

9 (The court adjourned until 10.00 am on  
 10 Tuesday, 11 October 2011)

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