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IN THE COMPETITION

APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 October 2011

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

CO-OPERATIVE GROUP LIMITED

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

WM MORRISON SUPERMARKET PLC

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING (DAY 15)

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 Tuesday, 18 October 2011
 2 (10.15 am)
 3 **THE CHAIRMAN:** Good morning. We are having Mr Matthews back
 4 this morning.
 5 MR PAUL MATTHEWS (continued)
 6 **THE CHAIRMAN:** Good morning, Mr Matthews.
 7 **A.** Good morning.
 8 **THE CHAIRMAN:** I remind you you are still on oath.
 9 **A.** Yes, of course.
 10 **THE CHAIRMAN:** Yes, Mr Williams.
 11 Cross-examination by MR WILLIAMS (continued)
 12 **MR WILLIAMS:** Good morning again, Mr Matthews.
 13 **A.** Good morning.
 14 **Q.** Before we pick up where we left off, there was just one
 15 thing we were looking at on Friday which I wanted to go
 16 back to very quickly just by way of clarification.
 17 You will remember that in the second trading
 18 agreement, a bonus was paid for pricing in line with
 19 an ongoing schedule of costs, bonuses and margins; do
 20 you remember that?
 21 **A.** Yes.
 22 **Q.** Do you want to look at the --
 23 **A.** Yes, I would prefer to, yes, thank you.
 24 **Q.** If we go back to annex 17, tab 85, please. {D17/85/463}.
 25 So it's on the second page of that agreement, page 463

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1 at the bottom right. In the second paragraph, you can
 2 see:
 3 "Based on the continued achievement of those
 4 differentials and the shelf prices highlighted in the
 5 ongoing [and then in italics] schedule of costs, bonuses
 6 and margins document."
 7 That was what I was referring to, it's the words in
 8 italics, it's that type of schedule. You gave your
 9 evidence about what this was intended to capture on
 10 Friday, and I do not want to go back over that question.
 11 I just want to make sure we understand what sort of
 12 schedule this is a reference to, the words in italics,
 13 because you might remember that the Chairman raised
 14 a question as to whether we were all talking about the
 15 same sort of schedule. Do you remember that?
 16 **A.** Yes.
 17 **Q.** So could you then turn back to tab 17 in this file.
 18 {D17/17}. You can see there is a letter there, and the
 19 first line of the letter says:
 20 "Please find attached a new schedule of costs,
 21 bonuses and margins."
 22 That's in italics. So am I right in saying that the
 23 reference to the schedule in the trading agreement is
 24 a reference to this sort of schedule, the sort of
 25 schedule that we see over the page?

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1 **A.** Yes, except I think that there is a difference in that
 2 the one that we are looking at, on 17, is a document of
 3 monthly investments which, from time to time -- as
 4 I think we discussed on Friday -- changed. Whereas the
 5 reference in the main body of the trading agreement is
 6 to the set-up of that, the framework. So I think that
 7 there is -- that that would be the principal difference
 8 between them.
 9 **Q.** I am not sure I follow. The only point I was getting at
 10 is that the agreement contemplates payment of a bonus
 11 for pricing in accordance with a schedule, and I've
 12 asked you some questions about what that means and how
 13 that worked.
 14 **A.** Yes.
 15 **Q.** The only thing I am asking you about now is: is the type
 16 of schedule that that's referring to, this type of
 17 schedule, are you saying that the answer to that is not
 18 a simple yes? Because obviously we saw the words in
 19 italics, and we see the same words in italics in the
 20 first line of tab 17, and that's actually a feature of
 21 this correspondence, if you just want to jump ahead to
 22 26.
 23 The first line of the letter is the same and we see
 24 the same sort of schedule.
 25 **A.** Yes.

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1 **Q.** I am just asking you about the type of schedule that the
 2 trading agreement is referring to.
 3 **A.** And the question again? I am sorry, I am lost a little.
 4 **Q.** Is the type of schedule, the words in italics in the
 5 trading agreement, is that a reference to the type of
 6 schedule we have just seen at tabs 17 and 26?
 7 **A.** That's the type of schedule, yes.
 8 **Q.** Thank you. Just to pick up where we were on Friday, you
 9 may remember I was asking you some questions about the
 10 interaction between ITL's pricing strategy and
 11 Morrison's pricing strategy?
 12 **A.** Yes.
 13 **Q.** Do you have your witness statement? Not yet?
 14 **A.** I don't.
 15 **Q.** It's at tab 42 in that file. Could you read
 16 paragraphs 126 and 127, please.
 17 (Pause)
 18 **A.** I've read that.
 19 **Q.** So we will look at the letter in just a minute, but just
 20 to talk about this issue in general terms, if we may.
 21 Here you are talking about a letter which responds to
 22 an indication from Morrisons that it wants to price
 23 multipacks more cheaply than they have been priced.
 24 **A.** Right.
 25 **Q.** The letter says that Morrisons wants to bring the prices

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1 down, whether or not you reduced the cost price; is that
 2 right?
 3 **A.** The letter is ...
 4 **Q.** Sorry, the letter that you are referring to in your
 5 witness statement. Would you like to see the letter?
 6 **A.** I would like to see the letter.
 7 **Q.** It's at tab 9 of annex 17. If you turn to page, bottom
 8 right, 45. There is a heading at the top of the page
 9 "Multipack Support". {D17/9/45}.
 10 **A.** I can see it, yes.
 11 **Q.** It might be a good idea for you to read that.
 12 (Pause)
 13 **A.** Okay.
 14 **Q.** There is some confidentiality marking in this, but I am
 15 going to ignore that in a moment, unless I am told not
 16 to.
 17 The letter says that Morrisons is in favour of
 18 reducing the price of multipacks, whether or not you
 19 were offering a bonus to subsidise that?
 20 **A.** Yes. It says they are considering it.
 21 **Q.** They are considering it. It's right to say, isn't it,
 22 that Morrisons could do that and still comply with ITL's
 23 preferred pricing differentials; that is to say they
 24 could reduce the prices of your multipacks and also
 25 reduce the prices of Gallaher's multipacks?

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1 **A.** Well, the two things don't follow, but they certainly
 2 would be able to reduce the price of our multipacks.
 3 **Q.** It was your strategy or policy to offer bigger packs at
 4 better prices to their customers because that's what
 5 their customers want, you would expect that to apply to
 6 Gallaher's multipacks as well as to yours?
 7 **A.** I think it would be unusual for it not to, but not
 8 unknown, and the reason that I say it might not be
 9 unknown is that -- my apologies for being parochial --
 10 but some of our brands had a particular type of
 11 demographic, a particular type of consumer that looked
 12 for increasing value with multipack purchase, being
 13 cloyingly parochial, that would have been Superkings, it
 14 just had a type of consumer that really did look for
 15 value in bigger packs, whereas Gallaher's offerings
 16 might have been different.
 17 **Q.** Superkings was often linked to Berkeley, wasn't it, so
 18 the sort of consumers that were interested in cheap
 19 multipacks of Superkings would presumably also
 20 potentially be interested in cheap multipacks of
 21 Berkeley?
 22 **A.** Potentially, but it was a potential opportunity for us
 23 to steal a march in larger packs.
 24 **Q.** Just taking this in stages, they could comply, they
 25 could price multipacks more cheaply in accordance with

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1 their own strategy --
 2 **A.** Yes.
 3 **Q.** -- and at the same time still comply with the pricing
 4 differentials?
 5 **A.** Well, if they reduced ours and didn't reduce those of
 6 our competitors' comparable brands, whether in a 20 pack
 7 or a multipack, we would have been quite happy with
 8 that, because we would have got competitive advantage.
 9 **Q.** You do actually say, in point 3 here, and this is the
 10 bit that's in the red box that I am going to ignore, it
 11 says above that:
 12 "I am prepared to offer this support provided we can
 13 agree on the following: that we are given a two-month
 14 period of advantage over our major competitor, ideally
 15 November and December, with advertising support."
 16 I don't know exactly what advantage you had in mind.
 17 **A.** I think what I was saying there was that Morrison had
 18 come to me and suggested that, as the letter says, they
 19 felt they weren't offering a great enough inducement to
 20 those consumers who wanted to buy larger packs. They
 21 probably were thinking in reference to other consumer
 22 goods where there was quite a big discount, and they
 23 wanted me to fund some of that, and I saw that as
 24 a point of negotiation. And I think what I was
 25 suggesting there was that, yes, I might do that, but

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1 what are you going to do for me? So some of the
 2 suggestions there were around perhaps getting
 3 a competitive advantage, as well as the material point,
 4 which was the full listing of Concept which was a very
 5 big new brand for us at the time.
 6 **Q.** So what seems to be envisaged here is that you will have
 7 a two-month period of advantage, but after that, if
 8 Morrisons wants to price your competitors' multipacks at
 9 the same advantageous price, then that will be a matter
 10 for Morrisons?
 11 **A.** Yes.
 12 **THE CHAIRMAN:** Do you accept, then, that when you are
 13 talking about a two-month period of advantage in that,
 14 you are talking about a price advantage rather than the
 15 advertising support?
 16 **A.** Both, but yes, pricing advantage too.
 17 **MR WILLIAMS:** So using that as an example, it looks as
 18 though Morrison's strategy is about the absolute prices,
 19 it's about making sure that the multipacks are
 20 competitive relative to its competitors, whereas your
 21 pricing differential requirements would have been more
 22 concerned with the relativity between your product and
 23 the linked Gallaher brand?
 24 **A.** Well, in this particular instance it was to try and do
 25 better than what we would have expected to achieve, so

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1 we would have had a differential larger than that that
 2 existed naturally.
 3 **Q.** That would have been the effect during the two-month
 4 period of advantage?
 5 **A.** Correct.
 6 **Q.** And then after that, one might well end up in
 7 a situation where, as I say, Morrisons chooses the
 8 absolute level of the price, the relatively cheap price
 9 compared to its competitors, and the pricing
 10 differentials would have been concerned with the
 11 relativity?
 12 **A.** That's possible but I also look at point 2, where I say
 13 that the policy is regularly reviewed, and I think that
 14 that would have been something I would have been
 15 watching quite carefully.
 16 **Q.** You also say in your witness statement that Morrisons
 17 made enquiries of you about prices in rival stores and
 18 whether you were giving Morrison's rivals a better deal
 19 than you were giving to Morrisons?
 20 **A.** Yes.
 21 **Q.** And that's something you comment on?
 22 **A.** Yes.
 23 **Q.** I think the example you give is at document 75, can you
 24 turn to that, please, and do you want to read it
 25 through.

1 (Pause)
 2 **A.** I've read that.
 3 **Q.** So I really had just a straightforward question about
 4 this, which is: I am presuming that what you told
 5 Morrisons in this letter was true to the best of your
 6 knowledge at the time?
 7 **A.** Yes, to the best of my knowledge.
 8 **Q.** So the outcome of this exchange is that you don't offer
 9 them any additional bonus, and if Morrisons wants to
 10 compete with its rivals, it basically knows what it has
 11 to do of its own accord?
 12 **A.** I think largely yes. I mean, this was a typical
 13 exchange that I referred to, I think, on Friday, where
 14 there would usually be a Monday morning or Monday
 15 afternoon conversation with buyers from various
 16 supermarkets who would have been out into the trade to
 17 see prices and would come back with tales of exaggerated
 18 pricing points and it would depend largely on the
 19 enthusiasm of the buyer at the time.
 20 Paul in this particular instance wasn't that
 21 insistent, but there were times when he was, and those
 22 of other supermarkets were. There was no guaranteed
 23 outcome of it.
 24 **Q.** No, but in this example the outcome is you don't offer
 25 them anything?

1 **A.** I managed to fend him off I think on this occasion,
 2 yeah.
 3 **Q.** Could you turn to the next tab and read that to
 4 yourself, please. I don't know if you are familiar with
 5 this document?
 6 **A.** I am familiar with this document.
 7 **Q.** Obviously there is an email at the top and then there is
 8 your comments and markings at the bottom?
 9 **A.** Yes.
 10 **Q.** Do you want to read it through again?
 11 **A.** No, I am quite familiar with this one.
 12 **Q.** I don't know if the Tribunal wants a moment.
 13 (Pause)
 14 So what's happening in this email is that Morrisons
 15 has already made a decision to reduce prices effective
 16 from 6 January, which is a couple of working weeks
 17 ahead, and having made that decision, they come to you
 18 asking you basically to money their price reduction?
 19 **A.** Yes.
 20 **Q.** What the letter says in the last paragraph is:
 21 "As you can guess, Old Holborn is going to the same
 22 prices on the same date."
 23 So this is at a point where you haven't yet offered
 24 any funding for the lower price?
 25 **A.** I haven't.

1 **Q.** And yet they have decided to price the two brands at
 2 parity. So doesn't this document show an understanding
 3 between you and Morrisons, as you can guess, that
 4 Golden Virginia and Old Holborn would always be priced
 5 at parity, even if Morrisons was reducing prices of its
 6 own accord?
 7 **A.** No, I am afraid that I can't agree with that. I think
 8 this letter is representative of the fact that Morrison,
 9 rather than being concerned about the differentials
 10 between Imperial Tobacco and Gallaher, were far more
 11 concerned with what they had seen in the marketplace,
 12 and from memory, that would have been an example of
 13 where Paul has been into the market and perhaps seen
 14 those shelf prices on our brands in Asda, and knowing
 15 that their KVI or known value item brands, would have
 16 asked me to fund a reduction. As you can see there,
 17 I had done some very basic calculations and found it
 18 a little bit rich for my blood, so I did not want to pay
 19 for it.
 20 **Q.** Could we look at the sequence of the email, because it
 21 does say:
 22 "The following prices have been keyed effective.
 23 Please let me have a cost schedule. Golden Virginia
 24 prices [then it says] this will take us to a level equal
 25 where the market seems to be."

1 So so far the email is about Golden Virginia prices?
 2 **A.** I mean, that's an assumed close, as any salesman would
 3 know. He is saying "I am going to do this, how much are
 4 you going to contribute?" Rather than "would you mind
 5 awfully stumping up some cash", and I think he was
 6 hoping that I would overlook this and perhaps say yes
 7 without doing the sums, but on this particular occasion
 8 I was awake and did the sums and realised that it was
 9 just too much of an investment. But I am not sure,
 10 again, just to -- I am not sure that that is
 11 representative of the fact that Morrison would feel
 12 compelled to reduce the price of our product simply
 13 because a competitor product was at the same price.
 14 This is very clearly, in my opinion, to do with their
 15 perceived competitive nature with a rival supermarket.
 16 **Q.** Sorry, I was just taking you through the email in
 17 stages, and I was just saying that when we get to the
 18 words "this will take us to a level equal where the
 19 market seems to be", so far he has only been commenting
 20 on Golden Virginia?
 21 **A.** Mm.
 22 **Q.** Then the next sentence is:
 23 "As you can guess, Old Holborn is going to the same
 24 prices on the same date."
 25 So I do not want to be too scientific in reading the

1 way this is laid out, but it does seem that the
 2 Golden Virginia prices are moved with reference to the
 3 market, and then there is a comment "as you can guess,
 4 Old Holborn is going to the same prices on the same
 5 date", and the thrust of it is they are moving
 6 Golden Virginia to compete with their competitors, and
 7 they are moving Old Holborn to the same price as
 8 Golden Virginia; that's what I am suggesting to you?
 9 **A.** Do you want me to comment upon that? Is that
 10 a question? Sorry to be --
 11 **Q.** It is a question.
 12 **A.** I hope I am not either missing the point or repeating
 13 myself. That might be the outcome of it, but I think
 14 I would just say what I said before, I think that this
 15 is Morrison wishing to replicate the shelf prices of
 16 their competitors.
 17 **THE CHAIRMAN:** But I think what you are being asked is: why
 18 would Mr Giles think that you would be able to guess
 19 that Old Holborn is going to the same price on the same
 20 date? Why would you guess that?
 21 **A.** I don't know, and -- I don't know, and I am not really
 22 sure what else to say about that.
 23 **MR WILLIAMS:** There is an obvious explanation, isn't there,
 24 which is that you have an agreement with Morrisons under
 25 which your brands are to be priced at certain

1 relativities to linked Gallaher brands, and Old Holborn
 2 and Golden Virginia were two such brands, they were two
 3 linked brands?
 4 **A.** Right.
 5 **Q.** But that's what's being put to you, Mr Matthews.
 6 **A.** I am missing the point, I really do beg your pardon,
 7 I am missing the point here.
 8 **Q.** I'll try one more time. What the email says is that
 9 Golden Virginia is being moved to a particular price,
 10 which is where the market seems to be on
 11 Golden Virginia, and then Mr Giles says:
 12 "As you can guess, Old Holborn is going to the same
 13 prices on the same date."
 14 So the way this reads is that Morrisons are moving
 15 Golden Virginia to a particular price level, which is
 16 where the market seems to be, and that there is a reason
 17 why you will be able to guess that Old Holborn is moving
 18 to the same price as Golden Virginia on the same date,
 19 and I am suggesting to you that the reason why you would
 20 be able to guess that is because you have an agreement
 21 with Morrisons that they will price Old Holborn and
 22 Golden Virginia at parity?
 23 **A.** But unless I am missing something, I've not -- I am not
 24 paying for this reduction that he's suggesting, and his
 25 suggestion that Old Holborn is moving is at this stage

1 just a suggestion. If... and if I was to want my brand
 2 at the same price as Old Holborn, I would have paid for
 3 it. But it hasn't moved.
 4 **Q.** The point I am making to you is that you didn't want to
 5 fund a promotion which appears to be all about Morrisons
 6 matching its competitors, but that nevertheless Mr Giles
 7 thinks you will be able to assume that even though you
 8 haven't offered any funding for that, Old Holborn and
 9 Golden Virginia are going to be priced at parity at
 10 a lower price point?
 11 **A.** Until I saw that, I wouldn't have taken any action.
 12 I think what I've assumed when I've written is: well, he
 13 would say that, but I don't know that that's going to be
 14 the case. If he was -- if he had an element of cunning,
 15 he could play one off against the other, and perhaps
 16 that's what he was trying to do, and perhaps at the back
 17 of my mind I was waiting to see the whites of his eyes
 18 before I did anything.
 19 **Q.** Can we just turn to what actually happened, then, which
 20 is that you didn't offer a bonus, but ITL has told us
 21 that Golden Virginia went down in any event, that
 22 Morrisons decided to price Golden Virginia at the lower
 23 price point in any event?
 24 **A.** Mm.
 25 **Q.** The only thing we know about Old Holborn is what's said

1 in this email, which is that it was going to the same
 2 price on the same date. So what we seem to see is
 3 an outcome where you don't fund the lower price for
 4 Golden Virginia, and yet still Morrisons respects
 5 pricing requirements, it still prices the brands at
 6 parity?
 7 **A.** I see. But if Morrison hadn't reduced the price of
 8 Golden Virginia, we would have still invested in that
 9 brand.
 10 **Q.** I think what I am putting to you is that, rather than
 11 take the view that you hadn't funded the price
 12 reduction, and therefore leave you to suffer
 13 a competitive disadvantage as against Old Holborn, what
 14 they do is they move the two brands to parity at a lower
 15 price point. So they respect ITL's pricing differential
 16 requirements at the lower price point, and I am
 17 suggesting to you that the reason they would do that is
 18 because they had a trading agreement with you which
 19 provided for these brands to be priced at parity?
 20 **A.** I don't think it is. Now I understand quite plainly
 21 what you are suggesting. My view on that remains the
 22 same, that they were more compelled to act because of
 23 the shelf prices they saw of their competitors, not out
 24 of any fear that they might be out of kilter with any
 25 perceived agreement. And that's why they have taken

1 that action.
 2 **Q.** I think in your witness statement you say that this sort
 3 of behaviour was not uncommon. Do you want to have
 4 a look at that? It's at paragraph 115. What you
 5 actually say, I am sorry, is:
 6 "It was not uncommon for Morrisons to suggest that
 7 our competitors were giving them funding to promote
 8 their brands to secure more funding from ITL or to
 9 secure funding for a longer period of time."
 10 **A.** Yeah, it was common, and not just Morrison, it was
 11 common amongst most buyers.
 12 **Q.** But this email doesn't suggest that, there is no
 13 suggestion in this email that the price of Old Holborn
 14 was being funded by Gallaher?
 15 **A.** There wasn't, and it's surprising that he hadn't made
 16 that insinuation.
 17 **Q.** If we turn over the page to tab 75(b), you will see you
 18 forward the email to Mr Batty, and you say:
 19 "I thought you may be interested in Morrison's new
 20 approach to pricing."
 21 So that email tends to suggest that the sort of
 22 exchange we see in 75(a) was not common, at least at
 23 that point in time?
 24 **A.** I think that's fair enough.
 25 **Q.** I think we have now looked at two examples of Morrisons

1 coming to you and asking you to fund lower prices in
 2 circumstances where it's not clear that Gallaher is
 3 funding lower prices on the linked brands, and in both
 4 instances you have said no?
 5 **A.** I don't know whether it was clear or not as to what
 6 Gallaher were doing, I wouldn't have known that. As
 7 I mentioned before, I was surprised that on that
 8 occasion Paul hadn't been more aggressive, and I think
 9 if he had taken his time with the email he would have
 10 probably worded it very much differently, in order to
 11 try and get me to react. When you look at the email, it
 12 was a bit -- there wasn't a lot of punch behind it.
 13 **Q.** But you didn't react to it by saying "Is this a Gallaher
 14 promotion? Is this something we need to react to?", you
 15 just say no?
 16 **A.** Because of the way that it's written. I would have just
 17 expected a little bit more aggression from him in the
 18 same way as perhaps another large supermarket might have
 19 said "Well, look, Paul, I know you are paying for this,
 20 you tell me you are not, but you must be, get your money
 21 out, I need this price, we need to sort something", but
 22 in this instance Paul didn't really do that.
 23 **Q.** Can we move on to a different topic now. Am I right in
 24 thinking that you reported to Roger Batty --
 25 **A.** Yes.

1 **Q.** -- during the period that you were managing this
 2 account?
 3 **A.** That's correct.
 4 **Q.** I am assuming that you discussed matters relating to
 5 pricing in Morrisons and ITL's pricing strategy with
 6 Mr Batty from time to time?
 7 **A.** Yes.
 8 **Q.** I think we have also seen reference to meetings of all
 9 of the account managers in the papers; is that right?
 10 Would the account managers get together from time to
 11 time?
 12 **A.** I think that like any remote workers, we had a monthly
 13 meeting to discuss company strategy.
 14 **Q.** Would people like Mr Goodall and Mr Culham be at those
 15 meetings?
 16 **A.** Both would have been there.
 17 **Q.** And Mr Batty presumably?
 18 **A.** And Mr Batty.
 19 **Q.** Did you discuss matters relating to the pricing strategy
 20 with other account managers at those meetings and
 21 generally?
 22 **A.** We would certainly discuss pricing strategy, as at the
 23 time it was critical, particularly on our lower end
 24 offerings, but yes, it would have been a big topic.
 25 **Q.** There are documents in the material that's been provided

1 to the OFT which the OFT believes show that Mr Batty,
 2 Mr Goodall and Mr Culham were all aware that Gallaher
 3 was operating strategy pricing differentials like ITL.
 4 Did you become aware of that through your discussions
 5 with Mr Batty and Mr Culham and Mr Goodall?
 6 **A.** I don't think I would have seen anything empirical, but
 7 we felt that when we moved price, that they would react
 8 and you could put together in your own mind a commercial
 9 argument that would suggest that they did have a pricing
 10 strategy.
 11 **Q.** So at the very least you had surmised that they were
 12 operating a pricing strategy around pricing list
 13 differentials like you were?
 14 **A.** I think that was plain, on some brands at least.
 15 **Q.** Moving on to a slightly different topic, we looked at
 16 documents on Friday in which ITL's prices followed
 17 Gallaher's prices up. That is to say that the price of
 18 a Gallaher brand went up and then we see a letter or
 19 email from you communicating that your price should go
 20 up to restore a differential. I asked you some
 21 questions about those documents; do you remember?
 22 **A.** I do remember the questions.
 23 **Q.** Would you agree that that dynamic worked the other way
 24 around too? That is to say, when you increased your
 25 prices, the Gallaher brand would follow and would

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1 restore the differential?
 2 **A.** I think that's quite a big question. I mean, there was
 3 so much or so many price increases and decreases and
 4 price marked packs and offers throughout this period,
 5 it's very difficult to give a binary answer to that.
 6 **Q.** Perhaps it will help if we look at some examples. Could
 7 you turn to tab 19 in annex 17. {D17/19}.
 8 **DR SCOTT:** While we are doing that, Mr Matthews, we are
 9 right in thinking that ITL did have a basic strategy
 10 about where prices should be relatively, leave aside for
 11 a moment the tactical bonusing and the ups and downs,
 12 but there was a basic strategy; yes?
 13 **A.** Yes.
 14 **DR SCOTT:** Thank you.
 15 **MR WILLIAMS:** So at tab 19, we see that the price of the
 16 Richmond Kingsize and Lights 100s are being held at
 17 16.25.
 18 **A.** Yes.
 19 **Q.** Is this one of the brands for which you had deduced that
 20 Gallaher was probably also applying pricing differential
 21 requirements?
 22 **A.** We had our own view that, at that time, Richmond as
 23 a brand had similar properties and conveyed a similar
 24 brand message as Mayfair did, but I think that during
 25 this period from about 98 to 2000 and something, it

22

1 wasn't that clear because they could be very aggressive
 2 on pricing, and I think it wasn't plain. Sometimes they
 3 would make very aggressive moves, they would bring in
 4 a price marked pack and hold it and hold it.
 5 So whereas with some brands I think that you could
 6 tell they were quite similar, Superkings and Berkeley,
 7 they had both been on the market for a long time, they
 8 were both 100-millimetre brands, they both had
 9 demographics of -- I'll pick my words very carefully --
 10 slightly ageing females of a certain demographic group.
 11 I think with established brands it was quite clear which
 12 smokers were which.
 13 With brands like Richmond that were emerging, the
 14 die hadn't been completely cast yet so there was quite
 15 a bit of jockeying for position on both brands, whilst
 16 we found what the consumer felt was the right
 17 differentials.
 18 **Q.** You mentioned Mayfair there, didn't you? But by this
 19 stage, which is January 2001, your strategy was parity
 20 between Richmond and Dorchester, you had made that move,
 21 I think, in your strategy at this point? We saw that
 22 last week. If you want to refresh your memory, there
 23 is --
 24 **A.** Yeah, I think by that stage we had, but it was still
 25 relatively new because Richmond had only been launched

23

1 a couple of years before, and repositioned in 1999,
 2 I think.
 3 **Q.** I don't expect you will remember exactly what happened
 4 to the price of Dorchester on particular dates --
 5 **A.** No.
 6 **Q.** -- so I am just going to tell you. Your price here is
 7 16.25. Prior to this, Dorchester 100s were at 16.45,
 8 but then it moved to 16.25, which is the same price that
 9 you were at, and just for the transcript, the reference
 10 for that is annex 7, document 9. {D7/9}.
 11 So the price of the Gallaher brand, Dorchester,
 12 moved to reinstate parity with Richmond at 16.25.
 13 **A.** Dorchester, not Mayfair?
 14 **Q.** Dorchester.
 15 **A.** Okay.
 16 **Q.** If you could then turn on to tab 31, do you want to just
 17 read the first page or cast your eye over the first
 18 page.
 19 (Pause)
 20 **A.** Okay.
 21 **Q.** So you move Richmond Kingsize and Lights 100s from 16.25
 22 to 16.75?
 23 **A.** Yes.
 24 **Q.** Again I'll tell you what happened to Dorchester, it
 25 moved up to restore parity at 16.75, and that's annex 7,

24

1 document 11, {D7/11}, for the Tribunal's note, and we
 2 also see it in annex 3, document 5, {D3/5} which is
 3 explicit that Gallaher was seeking to achieve parity
 4 between Dorchester and Richmond on these packs.
 5 So we have seen Dorchester following Richmond down
 6 to 16.25, and following it back up and further in fact
 7 to 16.75, maintaining the parity on both occasions.
 8 Would you agree that that's the pattern that you
 9 expected to see given that Morrisons had agreed to
 10 support your strategic pricing differentials?
 11 **A.** Can you just ask me that question again, the last
 12 sentence?
 13 **Q.** Would you agree that this pattern, the moving of the
 14 brands together to parity price points, that's what you
 15 would expect to see, given that Morrisons have agreed to
 16 price the two brands at parity for you?
 17 **A.** I think I am right in saying both brands were price
 18 marked at the time, so the shelf price might have been
 19 a function of that. But for all intents and purposes
 20 the price that the consumer was seeing and buying at
 21 would have been those prices, yes.
 22 **Q.** I think what I was suggesting to you is that, given that
 23 Morrisons had agreed to support your strategy of parity
 24 pricing on these brands, that's what you would expect to
 25 see? You would expect to see your pack of Richmond move

25

1 to 16.75 and then to see Dorchester move to 16.75 as
 2 well; that's parity pricing?
 3 **A.** Well, yes, if it's at the same price it's parity.
 4 **Q.** Could we then turn to tab 63, please. {D17/63/135}.
 5 I was interested in the second side of this. If you
 6 want to refresh your memory --
 7 **A.** 135?
 8 **Q.** I am interested in 135, and actually only down to the
 9 prices for Richmond 20s.
 10 (Pause)
 11 **A.** Okay.
 12 **Q.** So what the first paragraph says is:
 13 "Despite fierce competition, we feel there should be
 14 some upward movement in the ultra low price sector of
 15 the market."
 16 You go on to talk about price increases on Richmond.
 17 When you talk about the ultra low price sector of the
 18 market, you are not just talking about Richmond there,
 19 are you, you are talking about your rivals' brands like
 20 Dorchester?
 21 **A.** Well, the subtext there is I know it's probably not
 22 worthy of mention, but in that last document we looked
 23 at, I just happened to glance upon the bonuses we were
 24 paying, and I know they are commercially sensitive, but
 25 we weren't making any money on those brands at the time,

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1 so all I am saying there is despite fierce competition,
 2 in other words we are not making any money, we need to
 3 make a little bit more, please, and "we should feel
 4 there is some upward movement" is wishful thinking to
 5 try and restore some sanity to our margin, our margin
 6 chain. "Ultra low price" was a catch-all term for
 7 anything that sat below a certain shelf price, and
 8 I don't recall which brands would have been in that
 9 basket.
 10 **DR SCOTT:** I did a calculation over the weekend, and in 31
 11 the retro bonus in percentage terms is rather larger
 12 than the margin.
 13 **A.** Yeah.
 14 **DR SCOTT:** So you are taking quite a hit at that point.
 15 **A.** We were, and I actually looked at those bonuses in
 16 disbelief when I saw them, they were very, very chunky.
 17 **MR WILLIAMS:** So I think you are saying that you don't know
 18 which brands would have been competing with Richmond at
 19 that stage, but this is July 23, 2002. Do you want to
 20 turn to tab 85, and just to refresh your memory --
 21 **A.** Yes.
 22 **Q.** -- that's the trading agreement which applied at this
 23 stage.
 24 **A.** Okay.
 25 **Q.** On page 464, {D17/85/464}, Richmond is linked to

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1 Sterling and Dorchester.
 2 **A.** Yes, and that was certainly the intention when the
 3 agreement was written, but I can't be sure about this
 4 particular instance, but it was a point I was trying to
 5 make on Friday, that those agreements were a moment in
 6 time example, and those differentials could change
 7 within a year, dependent on the moves within the market,
 8 and both Gallaher and Imperial could get behind certain
 9 brands, so they might reposition a brand in the same way
 10 as in 1998 we decided to enter the ultra low price
 11 market and repositioned Richmond downwards, which would
 12 create a new dynamic. But I think it's fair to say at
 13 that time we were very interested in the pricing of that
 14 brand.
 15 **Q.** "That brand" being Dorchester or "that brand" being
 16 Richmond?
 17 **A.** Richmond/Dorchester, Richmond/Mayfair, Richmond
 18 potentially Sterling as well. It could change.
 19 **Q.** So when you talk about the ultra low price sector of the
 20 market, you are talking about those brands?
 21 **A.** Plus others too, because I can't remember with complete
 22 clarity, but Rothmans may have had a brand in there as
 23 well as would own label offerings which were still
 24 available during that period. So there was quite a bit
 25 of action in that sector of the marketplace.

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1 Q. So what you envisage in this first sentence is
 2 an increase in the price of Richmond and competing
 3 Gallaher brands?
 4 A. Well, what I am anticipating there is to claw back some
 5 investment which, if I did that, and the supermarkets
 6 wanted to maintain their cash margin, would see those
 7 shelf prices move from 3.49 to 3.54, and 3.35 to 3.58.
 8 Q. I'll tell you what happened to Dorchester, because again
 9 I don't expect you to remember that. It looks as though
 10 Dorchester went up by the same amount as the increase in
 11 the price of Richmond, that is 5p from 3.49 to 3.54. We
 12 don't have a Morrisons document which shows that, but we
 13 have a general Gallaher document which talks about these
 14 price increases, in annex 3, document 12. {D3/12}.
 15 So that reinstated parity, would you agree that
 16 that's really what your letter was envisaging?
 17 A. No, because I think the third paragraph is also
 18 instructive. It talks about us holding the multipacks
 19 at that lower price. Now, I can't be sure, but I am
 20 almost certain in the supermarkets the 100 multipacks in
 21 volume terms may have been similar to volume in 20s, so
 22 what I think we were trying to do there was look at the
 23 mix across different pack offerings, and whereas we
 24 might edge ahead on the 20s, at this stage we were
 25 keeping the price marked pack on the 100s down. So the

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1 effect would be to claw back a little bit more margin,
 2 but you would have that 100 multipack offer with a price
 3 mark on it.
 4 Q. I am sorry, I should have been more specific, I was
 5 talking about 20s where you talk about upward movement
 6 in the ultra low sector of the market.
 7 A. On 20s, yes, but the 100 multipacks stayed down.
 8 Q. Yes, so you are envisaging in that first sentence upward
 9 movement in the ultra low price sector of the market,
 10 including Dorchester, and in fact that is what happened?
 11 A. But we would have been hoping, wouldn't we, for the
 12 100s, for Gallaher to have gone up on the 100s,
 13 therefore giving us competitive advantage on our own
 14 multipacks.
 15 Q. Yes, I wasn't asking you about the 100s, I was asking
 16 you about the 20s.
 17 A. On the 20s we were looking to move our shelf prices up
 18 by those amounts, 5p and 6p.
 19 **THE CHAIRMAN:** The point that is being put to you
 20 Mr Matthews, is that you talk about upward movement in
 21 the ultra low price sector of the market, which seems to
 22 be something broader than the shelf price of Richmond.
 23 So what we are trying to find out is whether, in that
 24 reference to upward movement of the market, you were
 25 actually expecting the other brands in that sector to go

30

1 up just as you were putting up the shelf price of
 2 Richmond?
 3 A. Yeah, I think that that would have been written not just
 4 in terms of wishful thinking but we may have seen
 5 a price marked pack in the independent trade from
 6 Gallaher that showed that they were looking to move up
 7 there --
 8 **MR WILLIAMS:** On 20s?
 9 A. Yes.
 10 Q. We can check that.
 11 A. Because of course in the independent sector, as opposed
 12 to the multiples, there was quite a few price marked
 13 pack offerings, and it was quite easy to visit
 14 Cash & Carries or wholesalers and see when a new pack
 15 was launched, so that could have come from there.
 16 **DR SCOTT:** What would you expect to have happened,
 17 Mr Matthews, had you gone up and Gallaher had not
 18 followed?
 19 A. What would I have expected?
 20 **DR SCOTT:** What would you have expected? I mean, presumably
 21 you would expect either to lose sales or to go down
 22 again.
 23 A. We might -- I would have expected to have lost sales at
 24 that time, very much so.
 25 **DR SCOTT:** So something which was undesirable from ITL's

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1 point of view?
 2 A. Well, we wouldn't want to lose sales, no.
 3 **DR SCOTT:** And not compatible with your strategic pricing?
 4 A. It would have put us at a disadvantage.
 5 **DR SCOTT:** Thank you.
 6 **MR WILLIAMS:** Could you then move on to 68, please, and just
 7 read that to yourself.
 8 (Pause)
 9 A. Yes.
 10 Q. So the first line says:
 11 "As per yesterday's conversation ..."
 12 So you have had a prior conversation with Morrisons,
 13 and this email is the product of that conversation?
 14 A. Yes.
 15 Q. Now, at this time Richmond is going up another 5p?
 16 A. Yes.
 17 Q. I think it's fair to say at this time there is no
 18 ambiguity about what you want to happen to the Gallaher
 19 brands that you mention in this email?
 20 A. I think this is one of those conversations where Paul
 21 has told me what's going to happen, and I've expressed
 22 some joy that that is the outcome, because we are
 23 managing -- it's an opportunity to recoup some of the
 24 investment.
 25 Q. When you say Paul's told you what's going to happen and

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1 you are expressing some joy, what do you mean by that?
 2 **A.** He said that one of the brands that we are pitted
 3 against is moving, he has given me that intelligence,
 4 and based on that intelligence I am asking him that
 5 I want to reduce my investment, and I am saying that, as
 6 a consequence of that, I wish to reduce my investment by
 7 £2.13 per thousand on Richmond 20s and Superkings 20s.
 8 **Q.** Right. I was looking at the words "wouldn't it be good
 9 if Mayfair and Dorchester followed us?", which are
 10 underneath the lines --
 11 **A.** I can see that, yes. I didn't know you were referring
 12 to that specifically.
 13 **Q.** Sorry. So when I said it was unambiguous, perhaps I was
 14 wrong about that. What I thought this was saying was
 15 that you were moving your prices up, and this email was
 16 unambiguous because you obviously wanted Mayfair and
 17 Dorchester to follow you?
 18 **A.** I think that line there "wouldn't it be good", I mean,
 19 it's probably a fairly blunt instrument, but it was
 20 a little bit of a taunt. I said on Friday that I would
 21 use this rather nebulous argument that if brands, if
 22 there was a little bit of inflation, it was good to get
 23 cash through the till. It's just a little bit of
 24 kidology, I think.
 25 **Q.** I was wondering about that. I was wondering whether

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1 actually this is a bit more knowing than it seems. We
 2 have just seen you have put prices up 5p in document 63,
 3 and it looks as though, on that occasion, Dorchester
 4 followed you up by 5p. Here you are putting prices up
 5 5p again, and I wondered if this is a bit of a knowing
 6 comment: "wouldn't it be good if Mayfair and Dorchester
 7 followed us", because that's what you expected to
 8 happen?
 9 **A.** It is not a knowing comment.
 10 **Q.** But --
 11 **A.** I didn't have that level of prescience, I am afraid, it
 12 was just a throwaway line.
 13 **Q.** Could we look at your witness statement --
 14 **A.** Yes.
 15 **Q.** -- at paragraph 136, please. Do you want to read that
 16 to yourself?
 17 **A.** Yes. (Pause). I've read that.
 18 **Q.** So I think you say here the email simply states ITL's
 19 position on maximum prices. I don't see a reference in
 20 the email to maximum prices, it just looked to me as
 21 though you were asking them to move to 3.59 and 3.63;
 22 would you agree with that?
 23 **A.** Well, I think, as I mentioned on Friday, probably to the
 24 degree of being irritating, that Morrison were free to
 25 do what they wanted, and of course they could have held

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1 their prices at 3.54 and 3.58, but that would have meant
 2 a severe dent in their cash margin, and implicit in what
 3 I have written there is the fact they probably want to
 4 maintain cash margins, and if they did that given that
 5 I was reducing my investment by £2.13, that would see
 6 their prices increase, and was part of the audit trail
 7 that you can see in those documents, the schedules.
 8 **Q.** I am sorry, I was just focusing on a very specific
 9 point, which is whether the prices that you refer to
 10 here are communicated to be maximum prices, and I just
 11 don't see that in the email.
 12 **A.** Well, it doesn't say it in the email.
 13 **Q.** It's not what you meant either, is it? You were not
 14 saying these were maximum prices?
 15 **A.** I am sorry, you are going to have to just break that
 16 down, just so I really understand what you are
 17 suggesting.
 18 **Q.** I think we agree the email doesn't say the prices are
 19 maximum prices --
 20 **A.** No --
 21 **Q.** And also what I am suggesting to you is you didn't mean
 22 them to be maximum prices either because what you say is
 23 it looks like there is going to be some upward movement
 24 at last, so you are not seeking to keep prices down; you
 25 are looking for prices to go up.

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1 **A.** I am certainly looking for my investment to go down, and
 2 that's what this is really about.
 3 **Q.** Sorry, "upward movement at the bottom end of the
 4 market", that's about prices, isn't it?
 5 **A.** Yes.
 6 **Q.** Looking at your witness statement, you say, this is the
 7 last sentence:
 8 "If Morrisons had wished to leave its prices at the
 9 lower level without my funding, I would of course have
 10 been happy for them to do that, as I would have
 11 benefitted from increased sales that I was not having to
 12 fund."
 13 I struggled to square that comment with the second
 14 line of the email "it looks like there is going to be
 15 some upward movement at the bottom end of the market at
 16 last", which seemed to be, to use your word,
 17 an expression of joy that prices are going up rather
 18 than staying down?
 19 **A.** But if they had remained down, I might have been in
 20 danger of selling more, but given the tight margins that
 21 both parties were operating on, it was fairly unlikely.
 22 **Q.** But that's a different point, Mr Matthews. The question
 23 of whether you would have been happy to see prices stay
 24 down or go up is something which is answered by the
 25 terms of the letter. "It looks like there is going to

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1 be some upward movement at the bottom end of the market
 2 at last", this is telling us that you wanted to see
 3 prices go up?
 4 **A.** It might -- I can tell you what I meant when I wrote
 5 it -- not be as plain as it ought to be, but my view
 6 there is I am saving some money, I am going to recoup my
 7 investment.
 8 **Q.** Isn't the reality that Richmond and Dorchester had at
 9 this stage been paired for a good two years by ITL, and
 10 prices had moved over that period at parity? We have
 11 seen it didn't matter which price moved first, you could
 12 expect that parity relationship to be restored on
 13 Morrisons shelves; that's right, isn't it?
 14 **A.** I can't tell you that every store in every channel moved
 15 the prices like that, because firstly, as I was
 16 suggesting earlier, when it came to different pack
 17 offerings, we would try and get a competitive advantage,
 18 like on a 100s multipack that I mentioned a few moments
 19 ago, and there were times when supermarkets chose not to
 20 move, and that was of course their own free choice to do
 21 so.
 22 **Q.** Yes, although we do know that Morrisons got the
 23 differentials consistently right, we looked at that on
 24 Friday?
 25 **A.** They got them right more often than not.

1 **Q.** And those differentials involved pricing Richmond and
 2 Dorchester at parity?
 3 **A.** But they also involved an awful lot of investment from
 4 Imperial Tobacco, and also involved Morrisons working on
 5 fairly slim margins, and I think that that's
 6 an important point.
 7 **Q.** Morrisons was supporting Imperial's strategy that
 8 Richmond and Dorchester should be at parity, and you
 9 were confident when you sent this email that if you
 10 increased the price for Richmond, Morrison's prices for
 11 Dorchester would follow?
 12 **A.** I think what Morrisons were supporting was the ability
 13 to reduce cheap brands further than the market to give
 14 their consumers or their customers value, and they saw
 15 a willing partner in Imperial Tobacco.
 16 **DR SCOTT:** In your witness statement, Mr Matthews, back,
 17 much nearer the beginning in paragraph 18, you explained
 18 to us that retailers were very focused on margins, and
 19 that you assumed they wished to retain their margins.
 20 **A.** Yes.
 21 **DR SCOTT:** Morrisons may tell us later today that they are
 22 running an altruistic, for the benefit of the customers
 23 organisation, but they have to stay in business.
 24 **A.** They do.
 25 **DR SCOTT:** So what we are reading in the correspondence

1 between yourself and Morrisons is against the background
 2 that, whilst you are concerned to reduce your
 3 investment, they are concerned to retain their margins.
 4 **A.** Yes.
 5 **DR SCOTT:** There is there something of a squeeze on the
 6 pricing.
 7 **A.** Yes.
 8 **DR SCOTT:** And here we see that it would be a good idea for
 9 both of you in margin terms for them to retain their
 10 margin and for you to reduce your investment, thereby
 11 improving your margin; is that right?
 12 **A.** Well, if -- yeah, broadly. I mean, if they were able to
 13 retain those lower shelf prices and meet to continue to
 14 invest, they would obviously be happy because their cash
 15 margins were maintained. So --
 16 **DR SCOTT:** But you can't sustain those investments forever,
 17 can you?
 18 **A.** No. No.
 19 **DR SCOTT:** Thank you.
 20 **MR WILLIAMS:** The reason these letters talk about moving the
 21 market up is because your strategy wasn't just about the
 22 pricing of your brands, it was about the pricing of your
 23 brands and Gallaher's brands, and essentially it was
 24 your strategy that the prices should move together in
 25 accordance with the differentials; isn't that right?

1 **A.** But the only thing I could effect was my investment.
 2 I hope I am not sounding obtuse. That was the only
 3 thing I had in my gift, was my investment.
 4 **Q.** Well, you also had the trading agreement, a trading
 5 relationship with Morrisons relating to pricing
 6 differentials?
 7 **A.** I certainly had a trading agreement that was -- that
 8 talked about pricing and other things too, but, as
 9 I explained on Friday, I saw that not as a weapon but
 10 an intention for Morrison and Imperial to work together,
 11 the major weaponry I had was this money from time to
 12 time that we would invest in tactical or strategic
 13 bonuses. That was the thing that I could control, and
 14 I think that that was -- well, that's all I wanted to
 15 say about that. That was my main weapon.
 16 **MR WILLIAMS:** I don't have any further questions.
 17 **THE CHAIRMAN:** Yes, Mr Saini.
 18 Cross-examination by MR SAINI
 19 **MR SAINI:** Mr Matthews, I am counsel for Morrisons and
 20 Safeway, I have a few questions for you.
 21 Can I ask you, please, Mr Matthews, first of all, do
 22 you have bundle 17 open before you, and could you please
 23 go back to tab 4, which is the first trading agreement.
 24 If you could please refresh your memory and look at
 25 page 2 and the section on the pricing. {D17/4/2}.

1 A. Yes.
 2 Q. In particular the paragraph that begins "William
 3 Morrison to confirm instore promotional activities which
 4 may affect pricing strategy" and then the next sentence?
 5 A. Yes.
 6 Q. Mr Matthews, did this agreement or any understanding
 7 that you had with Morrisons prevent Morrisons from
 8 reducing the price of a Gallaher product?
 9 A. No.
 10 Q. What would happen if Morrisons had its own promotion on
 11 a Gallaher product, that's a promotion that's not been
 12 funded by Gallaher, in that situation would they have to
 13 offer that promotion to ITL at Morrison's cost?
 14 A. No.
 15 Q. If you would please go to, in that same bundle, 75(a),
 16 which was the document we were looking at a short while
 17 ago with Mr Williams. {D17/75(a)}.
 18 A. 75(a), yes.
 19 Q. It's the document with your handwriting on it?
 20 A. Yes.
 21 Q. Mr Williams focused on the typewritten part at the top,
 22 but I want to focus rather on your handwriting at the
 23 bottom. That's your writing, isn't it?
 24 A. That is my writing, yes.
 25 Q. If I can first of all get some of the facts straight,

1 I believe this morning Mr Williams put to you that ITL
 2 had a strategy which required parity between
 3 Golden Virginia and Old Holborn; you recall that
 4 question?
 5 A. I do.
 6 Q. If you keep your finger in that, please, and go to
 7 tab 85, which is the second trading agreement which was
 8 in force at this time, that's the time of the document
 9 75(a). If you would please go to page 464.
 10 {D17/85/464}.
 11 A. Yes.
 12 Q. Perhaps you can read down.
 13 A. Okay.
 14 Q. You see Golden Virginia there?
 15 A. Yes.
 16 Q. You see what the differential is?
 17 A. Yes.
 18 Q. Would it be fair to say, therefore, that at this time,
 19 going back to 75(a), {D17/75(a)} that's December 18,
 20 2002, ITL had no aspiration for parity between Old
 21 Holborn and Golden Virginia?
 22 A. That is true.
 23 Q. So we know that they are suggesting that Old Holborn
 24 will go to the same price as Golden Virginia, that's
 25 what Mr Giles is telling you. Having looked at the

1 trading agreement, why do you think Morrisons have
 2 decided upon this strategy, in other words moving
 3 Old Holborn and Golden Virginia down at the same time?
 4 A. I think it's largely because of the prices they will
 5 have seen in competitor supermarkets.
 6 Q. If we can just look at the handwriting, please?
 7 A. Yes.
 8 Q. Tell me if I am right, I have tried to decipher what's
 9 going on. We see a table prepared by you of the prices
 10 of Morrison, Tesco, and I think that's "JS"; is that
 11 J Sainsbury?
 12 A. It is J Sainsbury.
 13 Q. What seems to be happening, and tell me if I am right,
 14 is that the new Morrisons prices on the right-hand side
 15 that you have written in appear to be following the
 16 Tesco prices; do you see that?
 17 A. Yes.
 18 Q. Would it be a fair assumption on my part that someone
 19 from Morrisons, probably Mr Giles, has walked along to
 20 Tesco, had a look at what their prices are, and has
 21 decided he is going to match them?
 22 A. That would seem extremely likely.
 23 Q. This is an example, would you agree with me, of
 24 a retailer -- here we have Morrisons -- deciding of its
 25 own initiative to undertake a price promotion?

1 A. Yes.
 2 Q. You decided in this case that you were not going to
 3 support that?
 4 A. I did decide that, yes.
 5 Q. How common was this type of initiative? I am talking
 6 about, I think Morrisons, Sainsbury and Tesco, those are
 7 the entities you dealt with; is that right?
 8 A. Yes.
 9 Q. How common was this kind of initiative?
 10 A. Quite common.
 11 Q. Would you agree with me that this document shows that
 12 Morrisons had the freedom to reduce your prices and
 13 those of Gallaher independently?
 14 A. Absolutely.
 15 Q. Would you please stay in this bundle and go to document
 16 53, {D17/53}, which is a document you have been asked
 17 quite a few questions about, and which features quite
 18 heavily in the OFT's case.
 19 Perhaps you can just refresh your memory.
 20 (Pause)
 21 A. Okay.
 22 Q. Here you want Drum, your product, to match Amber Leaf;
 23 that's right, isn't it?
 24 A. It is right.
 25 Q. What if the recipient of this email, Mr Giles or

1 Mr Eastwood, had said to you actually they will decide
 2 to price Drum below Amber Leaf; how would you have
 3 reacted to that?
 4 **A.** I would have been quite happy.
 5 **Q.** Why would you have been happy?
 6 **A.** Because I would have gained commercial advantage.
 7 **Q.** If you look at 16, please, staying in the same bundle.
 8 You have just been taken to this document a short while
 9 ago. You have set out in the table there, the part
 10 that's in a square box, certain figures where in order
 11 to maintain your cash margin position, you state what
 12 the prices should be?
 13 **A.** Yes.
 14 **Q.** Again I ask you the question: what if Morrisons had said
 15 they did not wish to move the price of Richmond? What
 16 would have happened?
 17 **A.** I think we would have probably sold more. I don't think
 18 anything would have happened. But I think the natural
 19 outcome would have been that we would have sold more
 20 cigarettes.
 21 **Q.** Who would have funded that?
 22 **A.** Well, that would have been a potential point of
 23 contention. Should Morrisons have elected to subsidise
 24 that price because they felt strongly about the brand,
 25 then they would have funded it.

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1 **MR SAINI:** Thank you very much.
 2 **THE CHAIRMAN:** I think we will take a short break, then,
 3 before the Tribunal asks any questions and before any
 4 re-examination. So we will come back at 25 to 12. Just
 5 to remind you again, Mr Matthews, not to speak to
 6 anybody over that break. Thank you.
 7 (11.25 am)
 8 (A short break)
 9 (11.35 am)
 10 Questioned by THE TRIBUNAL
 11 **DR SCOTT:** Mr Matthews, just a couple of quick questions.
 12 The first one, if you take your witness statement, and
 13 if you look at paragraph 131, you may want to take
 14 a moment. I think we have looked at the top of it
 15 earlier on.
 16 (Pause)
 17 **A.** Okay.
 18 **DR SCOTT:** We have discussed the fact that you explained
 19 that the retailers were very focused on margins and this
 20 enabled you to see what margins they were making, so you
 21 had a pretty clear idea of where they were. I am
 22 particularly interested in the last sentence:
 23 "These documents were audit trailed to record bonus
 24 payments and expenditure in the account were important,
 25 for example, if the bonus was ever put into question."

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1 So I am right in thinking, then, that you were
 2 keeping quite an eye on all this; is that right?
 3 **A.** I think it's very right, there was an awful lot of money
 4 being spent.
 5 **DR SCOTT:** Thank you for that. The other, if you go back to
 6 paragraph 122, and it's the first few words. We have
 7 now seen quite a lot of documents in this case, and in
 8 this paragraph you refer to retail price maxima. We
 9 haven't noticed those words occurring in any of the
 10 documents. Is this a phrase that came from you or, as
 11 we discussed earlier on, when you were preparing this
 12 were you helped in relation to this phrase, or was this
 13 a phrase that ever occurred back ten years ago when
 14 these matters were going on?
 15 **A.** It wasn't a phrase that I used in common currency, as
 16 you can see from the letters. I think that's probably
 17 the best way to answer you on that.
 18 **DR SCOTT:** Thank you very much indeed. Thank you.
 19 **THE CHAIRMAN:** Looking at tab 4, which is the strategic
 20 pricing sheet, so that's stamped page 5 of tab 4,
 21 {D17/4/5}, some of these pairings we have heard a lot
 22 about, Richmond family at this stage linked with
 23 Mayfair, and we have had some discussion about Classic
 24 and Hamlet. But with Richmond, it seems over the period
 25 that we are talking about there was a lot of movement

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1 with Richmond, a lot of activity I think is the term
 2 people have used. But with some of these other
 3 pairings, we don't see them mentioned so much in the
 4 documents that we have looked at, JPS, Panama, Lambert &
 5 Butler we have seen a bit, but not nearly as much as
 6 Richmond.
 7 Now, a lot of the discussion, then, in this case so
 8 far has been focused on the brands which we see
 9 mentioned a great deal in the correspondence, but I am
 10 wondering whether that's a slight misdirection of
 11 attention in the sense that, in relation to those brands
 12 where there is a lot of activity, this schedule and this
 13 trading agreement were less relevant in this period than
 14 the trading agreement might be relevant in relation to
 15 some of the brands which were just continuing on,
 16 perhaps as they had been, maybe they had moments in
 17 other years that happen not to be involved in this case.
 18 But would that be fair to say: well, the agreement in
 19 relation to P&Ds tended to have more substance or more
 20 effect in relation to pairings where the brands were not
 21 going through a tumult at the time, but where brands
 22 were being repositioned or subject to great competitive
 23 activity, this strategic pricing sheet was less in
 24 people's minds?
 25 **A.** I think tumult is a very apposite adjective, because not

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1 only was there a lot of toing and froing but, if we
 2 consider Superkings, L&B and Richmond, in the case of
 3 most supermarkets that could be two-thirds of their
 4 business, so that's where there was more action there,
 5 and without going into a history lesson, it was those
 6 brands at the time that were priced competitively and
 7 those brands that we wanted to fight for, to get the
 8 attention of consumers. But that didn't mean that
 9 brands like Embassy or Regal weren't important, and from
 10 time to time there were discussions about those, but
 11 during this period those were the key brands.
 12 But if -- I don't know, if my managing director
 13 walked through the door of Sainsbury's in Bristol and
 14 saw that we were disadvantaged, Regal versus B&H, he
 15 would certainly pick up the phone and explain why
 16 I was -- why it needed correcting.
 17 **THE CHAIRMAN:** Right. My second question is on a slightly
 18 different point, which is that ITL sets its cost price
 19 to the retailer as a combination of the sort of the
 20 basic price they have to pay and then there is the bulk
 21 drop discounts, and then there are these bonuses. And,
 22 as you said, the bonus is really your weapon, because by
 23 increasing or decreasing that, that's the weapon that
 24 you have to try and influence what the retail price is
 25 going to be.

1 **A.** Yeah, largely. I mean, the supermarkets, if they had
 2 desired, could have sold their products at RRP, but, as
 3 I think I may have mentioned on Friday, that wouldn't
 4 have set them apart from the normal independent stores,
 5 so if they wanted to sell brands below RRP, and we felt
 6 that was highly desirable, those ongoing bonuses were
 7 also quite a hefty piece of ammunition. But when it
 8 came to the toing and froing between those brands that
 9 I mentioned a few moments ago, the tactical bonuses
 10 were -- that was where most of the money was spent.
 11 **THE CHAIRMAN:** Although they are called tactical, my
 12 understanding is that some of them did go on for a long
 13 time, we are not talking about like with price marked
 14 packs where it's for a few weeks, you could have a bonus
 15 going on with a brand for years in a sense.
 16 **A.** You could, and there were various tactics within that
 17 strategy, I suppose, but some of the pricing was more
 18 strategic than temporary.
 19 **THE CHAIRMAN:** Did you get any push-back from retailers
 20 saying, "Well, you seem to be perfectly happy to charge
 21 us Xp for that pack three months ago, and now you are
 22 charging us more for that, and nothing seems to have
 23 changed for you, you just removed the part of the bonus,
 24 why can't you just charge us a price and not mess about
 25 with all these bonuses, swelling, decreasing, and then

1 we can decide what our prices are"?
 2 **A.** I'm smiling to myself because a lot of the time you felt
 3 as if you were in administration, not in strategic
 4 account management, because you are absolutely right,
 5 there was so much -- I mean, weekly there were things
 6 changing. What I mentioned before about the audit trail,
 7 that was just such an important point, and I think a lot
 8 of them would have liked what they considered to be an
 9 EDLP, and Every Day Low Price, they could work off
 10 a margin and be competitive. But such was the nature of
 11 the relationship between us and our key competitor, that
 12 we just wanted to retain the right to respond and react
 13 to the marketplace.
 14 So a very long answer to a very short question,
 15 there was from time to time push-back about how we were
 16 changing things.
 17 **THE CHAIRMAN:** Mr Howard, do you have any questions?
 18 Re-examination by MR HOWARD
 19 **MR HOWARD:** Mr Matthews, first I want to ask you some
 20 questions about strategy. You were asked questions
 21 about Imperial's strategy. Could we just look at the
 22 pricing sheets, firstly, at tab 4 and tab 85, {D17/4}
 23 the ones that are pretty familiar, but I just want to
 24 look at a couple of points. If you could keep a finger
 25 in the one at tab 85, {D17/85}, so we can turn over it.

1 If we take the first one, tab 4, if we focus for
 2 a moment on Lambert & Butler; yes.
 3 **A.** Yes.
 4 **Q.** You see Lambert & Butler, we can see that's expressed as
 5 "not more than [so much] above Sovereign"?
 6 **A.** Yes.
 7 **Q.** Then Regal Kingsize is to be at least so much less than
 8 something else; Embassy at least so much less;
 9 Embassy Filter at so much less; JPS and JPS Lights,
 10 again not more than; and then Panama is again at least
 11 "less than and not more than".
 12 Just taking those ones for a moment, so we see them
 13 being expressed in this "not more than" language or "at
 14 least so much less".
 15 I think you were asked a question about the use of
 16 the words "price maxima" in your statement. Can you
 17 explain by reference to what we were just looking at on
 18 those brands, what you understand and how that relates
 19 to the use of the language "price maxima"?
 20 **A.** If we look at, for example, Superkings, we are saying
 21 that "level with", that would have meant --
 22 **Q.** No, I am asking you not about that, come back to
 23 Superkings, I want to deal with that separately. At the
 24 moment, if you are going to give us an example, take one
 25 of the ones where it says either "not more than" or "at

1 least [so much] less than"?

2 **A.** Well, okay, in the example of Lambert & Butler, then, we

3 wouldn't have wanted our brand to be more than 10p more

4 expensive than Sovereign, and anything better than that

5 was, well, obviously, better.

6 **Q.** If we just pursue the Lambert & Butler one for a moment,

7 you don't want to be more than -- not more than in the

8 case of 20s, 10p above Sovereign. So to what extent is

9 your strategy satisfied if Lambert & Butler is 5p above

10 Sovereign?

11 **A.** Well, that would be better.

12 **Q.** Yes, so in terms of your strategy, is that achieving it

13 or not?

14 **A.** Yes.

15 **Q.** Right. Now, if we ask ourselves, we see this

16 differential, Lambert & Butler not to be not more than

17 10p above Sovereign, what are you trying to achieve by

18 having it not more than 10p above Sovereign, why is that

19 something that is perceived to be a good strategy?

20 **A.** Well, because we have decided through analysis of

21 pricing and consumer needs and empirical data that we

22 would sell more if those were the pricing positions that

23 we were able to achieve, and clearly if we were better

24 off than that, we would do even better.

25 **Q.** Okay. If you would turn kindly to tab 85, I want to ask

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1 you specifically here: if we look in this one at

2 Superkings, which I think you see about a third of the

3 way down, then Richmond, Classic, which is a bit further

4 down still, and then the next one is Small Classic

5 filter SKUs. We can see here that these are all being

6 expressed at this stage as "no more expensive than"; do

7 you see that?

8 **A.** Yes, I do.

9 **Q.** So in relation to those brands, at the date that you

10 drew up this sheet, explain again to us what the

11 strategy was where you said something should be no more

12 expensive than?

13 **A.** Well, that would be the limit, and at that stage we

14 would feel as though we were achieving what we should in

15 the marketplace. But again, if we got better position,

16 so for example if Embassy Filter was 10p less than

17 Benson & Hedges Kingsize, we would be ahead of the game.

18 **Q.** That's fine that you took that one, I was focusing on,

19 say, Richmond SKUs.

20 **A.** Well, again, I mean, those positions are the minimum we

21 would expect in the marketplace to maintain share.

22 Should we do better than that, we would improve.

23 **Q.** Right. I think at one point Dr Scott asked you

24 a question about this, I am not sure it was actually

25 addressed to this sheet, but I think he was asking a

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1 question by reference to what the strategy was of the

2 company set by the board. Can you tell us whether this

3 document that you drew up, whether that was intended to

4 reflect the strategy of the board, that came down from

5 the board?

6 **A.** I am not sure if it would have been from the board.

7 **Q.** But from on high, is what I meant.

8 **A.** From more senior management.

9 **Q.** From whoever is responsible for setting the strategy?

10 **A.** Yes.

11 **Q.** If we focus for a moment on Richmond at tab 85, we see

12 that at this stage, the comparator for Richmond has

13 changed, and again I am not saying it, I am just going

14 to say the position, because we all know, that the

15 comparator changes in that originally the comparator had

16 been Sterling and/or Mayfair and now, although that's

17 still there, it's particularly Dorchester?

18 **A.** Yes.

19 **Q.** I want to ask you a further question about that, but

20 just for the moment, what we can see is, leaving aside

21 the change of comparator, it was expressed as "not more

22 than". If you go back to the original schedule, not the

23 original schedule but the schedule at tab 4, what we see

24 is, if we just focus on Richmond for a moment, that the

25 language here is not the same language. Here it's

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1 language which is slightly difficult to decipher in some

2 respects, because what the language actually says is

3 "level with on" and then under the particular things

4 it's "equals". So if one was just literally reading it,

5 it's "level with on". If we took Richmond 20s as

6 I understand it, it's "level with on equals against

7 Mayfair 20s".

8 In terms of the strategy that we see, can you tell

9 us whether the strategy in respect of how the

10 differentials were to work had changed between the first

11 sheet and your involvement in it and the later sheet?

12 **A.** Well, the first one is written in 2001, the second one

13 is written in 2003.

14 **Q.** Yes.

15 **A.** So between those two periods in time there would have

16 been, as I was mentioning earlier, a flurry of activity

17 from both sides. So from time to time we felt we should

18 pit our brands against different prices in the

19 marketplace, dependent on how aggressive that

20 marketplace was.

21 **Q.** Okay. It will make it easier if we take one where you

22 didn't have a different comparator. If you take Classic

23 at tab 4, it is expressed as "level with on equals

24 parity pricing on range against Hamlet"?

25 **A.** Yes.

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1 Q. If you go to tab 85, Classic SKUs are no more expensive
 2 than Hamlet SKUs?
 3 A. Yes.
 4 Q. What I am trying to find out was: was there any
 5 difference in the strategy in relation to Classics when
 6 looking at Hamlets?
 7 A. No.
 8 Q. So if we ask ourselves, as far as you were concerned,
 9 what was the understanding of what the differential
 10 strategy was for Classic as against Hamlet back in 2001
 11 before you drew up the 2002 sheet, what was the
 12 position?
 13 A. Well, it wouldn't have changed. It was the same.
 14 Q. So what was the position?
 15 A. Well, the position was that we felt if we were at the
 16 same price, we would be satisfied, but should we be
 17 cheaper, we would be advantaged.
 18 Q. Right. Mr Williams asked you a lot of questions which
 19 were designed to show that, notwithstanding the terms of
 20 the agreements, in fact he said Imperial wanted fixed
 21 parities rather than not more than, the maxima that's
 22 expressed. What he also said to you was, I think, when
 23 you said to him, "Well, I can't see any reason why
 24 anybody would effectively think we would not want lower
 25 prices", he said he didn't want to debate the economics

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1 with you. I am not entirely clear what he meant, but
 2 let's just see if we can understand it. Other than
 3 seeking to obtain a competitive advantage over your
 4 rival manufacturer, was there any other reason for the
 5 pricing strategy?
 6 A. Not at all.
 7 Q. Did the pricing strategy, namely this desire to obtain
 8 a competitive advantage over your rival manufacturer,
 9 would that require fixed as opposed to maxima
 10 differentials?
 11 A. No.
 12 Q. Did maxima differentials offer you any advantage over
 13 fixed differentials?
 14 A. No.
 15 Q. No, listen to the question. Did maxima, expressing it
 16 in the way you did in the 2002 agreement, does that
 17 provide any advantage to you over expressing it as
 18 absolute fixed, which must be complied with?
 19 A. I am sorry, you really must ask me that again.
 20 Q. Don't worry, if I haven't made it clear. Explain this
 21 to us: why did you choose, in the agreement that you
 22 drafted, to express things in the way you did, namely
 23 "not more than"?
 24 A. Well, that was just my own personal way of writing,
 25 I hadn't drafted the first agreement --

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1 Q. What were you trying to achieve by saying "not more
 2 than"?
 3 A. Well, just to suggest that, you know, I would be more
 4 happy if I got a more competitive position, and I just
 5 used that -- the example of the Embassy Filter, at least
 6 5p less: 6p good, 7p even better, et cetera.
 7 Q. Yes. Sounds like something out of Animal Farm. I was
 8 thinking of "four legs good, two legs better", I am sure
 9 you will all remember that, nothing to do with this
 10 case, probably more interesting.
 11 Anyway, I want to ask you a number of questions
 12 about how the agreement was to work. It was suggested
 13 to you that the agreements imposed, I think the word was
 14 "a constraint on Morrisons". I want to consider
 15 a number of points that arise out of that suggestion.
 16 If we look at the first agreement firstly at tab 4,
 17 under the heading "Trading Agreement" on the second
 18 page, you can see what we have is what's called a reward
 19 package. Do you see that?
 20 A. Mm.
 21 Q. What did you understand was meant by a reward package?
 22 A. Well, as I mentioned before, this wasn't an agreement
 23 that I wrote, but my understanding of a reward package
 24 is a commercial incentive to reward the retailer for
 25 working with the supplier, so quid pro quo.

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1 Q. Okay. Now, if Morrisons decided for some reason that
 2 they didn't want to seek to observe the differentials,
 3 what then -- because let's say it just didn't suit them
 4 in their commercial interests -- as far as you were
 5 concerned was the consequence of that?
 6 A. Well, that would depend on the circumstances. I mean,
 7 they were desirable to us, and we would do and try and
 8 invest money to achieve them. But from time to time
 9 they were able to, or chose not to follow them.
 10 Q. I think you have told us that the differentials that we
 11 see in the agreements, both the one at tab 4 and the one
 12 at tab 85, reflected or were based upon the RRP
 13 differentials?
 14 A. That's correct.
 15 Q. You also explain in your statement that the -- it's at
 16 paragraph 21 -- aim had been to -- I think what you are
 17 explaining in paragraph 21, as I read it, is that the
 18 RRP's, the differentials in RRP's, also reflected lower
 19 wholesale costs and that the aim of the strategy was to
 20 reflect the differentials in RRP's and wholesale prices
 21 in retail selling prices?
 22 A. That's correct.
 23 Q. I just want to understand that for a moment. Let's take
 24 an example at the time of the first agreement. So if
 25 you turn to tab 4 for a moment, and the pricing sheet.

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1 So if we take Richmond, we see that what it says about
 2 Richmond at this stage you were pitching it -- when
 3 I say you, Imperial was pitching it against Mayfair; do
 4 you see that?
 5 **A.** Yes, that's correct.
 6 **Q.** You have already explained to us that "level with on
 7 against Mayfair" meant that you were looking to see
 8 a selling price of Richmond which was at least the same
 9 and better if it were lower?
 10 **A.** Yeah, the shelf price to the consumer, yes.
 11 **Q.** Yes. Now, if we make an assumption for a moment --
 12 sorry, not an assumption. At this stage, where you have
 13 Richmond paired in this way against Mayfair, what should
 14 we understand the RRP's of Richmond and Mayfair were?
 15 I mean in terms of ...
 16 **A.** At that stage I would assume that the published retail
 17 recommended prices were the same.
 18 **Q.** Right. And the wholesale prices, this is before the
 19 various discounts, what would one therefore infer the
 20 wholesale prices, wholesale list prices --
 21 **A.** List prices would have probably been the same, though
 22 not always identical.
 23 **DR SCOTT:** Just to be clear, we are talking about Q1,
 24 presumably, before anything has happened?
 25 **MR HOWARD:** Yes. We are going to follow through what

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1 happens.
 2 Q1, I think, is what Dr Scott is referring to, you
 3 have the list price, I'll follow up it with some more
 4 detailed questions, but I think we all know there is
 5 a list price, there is a bulk drop discount -- I think
 6 the Chairman asked you about it before -- and then there
 7 is a discrete discount that could be negotiated by each
 8 retailer.
 9 **A.** Yeah, that's how the margin chain works, yeah.
 10 **Q.** That's how the what?
 11 **A.** The margin chain.
 12 **Q.** Now, the list price becomes a matter of public record,
 13 doesn't it?
 14 **A.** It does.
 15 **Q.** And the bulk discounts, the bulk drop discounts, they
 16 also feature in the price list?
 17 **A.** They are in the published price list, that's correct.
 18 **Q.** Again, that's all a matter of public record?
 19 **A.** Yes.
 20 **Q.** In paragraph 21 of your statement, in the last part, you
 21 say:
 22 "This reflected the fact that ITL had set its cost
 23 prices for its products through the Q price, the ongoing
 24 bonus and tactical bonuses, at levels designed to be
 25 competitive with Gallaher's products, and wanted these

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1 price reductions to be reflected in the retail prices
 2 paid by the consumers rather than the retailers charging
 3 the same or more for ITL products despite their cost
 4 price being cheaper."
 5 **A.** Yeah.
 6 **Q.** Now, I am going to explore this with you on a number of
 7 levels. Assuming -- let's just make an assumption for
 8 the moment -- that the net wholesale price, after all
 9 the discounts, to Morrisons of Richmond was less or
 10 equal to the net wholesale price of Mayfair. Making
 11 that assumption, what were you trying to achieve by the
 12 differentials?
 13 **A.** To see that reflected on the shelf.
 14 **Q.** Right. Now, we know, because -- we know as a matter of
 15 fact from all the evidence but we also know from the
 16 opportunity to respond clauses that Gallaher might have
 17 pricing initiatives?
 18 **A.** Yes.
 19 **Q.** I want to first take the situation where Gallaher
 20 decides -- still looking at just for the sake of example
 21 Mayfair and Richmond, so Gallaher decides to have
 22 a promotion which is 5p off a pack of 20s of Mayfair.
 23 Okay? The first question I want you to tell me is: if
 24 Gallaher chose to do that, which is they fund a 5p
 25 reduction, were Morrisons entitled to participate in

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1 that?
 2 **A.** Entitled to participate -- yes.
 3 **Q.** So assume Mayfair was £3.60, and at the time of this
 4 promotion so was Richmond, and Gallaher then have this
 5 5p promotion which they want reflected in the retail
 6 selling price of Mayfair, and assume that Morrison
 7 therefore priced Mayfair at £3.55; as far as you were
 8 concerned, having priced Mayfair at £3.55, were they
 9 required to do anything to the price of Richmond which
 10 had been at £3.60?
 11 **A.** No.
 12 **Q.** If faced with this competitive position whereby your
 13 competitor reduces its price, if you want to reduce the
 14 price of Richmond to try and meet the competition, what
 15 do you have to do?
 16 **A.** Well, I would have had to have stumped up some cash,
 17 unless of course that retailer was willing to work on
 18 a reduced cash margin, which was extremely unlikely.
 19 **Q.** Right. Now, consider a variant on the example that we
 20 just had. You have told us that -- take the case of
 21 Richmond and Mayfair -- you would know what the RRP's are
 22 and you know what the wholesale list price is and you
 23 know what the bulk discounts are. Let's assume that
 24 what Gallaher do, right at the outset, is they go to
 25 Morrisons and say "Look, Morrisons, in addition to the

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1 bulk drop discount, I am prepared at this stage to give
 2 you a 10p discount, say, on Mayfair, because I want to
 3 get Mayfair in at a low price and I want to undercut
 4 Imperial and I want to get in there and I want to grow
 5 my market share". So let's assume that Mayfair, in
 6 other words, is being supplied to Morrisons at a net
 7 wholesale price, taking account of this bonus, which is
 8 below the net wholesale price of Richmond. In that
 9 event, in the light of that pricing initiative by
 10 Gallaher, what were Morrisons entitled to do as regards
 11 the pricing of Mayfair when compared to Richmond?
 12 **A.** Anything that they desired.
 13 **Q.** Pardon?
 14 **A.** Anything that they desired.
 15 **Q.** So if they chose to price Mayfair below Richmond, having
 16 secured a lower net wholesale price, was there any way
 17 in which you were entitled to object to that, as far as
 18 you were concerned?
 19 **A.** I couldn't object to it, the only thing that I would
 20 have been able to do is try and make a similar offer, if
 21 I desired to do so.
 22 **Q.** Yes. So in terms of trying to get -- whether we are
 23 looking at the initial stage of bonuses right at the
 24 outset, as it were, or tactical promotions, which, as
 25 the Chairman says, is a bit of a misnomer because they

1 are very often long-term, but in terms of trying to get
 2 Morrisons to reflect the differentials in the pricing or
 3 better, to what extent was that dependent on Imperial's
 4 net wholesale prices to Morrisons at least reflecting
 5 the terms of the differences?
 6 **A.** It was hugely important, the amount of money I would put
 7 into that margin chain, that unknown bit at the end,
 8 after the publication of the wholesale prices.
 9 **Q.** Just to make it clear, we have been looking at the
 10 situation where Gallaher manages to get its retail
 11 selling price in Morrisons at a level that meant that
 12 the differential -- whether one calls it a maxima or
 13 a fixed doesn't matter for this purpose -- was not being
 14 achieved. In that event, if Morrisons have responded to
 15 Gallaher's pricing strategy so that they have lowered
 16 the price of Gallaher in such a way that you are not
 17 advantaged, was Morrisons as far as you were concerned
 18 required to reduce the price of Imperial if Imperial did
 19 not take any action of its own by funding?
 20 **A.** No.
 21 **THE CHAIRMAN:** Well, you say no, Mr Matthews, but what I am
 22 struggling with is what was the purpose of this trading
 23 agreement. Because you have said that the giving of
 24 these bonuses all had to be audited and it was important
 25 that you were able to explain why you were handing over

1 this money.
 2 **A.** Yes.
 3 **THE CHAIRMAN:** But did you ever have a discussion with
 4 someone along the lines, "Well, you have offered this
 5 tactical bonus to bring the price down of our brand to
 6 match a price reduction in a competing brand, but I, the
 7 auditor, have already signed off on you paying a reward
 8 package to them to achieve that in the trading
 9 agreement, so why are you paying more money to get them
 10 to do something which you have already paid them money
 11 in the trading agreement to do?"
 12 **A.** I think that's principally the difference between the
 13 trading agreement, which sets out an aspiration based on
 14 what you know now, and the tactical bonuses which were
 15 investments you had to make to hit those marks. Nobody
 16 would sign anything that held them to something that
 17 wouldn't allow them to move. If I had said that to
 18 Morrison -- and I don't think it would have been right
 19 to do so -- "these are the differentials, there is
 20 nothing you can do about it", that's just not practical,
 21 nobody would have signed that, because they would have
 22 wanted to, knowing the market was competitive, take
 23 advantage of the offers being made by Gallaher. And as
 24 long as I was given a chance to be competitive, it would
 25 be up to me to refuse it. So, as an example, if I was

1 paying [REDACTED] on Embassy, yes, I would like there to be the
 2 differential that naturally exists. But if another
 3 manufacturer offers money on that, and I choose not to
 4 respond, that's my issue.
 5 **THE CHAIRMAN:** So was the operation of this agreement only
 6 relevant, then, in between times of manufacturers
 7 offering money?
 8 **A.** I hope I don't repeat myself. The agreements have to be
 9 seen, I would suggest, with respect, in a holistic way.
 10 The most important thing in any of these agreements was
 11 the ability for our price -- for our products to be
 12 available and on the shelf and to have good shelf
 13 position. Pricing was only part of that.
 14 So if we look at the Morrison one, either the first
 15 or the last, tab 85, my opinion is that what they agreed
 16 to sell was the most important thing, the pricing was
 17 only one part of it. It's rather like a balance sheet,
 18 it's a snapshot in time. This is where you are now, and
 19 you have told us you are going to be, I am prepared to
 20 reward you for that. But things would change, and they
 21 did. So, you know, those -- it was a framework, it
 22 wasn't supposed to be a legally binding, "hit somebody
 23 over the head", agreement. It was between buyer and
 24 seller, and very often the negotiation after the
 25 negotiation was far more important.

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1 **MR HOWARD:** If we just go back to break down what
 2 the Chairman was putting to you, and take it in stages:
 3 where you see, for instance, Gallaher have reduced, by
 4 whatever mechanism, the price of Dorchester in
 5 a Morrison shop, so let's say they get Morrisons to sell
 6 at 3.29 and you are at 3.34; why are you then paying, as
 7 we see, a bonus to Morrison to go down from 3.34 to
 8 3.29?
 9 **A.** Because at 3.29 I would feel as though I was putting my
 10 brands, or that particular brand, at a price --
 11 **Q.** I think the question the Chairman is asking and I am
 12 asking you -- and it's my fault for not making it clear,
 13 perhaps break it down in this way: Gallaher get their
 14 price down to 3.29; had you already paid, I think is
 15 what the Chairman is asking, in the agreement --
 16 **A.** I see.
 17 **Q.** -- Morrisons to -- without you paying this vast sum of
 18 money we see you ultimately paid, had you already paid
 19 them to rules the price anyway so that you could say to
 20 them "Morrisons, you have reduced the price, that's
 21 jolly nice that Gallaher have gone down, now, Morrisons,
 22 you must put my price down at 3.29 because I've paid you
 23 to do that already"?
 24 **A.** No, and I understand the point now. Those bonuses that
 25 I was paying, again to repeat myself, were -- in the

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1 agreements weren't just for pricing differentials.
 2 **THE CHAIRMAN:** But they were a bit for pricing
 3 differentials.
 4 **A.** A bit. I don't know --
 5 **MR HOWARD:** Focus on the bit that's for pricing
 6 differentials. What you are being asked is in relation
 7 to the part that was for pricing differentials, where
 8 Gallaher had done something whereby they had paid extra
 9 money to Morrisons to get their price down, why were you
 10 not entitled to say to Morrisons "Look, you have to put
 11 my price down because you have put Gallaher's down"?
 12 Why weren't you saying that?
 13 **A.** Because it would be commercial suicide for them to take
 14 that course of action, because you would be saying to
 15 them, "You have a cash margin of 10p per packet on
 16 Gallaher, if I have my brand at the same price as theirs
 17 you are going to make 5p". No-one would -- I mean, it's
 18 just not realistic.
 19 **THE CHAIRMAN:** Why, then, have this agreement at all?
 20 Because all this toing and froing with bonuses being
 21 added and subtracted, you can see what the RRP is, you
 22 see what is on the shelves, you see what the list prices
 23 of your competitors are, all this flexing of the retail
 24 price by you and Gallaher, increasing and decreasing the
 25 tactical bonus, could happen anyway, without you having

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1 paid anything in this agreement, for the pricing bit of
 2 the agreement. So what was the purpose of the pricing
 3 part of the trading agreement? Because you extended it
 4 and then you included it in the subsequent version of
 5 the agreement. At the moment I am still struggling to
 6 understand why that was entered into.
 7 **A.** Again, I think that it was a lot more than pricing, and
 8 within pricing it was that bit, to use your expression,
 9 that was not for tactical pricing. Again I hope I am
 10 not repeating myself too often, but those bonuses that
 11 we agreed to pay, you know, had been created over, you
 12 know, several years, in some cases much more than
 13 several years, and they were the results of negotiations
 14 on a range of things, not just pricing.
 15 So, for example, the bonus I see here that, in 2001,
 16 was being paid on Lambert & Butler, which is, I don't
 17 know, 16p per outer, that could quite well be as
 18 a result of lots of different things, with very little
 19 to do with differentials.
 20 **DR SCOTT:** But if we go back to the example that Mr Howard
 21 was putting to you, the situation, as I recall, at the
 22 beginning was that both were at £3.34; is that right,
 23 Mr Howard? Before your move to 3.29 by Gallaher, you
 24 had both products at 3.34?
 25 **MR HOWARD:** I am not sure what you are referring to.

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1 **THE CHAIRMAN:** This is a hypothetical example.
 2 **DR SCOTT:** Your hypothetical example, you were saying that
 3 Gallaher moved their price from 3.34 to 3.29.
 4 **MR HOWARD:** Yes.
 5 **DR SCOTT:** As I understand it, the 3.34, 3.34 could be
 6 an example of your snapshot.
 7 **A.** Right.
 8 **DR SCOTT:** And for that you were paying a bonus which was
 9 nothing to do with the tactical bonus because that was
 10 the steady state situation. Now, once we get into
 11 tactical bonuses, that's a different thing. What you
 12 seem to be suggesting with the snapshot is that there
 13 was a level of bonusing which related, as you explained,
 14 to the marketing aspects in a broad sense, but to the
 15 basic pricing relativities in relation to RRP's as part
 16 of that.
 17 Do we have that right?
 18 **A.** Yes.
 19 **DR SCOTT:** And then we get into the situation which
 20 Mr Howard is exploring, which is what happens when
 21 somebody disturbs that, what we might call equilibrium.
 22 **MR HOWARD:** Actually I was seeking to -- that's helpful, but
 23 I think let's just think about it for a moment.
 24 You explain in paragraph 21 -- we have already
 25 looked at it -- how what you were trying to do was to

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1 reflect your lower cost prices. Right? Now, we know
 2 the tactical bonuses by Gallaher, that's a sort of
 3 simple situation where you can see Gallaher may have
 4 a 5p per pack tactical bonus which might last a long
 5 time, and as Dr Scott puts it, that can upset your
 6 strategy. Correct?
 7 **A.** Yes.
 8 **Q.** Now, if, instead of calling it a tactical bonus, simply
 9 what Gallaher do is they see you publish your RRP, and
 10 in that RRP they see that you have Richmond at the same
 11 price as Mayfair. They also see in the list price that
 12 basically they are the same price. But assume at that
 13 stage Gallaher say "I know how we can catch out those
 14 Imperial people, what we are going to do is offer
 15 an increased discount to Morrisons and the other
 16 supermarkets on Mayfair in order that we can get them to
 17 price it favourably to us".
 18 Now, stopping there for a moment, in other words, is
 19 there any distinction between that situation and the
 20 tactical bonus?
 21 **A.** No, I don't think so.
 22 **Q.** So if you see the price of your goods in Morrisons, if
 23 we take Richmond, if you see Richmond at a higher price
 24 than Mayfair, what can you do in that event and what do
 25 you do if you want to try to get Richmond priced

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1 favourably against Mayfair?
 2 **A.** Well, the pragmatic thing to do would be to try and
 3 invest some money to achieve your pricing position, but
 4 before you dive into investing what could be a lot of
 5 money in absolute terms, there would be a conversation,
 6 and the art of that conversation would be to try and
 7 find out how that had happened. I mean, it might be
 8 a shelf price error, and then you would look rather
 9 foolish if you invested the money. It might be that the
 10 retailer was working on a much lower margin than they
 11 realised, and in that instance you would say, "Well, why
 12 are you working on such a high margin on our products?
 13 So you would try and reduce the prices of your product
 14 based on the margin. But in truth, if it was --
 15 **Q.** Stopping there for a moment. If what you discover is
 16 actually what they are doing is the reason that Mayfair
 17 is a penny cheaper than Richmond is because they are
 18 applying a 5 per cent margin to Mayfair and a 6 per cent
 19 margin to Richmond, let's say that's what comes out of
 20 the discussion, then what is your attitude to that in
 21 the light of the trading agreement?
 22 **A.** I think that I would have another conversation within
 23 that, because there is always something behind
 24 something, nothing in these relationships can be seen in
 25 terms of itself, I would want to know if it was

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1 a strategy that the supermarket had adopted on a certain
 2 strata of brands. Is it that they were looking at
 3 a basket of goods approach, that they were looking at
 4 the weight of the entire product category that the
 5 supplier was providing. I would use that argument
 6 myself, to say that every pound through the till of our
 7 brands, you make more money, because we have a very
 8 broad basket of brands.
 9 **Q.** To what extent did you regard them as entitled, if they
 10 chose, to simply say, "I want to have a differential
 11 margin policy on Dorchester, or here Mayfair, as opposed
 12 to Richmond"?
 13 **A.** They would be within their rights to do that, I would
 14 use everything that I could to try and persuade them
 15 that that wasn't a good idea, and that would be using
 16 a range of tactics, the last one would be the investment
 17 of money. In the example that you give me, if I was
 18 having to invest money because the retailer was working
 19 on a higher margin on my brands than the others, that
 20 would be a suboptimal commercial result.
 21 **Q.** Yes. I think going back to what the Chairman was asking
 22 you, you having paid them a sum of money, assuming that
 23 it turns out that Dorchester and Richmond are being
 24 supplied at the same net wholesale price, and assuming
 25 for a moment they are not responding to any competitive

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1 activity in the market, just they are saying "I am
 2 choosing to have a higher margin on Richmond", in the
 3 light of the money that you have paid them under the
 4 trading agreement, would you have complained about that?
 5 **A.** I think I would have done.
 6 **Q.** Now, can we turn to a slightly different point. We know
 7 and we have seen the Richmond story, that that's
 8 an example where Imperial took the initiative and
 9 reduced the price of Richmond because they were
 10 repositioning it against Dorchester.
 11 **A.** Yes.
 12 **Q.** What was the commercial strategy there of cutting the
 13 price of Richmond?
 14 **A.** Well, it came after a period of almost a year of
 15 intellectualisation about it in the business at the very
 16 highest level, in that we felt at the time that
 17 Gallaher's move into ULP or ultra low price was
 18 premature and was commercially not advisable, and for
 19 a whole year we decided whether or not we should be in
 20 that part of the market, and we had a very strong
 21 property in L&B, and we felt that by putting a brand
 22 underneath it, that might suck -- it might cannibalise
 23 sales from our existing brands. I think given the fact
 24 that advertising was becoming very difficult, conveying
 25 any values to consumers very difficult, we took again

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1 a pragmatic view that we needed a brand there, and hence
 2 our action with Richmond.
 3 **Q.** We have been told by various witnesses that Imperial's
 4 view was that Richmond was a better brand than
 5 Dorchester, and so if it was at parity or better, you
 6 were confident that you would increase your market
 7 share, I think could you just explain to the Tribunal --
 8 **MR LASOK:** I don't think that is actually the evidence we
 9 have been given.
 10 **MR HOWARD:** That is Roger Batty's evidence, amongst others.
 11 Let's go back a stage, since Mr Lasok's memory fails
 12 him. In your view, how did Richmond compare with
 13 Dorchester?
 14 **A.** I think that there was a lifecycle issue, all brands
 15 have lifecycles, and you referred to this before, but
 16 out of the tumult, some brands were just left alone.
 17 Dorchester was a brand that had been around for many,
 18 many years and had a perception in the eyes of the
 19 consumer as being cheap rather than good value, so we
 20 felt with Richmond, that was a new brand with better
 21 packaging, that crucially we supported above the line,
 22 when Dorchester wasn't supported above the line with
 23 advertising, that we had an intrinsically better brand
 24 and I think that was borne out by various consumer
 25 groups as well as our own feeling about the product.

1 **Q.** If Imperial chose to promote Richmond and pay
 2 an incentive to reduce its shelf price, so get the shelf
 3 price down, having paid, say, 10p per pack to Morrisons,
 4 did you have any requirement as to what Morrisons should
 5 do with the Gallaher product?
 6 **A.** No.
 7 **Q.** Because the OFT says that in the event, Morrisons was
 8 required to reduce the price of the competing Gallaher
 9 product, and I would like you to comment on that,
 10 including your view as to the commercial sense of such
 11 a suggestion?
 12 **A.** Well, it's the corollary of what we just discussed
 13 a moment ago, isn't it? I don't think that I would have
 14 expected a retailer to work on a much lesser margin on
 15 my brand, same as I wouldn't have expected our
 16 competitors to do the same. I mean --
 17 **Q.** No, focus on the point I am asking you: you are paying
 18 to reduce the price of your brand, the OFT says, well,
 19 part of this trading agreement, the way it worked, was
 20 if the price of Imperial's product comes down, the
 21 retailer automatically, as a result, had to reduce the
 22 price of the competing brand?
 23 **A.** Not at all, the only party that would have been
 24 interested in doing that would have been another
 25 manufacturer.

1 **Q.** And if they wanted to do that, what would they have to
 2 do, as you see it?
 3 **A.** They would have had the same conversation that I talked
 4 about a few moments ago, and ultimately they would have
 5 had to have made a call on the investment. That's what
 6 I meant by the corollary of what I had just said.
 7 **Q.** Can I ask you about an Imperial price increase in
 8 a particular situation. Firstly, assume Imperial has
 9 an MPI, manufacturers' price increase, and assume
 10 that -- again if we take Richmond and Dorchester --
 11 prior to the MPI they have the same RRP, the same net
 12 wholesale price, and they have been priced at the same
 13 level by Morrisons. Let's assume against that scenario
 14 Imperial has an across the board, in the case of
 15 cigarettes, MPI of 5p so the net wholesale price of
 16 Richmond goes up by 5p or so.
 17 **A.** Yes.
 18 **Q.** Now, firstly, if you put up the net wholesale price of
 19 your product, here Richmond, was Morrisons required by
 20 you in that event to put up the retail selling price?
 21 **A.** No.
 22 **Q.** Now, if you put up your net wholesale price, you have
 23 told us that Morrisons weren't required to put up the
 24 retail selling price, what would you expect them to do
 25 if they wished to retain their margin?

1 **A.** So we have had an MPI and in order to maintain their
 2 margins they would increase the shelf prices.
 3 **Q.** Of what?
 4 **A.** Well, of any brand that we chose to increase.
 5 **Q.** Right. If they chose to put up the price of, here
 6 Richmond, by 5p as a result of your MPI, as far as you
 7 were concerned, was there any requirement on them to put
 8 up the price of Gallaher's brands?
 9 **A.** No.
 10 **Q.** We see that sometimes there is an MPI and then you have
 11 a price hold sometimes across the board and sometimes of
 12 a specific product. So let's take an MPI, which is 5p,
 13 but you then say to the retailer "I want to hold the
 14 price of Richmond at pre MPI levels and I give you
 15 a bonus to do that". What was the reason, why are you
 16 having a price hold, why did you need to do it?
 17 **A.** Well, I think I touched on this on Friday. We had
 18 an interesting portfolio from premium down to ultra low
 19 price, and it was a commercial decision, the equation
 20 was quite finely balanced but if you were able to go up
 21 7p on Embassy, that might allow you to only go up 3p on
 22 Richmond or perhaps hold Richmond for a period of time.
 23 So what we were trying to do there in essence was
 24 steal a commercial advantage over our competitor brands.
 25 This would happen at Budget increases too where it was

1 out of our hands, there was an increase, if the
 2 Chancellor decided to go up, that might mean we would do
 3 the same, we could hold a brand there.
 4 **Q.** Okay. Now I want to consider the position where --
 5 withdrawing a tactical bonus. Again if we can take it
 6 in stages. If we take a tactical bonus or any sort of
 7 bonus that you are paying to reduce the shelf price, why
 8 are you doing it? Why are you interested in reducing
 9 the shelf prices?
 10 **A.** I think the example earlier that we touched on, on
 11 Richmond, where we were paying a bonus of ██████ per
 12 thousand, and I remarked that that level of investment
 13 would, I believe, at the time have been greater than the
 14 margin we were making on the brand, so particularly on
 15 brands like Richmond and before it L&B, it was really
 16 about trying to make our brands more profitable. The
 17 less investment in those brands on pricing, the more
 18 profitable they would be.
 19 So to answer your question directly, we would be
 20 trying to reduce our investment in a brand.
 21 **Q.** Now, we have seen in the case of various brands you
 22 responding to competitor activity. Let's take again the
 23 assumption -- we see it in the papers, but it's easier
 24 to take it as an assumption at the moment -- you pay
 25 a tactical bonus to get Richmond down to £3.29 in

1 response to Gallaher's activity, and the level of your
 2 bonus is pitched at the level which allows Morrisons to
 3 earn their margin and to price at £3.29.
 4 **A.** Yeah.
 5 **Q.** So assume that you then decide that this is costing me
 6 too much, paying this bonus, so I am going to withdraw
 7 part of it, let's say you say "I am going to withdraw 5p
 8 of it", and you then say that the price in the light of
 9 Morrison's margin requirement goes back to 3.34.
 10 Assuming all of that, if Gallaher choose to continue
 11 funding a lower net wholesale price for their competing
 12 brand, so in other words they are happy to carry on
 13 paying Morrisons to be at 3.29, what was Morrisons
 14 obliged to do as far as you were concerned to the price
 15 of Gallaher where you have withdrawn from the fight?
 16 **A.** Well, nothing.
 17 **Q.** Take a Gallaher price increase, where Gallaher has
 18 an MPI across the board again, the same sort of example
 19 as we were thinking of before. If you don't have an MPI
 20 and Gallaher does, so they put up the price of
 21 Gallaher's product, what was, as far as you were
 22 concerned, Morrisons required to do in relation to the
 23 selling price of your products where you haven't had
 24 an MPI?
 25 **A.** Well, they wouldn't be required to do anything, I would

1 try and persuade them not to put the shelf prices of our
 2 brand up, because we hadn't increased. I would wish
 3 them to continue to make the cash margins they appeared
 4 happy to make and to keep your brands on shelf at the
 5 price they decided to sell at.
 6 **Q.** Now, if we take a situation again we see sometimes in
 7 the papers --
 8 **DR SCOTT:** Can we just pause at that point? You talked
 9 earlier on about the fact that amidst all these changes
 10 new schedules came out.
 11 **A.** Yes.
 12 **DR SCOTT:** In that situation, where there had been
 13 a Gallaher MPI not followed immediately by an Imperial
 14 MPI, we realise that that occurred in June 2002,
 15 I think; presumably you would re-issue the schedule so
 16 that people knew where they were meant to be at that
 17 stage; is that right?
 18 **A.** Well, from time to time in an instance like that, and
 19 I remember it many times, what you tried to avoid would
 20 be an enterprising buyer putting everything up at the
 21 same time anticipating that we might have an increase.
 22 **DR SCOTT:** Because normally, as I recall the sequence of
 23 events, one party would go up and then a couple of weeks
 24 later, the other party would go up.
 25 **A.** That did happen from time to time, yes, could be

1 a month, could be a matter of weeks. During that period
 2 we would see a natural extended commercial advantage.
 3 So if the price list differentials showed Embassy and
 4 Benson & Hedges, naturally Embassy was 3p below, if
 5 Gallaher were to go up by 5p, that would extend to 8.
 6 What I would do in that instance was not perhaps to
 7 issue a new schedule but to have a conversation saying
 8 "Well, we are not moving, we would expect to see our
 9 differentials widen the period of advantage".
 10 **DR SCOTT:** Just so that we understand, if that were to
 11 happen, then presumably you would reward Morrisons for
 12 keeping their prices down using the trading agreement;
 13 is that right?
 14 **A.** No, I wouldn't want to reward them, because that would
 15 mean that I would be investing in a situation that would
 16 occur naturally, and that would be to my commercial
 17 detriment.
 18 **DR SCOTT:** But they would get the ongoing bonuses?
 19 **A.** Of course, yes.
 20 **DR SCOTT:** Thank you.
 21 **MR HOWARD:** Of course, the example that you were just being
 22 asked about where there is a Gallaher price increase,
 23 I think you were asked whether you would need to issue
 24 a new schedule. Of course if we look at your schedules,
 25 if we take tab 85, the price list differentials. If

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1 Gallaher issue an MPI, if you -- sorry, are you at
 2 tab 85?
 3 **A.** Yes.
 4 **Q.** If Gallaher put up their price and you are content with
 5 the differentials as expressed here, why would you need
 6 to issue a new schedule?
 7 **A.** I wouldn't.
 8 **Q.** So the new schedule would be seeking to do what in
 9 relation -- I mean, if we take an example, say Embassy
 10 against Benson & Hedges, assume that Benson & Hedges has
 11 gone up so that the RRP differential is now, say, 6p, if
 12 you want to have a differential schedule that recognises
 13 that, what would you then do?
 14 **A.** Are we talking now about the situation of the MPI or --
 15 **Q.** Yes.
 16 **A.** Well, I think I would refer to what I said a few moments
 17 ago, in that in the instance of an MPI I wouldn't feel
 18 it perhaps necessary to issue a schedule, depending on
 19 circumstance. But what I would expect to see is that if
 20 there was a 5p differential, it might widen, and I would
 21 want to see that reflected.
 22 **Q.** Yes. Now, if we take the position of Gallaher and its
 23 tactical bonuses, when you see, say, the shelf price of
 24 Dorchester goes down to 3.29, would you actually know
 25 how Gallaher was achieving it? Or would you be able to

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1 infer how they were doing it, or what?
 2 **A.** No.
 3 **Q.** Assume that, however they have done it, Gallaher have
 4 managed to get the shelf price down to 3.29 and you have
 5 then responded with your own tactical bonus, and then
 6 Gallaher stops doing whatever it's doing whereby it
 7 manages to get the shelf price down, and the price of
 8 Dorchester goes up to £3.34. Assume you say nothing to
 9 Morrisons at that stage, so you have already agreed to
 10 pay them the bonus to go down to 3.29, so you say
 11 absolutely nothing. What was Morrisons required to do
 12 about the price of Richmond where it had put up the
 13 price of Dorchester as a result of Gallaher seemingly
 14 withdrawing from the battle?
 15 **A.** They wouldn't be required to do anything.
 16 **Q.** So you having funded a price reduction, your competitor
 17 having to some extent withdrawn from the fray, what did
 18 you have to do if you no longer wished to fund such
 19 a deep price discount?
 20 **A.** I would explain to them that I wanted to reduce my bonus
 21 or perhaps take the entire tactical element away.
 22 **Q.** Right. Now, if we take the position of Morrisons and
 23 their competitors, as I understand it, you have told us
 24 that you knew that Morrisons were benchmarking against
 25 particular retailers, if Morrisons discover that Tesco

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1 are pricing, say, Dorchester 2p cheaper and they sought
 2 to respond to that by lowering the price of Dorchester
 3 in their stores to match Tesco, what was your
 4 understanding as to whether they were entitled to do
 5 that?
 6 **A.** Well, of course they would be entitled to do it, yeah.
 7 **Q.** Did they ever do that, respond as far as you knew to
 8 competitor activity and reduce prices?
 9 **A.** Morrisons, well, yes, we saw an example of that earlier,
 10 I think, concerning Old Holborn and GV, where they had,
 11 one assumes -- it was the document with my handwriting
 12 on it, where they had seen something in the marketplace
 13 and responded to it.
 14 **Q.** Could you turn to document 53, please. {D17/53}. You
 15 were asked some questions about this. I just want you
 16 to -- let's just see if we can understand what has
 17 happened here. We see that you want to, in the earlier,
 18 in the first line, that you want to match Amber Leaf.
 19 Do you see that?
 20 **A.** Yes.
 21 **Q.** And that's across all SKUs?
 22 **A.** Yes.
 23 **Q.** You then are setting out bonuses which, in relation to
 24 the various price levels, which presumably are the price
 25 levels of Amber Leaf?

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1 **A.** Yes.
 2 **Q.** So we can just be clear about it, you are calculating
 3 here, you have told us, the bonus, the increase in bonus
 4 which would be required to keep Morrison's margin and
 5 still price at £2.09 in the case of the 12.5 grams.
 6 Right?
 7 **A.** Cash margin, yeah.
 8 **Q.** Yes. In the event that Morrisons decided to reduce
 9 their own margin, and so price Drum at below Amber Leaf
 10 at 208p, would you have any objection to that?
 11 **A.** Not at all.
 12 **Q.** Then if you would go to document 16, {D17/16}, if we
 13 take it in stages, under the "Kingsize", do you see the
 14 current shelf price, 3.29?
 15 **A.** Yes.
 16 **Q.** Then there is an ongoing bonus and an additional bonus?
 17 **A.** Yes.
 18 **Q.** In order to get to the shelf price of 3.29, what had you
 19 done?
 20 **A.** Well, there is two -- well, there is three constituent
 21 parts. You can see there the cost price in brackets,
 22 Q6, which is what we established earlier is the bulk
 23 drop discount price, so that's the sort of landed
 24 wholesale price. On top of that, there would be the
 25 ongoing bonus, which we talked about earlier as being

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1 partly for selling beneath RRP and partly for achieving
 2 a differential. But the most substantive element of the
 3 investment was the additional bonus which seems to be
 4 █████ per thousand, which the maths would suggest
 5 a margin of █████ or just shy of █████ per packet of 20, and
 6 just shy of █████ per cent margin. So those are the parts
 7 that get to, or the elements that help Morrison achieve
 8 that shelf price.
 9 **Q.** We see in this case that you refer to the broad
 10 marketplace for Dorchester having moved up?
 11 **A.** Yeah.
 12 **Q.** Now, if you hadn't written this letter, what would
 13 Morrisons have been entitled to do in terms of claiming
 14 the bonus of £4.31 odd from you?
 15 **A.** They would have been able to continue to claim that
 16 bonus.
 17 **Q.** Right. We then see that what you are doing is reducing
 18 your, what you have called your investment --
 19 **A.** Yes.
 20 **Q.** -- and it's here called the additional bonus, from £4.31
 21 to £2.18. Again, I think the position is obvious, but
 22 explain to us why did you feel from your competitive
 23 position at this stage you could afford to reduce your
 24 investment in this bonus?
 25 **A.** Having seen what's happened in the marketplace, I've

1 suggested to Morrison here that I want to reduce my
 2 investment and that if they wanted to maintain that cash
 3 margin, which I see is a facsimile of what it was at
 4 3.29, that would necessitate an increased shelf price to
 5 3.34. So the only thing that differs in that equation
 6 is my investment and the slight reduction in percentage
 7 margin, as a consequence of selling at the same higher
 8 shelf price.
 9 **Q.** If you go back to tab 9, {D17/9}, if you go to the
 10 second page, if we look under "Richmond", we see that
 11 you say:
 12 "I understand that Dorchester Kingsize will also be
 13 moving from next Monday, 2 October from 3.38 to 3.29.
 14 You believe this is a temporary move and that this
 15 position will only last one month."
 16 So what was Mr Addison telling you, as you
 17 understood it?
 18 **A.** Well, he's told me in this instance that Dorchester is
 19 reducing its shelf price in Morrisons stores.
 20 **Q.** So as a result of that, as a result of what you
 21 understood to be the competitor activity, what were you
 22 then prepared to do in order to match it?
 23 **A.** Well, that's an instance where I have had to go away
 24 from the confines of the trading agreement and make
 25 a tactical investment in order to try and not lose

1 competitive advantage for Richmond against Dorchester,
 2 which has necessitated the increase or the input of
 3 an additional or tactical bonus.
 4 **Q.** If you could be given annex 7 for a moment, which is
 5 communications between Gallaher and Mr Addison, and if
 6 you turn to tab 6, {D7/6}, what you find is -- this
 7 isn't something you have seen, but I just want to set
 8 the context -- this is six days before the letter that
 9 you had written relating to your meeting, I think, which
 10 was on the Friday, which I think would have been the
 11 22nd.
 12 We see here that Gallaher are writing to this
 13 Mr Addison confirming that Dorchester pricing -- and if
 14 we look at Kingsize, it's 3.34, there is a bonus to get
 15 to that:
 16 "... and that these prices [if you look underneath
 17 it] to be featured on shelf barkers as agreed from
 18 2 October to the 29th."
 19 So in other words, what Gallaher were actually
 20 saying, it appears, to Mr Addison was that the price was
 21 going to be £3.34, but you seem to be working on the
 22 basis that it's going to be, from what he has told you,
 23 3.29. Is that right?
 24 **A.** It does appear to be the case, yes.
 25 **Q.** This sort of thing, where the retailer appears to give

1 this sort of information which may not actually reflect
 2 the position, to what extent was that happening?
 3 **A.** I mean, it was -- clearly in this case that was quite
 4 plain what was happening. I mean, it was, I think, part
 5 of the game between buyer and seller, and this is
 6 representative of it, and it wasn't just confined to
 7 Morrison, that would be something that would be a pretty
 8 regular tactic in Tesco.
 9 **Q.** So here Morrisons, what are they trying to get you to
 10 do, and how are they playing you?
 11 **A.** Well, they are being quite clever, after the fact,
 12 aren't they? They are encouraging me to part with more
 13 of my money than I want to, which might have several
 14 repercussions. It might force the other party,
 15 Gallaher, to reduce the price of their product even
 16 further having reduced it, and it could be
 17 an interesting threesome here.
 18 **Q.** Of course, ultimately, in terms of the consumer, what's
 19 the net result in terms of your prices?
 20 **A.** Well, looking at it now, I imagine that what Justin is
 21 trying to do is perfectly sensible, he is fighting to
 22 gain competitive advantage for his brands versus the
 23 other supermarkets, with a net effect of providing
 24 Morrisons shoppers with cheaper brands, and he is using
 25 his guile and his buying power to be able to do that.

1 Q. You were asked some questions about tab 28, {D17/28},
 2 which was this document which had various schedules,
 3 including, in the fourth line, a 5p Richmond shelf price
 4 increase. Do you see that?
 5 A. Yes, I do.
 6 Q. What you weren't, I think, shown was document 26, which
 7 I think is the previous month.
 8 MR WILLIAMS: The witness was shown this document, but we
 9 didn't debate Richmond and Dorchester, I don't think, in
 10 this context.
 11 MR HOWARD: Let's look at the document at tab 26, and
 12 I think he was not shown it in this context, is the
 13 important point. {D17/26}.
 14 If we look at document 26, some three weeks before,
 15 we can see that there has been a Budget, and then you
 16 say in the first paragraph that you are going to hold
 17 the price of Richmond necessitating an additional bonus.
 18 A. Yes.
 19 Q. And again, in the next paragraph. So there was a price
 20 increase but then you held it by paying an additional
 21 bonus?
 22 A. Yes.
 23 Q. If we then go to tab 28, {D17/28} where, in respect of
 24 Richmond, there is then a 5p shelf price increase, what
 25 is actually happening, can you help us, in terms of the

1 bonus? Where you had previously held the price, what
 2 are you now doing?
 3 A. Well, I am trying to recoup that investment.
 4 Q. So in terms of the Budget price increases which had
 5 previously been held, what are you now doing in respect
 6 of Richmond from 9 April?
 7 A. Richmond is going to catch up with that prevailing
 8 increase.
 9 Q. Thank you. Then if you would turn to tab 31 and 32 --
 10 THE CHAIRMAN: I am just looking at the time, Mr Howard.
 11 Are you nearly finished?
 12 MR HOWARD: No, I'll be another half an hour or so.
 13 THE CHAIRMAN: Perhaps we will take a break there. Is that
 14 at all convenient?
 15 MR HOWARD: That's fine, that's a perfectly convenient
 16 moment.
 17 THE CHAIRMAN: We will come back, then, at 2 o'clock.
 18 (1.00 pm)
 19 (The short adjournment)
 20 (2.00 pm)
 21 MR HOWARD: Mr Matthews, I just have a few questions, I'll
 22 try and get through it quickly.
 23 Could you go to tab 56, please. This, we can see
 24 here, on 1 March, you were -- who sent this? You sent
 25 it, to Paul Giles?

1 A. Yes.
 2 Q. We see it refers to:
 3 "... our recent conversation concerning the
 4 forthcoming Sterling price moves and I too would like to
 5 move the shelf price of Richmond Superkings up 2p to
 6 347p. I've asked Graham Plummer to create a new
 7 schedule to reflect this change."
 8 If we try and break that out a little bit, what, as
 9 you understand it, was happening in terms of bonusing on
 10 Richmond to get to a particular price?
 11 A. Well, without seeing the workings behind this, I have to
 12 believe that we were suppressing the shelf price of
 13 Richmond, therefore increasing our investment on that
 14 brand to hit a shelf price and, having had
 15 a conversation with Paul concerning Sterling moving
 16 upwards, I am asking to do the same.
 17 Q. Yes, and I think the Chairman said that the letter
 18 didn't seem to be referring to any change that you
 19 already had decided to make to the bonus, and it doesn't
 20 refer to the bonus on margins or anything. Can you
 21 explain to us, what is the second paragraph, where you
 22 ask Graham Plummer to create a new schedule to reflect
 23 this change? What's that talking about?
 24 A. Well, it is a very shorthand note, and that second
 25 one-line paragraph would be me suggesting via Graham,

1 who was my clerk on this account, that I would create
 2 this new schedule, Graham would create this new schedule
 3 for me to reflect the change, the reduction in tactical
 4 bonus.
 5 Q. Right.
 6 DR SCOTT: Is that the schedule of costs, bonuses and
 7 margins that we --
 8 A. That is correct, yes.
 9 DR SCOTT: Thank you.
 10 MR HOWARD: Could I then, on a separate point, ask you to go
 11 just two tabs on to -- in fact, if you go to the next
 12 tab I think you can actually see from that, and that may
 13 help you, what the -- where the Richmond Superkings ...
 14 does that help? (Pause). Actually I am not sure it
 15 does. Can you tell us, does the next document, which is
 16 in April, about six or seven weeks later, under
 17 "Superkings", does that help us at all?
 18 A. I am not sure that it does. I think this is a separate
 19 event.
 20 Q. Let's leave that on one side, and go to 58, {D17/58}
 21 which you were asked some questions about. It concerns
 22 the June 2002 episode. We see that what we know
 23 happened here was that Gallaher had announced an MPI,
 24 you refer to that, about a third of the way down:
 25 "As you are already aware, one of our competitors

1 has already announced a price increase effective
 2 June 25."
 3 **A.** Yes.
 4 **Q.** Then you refer to widening differentials. Now, why was
 5 it necessary, from your perspective, to write a letter
 6 referring to widening differentials? What were you
 7 trying to achieve?
 8 **A.** We touched on this earlier, I think, in a conversation
 9 piece with the gentleman on the end, I believe, with
 10 Dr Scott, and this was -- I think he asked me the
 11 question: would you feel compelled to send a schedule at
 12 this time, and I would repeat my answer from that, that:
 13 no, I don't think I would, but what I would try and do
 14 is remind, in this case Morrison, that we wouldn't
 15 expect to see our brands going up at such a time when
 16 our competitors' have gone up. So I think launching
 17 a new schedule would be heavy-handed and not right, but
 18 this was to explain that we had not had an increase and
 19 would prefer to see our brands stay exactly where they
 20 were.
 21 **MR SUMMERS:** May I just ask: would you have felt that
 22 sending out a new schedule would have tied your hands
 23 too much, in terms of making an earlier upward response
 24 if you had wanted to?
 25 **A.** That's a very good question. Possibly. Because at that

1 stage I probably wouldn't have known what my business
 2 had at -- the most senior levels had in mind, and it was
 3 mentioned earlier that from time to time we went up soon
 4 after. So I think this is a sort of holding letter, in
 5 case something happened. If I had published something
 6 more formal, perhaps, as you say, it might have tied my
 7 hands.
 8 **MR SUMMERS:** Thank you.
 9 **MR HOWARD:** Just looking at this episode, what we know
 10 happened, and is referred to, is: Gallaher announce
 11 a price increase, you are not announcing a price
 12 increase and are seeking to hold, widen the
 13 differentials; then Gallaher announces a price hold, in
 14 order to meet what you are doing.
 15 Now, what does that tell us about the competitive
 16 dynamics that are going on between you and Gallaher at
 17 this stage?
 18 **A.** It seems fairly plain that this was representative of
 19 the cat and mouse relationship that existed between us
 20 and Gallaher and vice versa, where they have made a big
 21 call to go up, but have decided to try and balance their
 22 margin basket and hold back like we had done and we
 23 discussed earlier.
 24 **Q.** Mr Williams said to you: well, why didn't you, at this
 25 stage, say "We want to be 4p under so please can you

1 reduce our prices by 4p"? Just get it in context. You
 2 have sought to get a competitive advantage by holding
 3 prices, Gallaher then react to that by holding their
 4 prices. Mr Williams said: well, why didn't you write
 5 then in response to that and try and get Morrisons to
 6 reduce the price, say, of Richmond? If you had wanted
 7 Morrisons to reduce the price of Richmond, what would
 8 you have had to do to get them to do it in terms of
 9 money?
 10 **A.** I would have had to have funded that further reduction.
 11 **Q.** Why at this stage did you choose not to do that?
 12 **A.** Because there was a limit to our investment.
 13 **Q.** Okay. Could we go back, then, to tab 9. You were asked
 14 this morning about tab 9, the part of the letter dealing
 15 with multipack support. {D17/9}. It's on the third
 16 page.
 17 **A.** Yes.
 18 **Q.** What we see happening is Morrisons, we see it in the
 19 last sentence, in that paragraph, that Morrisons are
 20 giving a discount, they are concerned it's not
 21 a sufficient inducement to the customers, and they want
 22 to get to a bigger discount. As I understand it, this
 23 is for buying large packs of cigarettes?
 24 **A.** For buying 200 packs.
 25 **Q.** And they are going to restore that irrespective of

1 supplier support, but what you then in fact seem to do
 2 is to give them support; is that right?
 3 **A.** It is right, on -- with various conditions.
 4 **Q.** Yes. So why did you want to secure what you describe as
 5 an advantage?
 6 **A.** Because I felt that -- there is stages of negotiation in
 7 a couple of paragraphs there. I have been asked for
 8 something I don't have to support but by agreeing to
 9 support it, I am trying to get something for it, but at
 10 the heart of the matter my feeling is that if I can
 11 secure a shelf price advantageous to my brands over
 12 competitor brands, I am going to sell more.
 13 **Q.** What are you here doing? What are you trying to do
 14 about the absolute levels of prices at this stage, of
 15 the multipacks?
 16 **A.** Well, I think this is very little to do with absolute
 17 shelf prices, because it's clear here that not only are
 18 Morrisons selling beneath RRP, which is a function of
 19 their 200s price versus their 20s, but they want to sell
 20 beneath that. So at this stage I am not especially
 21 concerned about that, it's the advantage that I see
 22 I can get from doing this deal.
 23 **Q.** On a separate point could you turn to tab 59, please.
 24 {D17/59}. We see the first part of the letter was about
 25 Amber Leaf and you expressed that you needed your brands

1 to remain competitive. What did you mean by that?
 2 **A.** Well, this seems to be not so much a tactical move by
 3 our competitors but a strategic move, because I am
 4 saying here that I've understood a reduction in RSP,
 5 which seems more fundamental, but essentially what I am
 6 trying to do here is to make my brands competitive with
 7 what was a challenger brand, Amber Leaf.
 8 **Q.** Okay. Then halfway through the letter, you say:
 9 "At the same time could you help me [I think the
 10 word 'with' must be missing] with the following moves."
 11 It's the next bit I am interested in:
 12 "Not sure why, but Cafe Creme 50s are out of line
 13 with Hamlet Miniatures which must have been held
 14 following the Gallaher MPI? Whilst Hamlet Miniatures
 15 are at 12.99, I would like Cafe Creme to be also at
 16 12.99. This would mean an increase in bonus of 22p per
 17 outer or 44p for 100."
 18 Seeing the text of this letter, we can see that you
 19 clearly were observing that Hamlet were at £12.99. Did
 20 you know whether that was as a result of Gallaher's
 21 initiative or Morrison's initiative?
 22 **A.** Well, I don't know, and that's why I've asked that
 23 question in parentheses there.
 24 **Q.** Whichever initiative it was, whether it was that of
 25 Gallaher or Morrisons, what did you recognise needed to

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1 be done in order to get you to a competitive position
 2 vis-a-vis Hamlet?
 3 **A.** Well, judging by what I've written, it means
 4 an investment, an increase in bonus to achieve that
 5 position.
 6 **Q.** Could you then turn to document 75. {D17/75}.
 7 **A.** Yes.
 8 **Q.** Stopping for a moment, at document 59 -- sorry, go to
 9 document 75, which we looked at also this morning.
 10 I just want to remind you of the terms of that.
 11 **A.** Yes.
 12 **Q.** Then we see that Morrisons appear here to have raised
 13 concern with you about differences between shelf prices
 14 and those of their grocery competitors; is that right?
 15 **A.** That's correct.
 16 **Q.** Right, and what -- if you don't recall, tell us -- did
 17 you understand they were trying to get you to do in the
 18 light of that?
 19 **A.** No, I do recall because I was reminded of this when we
 20 discussed it on Friday, and I think my words were that
 21 this was fairly typical of a buyer, in this case Paul,
 22 having gone out to visit stores and seen some pricing he
 23 thought was very cheap, and was asking me potentially to
 24 invest money to meet those prices that his perceived
 25 competitors were hitting.

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1 **Q.** So when we go to tab 75(a), we see in the manuscript
 2 that you are not prepared to pay, you have written,
 3 because you wanted to keep profit in roll-your-own, but
 4 stopping for a moment: as far as you were concerned,
 5 were Morrisons entitled to reduce the price of
 6 Golden Virginia if that's what they thought they needed
 7 to do to meet their competitive set?
 8 **A.** Yes.
 9 **Q.** Mr Saini, I think, referred you to the fact that
 10 Golden Virginia, which we see at tab 85, was not in fact
 11 required by you to be at parity with Old Holborn, it was
 12 actually to be less expensive, at least 4, 6 and 12p?
 13 **A.** Yes, that's correct.
 14 **Q.** So the pricing that is being proposed here by Mr Giles,
 15 how would that fit with that differential strategy?
 16 **A.** Well, he wants to make a call on a product, and I think
 17 it may put us in a better position.
 18 **Q.** Well, instead of making Golden Virginia cheaper than
 19 Old Holborn, he is going to put it at the same price?
 20 **A.** I beg your pardon.
 21 **Q.** I mean, on the basis that Old Holborn is going to the
 22 same price, one can see that that is not 4p, 6p and 12p
 23 less expensive?
 24 **A.** That's a disadvantage.
 25 **Q.** Yes. Now, bearing in mind he seems to be saying that

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1 he's doing this because he wants to match what he says
 2 is the market, was that something he was entitled to do,
 3 if he wanted to?
 4 **A.** Yes.
 5 **Q.** Then you were asked some questions about your knowledge
 6 of Gallaher's strategy, and how it worked. Insofar as
 7 you were able to ascertain what Gallaher's strategy was,
 8 for instance matching one brand against another, what
 9 did the RRP's tell you about that?
 10 **A.** I think we touched on this before. Where we saw RRP's
 11 being close and wholesale prices being close on the
 12 price lists we would see from time to time that Gallaher
 13 would make strategic investments in those brands, so we
 14 felt we assumed that they were working a pricing
 15 philosophy or strategy around that. So when we saw
 16 brands go up and down, we felt quite confident we knew
 17 what they were doing.
 18 **Q.** For instance, you told the Chairman earlier today about
 19 Superkings and Berkeley, I think, which you said had
 20 been in the market for some time; similar demographics,
 21 I think you said. What did you know, if anything, about
 22 Gallaher's strategy beyond knowing that those were aimed
 23 at the same demographics?
 24 **A.** Well, we would know much less with newer brands, I think
 25 that was the point I was trying to make earlier.

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1 I talked about lifecycle before, Berkeley and Superkings
 2 were similar aged brands, we understood them very well.
 3 We understood much less when it came to new properties
 4 from both our own portfolio and theirs.
 5 **Q.** So if we take Embassy and Benson & Hedges.
 6 **A.** Right.
 7 **Q.** They have been around since the year dot, I think,
 8 haven't they?
 9 **A.** 1977 for Embassy and the 1950s for Benson & Hedges.
 10 **Q.** Right. Not quite the year dot but for some time. So
 11 the knowledge of how you perceived the brands and the
 12 extent to which Gallaher had a perception, I mean, how
 13 had that built up over those years?
 14 **A.** I could talk about this for some time, but it's probably
 15 not appropriate, except to say that during the 1950s and
 16 60s, of which I have a hazy recollection myself, I have
 17 been told that Benson & Hedges was a weekend cigarette,
 18 it was a cigarette that people smoked at weekends, and
 19 it was more expensive because of the weight of tobacco,
 20 Kingsize -- the whole taxation system changed in the 50s
 21 and 60s, we didn't recognise that and we were still
 22 selling smaller cigarettes like Embassy Filter and Regal
 23 Filter and when the taxation changed, consumers found
 24 they could buy longer length Kingsize cigarettes as
 25 cheap as our smaller ones, and we were very slow to

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1 respond to that. So when we did respond in 1977 with
 2 Embassy, we had very little except price as our key
 3 weapon.
 4 So that's just an example of how, over many years,
 5 knowledge was built up through reacting, responding and
 6 understanding in the marketplace. With a property like
 7 Richmond, when you didn't have very much above the line,
 8 no television advertising, you were a little bit in the
 9 dark, you could do consumer TPT testing, total
 10 proposition testing, which would make assumptions about
 11 the brand and you test the hypothesis, but very largely
 12 when you went into the marketplace you had to find your
 13 way, and as we have seen during this period, there was
 14 a lot of finding of ways for both sets of brands.
 15 **Q.** Okay. Then if you could go back to tab 31, which you
 16 looked at this morning --
 17 **DR SCOTT:** Sorry, can I just ask a question following that
 18 up? Presumably when you launch a product like Richmond,
 19 you start with an idea about where you are pitching it
 20 price wise?
 21 **A.** Yes, very much so.
 22 **DR SCOTT:** Yes, and then later on, as we know, it gets
 23 repositioned, but you do start with --
 24 **A.** Yes.
 25 **DR SCOTT:** Thank you.

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1 **MR HOWARD:** So in fact -- that's a useful question -- when
 2 Richmond was launched, we know -- and we can look at it
 3 in the contract, but you'll remember -- it was
 4 originally launched against Mayfair.
 5 **A.** That is correct.
 6 **Q.** And then it's decided to reposition against Dorchester?
 7 **A.** Yes.
 8 **Q.** So in terms of the position in the market that you are
 9 deciding to aim for, what happened? What was the change
 10 in marketing strategy?
 11 **A.** Slightly complicated but from my recollection, Sterling
 12 was a brand that Gallaher marketed which they put into
 13 the multiple supermarket business to try and -- what's
 14 the best word that I can think of -- to try and not get
 15 rid of but to blunten the threat of own label. Own
 16 label products at one time were thought to be quite
 17 important. Sterling came into the market, they were
 18 trying to do deals with the supermarkets to make
 19 Sterling the effective own label, but a proprietary
 20 brand. So when they did that, that was to us -- I mean,
 21 your point is absolutely right, we had a market
 22 position, and that market position we were confident of
 23 until something happened, maybe a competitor is
 24 repositioning their own brand.
 25 **Q.** Now, if you go back to tab 19, {D17/19}. which we looked

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1 at this morning, you looked at it here now in the
 2 context of the Kingsize Lights 100s. Do you see that?
 3 **A.** Yes.
 4 **Q.** And the current shelf price, 16.25?
 5 **A.** Yes.
 6 **Q.** And the bonuses. So we see from the text that precedes
 7 it that Richmond haven't gone up in the MPI, not
 8 strictly true as the cost price is going up, but you
 9 wanted to hold them and pay an additional bonus?
 10 **A.** Yes.
 11 **Q.** What Mr Williams said to you was: you did this and you
 12 managed to keep the price at £16.25, and in due course,
 13 Gallaher did something similar whereby they managed to
 14 hold the price of Dorchester at 16.25. Now, when you
 15 wrote your letter and you were seeking to hold your
 16 price at 16.25, did you know whether or not Gallaher
 17 would meet you competitively and hold Dorchester at
 18 16.25?
 19 **A.** No, I didn't know that.
 20 **Q.** From your point of view, what would have been the best
 21 thing? What would you have liked to have happened?
 22 **A.** Well, at that time, for our brand to have clear blue
 23 water versus its competitors, so be cheaper.
 24 **Q.** So who was it here who would decide whether or not you
 25 were able to get that competitive advantage? Who was it

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1 who stopped you?
 2 **A.** Well, Gallaher.
 3 **Q.** By doing what?
 4 **A.** By increasing and making an investment.
 5 **Q.** Yes. Then you were asked about what next happened in
 6 this, which was, I think, at tab 31. {D17/31}. At
 7 tab 31, what we see happened was you moved the price up.
 8 Let's just actually look at the bonus for a moment.
 9 Back at tab 19, the additional bonus was £5.54 --
 10 **A.** Yes.
 11 **Q.** -- per thousand. Look at tab 31.
 12 **A.** Yes.
 13 **Q.** We now see that, at 16.25, the bonus has gone up to
 14 £1.22.
 15 **A.** That's £10.22.
 16 **Q.** Sorry, £10.22. So it seems to have gone up
 17 considerably. Can you explain why that would have been?
 18 **A.** I am just going to try and get my head round it, as they
 19 say. I think this would be because at 16.25, prior to
 20 an MPI, the investment required would have been much
 21 less than having had an MPI then having to bonus it
 22 back. So what I think has happened here is that we have
 23 held the brand through suppressing the new invoice
 24 price, which has necessitated almost doubling our
 25 investment to maintain that shelf -- that 16.25.

1 **Q.** There was a Budget in between. Would that have been the
 2 cause of that?
 3 **A.** Yes, if it's -- there has been an increase, MPI, Budget,
 4 the prevailing cost price has gone up but we wanted to
 5 hold onto that 16.25 price, so whichever way it's
 6 increased, I think it's an MPI, I am just trying to
 7 follow the thread here, it's meant an increase from
 8 investment.
 9 **Q.** Yes.
 10 **THE CHAIRMAN:** So you are saying that because the cost has
 11 gone from 13.74 to 14.18, comparing tab 19 to tab 31,
 12 the additional bonus to keep it at 16.25 has had to
 13 increase from 5.54 to 10.22?
 14 **A.** Yes. Mathematically, I am just trying to work -- that
 15 seems -- I can see you nodding your head in agreement,
 16 you are there before I am. I suspect what you are
 17 saying might be true in that there has been an MPI and
 18 a Budget, there has been a couple of increases,
 19 otherwise that level of bonus wouldn't have been
 20 required. Just the basic maths suggests that.
 21 **MR HOWARD:** Yes.
 22 **DR SCOTT:** This is the point where I had done the
 23 calculations, and now the figures are in the open, the
 24 retro bonus is 7.39 per cent of the price net of VAT,
 25 the ongoing bonus is 1.08 per cent of the price net of

1 VAT, making a total bonus of 8.47 per cent, which is why
 2 I said it's considerably larger than the margin that the
 3 retailers are making at 5.94 per cent.
 4 **MR HOWARD:** Yes.
 5 In fact, you can see at tab 26, maybe that helps
 6 you, {D17/26}, which is the effect of the Budget,
 7 showing the -- in fact, you can see in respect of the
 8 multipacks you had had to increase the bonus by 255p at
 9 that stage; do you see that?
 10 **A.** Yeah.
 11 **Q.** I have a rather simple question: a bonus of £10.22 per
 12 thousand, in terms of a significant amount of money
 13 being paid out by Imperial, how does that fit in the
 14 scale of things?
 15 **A.** I don't know what our pounds per thousand margin would
 16 have been at the time, but it would have been less than
 17 [REDACTED]. So when I mentioned the phrase "under water" last
 18 Friday, this is what I was referring to.
 19 **THE CHAIRMAN:** In what sense is it really being paid out?
 20 I mean, what's happened is that you have increased your
 21 MPI, that may or may not be due to -- I assume, if this
 22 isn't a Budget, may or may not be increases because of
 23 your costs, the cost of tobacco going up, or petrol for
 24 distribution or whatever. So you have increased your
 25 basic wholesale cost, and you then increase your

1 recommended resale price, which is a notional price,
 2 it's a price at which some people are charging, some
 3 retailers are charging, but it's not what Morrisons sell
 4 at. The bonus, as I understand it, isn't really a sum
 5 which is paid out, it's a notional difference between
 6 the RRP and the cost price Q6. Is that right?
 7 **A.** Well, I suppose there is two different ways of looking
 8 at it. If it was based on an MPI, you could argue that
 9 we weren't taking the profits that we would make on that
 10 brand under the normal run of things, therefore we were
 11 making less money than we could. If it was a Budget
 12 increase, that's not where we would take any margin,
 13 that's the Chancellor saying "Cigarettes are going up 8p
 14 from tonight" and he gets all of the 8p. So that
 15 wholesale price that you referred to, yes, it would go
 16 up, but for us to maintain a shelf price, in other words
 17 not to take the -- you know, we would be funding the
 18 Chancellor's Budget. So that's why I suspect that the
 19 contributions had to increase so markedly.
 20 **THE CHAIRMAN:** But it's not being paid out by you?
 21 **MR HOWARD:** I think there are two different questions. If
 22 one is asking: does money physically get paid out by
 23 Imperial, that depends upon the accounting and whether
 24 or not this is taken, deducted from an invoice or
 25 a separate invoice. So who writes the cheque to whom is

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1 one thing. Perhaps I can just make the point by way of
 2 submission rather than putting it to the witness. If
 3 you are asking: did Imperial necessarily actually have
 4 to pass money across?, in accounting terms the answer is
 5 probably yes; in cash terms the answer is probably no,
 6 because it's just being at the deducted from invoices.
 7 **THE CHAIRMAN:** But really what you are talking about as
 8 a bonus is you are going to put your prices up and then
 9 you decided not to put your prices up, and then it's
 10 expressed as a bonus because it's all linked with the
 11 recommended retail price.
 12 **DR SCOTT:** No, it's the gap between the net wholesale price
 13 and Q6.
 14 **THE CHAIRMAN:** Yes.
 15 **DR SCOTT:** So you go to Q6 and then the net wholesale price,
 16 the gap there is the bonuses, as I understand it.
 17 **A.** But if we were selling a product at £10 for an outer and
 18 the Chancellor -- you are absolutely right, that
 19 wholesale price is largely based on the retail -- the
 20 RRP. The Chancellor increases tax at a Budget, the RRP
 21 goes up, and with that, the wholesale price has to go
 22 up. If we don't increase our wholesale price in our
 23 price list, and we bonus to maintain, we are not -- we
 24 are going to lose money from that, or make less money.
 25 **THE CHAIRMAN:** Yes, I can see that in relation to where it's

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1 a Budget increase, and it's just passing through; but
 2 it's less clear to me when there is an MPI, given
 3 that --
 4 **A.** That's foregoing the margin that you might be making.
 5 **THE CHAIRMAN:** Well, it's foregoing the margin you might
 6 make but you don't know whether you have actually lost
 7 money, because we don't know whether the MPI reflects
 8 any increase in tobacco costs or distribution costs.
 9 It's a bit like the point I put to Mr Saini, this idea
 10 of funding how much of the margin is funded --
 11 **MR HOWARD:** With respect, I don't think that's quite right.
 12 When one talks about losing money, it's simply --
 13 I mean, another way of looking at it, the most simple
 14 way, is you are reducing the net wholesale price. So
 15 it's simply instead of the wholesale price being £10,
 16 it's £8 or whatever it is. It gets expressed in
 17 a number of different ways. That's ultimately the
 18 bottom line in relation to all of this. Except the
 19 only -- the difference about the Budget increase, and
 20 you see that at tab 26, where there is a Budget increase
 21 and you absorb the cost as the manufacturer, you have
 22 actually then got to -- well, somebody has to account
 23 for the tax to the Revenue, and I imagine -- we could
 24 look at it -- what then happens is presumably the
 25 manufacturer has to account for the tax.

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1 **THE CHAIRMAN:** Putting the Budget point aside, the size of
 2 the bonus seems to me at the moment to be a construct of
 3 how much you decide to announce you are going to
 4 increase your prices and then by how much in fact you
 5 decide to increase them, and if that is less then you
 6 treat that as a bonus. But the amount that you have
 7 initially announced is the MPI is entirely within your
 8 control, so you could announce it would be another 10p,
 9 and then you would bonus them 30p.
 10 **MR HOWARD:** The MPI is across the board.
 11 **THE CHAIRMAN:** Yes.
 12 **MR HOWARD:** The bonuses, remember one has bonuses which are
 13 holding a price and then you have bonuses which are
 14 trying to reduce the shelf price.
 15 **THE CHAIRMAN:** But an MPI doesn't have to be across the
 16 board. It's the way this market works that it's
 17 announced as across the board, and then you hold it
 18 back, for whatever reason, in relation to some.
 19 **MR HOWARD:** I don't think it quite works like that. The
 20 reason is you have to remember once you have an MPI you
 21 have to have an RRP. The RRP is across the board. You
 22 can't have an RRP different because of the tax
 23 consequences, you can't have an RRP for Morrisons and
 24 an RRP for Sainsbury's.
 25 **THE CHAIRMAN:** No, I mean per brand rather than per

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1 retailer.
 2 **MR HOWARD:** Yes. But of course the extent to which -- well,
 3 you may have a price hold which doesn't necessarily
 4 apply all across the market, it rather depends.
 5 **THE CHAIRMAN:** No. That's my point, that you announce
 6 an MPI for all the brands, and it's entirely your choice
 7 as to how much -- subject to competitive constraints,
 8 et cetera, you could announce it as putting them all up
 9 by 20p, and then you decide that "these brands we only
 10 want to put them up this little bit", and then you
 11 regard the difference in that as being a bonus. But is
 12 it really a bonus when it could equally be achieved by
 13 saying the MPI is going to be achieved for different
 14 brands and then not creating this notional difference
 15 between the MPI and the actual price that you are
 16 selling?
 17 **A.** I think that you are right. The other perspective, if
 18 I may, is that I know how the accounts work, as in how
 19 we declare and how much money we make from gross sales
 20 valued through the taxes, the apportionment. The only
 21 thing I would say is one way or another we weren't
 22 making £10.22 an outer on Richmond, whichever way we
 23 look at it. So I understand the point about accounting,
 24 but that would have represented -- that investment,
 25 whichever way you look at it, would have meant that we

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1 were making a negative profit outcome on Richmond.
 2 **DR SCOTT:** You would still presumably be making
 3 a contribution, because part of the costs are allocated
 4 costs which are not variable with the supplier --
 5 **A.** There is a throughput argument, but on a brand
 6 contribution level, if you got gross selling price --
 7 sorry, should I?
 8 **MR HOWARD:** Yes.
 9 **A.** You have gross selling price, the amount of money you
 10 take for the product, then dependent on how the accounts
 11 work in every market, you then have COGS, cost of goods
 12 sold, costs to serve, taxes, deductibles, A&P,
 13 overheads, you get down to a brand contribution, and the
 14 brand contribution on Richmond wasn't £10.22 per
 15 outer -- per thousand.
 16 So ...
 17 **THE CHAIRMAN:** I can understand that, but I just at the
 18 moment, and it may be we have to explore this at some
 19 other occasion, I don't see that that £10.22 is a figure
 20 which genuinely reflects anything other than the fact
 21 that ITL has put up the price, or announced that it's
 22 going to increase its price, and then not in fact
 23 increased its price for a particular brand and then
 24 treats that difference which it has created by the way
 25 it increases its price across the board and then holds

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1 them, expresses that as a bonus. But to then say "Oh,
 2 and then that bonus is greater than our profit" does not
 3 follow from that that --
 4 **MR HOWARD:** I think the point is being made, and I actually
 5 think we are looking at it in slightly too complicated
 6 a way. I think that all that Mr Matthews was saying was
 7 that on Richmond Lights at the price that it's being
 8 actually sold at with this discount, whatever you want
 9 to call it, or bonus, but the net wholesale price that
 10 we are selling it to Morrisons, we are making a loss at
 11 that net wholesale price.
 12 **THE CHAIRMAN:** That may or may not be the case, but at the
 13 moment I don't see that you can derive that from looking
 14 at the £10.22.
 15 **MR HOWARD:** Because the £10.22 is the amount, if you want to
 16 call it a discount, to the price, and that's in other
 17 words you are giving that off the -- that's a further
 18 reduction in price. What the witness is telling you is
 19 that that level reducing our price by that much means
 20 that we are under water.
 21 **DR SCOTT:** There are two different things to consider,
 22 Mr Howard, one is whether you are looking at fully
 23 allocated costs, and if you are looking at fully
 24 allocated costs, you have a number of things in there
 25 which are not variable with the supplier of the tobacco,

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1 and so the point is that it's still making
 2 a contribution to Imperial's costs, even though, on
 3 a fully allocated basis, it may be making a loss.
 4 **MR HOWARD:** I think the answer to that is that may or may
 5 not be right, and you would have to look a lot deeper
 6 into the accounts. I don't think one can say what you
 7 have just said is right or wrong, and I don't know the
 8 answer. Because you can certainly have a situation just
 9 in simple accounting terms where the result of
 10 a particular activity is actually it's costing you more
 11 than the contribution to overheads. It's far too
 12 simplistic to say this must be making a contribution.
 13 It may or may not.
 14 I think we are going off at a tangent, which isn't
 15 really ...
 16 **THE CHAIRMAN:** Yes. I don't think that -- the question I am
 17 asking, I suppose, is: is the MPI price, the Q6 price,
 18 anything other than a notional figure from which bonuses
 19 or discounts are made to arrive at the actual price?
 20 **MR HOWARD:** It seems to me saying that is really just saying
 21 is the wholesale list price a -- is that the wholesale
 22 list price? People then get discounts off it.
 23 **THE CHAIRMAN:** Perhaps we can go back to where we started
 24 from, which is that we must be careful when we are
 25 talking about "well" -- I can't remember what phrase it

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1 was that first led to this, but handing over large sums
 2 of money and that kind of reference, because these
 3 bonuses are constructs from the way in which pricing
 4 occurs in this industry, and they don't necessarily lead
 5 to money being handed over in the same way as we have
 6 seen some other bonuses do. Nor do you necessarily
 7 compare the bonus to a wholesale margin and say "Well,
 8 that bonus is then eating up the whole of the wholesale
 9 margin."
 10 **MR HOWARD:** In very simple terms, any discount to your
 11 selling price is reducing the sum of money that you
 12 receive, and it doesn't really matter whether you give
 13 the discount to the invoice, is what's sometimes done in
 14 any trading relationship, or you have a rebate whereby
 15 you pay back money after the event. The net effect is
 16 the same, but you are still getting less money into your
 17 coffers.
 18 I am not really sure where any of that takes us in
 19 relation to this case.
 20 What I wanted to ask you about the document, I was
 21 responsible for us going off at a tangent, but what we
 22 can see is that the level of the bonus, perhaps if we
 23 take it in stages, if you go to tab 26, at tab 19 you
 24 had paid one level of bonus, and then we see at tab 26
 25 {D17/26} the level of the bonus for one reason had gone

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1 up because of the Budget increases, and you are
 2 absorbing the Budget cost; correct?
 3 **A.** Yes. Yes.
 4 **Q.** Right. So then, when we get to tab 31, {D17/31}, when
 5 you are moving, what you are doing is reducing what's
 6 called the bonus, the retro bonus is going from £10.22
 7 to £5.96.
 8 **A.** Yes.
 9 **Q.** When you did that, did you know whether or not Gallaher
 10 were going to also put up the price, reduce their bonus
 11 in respect of the corresponding Dorchester cigarettes?
 12 **A.** No.
 13 **Q.** You were asked what would happen, I think Dr Scott asked
 14 you, in this type of situation, you withdraw part of
 15 your bonus and then Gallaher, let's say, keep Dorchester
 16 at 16.25 with their bonusing; if Gallaher do that, what
 17 would be your choices in that situation?
 18 **A.** To continue paying the £10.22, if I didn't pay the
 19 £10.22 and continued to pay the £5.96 I would be at
 20 competitive disadvantage. There would be very limited
 21 choices given that size of investment, very limited.
 22 It's binary. You either stick it or you don't.
 23 **MR HOWARD:** Thank you very much indeed.
 24 Further questioned by THE TRIBUNAL
 25 **THE CHAIRMAN:** Can I ask you one further question, I am

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1 afraid, Mr Matthews.
 2 **MR WILLIAMS:** Madam, before you do, I wanted to let you know
 3 I have three or four very short questions I want to put
 4 to Mr Matthews arising from re-examination. I don't
 5 know whether it would be better for me to do that before
 6 or after.
 7 **THE CHAIRMAN:** Let me just ask this: at tab 63 on the second
 8 page, {D17/63} the last bullet point about Drum and
 9 Drum Milde SKUs, there is says:
 10 "The cost prices of these SKUs have been reduced,
 11 effectively this means that the retro bonuses I am now
 12 paying you become off-invoice. This will necessitate
 13 reductions in my contribution of [X, Y and Z]
 14 respectively."
 15 So there it seems that what were retro bonuses are
 16 now going mainstream, as it were?
 17 **A.** Yes.
 18 **THE CHAIRMAN:** They are being incorporated into the
 19 off-invoice price.
 20 **A.** Yes.
 21 **THE CHAIRMAN:** What was it about that particular competitor
 22 action that would have led you to move money from being
 23 a retro bonus into being an off-invoice price?
 24 **A.** There was -- part of the background noise to this was
 25 that we had generally paid Morrisons off, not

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1 off-invoice, retro. So if something was £10, and we
 2 wanted to give them £1, they would have to wait a month
 3 to get their £1, and what they always wanted was
 4 off-invoice bonuses. And you made this point earlier
 5 "just give me the price". So there was a whole argument
 6 over a few years as to whether to give Morrisons
 7 off-invoice bonuses, and this was part of that debate
 8 they just wanted off-invoice bonuses.
 9 **THE CHAIRMAN:** Yes, Mr Williams.
 10 Further cross-examination by MR WILLIAMS
 11 **MR WILLIAMS:** Mr Matthews, could you turn back to tab 75(a),
 12 please. {D17/75(a)}. We have looked at this a few
 13 times.
 14 **MR HOWARD:** I just wonder whether it's appropriate to start
 15 further cross-examination by reference to documents
 16 which Mr Williams has already asked the witness
 17 questions about.
 18 **THE CHAIRMAN:** I think on this point you took him to tab 85,
 19 which appeared to show that the basis on which the
 20 original cross-examination had taken place was on the
 21 basis of a misconception.
 22 **MR HOWARD:** Yes, and the answer to that is: too bad. That's
 23 not surely, the basis of the process --
 24 **THE CHAIRMAN:** The answer to that is the Tribunal needs to
 25 understand what the true position is, and if that's

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1 about to be revealed, then I think that would be helpful
 2 for us.
 3 **MR WILLIAMS:** Thank you, Madam.
 4 As I understand it, the background to this is as
 5 follows, and you can tell me if I am right, Mr Matthews:
 6 at one stage Golden Virginia and Old Holborn had the
 7 same RRP, and therefore the RRP differential was parity;
 8 do you recall that?
 9 **A.** I do recall that.
 10 **Q.** Then what happened in June of 2002, as we have seen, is
 11 that there was the Gallaher MPI to which ITL didn't
 12 immediately respond. We have seen that. For example,
 13 the document at tab 58. {D17/58}.
 14 **A.** Okay.
 15 **Q.** It's as a consequence of that that the price
 16 differential widened to 4p, the 4p, 8p, 12p that you see
 17 in tab 85. Do you want to turn to tab 85?
 18 **A.** Are we referring now to the RYO, specifically to that?
 19 **Q.** I am referring to Golden Virginia and Old Holborn, I beg
 20 your pardon, yes.
 21 **A.** I am just catching up with 58 and seeing exactly what it
 22 says on that. Sorry, I am reading slowly. I can see
 23 that if it is 58, because that -- is that the right tab?
 24 **Q.** 58 is the letter of 11 June which says "We are not
 25 following Gallaher's MPI immediately".

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1 A. Right.
 2 Q. It's as a result of that that the parity relationship
 3 moves -- if you want to turn to tab 85 -- to 4, 6 and
 4 12p. You might not recall the detail of that, but
 5 that's what I think the documents show. Then if we go
 6 back to 75(a), what's contemplated here is that
 7 Old Holborn and Golden Virginia are priced at parity.
 8 "As you can guess, Old Holborn is going to the same
 9 price on the same date."
 10 A. Okay.
 11 Q. So from your point of view, that is worse than the minus
 12 4 that we just saw in tab 85.
 13 THE CHAIRMAN: I think you should limit yourself,
 14 Mr Williams, to questions as to what was the actual P&D
 15 set by the agreement at the point when the letter at
 16 tab 75(a) was sent. I understood that was going to be
 17 the thrust of your question.
 18 MR WILLIAMS: I was only going to really put one more point
 19 to the witness and it does relate to that, which is that
 20 Mr Matthews doesn't react to this email by complaining
 21 that Golden Virginia is not going to be at minus 4, it's
 22 going to be at parity, and so it looks to me as though,
 23 when he received this email, both he and Paul Giles were
 24 still in the mindset of a parity relationship. That's
 25 the point I was putting to the witness.

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1 THE CHAIRMAN: When you received that letter of
 2 December 2002, Mr Matthews, what did you have in mind as
 3 being the strategy of ITL with regards to pricing as
 4 between Golden Virginia and Old Holborn, if you had
 5 any --
 6 A. I would refer myself to document 74, which precedes
 7 that, November 8, 2002, which came before that
 8 Wednesday, December 18th, and that would suggest to me
 9 that Golden Virginia we would wish to see less, 4, 6 and
 10 12p, as compared to Old Holborn. That would have been
 11 my mindset.
 12 THE CHAIRMAN: Thank you. Well, thank you very much,
 13 Mr Matthews, I know that's been quite an intensive
 14 period of questioning --
 15 A. I am back next week, I am afraid.
 16 THE CHAIRMAN: For the moment, then, you can leave the
 17 witness box. Thank you very much.
 18 A. Thank you.
 19 MR HOWARD: As you know, Mr Matthews, he won't be pleased to
 20 know this, is due to come back on Sainsbury. I've
 21 spoken to Mr Williams and Mr Lasok. There may be some
 22 shifting around of the timetable on Sainsbury's, but it
 23 looks -- just so Mr Matthews knows -- as though he will
 24 be back on Friday week for the day and preceded by
 25 Ms Bayley on Thursday week.

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1 THE CHAIRMAN: Thank you very much.
 2 (The witness withdrew)
 3 THE CHAIRMAN: Is that a convenient moment for us to take
 4 a break, actually?
 5 MR SAINI: Madam, I was going to make some very short
 6 observations and then call Mr Eastwood, and I was going
 7 to emphasise that Mr Eastwood needs to be away by the
 8 end of tomorrow.
 9 THE CHAIRMAN: Yes.
 10 MR SAINI: If everyone is confident that that can happen,
 11 I am happy that we have a break now.
 12 THE CHAIRMAN: Right. We will have a break and come back at
 13 ten past 3. Thank you.
 14 (2.57 pm)
 15 (A short break)
 16 (3.10 pm)
 17 Further opening submissions by MR SAINI
 18 MR SAINI: Madam, before calling Mr Eastwood I just want to
 19 make some brief comments and I do not want to take
 20 the Tribunal again through the documents, because
 21 Mr Howard has done that already in his mini opening in
 22 relation to Morrisons. I just want to reiterate some
 23 points, and in particular emphasise what we say the OFT
 24 has to put to the witnesses, and in particular
 25 Mr Eastwood, before Mr Eastwood gives evidence.

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1 I said in my original opening in this case that this
 2 was a one issue case, and I repeat that again today.
 3 What's clear, and has become clearer as we've gone
 4 throughout the evidence, is that the issue in this case
 5 is the use of bonuses or discounts or promotional
 6 payments to reduce the cost price of a product, and with
 7 the desire on the part of the manufacturers that the
 8 price of that manufacturer's own products will be
 9 reduced in stores. That's what the issue is in this
 10 case.
 11 We say that the practice of a manufacturer reducing
 12 his cost price, through whatever mechanism one chooses
 13 to call this reduction, bonus or an incentive payment,
 14 that is a common practice, and in fact we will see when
 15 we get to closing that the idea that a manufacturer may
 16 lawfully have a significant influence over retail prices
 17 is unexceptional. One sees that from the JCB case which
 18 we will look at in closing.
 19 So that's really what this case is about. What's
 20 happened, however, is that there is a mismatch between
 21 the case that appears to be being put to the witnesses
 22 in cross-examination and the pleaded case.
 23 Without trying the Tribunal's patience too much,
 24 I would ask you to look at bundle 4, which is the OFT's
 25 skeleton and defences and to go back to the famous

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1 paragraph 40, which is in tab 45 at page 19
 2 {C4/45/19/40}. So it's page 19, paragraph 40.
 3 This is what I have named the "handcuffing"
 4 paragraph. I call it that because the OFT's case is
 5 that the prices of Gallaher and ITL products were
 6 handcuffed together. They had to move together.
 7 This is the essential vice of the arrangements.
 8 However, that case has not been put to the witnesses.
 9 I am putting down a marker now rather than making it in
 10 closing, that when Mr Eastwood gives evidence, it's
 11 vital that the OFT puts to him, by reference to
 12 whichever documents it chooses, that case. Instead,
 13 what seems to be happening is a different case is being
 14 put by Mr Williams in particular to Mr Matthews, which
 15 is that bonuses are being used in order for
 16 a manufacturer to achieve a desired price of his own
 17 product. We agree with that, that's our case, that's
 18 why the bonuses are being paid. The case that hasn't
 19 been put is that the arrangements between the parties
 20 were such that when ITL moved the price of one of its
 21 own products by paying the bonus or withdrawing the
 22 bonus, there had to be a change in the price of
 23 a Gallaher product.
 24 What's concerning us, on this side of the court, is
 25 that if we make the point in closing that the case in

1 paragraph 40 hasn't been put, the Tribunal and others
 2 may say to us: well, why didn't you make this point any
 3 earlier? So it's very, very important that that case is
 4 clearly put to Mr Eastwood and you will have noticed,
 5 and there is no surprise in this, that Mr Howard's
 6 re-examination of all of the witnesses has been lengthy.
 7 That's not a criticism of Mr Howard. What
 8 Mr Howard's had to do is put the OFT's case -- the
 9 paragraph 40 handcuffing case -- to his own witnesses
 10 and the witnesses of others because it hasn't been
 11 clearly put. That leaves the Tribunal in an impossible
 12 position if that carries on, if that position is
 13 subsisted in by the OFT, because how is the Tribunal
 14 meant to discover whether or not the facts are
 15 established in accordance with paragraph 40?
 16 It's only been at the tail end of Mr Matthews'
 17 cross-examination that Mr Williams put to him two
 18 documents which came anywhere near paragraph 40.
 19 Therefore we remain puzzled as to which case the OFT is
 20 putting.
 21 So the marker I am putting down is that Mr Eastwood
 22 at least must have put to him paragraph 40 and the
 23 documents which are said to support the assertions in
 24 paragraph 40. It should not be for me, nor for
 25 Mr Howard, to seek to extract answers which deal with

1 the paragraph 40 propositions. I am not going to do it,
 2 in re-examination, and it's up to my learned friends to
 3 put paragraph 40 to Mr Eastwood.
 4 That having been said, it remains unclear to us now
 5 what the case is of the OFT in relation to payment of
 6 bonuses. They do not appear to be suggesting that when
 7 the price of an ITL product changed, there was
 8 an automatic requirement to change the price of
 9 a Gallaher product. They did not even appear to be
 10 suggesting that there is an expectation. What they are
 11 putting to the witnesses is that bonuses are used to
 12 change the price of an ITL product, up or down; they are
 13 not putting any case that the price of the competing
 14 Gallaher product also had to change.
 15 **THE CHAIRMAN:** Well, to be fair to the OFT, it seems to me
 16 that the case which the OFT is having to meet has
 17 changed somewhat from being a case along the lines: yes,
 18 we entered into these agreements, these were P&D
 19 agreements, this is what everyone agreed to do and the
 20 effect of that is pro-competitive and not
 21 anticompetitive, to a very different case, namely: yes,
 22 we signed these, we had no expectation that anyone would
 23 abide by them, the people who signed them had no
 24 expectation that they would abide by them, they actually
 25 had no effect at all, either pro or anticompetitive, on

1 the nature of people's conduct.
 2 It seems to me that a lot of the cross-examination
 3 has been directed at getting the witnesses to agree that
 4 these agreements had any substance or content at all,
 5 and any effect on pricing at all, before we can then get
 6 to the question of: did they have the effect in
 7 paragraph 40 and was that effect pro or anticompetitive.
 8 Now, in relation to Shell, one might have
 9 anticipated that there was going to be a debate about:
 10 was it a recommended price or a retail price? But so
 11 far as the other retailers are concerned, the fact that
 12 the witnesses have so far downplayed to such an extent
 13 the importance of these agreements in any pricing
 14 decisions they take has, I agree, taken us rather away
 15 from the question of: well, what was actually agreed as
 16 the terms of the agreement and what is the likely effect
 17 of those terms?
 18 **MR SAINI:** Madam, with respect, both points you make are
 19 fair but neither of them apply to my clients. First of
 20 all, we are not running any exemption argument.
 21 Secondly, it is not our case that these were not binding
 22 agreements, that they were not adhered to. We do not at
 23 all agree with Mr Matthews when he says that TA1 and TA2
 24 were not binding. They were very much binding as far as
 25 Morrisons were concerned, because they had great value

1 to us. Perhaps I should just deal with that, because
 2 that was the last point I was going to make: these were
 3 not agreements of no value because they imposed certain
 4 obligations upon my clients and we expected certain
 5 benefits in return.
 6 We would have been furious if, for example, we had
 7 priced a product at a certain low price on the basis
 8 that we were going to get a bonus or a reduction off
 9 cost price and it never appeared. We would be furious;
 10 it would be a breach of contract. So as far as
 11 Morrisons were concerned, these were binding agreements,
 12 we are not hiding from them, we embrace them and we say
 13 they are perfectly lawful.
 14 I should just identify what we say the two material
 15 obligations were in TA1 and TA2. The first obligation,
 16 a binding contractual obligation, not to be hidden from,
 17 is that we had to give ITL an opportunity to respond to
 18 a pricing initiative by Gallaher. What that means is
 19 very simply this: if Gallaher reduced its price, ITL had
 20 to have the chance to respond by reducing its own price.
 21 That was a binding obligation. We couldn't say to ITL
 22 if they knocked on our door and said, "By the way, we
 23 have an opportunity to respond", we wouldn't say to
 24 them, "This is not binding", it was binding.
 25 Secondly, and more importantly for my clients, why

1 we think this is a very important agreement -- both of
 2 them are important -- is that if we accepted a bonus or
 3 a discount of a cost price in order to price in
 4 accordance with maxima, we would expect to be paid that
 5 bonus, but if we didn't price in accordance with
 6 a maxima, we would forfeit our right to the bonus.
 7 That's a binding obligation.
 8 So it is not, with respect, fair to tar our clients
 9 with the brush that one may use to tar other retailers.
 10 These were very, very useful agreements from the
 11 perspective of Morrisons, and we are not hiding from
 12 them, we embrace them.
 13 The last point, that having been said, I do not want
 14 the Tribunal with respect to lose sight of the
 15 paragraph 40 point, because we should not be trawling
 16 through the transcripts on Day 47 of this hearing to
 17 decide whether or not one can patch together the OFT
 18 putting the case in paragraph 40. It has to be put
 19 fairly and squarely to Mr Eastwood, and I am not going
 20 to put it in re-examination.
 21 The last point I am going to make, which is in
 22 relation to Gallaher, I don't think you have heard
 23 anything about the Gallaher and Morrisons relationship,
 24 it's only one point, which is that there is no trading
 25 agreement with Gallaher containing parity and

1 differential agreements. Certainly one hasn't been
 2 found, and Mr Eastwood's evidence is there was no such
 3 agreement and there was no counter evidence from the
 4 OFT.
 5 Having said that, I would call Mr Eastwood.
 6 I think we can put away bundle 4 and take up
 7 bundle 8, which is the witness statements bundle, as far
 8 as Morrisons are concerned.
 9 MR GRANT EASTWOOD (sworn)
 10 Examination-in-chief by MR SAINI
 11 MR SAINI: Mr Eastwood, could you please be given bundle 8,
 12 and could you please turn to tab 94, which is the very
 13 last tab in that bundle, please. {C8/94/440}.
 14 Do you have that, your statement, in front of you?
 15 A. Yes, I do, thank you.
 16 Q. Could you go to the last page, which I believe is
 17 page 440. Does it contain your signature?
 18 A. Yes, it does.
 19 Q. Is that statement true?
 20 A. This statement is true.
 21 MR SAINI: Madam, subject to the leave of the Tribunal,
 22 I have a few supplementary questions to ask Mr Eastwood
 23 which I have mentioned to my learned friend Mr Williams,
 24 and he has no objection to me asking those questions.
 25 THE CHAIRMAN: Yes. Just one moment. (Pause). Apologies,

1 I had taken it out of the bundle to read on a different
 2 occasion, and have not put it back in.
 3 MR SAINI: Mr Eastwood, could you be also provided with
 4 annex 17, which I am sure Mr Williams will ask you
 5 questions about, but I just want to identify the
 6 relevant individuals that were representing Morrisons.
 7 Before asking you to go to this particular document,
 8 we see identified in annex 17 three persons at Morrisons
 9 throughout the material period. There is yourself,
 10 a Mr Paul Giles and Mr Justin Addison. Can you explain
 11 what your relationship was with Giles and Addison, and
 12 where they fell within the reporting structure?
 13 A. I was the trading manager for Morrisons. My role
 14 covered beers, wines, spirits and tobacco areas.
 15 Paul Giles -- or firstly, Justin Addison was the tobacco
 16 and beer buyer working directly for me, so in his
 17 reporting line he would report to me. Then Justin left
 18 the business, Paul Giles replaced him in exactly the
 19 same role reporting to me directly.
 20 Q. So you were effectively their boss?
 21 A. Yes.
 22 Q. I also want to mention one other oddity to you which I
 23 think you might be able to help the Tribunal with, which
 24 is that you appear to be the recipient of many emails,
 25 particularly from Mr Matthews, but they are always sent

1 for the attention of Paul Giles. Why did Mr Matthews
2 not just email Paul Giles or Justin Addison?
3 **A.** Until the latter part of 2003, Morrisons had no email
4 facility and therefore I provided a laptop that was for
5 the team, and it had an account name, which was mine,
6 and the team used it because the internal -- well, it
7 wasn't an email facility, was -- only allowed you to
8 send text, there was no images, no spreadsheets and
9 things like that. So this was a quick -- a quicker way
10 that the external world could contact Morrisons, and
11 therefore the laptop was just resident in the
12 department, always I believe went to my name and then
13 underneath it normally said "to Paul Giles and whoever".
14 **Q.** Can I please ask you another question, which is that we
15 have heard that there were regular contacts between the
16 persons that worked for you and yourself and NAMs,
17 national account managers, and also we have heard
18 evidence that there would be viewing of supermarket
19 prices in your competitors. Can you explain in
20 a general way when you would look at supermarket prices
21 of your competitors?
22 **A.** Each Monday one of the KPIs --
23 **Q.** What do you mean by KPIs?
24 **A.** Key performance indicators -- of the buyers would be to
25 ensure that they remained competitive at all times. We

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1 had no electronic facility, as today allows, and so each
2 Monday invariably the traders would go out, part of the
3 day, usually in the afternoon, and visit the
4 competition. Whilst I say Monday, on occasions it could
5 be Wednesday, because during the period that we are
6 looking at, some supermarkets chose to change their
7 prices on different days for more tactical reasons and
8 therefore the buyer tended to be out on those days.
9 Usually afternoon, because we invariably knew if the
10 price had gone down to the supermarket shop first thing
11 in the morning, it would be the afternoon before you
12 could see it reflected on a shelf edge label.
13 **Q.** Then how often would you or those under you speak to
14 NAMs?
15 **A.** I would say at least weekly, given the activity that was
16 going on specifically with the competitiveness, ie we
17 were going out to the competition, the supermarkets,
18 noticing things and by default there was always usually
19 a discussion that afternoon or the next day, depending
20 on when the fax came in.
21 Myself, I was less frequent with the national
22 account managers, more with the account controller, and
23 that could be quarterly, half yearly, to go through
24 business performance or indeed if there was a problem
25 that needed escalating then I would be involved in that.

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1 **Q.** Can I finally ask you, Mr Eastwood, I think you were in
2 court, was it last week you first arrived in court?
3 **A.** I think it was the week before.
4 **Q.** You were here for some evidence, but have you read any
5 transcripts of evidence or of these proceedings?
6 **A.** The transcripts I read was up to Day 5. I attended
7 court, I think it was a week last Thursday, of which it
8 was requested firstly that no witness remain, so I duly
9 left at lunchtime, and that no witness could see
10 a transcript from thereafter, so I've seen up to I think
11 it was Day 5.
12 **MR SAINI:** Thank you very much. Mr Williams will have some
13 questions for you.
14 Cross-examination by MR WILLIAMS
15 **MR WILLIAMS:** Good afternoon.
16 **A.** Good afternoon.
17 **Q.** Mr Eastwood, Mr Saini asked you to explain who
18 Justin Addison and Paul Giles were. As I understand it,
19 they ran the account day-to-day under your supervision?
20 **A.** They were the buyers responsible for tobacco and beer,
21 if I recall.
22 **Q.** So they were directly responsible for dealings with ITL
23 and Gallaher day-to-day?
24 **A.** Yes, they were.
25 **Q.** But you supervised them in carrying out that role?

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1 **A.** Yes, I did.
2 **Q.** I think in your witness statement you say you worked
3 very closely with them and had a good general awareness
4 of what they were doing?
5 **A.** Yes, I did.
6 **Q.** I think you have also commented in your witness
7 statement on annex 1 to Morrison's notice of appeal,
8 which is a detailed document dealing with the various
9 documents on the OFT's file. So is it fair to say that,
10 although you were in a management role at this stage,
11 you were familiar with the documents which the OFT has
12 relied on in its decision?
13 **A.** Yes, I am familiar with the documents.
14 **Q.** Just on logistic, looking at the documents, it looks
15 like there is a period between Mr Addison leaving his
16 role and Paul Giles taking over when you were named on
17 the correspondence. That is I think around March to
18 July 2001 or thereabouts. Is that because you were
19 holding the fort in their absence?
20 **A.** That's correct. Justin resigned and because he was
21 going to the competition then it was almost immediate
22 and Paul Giles was working, if I recall, at another
23 retailer, so there was a gap of three or four months of
24 which I then naturally stood in and took up the reins as
25 such.

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1 Q. It was just you at that stage; is that right?
 2 A. Yes, it was.
 3 Q. Mr Saini asked you about the "for the attention of
 4 Paul Giles" emails. Would you read those emails, given
 5 that they were addressed to you?
 6 A. No, the laptop was situated in the middle of the team,
 7 the correspondence was always, as it clearly says, to
 8 Grant Eastwood, but underneath it would then say to the
 9 relevant buyer, so the buyers would frequently go to the
 10 laptop, invariably had a discussion where somebody has
 11 mentioned "we have just sent you an email" and you would
 12 go and print it, so very, very rarely would I pick up
 13 any emails as such.
 14 **THE CHAIRMAN:** You need to speak a little louder and slower,
 15 I think, Mr Eastwood, so that the transcript writers can
 16 catch up.
 17 A. Sorry.
 18 **MR WILLIAMS:** You describe your relationship with the
 19 tobacco manufacturers in your witness statement, and you
 20 use various words. At paragraph 21 you talk about
 21 a relationship of mutual suspicion, if not on occasion
 22 antagonism. That's paragraph 21.
 23 A. Yes.
 24 Q. You talk about the relationship -- sorry, in
 25 paragraph 25, which is on the last but one page -- being

1 tense and combative, particularly the relationship with
 2 ITL?
 3 A. Yes, that's correct.
 4 Q. Would you be surprised if I were to tell you that's not
 5 how ITL saw it at the time?
 6 A. I wouldn't have a view how they saw it. I certainly
 7 recall it being a very tense time.
 8 Q. Mr Matthews said in his evidence to the Tribunal that it
 9 was a broadly positive commercial relationship. Would
 10 you agree with that?
 11 A. I am not certain what measure he was using. If it was
 12 his business was growing, then his business was growing
 13 and then he was equally rewarded with growth. If it was
 14 any other measure, I remember personally having tense
 15 conversations with Mr Matthews and other of his
 16 colleagues.
 17 Q. We have an ITL internal document from the time. It's
 18 probably fair to ask you to look at it. Obviously you
 19 won't have seen it before, it's an ITL document, but
 20 I just wanted to see whether you thought that what was
 21 said at the time was a fair description of the
 22 relationship from your point of view. It's tab 96.
 23 This is a redacted copy for Mr Eastwood. (Handed).
 24 So your version will have lots of blanking out. On
 25 the second page, it says:

1 "However, as testimony to good time management
 2 skills ..."
 3 (Pause)
 4 A. Yes.
 5 **DR SCOTT:** That may be redacted, Mr Williams.
 6 **MR WILLIAMS:** We have had a different version prepared based
 7 on what was said last week about the confidentiality of
 8 certain parts of the document.
 9 Obviously you can't say what ITL thought at the
 10 time, but does that description of your relationship
 11 with ITL and your performance under the trading
 12 agreement accord with your recollection?
 13 A. I think this is less description of relationship it's
 14 more a measure of ability and speed here. It talks
 15 about a quick response to bring in new product to
 16 market, few gaps, availability, et cetera, so I think
 17 it's reasonable that, yes, Morrisons was very quick in
 18 some of those areas that it caught out.
 19 Q. In respects which would have helped ITL?
 20 A. Certainly new product would help ITL, availability would
 21 help ITL, investing price promotions, et cetera, yes is
 22 the answer.
 23 Q. If you could just turn to the page that has 229 bottom
 24 right, there is a sort of lonely sentence in the middle
 25 of the page which says "our relationship with the buyer

1 and his manager" and Mr Matthews confirmed that he meant
 2 by that you and Mr Giles, the other way around. He
 3 says:
 4 "It is sound and probably has greater continuity
 5 than relationships with other manufacturers."
 6 Does that ring true from your point of view?
 7 A. I think it's fair to say continuity is the key word
 8 here. Morrisons is slightly different than other
 9 supermarkets where they tend to turn the traders or the
 10 buyers round roughly every two years. Within Morrisons
 11 there was a real will that the buyer grew with the
 12 category and retained other knowledge. So "continuity"
 13 is a fair word. I had been with that department,
 14 I guess, at this stage for almost six years, which would
 15 be very unusual in another supermarket.
 16 Q. No doubt that continuity helped in relation to the
 17 measures that we were looking at on the previous page.
 18 That is listing, pricing and so on and so forth. The
 19 continuity will have helped you to perform your trading
 20 agreements with ITL to their satisfaction?
 21 A. I think we are getting the two misaligned. The
 22 availability, new product development, promotions and
 23 things of that nature were a general supermarket
 24 requirement. The continuity, regardless of whether
 25 a supermarket changes the buyers every two years or not,

1 it is regardless, you also have to have the products on
 2 shelf at the best price, et cetera, and the best
 3 availability. It's not usually about the relationship
 4 with the manufacturer.
 5 **Q.** In something like pricing differentials, continuity of
 6 personnel, understanding ITL's requirements, that will
 7 have helped, won't it?
 8 **A.** That would have helped.
 9 **Q.** I am just going to ask you a few questions about the
 10 trading agreements with ITL first of all. Will you
 11 understand if I talk about the first and second trading
 12 agreements?
 13 **A.** Yes.
 14 **Q.** So the first is the one which started in 1999 and
 15 carried on, on its face, until March 2001, but then it
 16 was extended; and the second is the agreement which was
 17 signed in April 2003 but backdated to, I think it's
 18 August 2002.
 19 Both of those contained provisions about pricing
 20 differentials?
 21 **A.** Yes.
 22 **Q.** When you talk about arrangements relating to the
 23 differentials in your witness statement, you tend to
 24 talk generally about the agreements, without
 25 distinguishing between the two of them. Is that because

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1 from your point of view, the two agreements worked
 2 essentially in the same way as far as differentials were
 3 concerned?
 4 **A.** Can you explain what you mean by "both working in the
 5 same way"?
 6 **Q.** Well, I am just making the point that in your witness
 7 statement you comment -- for example, if you want to
 8 look at paragraph 15 in this section of your witness
 9 statement you talk about the trading agreements and you
 10 go on to make other points about them in the following
 11 paragraphs, which we will explore before very long.
 12 You talk about the trading agreements generically,
 13 if I can put it that way, you just talk about the
 14 trading agreements, and I was really just asking if
 15 that's because you saw them as working in the same way,
 16 at least as far as differentials are concerned, you
 17 don't see any significant difference in the way they
 18 worked?
 19 **A.** The trading agreement with Imperial specifically was
 20 about three things, it was about availability,
 21 merchandising and then there was the pricing
 22 strategies --
 23 **Q.** Yes.
 24 **A.** -- as it was called. The pricing strategy just
 25 reflected the price differentials that had been there in

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1 the natural price lists or the price lists that were
 2 published for many years. So as I say in my statement,
 3 there was no need to check, there was no change needed,
 4 it was an agreement that was already there by the sheer
 5 nature of, you know, the pricing had already been
 6 established, so this was about Morrisons securing
 7 additional funding from Imperial to support our overall
 8 business.
 9 **Q.** I do not want to labour the point, it's straightforward,
 10 it's just you talk about both trading agreements in the
 11 same paragraph?
 12 **A.** Yes.
 13 **Q.** And then you comment on both the trading agreements that
 14 you had with ITL at this time, you comment on them both
 15 in a number of paragraphs that deal with both of them
 16 together?
 17 **A.** Yes, sorry. They were very similar trading agreements.
 18 I thought --
 19 **Q.** As far as differentials were concerned, you see them as
 20 having essentially the same provisions in them?
 21 **A.** Very little changed, as I recall, from one agreement to
 22 the other, other than the financial amount.
 23 **Q.** Can we turn, then, to tab 85 of the annex which you will
 24 have in front of you still. Before we get into it,
 25 would I be right in assuming that Mr Giles, who signed

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1 this, we can see it on the back page, would he sign
 2 a document like this without you having had sight of it,
 3 having approved it?
 4 **A.** It is very possible. There were many documents that
 5 were going through the training team at any one time, so
 6 it's very possible that he could have signed it without
 7 me seeing it.
 8 **Q.** So you don't recall whether you saw it in draft or at
 9 the time?
 10 **A.** I certainly don't recall whether I saw it in draft or as
 11 it is currently, no.
 12 **Q.** Do you recall whether you saw it during the period when
 13 it was in operation?
 14 **A.** I really can't recall when I actually saw it, other than
 15 I have seen it obviously recently and when it was in
 16 operation, but when it was in operation it wasn't
 17 something that was pulled out, it would have been
 18 signed, and as I've said in my statement, left in the
 19 drawer. It was not something that was is the sat on
 20 somebody's desk and was pointed to on occasions.
 21 **Q.** It's not clear to me based on what you've just said
 22 whether you would know whether it was in the draw or
 23 not. We will come back to that point in a minute.
 24 **MR SUMMERS:** May I just ask: how important was the
 25 negotiation of this document in the context of his work

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1 that year? Would it be one of his key performance
 2 indicators?
 3 **A.** He was covering, if I recall rightly, both tobacco and
 4 beers at that time. In the scheme of the amount of
 5 money that this was driving ██████ a year, that wasn't
 6 a big amount compared to other monies that he was
 7 securing funding for.
 8 **MR SUMMERS:** So that in terms of his performance, it
 9 wouldn't have featured on any --
 10 **A.** It would be a small number in amongst a big number.
 11 **MR SUMMERS:** Not the sort of thing you might bonus him on?
 12 **A.** There was no bonuses for any buyers at that particular
 13 time, it was purely a salary basis.
 14 **MR SUMMERS:** Thank you.
 15 **MR WILLIAMS:** Although you have just said that you don't
 16 recall whether you saw this document at the time,
 17 obviously you do comment on it in your witness
 18 statement. Do you want to just explain on what basis
 19 you have made the comment, if you can't recall whether
 20 you saw the document at the time it was in effect?
 21 **A.** I thought the question you said, do I recall the
 22 document at the point it was drafted, which I clearly
 23 can't recall that. Can I recall the document? Then the
 24 answer is, yes, I've seen the document several times.
 25 **Q.** I think I asked you, but apologies if I wasn't clear

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1 about this, I certainly meant to ask you: do you recall
 2 whether you saw the document at the time it was in
 3 effect?
 4 **A.** Yes, I do remember seeing the document at the time it
 5 was in effect.
 6 **Q.** I am grateful. Just looking at the provisions of the
 7 document, you can see the bonus that you just mentioned
 8 at the top of the first page?
 9 **A.** Yes.
 10 **Q.** Then turning over to the second page, do you want to
 11 just read to yourself the first two paragraphs under
 12 "Pricing".
 13 (Pause)
 14 I am just going to tell you what I think the
 15 document means and you can tell me whether you agree
 16 with that. What it's saying is that ITL's pricing
 17 strategy as two aspects, one of which relates to pricing
 18 differentials, which we will come on to in a minute, and
 19 the other which relates to the achievement of certain
 20 absolute price levels. Okay so far?
 21 **A.** Yeah.
 22 **Q.** Then what it goes on to say is that ITL is investing in
 23 Morrisons, that is paying them a bonus, to achieve that
 24 strategy, and that is the bonus we have just seen on
 25 page 1, or some part of that bonus I should say. Do you

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1 agree?
 2 **A.** Simplistically yes, but it wasn't to achieve, as you
 3 emphasise the word, "absolute" level of those shelf
 4 prices.
 5 **Q.** Can we explore that, because what the second paragraph
 6 says is that you will be paid a bonus based on the
 7 continued achievement of, skip out differentials for the
 8 minute, the shelf prices highlighted in the ongoing
 9 schedule of costs, bonuses and margins document. Now,
 10 do you know what one of those schedules is?
 11 **A.** There are many of those schedules that -- yes --
 12 **Q.** There are many of them in the file?
 13 **A.** Yes.
 14 **Q.** What the agreement is saying is that you will be paid at
 15 least some part of the ongoing bonus on the basis that
 16 you achieve the shelf prices in that document; that's
 17 what the agreement says?
 18 **A.** As a maximum, yes.
 19 **Q.** Well, it doesn't say as a maximum, it says you will be
 20 paid a bonus based on the achievement of the prices in
 21 the schedule; do you agree with that?
 22 **A.** I do agree, it doesn't say the word "maximum", but in
 23 behaviour and day-to-day, that was the case. So at no
 24 point, if I chose to go lower or higher than that was
 25 acceptable; clearly if I went lower than the designated

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1 retail price, that meant Morrisons invested more margin
 2 of its own, and Imperial would have been, I guess,
 3 elated, and if I went higher then I also knew at the
 4 same time -- if the price, sorry, was 2.50 and
 5 an example, and it went to 2.51, then I would lose part
 6 of the bonus.
 7 **DR SCOTT:** Mr Eastwood, Mr Matthews said to us that he was
 8 talking about particular instances, he said "unless
 9 Morrisons were willing to work on reduced margin, which
 10 was extremely unlikely".
 11 **A.** I think with regards to extremely unlikely, then that's
 12 an extreme statement. Did we do it? The answer is
 13 clearly yes. We have done it over occasions. The point
 14 he makes that the margins were considerably lower, then
 15 I would also agree.
 16 **DR SCOTT:** Just one other question while I am speaking, and
 17 that is you mentioned that you can recall seeing this
 18 agreement at the time, the question in my mind is: in
 19 your witness statement you said they were put in the
 20 drawer, what would have caused the agreement to have
 21 been got out of the drawer and shown to you, do you
 22 suppose?
 23 **A.** I think the only time they would ever come out the
 24 drawer would be the sum that was agreed at the beginning
 25 of the year would have fallen into Paul or Justin's

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1 annual target. If there was a shortfall, as with any
 2 supplier, we would systematically go through A to Z,
 3 where is the shortfall, and then you would therefore
 4 pull it out the drawer and say "I think we had
 5 an agreement for X, we got Y". So that would be the
 6 only time in essence it would be pulled out.
 7 **DR SCOTT:** So when the manufacturer checked and you checked
 8 to see whether the amounts of money looked right --
 9 **A.** Yes, it was usually half yearly or annually, that would
 10 be it.
 11 **DR SCOTT:** Thank you.
 12 **MR WILLIAMS:** We will come back to that point in a minute,
 13 if we may.
 14 You would agree, as far as the bonus paid for
 15 absolute price is concerned, the benchmark is what's in
 16 the schedule?
 17 **A.** Yes, so where there are two price lists and it said
 18 a brand was 2p below B brand, that exists in the price
 19 schedules, that was reflected, yes.
 20 **Q.** I was talking about absolute prices.
 21 **A.** Absolute?
 22 **Q.** What they are interested in, they are benchmarking you
 23 against the schedule?
 24 **A.** Okay.
 25 **Q.** That's what the agreement says. Do you agree with that?

1 **A.** I just want to make the point that the absolute price
 2 that we keep talking about was a maximum price, I could
 3 and did --
 4 **THE CHAIRMAN:** It was as against what? How would you know
 5 what the maximum or absolute level was?
 6 **A.** It was never -- as I said in my statement, it was
 7 something that was already there, it wasn't something
 8 that we had to move to.
 9 **THE CHAIRMAN:** Already where?
 10 **A.** Already established, sorry. The pricing that we talk
 11 about had already been established. It was just
 12 reflecting what was going on ... maybe I am confused.
 13 **MR WILLIAMS:** I think you say that about the differentials
 14 and we will come to that point in a minute. I am sorry,
 15 I am just still back on absolute prices.
 16 **A.** Okay.
 17 **Q.** And the bit of the bonus that's paid for that. The
 18 reason I used the word "benchmark" is because
 19 I understand you have said "maxima". I have put to you
 20 that this doesn't say "maximum", but whether it's
 21 a maximum or not, the benchmark -- what you are looking
 22 at is pricing with reference to the schedule?
 23 **A.** Yes, so if you are saying there is a bonus specifically
 24 that is given an additional 5p to achieve a certain
 25 retail -- is that what you are saying?

1 **Q.** I don't think that is what this is about. This is not
 2 talking about tactical bonuses or short-term bonuses of
 3 that sort. This is just saying that they will pay you
 4 what's called an ongoing bonus if you price --
 5 **A.** Can you --
 6 **Q.** You've said treating the schedule as a maximum, I've
 7 said that it just says "in accordance with the
 8 schedule".
 9 However that works, you get the price from the
 10 schedule?
 11 **A.** Yes.
 12 **Q.** Moving on to pricing differentials, what I think the
 13 agreement says effectively that you have to achieve the
 14 differentials to get the bonus. That's the way the
 15 second paragraph works. Would you agree with that?
 16 **A.** Yes.
 17 **Q.** Then underneath that, do you want to read the first
 18 bullet point.
 19 (Pause)
 20 **A.** Yeah.
 21 **Q.** So this is a clause which has been referred to in this
 22 case as an opportunity to respond clause, and it's
 23 expressed here as a mechanism for enabling ITL to
 24 realign its price list differentials by paying
 25 a tactical bonus if a Gallaher promotion or Gallaher

1 price move puts the differentials out of kilter. Do you
 2 agree with that?
 3 **A.** Correct.
 4 **Q.** I think the context for that is that your margin on
 5 tobacco products was small, and so if ITL wanted to
 6 respond to a Gallaher promotion, you take the view,
 7 quite understandably, that any promotion shouldn't
 8 reduce your margin. So if ITL wants to be able to
 9 respond, it has to pay a bonus which will make your
 10 margin up to what it would have been beforehand?
 11 **A.** Yes, to maintain the margin.
 12 **Q.** In paragraph 10 of your statement, do you want to just
 13 turn to that, at the bottom of page 433, it says:
 14 "Given our commercial strategy of offering the
 15 lowest possible retail price to the customers, as
 16 a general matter it made good commercial sense for
 17 Morrisons to accept the manufacturers' offers to fund
 18 even lower retail prices. Provided that Morrisons'
 19 margins were preserved, there would need to be a good
 20 reason not to accept a cost price reduction to be passed
 21 on to our customers."
 22 So essentially if ITL wanted to respond to
 23 a Gallaher promotion, it could expect that you would
 24 accept an offer of a tactical bonus?
 25 **A.** Yes. It's fair to say if they offered us 5p in this

1 particular instance then we would accept the 5p and
 2 reflect it as a minimum or more in the price, the end
 3 price, yes.
 4 **Q.** If it was more than 5p in that example you would be
 5 taking that out of your own margin?
 6 **A.** Yes, I would.
 7 **Q.** So in the context of the last question I asked you, it's
 8 more likely, isn't it, that you would go to the price
 9 that they were funding rather than a lower price?
 10 **A.** It is likely, however there are many occasions where we
 11 didn't, as the buyer makes the decision of various
 12 things that he would take into account. His sales would
 13 be one factor, his profit specifically would be
 14 a factor. So in coming to the end decision, he would
 15 take those into account as well, so not always would he
 16 go to the 5p, if that was the bonus offered.
 17 **Q.** I didn't put the question in terms of always because you
 18 should never say never, but what you say in paragraph 10
 19 is:
 20 "Provided that Morrisons' margins were preserved,
 21 there would need to be a good reason not to accept the
 22 cost price reduction."
 23 **A.** Correct.
 24 **Q.** So that suggests that you are focused on your
 25 preservation of your margin?

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1 **A.** As one factor, yes.
 2 **Q.** While we are here, could you read to yourself
 3 paragraphs 11, 12 and 13. There is quite a lot of text
 4 there. I just want to take a couple of general
 5 propositions from that.
 6 (Pause)
 7 **A.** Yes.
 8 **Q.** So first, in paragraph 11, in the section of that
 9 paragraph where you say:
 10 "Keeping a retail price without the benefit of the
 11 manufacturer funded reduction would mean that Morrisons'
 12 margin would be further eroded. This would not be
 13 sustainable in the long term and so it was natural that
 14 we would generally but not always return our retail
 15 price to whatever level was implied by the removal of
 16 the bonus."
 17 That's really the reverse of the point we were
 18 discussing just a moment ago, I think?
 19 **A.** That's correct, so if I was offered 5p when the bonus
 20 was removed, in this particular instance, I'm saying
 21 it's -- we would reflect the 5p back up.
 22 **Q.** So ITL could expect, even if it didn't have a cast-iron
 23 guarantee, that in that situation you would put your
 24 price back up?
 25 **A.** It certainly had no cast-iron guarantee, as you say, but

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1 in times when it was more sensitive, particularly around
 2 a Budget and a manufacturers' price increase, then the
 3 certainty would be considerably less.
 4 **Q.** Then in paragraph 12 I think you say more or less -- you
 5 say something pretty similar about a price increase at
 6 an MPI, you would generally increase prices at an MPI or
 7 Budget in line with the increase in cost to you?
 8 **A.** That's correct.
 9 **Q.** Going back to tab 85, before we move on, could you read
 10 the second bullet point to yourself, please, which says:
 11 "With the exception ..."
 12 (Pause)
 13 **A.** Yes.
 14 **Q.** Are you able to tell us what that's about?
 15 **A.** This is where, if they funded us 2p specifically, and
 16 I only reflected 1p, then I would expect the 1p to be
 17 removed.
 18 **Q.** Are you talking about a tactical bonus there?
 19 **A.** As in --
 20 **Q.** When you say "funded as 1p" --
 21 **A.** If they gave you -- if they passed on 2p and I only
 22 chose to take the 1p, then obviously they would remove
 23 the 1p.
 24 **Q.** But when you say "funded 1p" are you talking about
 25 a tactical bonus to find a specific price move?

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1 **A.** Yes, or go upwards. If I went upwards, and the bonus
 2 needed to be at the maximum retail, then I would expect
 3 that the bonus would be removed.
 4 **Q.** But a tactical bonus, I think that's what you are
 5 talking about?
 6 **A.** A bonus.
 7 **Q.** You talked about --
 8 **THE CHAIRMAN:** There are some bonuses which are for
 9 pricing -- are there bonuses for pricing below RRP?
 10 **MR WILLIAMS:** Mr Eastwood said "if they funded us 2p", so
 11 that sounded like it was finding us a specific price
 12 move of, say, 2p, so I think what you were describing
 13 was a situation where they give you a bonus which is
 14 specifically designed to bring about, say, a price
 15 reduction of 2p in your example.
 16 **A.** Correct, yes.
 17 **Q.** And I think in our terminology that's a tactical bonus?
 18 **A.** Yes.
 19 **THE CHAIRMAN:** For a specific brand rather than --
 20 **A.** In this example I am using a specific brand, yes.
 21 **MR WILLIAMS:** So while we are here, we will move on from
 22 this document, but you will see --
 23 **DR SCOTT:** Sorry, I am not sure that we actually clarified
 24 what Mr Eastwood understood by that second paragraph.
 25 What it says, Mr Eastwood:

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1 "Imperial Tobacco investment should reduce in line
 2 with any upward movement in shelf price."
 3 What that is suggesting is that, say the price moves
 4 from 3.29 to 3.34, there is a reduction in the bonus of
 5 5p. I know I am simplifying, there is VAT, but leave
 6 that on one side.
 7 **A.** What I am saying is if they had funded us to that point
 8 and we chose a higher number, then I would expect the
 9 bonus to be reduced accordingly, yes.
 10 **DR SCOTT:** Thank you.
 11 **MR WILLIAMS:** Just before we move on from this document
 12 I thought it would be useful to pick up on the
 13 right-hand side which is the pricing differential
 14 schedule and some of the brands that we will see in some
 15 of the documents. So you can see Richmond is linked to
 16 Sterling and Dorchester. You see that?
 17 **A.** Correct.
 18 **Q.** Also Small Classic is linked to Hamlet Miniatures.
 19 Could you then turn to tab 4, please. So we see in
 20 the first sentence under "Pricing" on the second page
 21 that the bonus is paid for achieving the differentials,
 22 which is what we saw in the second trading agreement?
 23 **A.** Yes.
 24 **Q.** There is no provision here about absolute pricing, is
 25 there?

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1 **A.** No, there isn't.
 2 **Q.** So ITL wasn't paying Morrisons a bonus on the basis of
 3 absolute pricing at this time?
 4 **A.** No.
 5 **Q.** Underneath that it says:
 6 "If our pricing strategy changes, Morrisons to be
 7 notified and a new price sheet will take effect."
 8 Then under that:
 9 "WM Morrison to confirm in store promotional
 10 activities which may affect pricing strategy."
 11 **A.** Yes.
 12 **Q.** So that was a requirement on Morrisons?
 13 **A.** Yes.
 14 **Q.** It relates to a scenario where there is a promotion by
 15 Gallaher or Gallaher's paying a bonus to fund a price
 16 reduction; is that right?
 17 **A.** Correct, if Gallaher did a promotion then that's what it
 18 relates to, yes.
 19 **Q.** So it's essentially the same thing that we saw in the
 20 second trading agreement?
 21 **A.** Yes, worded differently.
 22 **Q.** Can we then turn to your witness statement at
 23 paragraph 16, please. In the first line you talk about
 24 pricing at or below maximum prices for ITL products?
 25 **A.** Yes.

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1 **Q.** A bit further down you say:
 2 "If we took a positive decision of our own to
 3 increase the retail price of those ITL brands above the
 4 maximum price, so disturbing the competitiveness of the
 5 brands ..."
 6 **A.** Yes.
 7 **Q.** Are you talking in this paragraph about pricing
 8 differentials?
 9 **A.** It could be, it could be anything. So if -- may I just
 10 read it again?
 11 **Q.** Please do, yes.
 12 (Pause)
 13 Yes would be the answer, then, with regard to the
 14 pricing differentials. So if the differential was
 15 quoted as a 2p difference and we reflected 1, then
 16 I would expect to lose the 1p.
 17 **Q.** We are not talking then about maximum prices, are we, we
 18 are talking about relativities?
 19 **A.** In this particular instance, yes. As I said before, the
 20 difference between the two price schedules that
 21 naturally existed.
 22 **Q.** We will come to that in a minute, that's paragraph 15.
 23 **A.** Okay.
 24 **Q.** When you talk about maximum prices, do you mean maximum
 25 relativities or something of that sort? Is that what

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1 you are getting at here?
 2 **A.** Could you be more specific, please?
 3 **Q.** Well, I'm struggling to be more specific, because it's
 4 what your witness statement says. I am really just
 5 asking whether, when you talk about frequently pricing
 6 ITL brands below the relevant maximum prices, whether
 7 you are talking about a requirement of the trading
 8 agreement in relation to maximum prices per se, or
 9 whether you are talking here about the pricing
 10 differentials?
 11 **A.** This is the bonus schedule, so if there was a bonus to
 12 price as to a specific price and we chose a different
 13 one, higher, I would expect to lose some of that bonus.
 14 **Q.** So this paragraph isn't about differentials at all; is
 15 that right?
 16 **A.** Not per se, no.
 17 **DR SCOTT:** Where would we find a relevant maximum price in
 18 the documents?
 19 **A.** In the pricing schedules. If I just may ...
 20 **THE CHAIRMAN:** If you look at tab 6, for example.
 21 **A.** So if I look at tab 6, on the second page, it has
 22 "Embassy No 1 Kingsize" -- sorry, that's a bad example.
 23 **MR WILLIAMS:** This is a document which dates from July 2000.
 24 Tab 6?
 25 **A.** Yes.

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1 Q. So this is under the first trading agreement that we
 2 were looking at a few minutes ago.
 3 A. Okay.
 4 Q. I think you agreed when we were looking at that, that
 5 that doesn't contain any provision relating to absolute
 6 prices; it only deals with pricing differentials?
 7 A. Yes.
 8 Q. Thinking about this in terms of the first trading
 9 agreement, it's not clear where one would get the idea
 10 that those prices are absolute maximum prices?
 11 A. I don't think we ever distinguished between the first or
 12 second pricing agreement. It was -- sorry, trading
 13 agreement. It was a trading agreement that went
 14 back-to-back. There was no point in which we said the
 15 trading agreement has fundamentally changed in terms of
 16 this to this.
 17 Q. Well, anyway, I think what I take from your evidence is
 18 that paragraph 16 is not about price differentials, it's
 19 about absolute maximum prices, wherever one gets that
 20 from. I think that's what you said?
 21 A. Okay.
 22 **THE CHAIRMAN:** Well, are you agreeing that that's the case?
 23 A. Sorry, yes.
 24 **MR WILLIAMS:** Before we leave that point, you would agree,
 25 wouldn't you, that the provisions dealing with price

1 differentials, they are not about absolute maximum
 2 prices, they are about relativities between --
 3 A. The two price lists, yes.
 4 Q. So moving then to paragraph 15, you have read that, do
 5 you want to read it again before I ask you some
 6 questions about it.
 7 (Pause)
 8 A. Yes.
 9 Q. So I think it's useful to read that in the context of
 10 the second trading agreement. So could you just turn
 11 back to tab 85, please. {D17/85}. On the second
 12 page of that again, under the heading "Pricing", this
 13 says that Morrisons agreed to support Imperial Tobacco's
 14 pricing strategy, and we have looked at the words after
 15 that to do with investment. Then under that it says:
 16 "Based on the continued achievement of the
 17 differentials" they will pay you a bonus.
 18 Then the top right do you see the words "at the time
 19 of writing"?
 20 A. Yes.
 21 Q. It says:
 22 "The following price list differentials should be
 23 reflected in Morrison's shelf pricing."
 24 So the agreement is recording that you had been
 25 supporting their pricing strategy by achieving the

1 differentials, and that in return for bonus payments you
 2 would continue to do that essentially for the reasons
 3 you set out in paragraph 15 of your witness statement?
 4 A. Correct.
 5 Q. So looking at that paragraph and just breaking it down,
 6 you entered into the trading agreements with ITL because
 7 you thought the agreement was in your own interests, was
 8 in Morrison's own interests. I don't find that
 9 surprising. I don't suppose you made a habit of signing
 10 agreements that were not in your interests?
 11 A. Clearly not.
 12 Q. The reason why it's in your interest is because it
 13 secured funding for, you say, promotional activities.
 14 That's the third line. In the last two lines, you say:
 15 "The differentials recorded the differences in RRP's
 16 and were already reflected in Morrison's pricing", so
 17 here you are talking about the differentials?
 18 A. Yes.
 19 Q. "We therefore did not need to change any retail prices
 20 in order to receive those bonuses."
 21 So when you talk about funding for promotional
 22 activities in the third line, that includes the bonuses
 23 paid for differential prices?
 24 A. And it also includes monies attributed to merchandising
 25 and availability in making the promotion available and

1 the signage, et cetera.
 2 Q. It's various things, including --
 3 A. Yes.
 4 Q. -- pricing on the basis of the differentials?
 5 A. Correct.
 6 Q. Because you say here the agreement secured funding for
 7 you, and we have just seen that under both agreements,
 8 you actually got the funding based on achievement of the
 9 differentials. What you go on to say is that the
 10 differentials were already reflected in the pricing. So
 11 I think you are saying you didn't need to change your
 12 approach to pricing in order to get the bonus payments?
 13 A. That's correct.
 14 **THE CHAIRMAN:** That was because these differentials set out
 15 here really mirror the differentials that exist anyway
 16 if you look at the ITL RRP's and the Gallaher RRP's?
 17 A. That's correct.
 18 **MR WILLIAMS:** So when you entered into the agreement, you
 19 saw this as securing funding for you because you
 20 expected to do what was required as far as differential
 21 pricing is concerned?
 22 A. The words "secure funding" was -- I just need to be
 23 clear. If I remember correctly in previous years to
 24 this, there would be no guaranteed sum of money, so it
 25 was all very ad hoc. So when I talk about secured

1 funding, I had something there that was a number that
 2 I could safely put into my numbers.
 3 **Q.** You could do that safely because, as you say, you were
 4 going to price on the basis of the differentials, so you
 5 expected to meet the criteria in the agreement?
 6 **A.** Those differentials were already there, so it was
 7 reasonable to assume that I would enjoy those bonuses.
 8 **Q.** So if we think about pricing during the period we are
 9 looking at, which is 2000 to 2003, you would actually
 10 expect to see an outcome which is consistent with what
 11 we saw in the ITL document earlier on, which is that
 12 basically Morrisons got the differentials right from
 13 ITL's point of view?
 14 **A.** In the main, I think that's fair, other than there are
 15 periods, as I said before, particularly around Budgets
 16 and price increases or more tactical on Morrison's
 17 behalf that don't necessarily follow that.
 18 **Q.** I understand the idea that applying the differentials is
 19 something which you expected to do anyway and therefore
 20 you thought that you would become entitled to the bonus,
 21 but would you accept that having agreed to do it for ITL
 22 in this agreement, you couldn't just change your mind
 23 and do something different?
 24 **A.** It was an agreement -- as you say so the intent was to
 25 honour the agreement. However, as I've said within my

1 statement, if I moved my retails out of the
 2 differential, or lower then I expected if it was
 3 certainly up, my bonuses would be adjusted accordingly,
 4 and if it was down I didn't expect any increased bonus.
 5 **Q.** So just to unpack that, when you said if you moved your
 6 prices up, what you mean is if you went outside the
 7 maximum differential, if I can put it that way; is that
 8 situation you are talking about then?
 9 **A.** Correct. If they had funded the 2p difference between
 10 the two price lists on a specific brand and I only
 11 reflected 1p or none in this particular instance, then
 12 I wouldn't expect to take the 2p bonus that they had
 13 offered for the --
 14 **DR SCOTT:** If you were in a situation where you saw your
 15 retail competitors going down, and you wanted to go
 16 down, but retain your margin, can we expect that you
 17 would be -- you or one of your staff -- on the phone to
 18 the manufacturers?
 19 **A.** Absolutely. As I said, every Monday is the absolute
 20 day, then my buyers, if they had seen the competition
 21 move retails down, within a couple of hours there would
 22 be some very tense conversations.
 23 **DR SCOTT:** And you would be looking for a bonus?
 24 **A.** Absolutely, that was the full intent that we maintain
 25 margin.

1 **MR WILLIAMS:** Is that because you would assume that that
 2 sort of price reduction was being funded by ITL?
 3 **A.** In the main, yes. I think most promotions in any
 4 industry across all the categories I've bought, it's
 5 invariably the manufacturer that has supported the
 6 promotion, yes.
 7 **Q.** Just going back to what you were saying before Dr Scott
 8 asked you that question, I asked you whether, having
 9 signed the agreement, you would accept you couldn't just
 10 change your mind, and you said something along the lines
 11 of "broadly we have signed an agreement and we would
 12 intend to honour it", and then you said something about
 13 losing a bonus if you put your price up. I am afraid
 14 I've lost the transcript reference. Can we just make
 15 sure we have understood what you said there. I think
 16 you went back to the loss of a bonus that was being paid
 17 to fund a particular 2p reduction?
 18 **A.** No, what I was talking about was the differentials that
 19 this particular page is talking about between the two
 20 price lists. In the main, as I said before, the prices
 21 were already there, and therefore they were securely
 22 funding for something that was already there. However,
 23 if for whatever reason we chose not to reflect the 2p,
 24 if it was in this particular case 2p and I went upwards,
 25 I fully expect that the bonus would have reduced.

1 **Q.** I understand, thank you. Coming back to paragraph 15,
 2 I just wanted to then ask you some questions about the
 3 last sentence. You say there -- I need to read the last
 4 sentence in the context of the previous sentence:
 5 "They simply recorded the differences in RRP's and
 6 were therefore already reflected in the prices. We
 7 didn't need to change any retail prices in order to
 8 receive those bonuses."
 9 **A.** Yes.
 10 **Q.** I understand what you are saying there in general terms,
 11 but obviously the price to you of tobacco did change
 12 from time to time, and when frankly ITL put its costs up
 13 you tended to put your prices up; we have seen that from
 14 paragraph 12?
 15 **A.** That's correct.
 16 **Q.** When you say you didn't need to change any retail prices
 17 in order to receive the bonuses, is what you are saying
 18 that you would tend to put shelf prices up by the same
 19 amount as, for example, an MPI price increase, so when
 20 you put prices up at MPIs at Budgets, the outcome of
 21 that would tend to be that the differentials were still
 22 in place and therefore you would remain entitled to
 23 bonuses paid for differential pricing?
 24 **A.** I am specifically saying here, with regards to what is
 25 on this document in terms of the differentials, I didn't

1 have to change anything that was currently in situ to
 2 meet this layout, it was already there.
 3 **Q.** Yes, but -- I understand that -- obviously MPIs, for
 4 example, manufacturers' price increase, is what you are
 5 saying that you would, at the time of a manufacturers'
 6 price increase, expect to carry through the price list
 7 differentials when you put up prices at MPI time and
 8 therefore you would remain entitled to the bonus in that
 9 situation, so as wholesale prices changed retail prices
 10 will change in line with the differentials?
 11 **A.** We would reflect the increase, as you suggest, from
 12 a manufacturers' price increase. Having considered
 13 everything, generally there we would reflect the
 14 manufacturers' price increase.
 15 **Q.** I am just saying that because you said:
 16 "We didn't need to change any retail prices in order
 17 to receive those bonuses"?
 18 **A.** The point I was making was, or the point I wanted to
 19 make in my statement was we didn't have to change
 20 something to achieve these monies. I'm saying --
 21 **THE CHAIRMAN:** When you first entered into the agreement?
 22 **A.** Correct.
 23 **THE CHAIRMAN:** Okay.
 24 **MR WILLIAMS:** I think what you were saying is you didn't
 25 need to change your approach to pricing?

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1 **A.** No.
 2 **THE CHAIRMAN:** No, I think what he is saying is that when
 3 they signed the agreement, they didn't have to change
 4 the prices because the prices were already consistent --
 5 **MR WILLIAMS:** On day one.
 6 **THE CHAIRMAN:** -- on day one. What you are asking him is:
 7 after day one, going through the currency of this
 8 agreement, would you, when prices were going up
 9 generally, expect that your prices would continue as
 10 they ratcheted up to reflect these differentials?
 11 **A.** Yes is the answer.
 12 **MR WILLIAMS:** Could you then turn to paragraph 25 and just
 13 read to yourself the first two sentences.
 14 (Pause)
 15 Then a bit further down, you say:
 16 "The commercial reality was that Morrisons certainly
 17 never considered it needed to go along with
 18 manufacturers' pricing indications."
 19 Do you see that? It's about seven lines up from the
 20 bottom.
 21 **A.** On the next page?
 22 **Q.** Yes, sorry, on page 25. It's in paragraph 25.
 23 (Pause)
 24 **A.** Yes.
 25 **Q.** I am just a bit confused by what you say here, because

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1 what you have just been telling us is that signing up to
 2 the trading agreement worked consistently with your
 3 commercial interests because you priced on the basis of
 4 RRP differentials anyway, and therefore you expected to
 5 comply with the agreement and to be entitled to the
 6 bonus just on the basis of your normal approach to
 7 pricing. But this paragraph seems to talk about
 8 a tension between your approach to pricing and ITL's
 9 parity and differential requirements, so I wondered if
 10 you could explain that. As I see it --
 11 **THE CHAIRMAN:** Well, let him explain it, then you have asked
 12 him to explain it.
 13 **A.** What I am saying here is, in the third sentence, it
 14 says:
 15 "We wish to accept such offers."
 16 So I am suggesting if the -- in this particular
 17 case, Imperial wished to offer the customer
 18 an additional 5p, then it coincided that we too would
 19 like to make sure that the products that we offer
 20 remained very competitive. So it was a similar
 21 objective.
 22 **MR WILLIAMS:** I understand, I can understand that when they
 23 are paying you a tactical bonus, if you are happy with
 24 that terminology, your interests coincide because they
 25 are saying "We want prices lower" and you say "We like

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1 low prices"; everyone's happy. The point I was making
 2 was a more general one which is that what paragraph 15
 3 told us, and in the way that you elaborated on
 4 paragraph 15 just a few minutes ago, you said that
 5 differential pricing was what you did anyway, generally,
 6 and you regarded the agreements as securing funding
 7 essentially for something that you were going to do
 8 anyway.
 9 So I don't see any tension between Morrisons'
 10 pricing strategy as described in paragraph 15 and as you
 11 have described it today and what ITL wants you to do.
 12 **A.** There was always tension with the pricing strategy in
 13 terms of the profitability. It would be a key, a very
 14 key factor in terms of tension.
 15 **Q.** I'll just put the point to you again. I think what you
 16 say in paragraph 15, and I think you have said it again
 17 today, is that pricing on the basis of RRP differentials
 18 is what you would want to do anyway?
 19 **A.** Correct. It was there currently in the market.
 20 **Q.** That's right, and when prices went up, you continued to
 21 do it, it's the way you set your prices?
 22 **A.** As you said, the manufacturers' price increase, yes.
 23 **Q.** The whole thrust of paragraph 25 is that there is some
 24 tension between ITL's requirements and what you want to
 25 do. What I am putting to you is that you already

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1 explained that there is no tension. So, for example,
 2 the phrase "as I explained above, Morrisons never
 3 changed prices because of parity and differential
 4 requirements", what you are hinting at there is some
 5 sort of conflict; but in fact there is no conflict, you
 6 were doing it anyway, you have already explained that?
 7 **A.** (Pause). I wasn't -- correct, I wasn't having to change
 8 any differential prices, that's correct, because
 9 I was -- I have said several times, it was already
 10 there.
 11 **THE CHAIRMAN:** I think the point that's being put to you is
 12 that you say at the end of paragraph 25 "we never
 13 thought we needed to go along with manufacturers'
 14 pricing indications except to the extent I've outlined
 15 above", and what Mr Williams is saying: well, the extent
 16 that you have outlined above seems to cover everything.
 17 You were happy to go with their P&Ds, you were happy to
 18 accept tactical bonuses, so the exception is actually
 19 all the time we were happy to go with their suggestions.
 20 **A.** Unless specifically if it didn't suit us not to, then
 21 there would be occasions where we didn't do as they
 22 requested.
 23 **THE CHAIRMAN:** Right, but that was an occasional thing,
 24 whereas reading paragraph 25 one might think it was only
 25 occasionally that you wanted to go along with what the

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1 manufacturers wanted.
 2 **A.** In the main, should they pass bonuses on, the answer is
 3 clearly yes, we would pass them on. Were there
 4 occasions that we chose not to, or to do something
 5 different, then we certainly did.
 6 **DR SCOTT:** Mr Matthews' evidence was that he was acutely
 7 aware of the need to maintain retailers' margins,
 8 particularly in the supermarket sector where those
 9 margins were tight, and we see the schedules which show
 10 the margins. As I understood his evidence, he was
 11 normally concerned -- though not always -- to ensure
 12 that the wholesale prices and retail prices moved in
 13 a way that maintained your margins. Now, if I think
 14 about the results of the tobacco sector in Morrisons,
 15 and the inelasticity of tobacco generally, as far as
 16 I can see, provided you have your ongoing bonuses and
 17 provided those margins were maintained at the sorts of
 18 levels that you were expecting, then you should be able
 19 to deliver the tobacco results, unless something went
 20 awry in the inter-retailer competition, in which case,
 21 as you have already explained, you would be on the phone
 22 on Monday or Wednesday trying to sort that out.
 23 **A.** Correct.
 24 **DR SCOTT:** Thank you.
 25 **MR WILLIAMS:** Madam, that's probably a convenient moment to

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1 stop.
 2 **THE CHAIRMAN:** Yes.
 3 **MR WILLIAMS:** I think we wanted to have a quick word about
 4 timetable, if that's all right.
 5 **THE CHAIRMAN:** Yes. We are going to finish there for the
 6 afternoon as far as you are concerned, Mr Eastwood, and
 7 you will need to come back again tomorrow morning, and
 8 if you wait outside, someone will come out and tell you
 9 after we have had our discussion what time you should
 10 come tomorrow morning. Other than being told what time
 11 it is, let me say that, as you are in the middle of
 12 giving your evidence, it's very important that you
 13 mustn't speak to anybody about your evidence, so you
 14 mustn't have any contact with your legal team and
 15 probably best not to have contact with colleagues who
 16 have given evidence as well until you have completed
 17 your evidence.
 18 **A.** Okay. Thank you very much.
 19 **THE CHAIRMAN:** Thank you.
 20 Discussion re timetable
 21 **MR WILLIAMS:** Can I then turn to timetable, please, madam?
 22 I think, as Mr Howard mentioned, Mr Lasok and I spoke to
 23 Mr Howard about timetable, particularly in relation to
 24 Sainsbury's, and Mr Howard explained to you that, in
 25 terms of witness availability it would be very helpful

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1 if we could make sure that both Ms Bayley and
 2 Mr Matthews give evidence when they are scheduled to
 3 give evidence, which is on Thursday and Friday of next
 4 week respectively. I think it's probably quite
 5 important to try and keep Ms Bayley where she is,
 6 because lots of counsel will want to attend that day who
 7 may not otherwise be intending to attend the hearing.
 8 In terms of what that means practically speaking,
 9 I think from where we are at the moment, it looks as
 10 though we will finish Mr Eastwood tomorrow, and then we
 11 will hear Mr Howard in relation to Safeway, and then we
 12 will have Mr Culham. Mr Culham is likely to be
 13 finished, one would hope, at the latest by the end of
 14 Thursday, possibly before that.
 15 That then brings us on to Asda, when Mr Lasok will
 16 be where I am standing. I think Mr Lasok's view is that
 17 Asda is likely to take the three days which have been
 18 allocated to it, so that will take us, if we start on
 19 Friday, that would take us up to the end of Wednesday,
 20 and if we can make that work, then we could hear
 21 Ms Bayley on next Thursday and Mr Matthews on Friday as
 22 timetabled. That would mean skipping over First Quench,
 23 which is currently timetabled for 25 October. There is
 24 actually some benefit to that, because the Tribunal may
 25 have noticed that the witnesses dealing with

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1 First Quench overlap to a limited extent with the
 2 evidence in relation to Somerfield, so actually hearing
 3 First Quench and Somerfield sequentially, there is
 4 actually sense in that anyway. So there is a beneficial
 5 side effect of all of this rejigging, but I think that
 6 the question really for today is whether we work on that
 7 basis so that the witnesses who are due to deal with
 8 First Quench can be told that the timetable has moved.
 9 **THE CHAIRMAN:** Does anybody have any comments that they wish
 10 to make on that suggestion?
 11 **MR HOWARD:** No. We are still checking people's
 12 availability, but subject to that, I don't have any
 13 objection to it.
 14 **THE CHAIRMAN:** Yes, Mr Flynn.
 15 **MR FLYNN:** Well, I had better say the same thing, madam,
 16 it's the first time I've heard the suggestion we might
 17 be going as far as a week late for the Asda witnesses --
 18 **THE CHAIRMAN:** I am sorry, I can't hear you.
 19 **MR FLYNN:** I'm saying it is the first time I've heard the
 20 suggestion we might be going nearly a week late for the
 21 Asda witnesses, so I can't absolutely vouch for all
 22 their availability, Tuesday and Wednesday next week.
 23 I think it will be all right, but we will certainly need
 24 to double check. I believe it's the situation that the
 25 ITL witness on Asda does need to be finished by the end

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1 of Friday, for medical reasons, as I understand it.
 2 **MR HOWARD:** That's right, Mr Hall unfortunately is going
 3 into hospital I think next week, so he has to be
 4 finished on Friday.
 5 **THE CHAIRMAN:** Well, I agree that we should then move
 6 First Quench to later, or swap them with Sainsbury,
 7 basically. It is likely, on present progress, that Asda
 8 will take up the time allotted to them. So as soon as
 9 we can know whether the witnesses can be available for
 10 those days, and rearrange the First Quench witnesses,
 11 the better.
 12 (Pause)
 13 Yes, Mr Summers reminds me that Mr Matthews was
 14 supposed to be here on the Friday, I don't know whether
 15 he is planning to go back to the US in between, clearly
 16 if he is flying backwards and forwards then we need to
 17 make sure that his arrangements are not too disrupted.
 18 **MR WILLIAMS:** I think part of the reason for raising this
 19 now is because Mr Matthews can be available on that
 20 Friday, but if he weren't to be heard on that Friday,
 21 then complications might arise, so that's part of the
 22 reason for raising this with the Tribunal now.
 23 **MR HOWARD:** The point I made to the OFT is that, if we have
 24 Fiona Bayley on Thursday and therefore we say we have to
 25 complete her on Thursday --

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1 **THE CHAIRMAN:** This is Thursday 27th?
 2 **MR HOWARD:** Yes, and then Mr Matthews will come back on the
 3 28th, and he has to be finished on the 28th, because
 4 he's due to address 1,000 people or something at
 5 a conference on the Monday.
 6 **DR SCOTT:** Are you having some co-ordination between the
 7 appellants on Ms Bayley on the grounds that if we are to
 8 accomplish her swiftly and she is the only OFT witness,
 9 there are a lot of parties here who may want to put
 10 points to her?
 11 **MR HOWARD:** There are a lot of parties. The answer is
 12 I can't recall what everybody else had estimated.
 13 **MR WILLIAMS:** I can remember that we totted up the suggested
 14 cross-examination time and it was very slightly over
 15 a day. I think it came to something like six hours,
 16 maybe six hours 15 minutes, and I think that included
 17 four hours for ITL. So we did wonder whether that might
 18 actually boil down to a full day.
 19 **THE CHAIRMAN:** I am sure it won't be less than a day.
 20 **MR HOWARD:** There is a slight risk of our compressing --
 21 obviously we have complaints about the absence of
 22 witnesses on the OFT's side, that's for another day, but
 23 they have chosen to present themselves with one witness,
 24 and certainly we do not want -- and I am sure the other
 25 appellants will not want -- to be deprived of the

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1 opportunity properly to explore things with the witness.
 2 **THE CHAIRMAN:** Well, the difficulty then is her expanding
 3 into the time where Mr Matthews needs to occupy, if he
 4 is to get his evidence also finished on that Friday.
 5 **MR WILLIAMS:** I think it's also right to say that Ms Bayley
 6 would have difficulties being here on the Friday.
 7 **MR HOWARD:** Would she be able to be here on the Wednesday as
 8 well as the Thursday?
 9 **MR WILLIAMS:** We can make that enquiry.
 10 **THE CHAIRMAN:** Yes, if she could plan to start on the
 11 Wednesday, all being well, then she could be sure to
 12 finish on the Thursday, and then Mr Matthews could be on
 13 the Friday, with Cynthia Williams as well if that
 14 was ...
 15 **MR WILLIAMS:** As I say, we will make that enquiry.
 16 **MR HOWARD:** One of the other points I would make just about
 17 timing and generally, I am slightly surprised that
 18 Mr Culham is going to take as long as was suggested in
 19 relation to Safeway. Mr Culham is coming back, he is
 20 going to be here on Safeway, First Quench and then on
 21 T&S Stores. Obviously each retailer's position is
 22 different, although one would have thought the
 23 cross-examination of the Imperial witnesses wouldn't
 24 each time require to go over the same ground and that
 25 the OFT could try and accelerate it when they are

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1 dealing with, say, Mr Culham.
 2 **THE CHAIRMAN:** Yes. I think that's right. I don't think
 3 that points that are made generally in Mr Culham's
 4 witness evidence which have already been gone over in
 5 cross-examination don't need to be gone over again in
 6 relation to each of the retailers. I would expect you
 7 to focus on those parts of his witness statement which
 8 deal with the specific documents, also bearing in mind
 9 the points that we made at the beginning of one of the
 10 days about only needing to put to him documents where he
 11 actually gives evidence rather than saying what
 12 inferences he draws from a document where the Tribunal
 13 is in as good a position to draw an inference from the
 14 wording of the document as Mr Culham is.
 15 **MR WILLIAMS:** Can I raise this with the Tribunal now, then,
 16 because there is a peculiar issue about Mr Culham which
 17 is that he only took over the Safeway account in,
 18 I think, June 2003, which is obviously reasonably close
 19 to the end of the infringement period, being
 20 August 2003, and he only deals in his witness statement,
 21 I think it's right to say, with documents to which he
 22 was a party, but he also says "I am sure the account was
 23 run in the same way throughout its life".
 24 Now, it could be that Mr Culham's evidence will boil
 25 down, because he was only there from June 2003, but

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1 obviously if Mr Culham is going to say that he is in
 2 a position to talk about the previous period, then that
 3 may raise matters which need to be dealt with in
 4 cross-examination.
 5 **THE CHAIRMAN:** You have dealt with some of them already,
 6 though, in cross-examination. You mean in relation to
 7 particular accounts?
 8 **MR WILLIAMS:** In relation to Safeway he says something along
 9 the lines of "I'm sure the way I ran the account was
 10 a continuation of the way it was run before", and
 11 explicitly said in the last paragraph of his statement
 12 "both before and after I took over the account". So we
 13 have that difficulty, Madam. As I say, it may be when
 14 Mr Culham gives his evidence that it will boil down to
 15 the period during which he was national account manager,
 16 but as I say, the ambit of cross-examination is
 17 naturally a function of the evidence he gives. If he
 18 were to say "I'm only dealing with June 2003 onwards",
 19 we would be in a different position. But we weren't
 20 certainly planning to go back to Shell or to get into
 21 anything else, we have enough on our plates dealing with
 22 each retailer in turn, Madam.
 23 **THE CHAIRMAN:** Yes. Yes, thank you, that's helpful.
 24 As far as tomorrow morning is concerned, then we
 25 have Mr Eastwood to finish, then just remind me, we

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1 have ... you are going to say something further about
 2 ITL and Safeway?
 3 **MR SAINI:** At present I wasn't going to, I was going to hear
 4 what Mr Howard was going to say first.
 5 **MR HOWARD:** I will not have much to say, I will be fairly
 6 brief.
 7 **THE CHAIRMAN:** All being well, we should get on to Mr Culham
 8 again tomorrow.
 9 **MR HOWARD:** Yes. I think it was said we should finish
 10 Mr Culham by close of play on Wednesday. That seems to
 11 me a far too pessimistic view.
 12 **THE CHAIRMAN:** That's tomorrow.
 13 **MR HOWARD:** Sorry, Thursday. That seems to me incredibly
 14 pessimistic, things should start to move a bit quicker
 15 than that. Mr Culham has been here already.
 16 **THE CHAIRMAN:** The thing is, should Mr Hall be here
 17 tomorrow, or can we tell Mr Hall that he is only going
 18 to be here on Thursday? Presumably there will be some
 19 opening on Asda?
 20 **MR HOWARD:** I think Mr Flynn is going to open on Asda.
 21 **THE CHAIRMAN:** It seems unlikely that we will get through
 22 both Mr Eastwood and Mr Culham and an opening for Asda
 23 all tomorrow.
 24 **MR HOWARD:** No, we won't do that all tomorrow, but I think
 25 what was being suggested is that we wouldn't --

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1 **THE CHAIRMAN:** Even do that by Thursday.
 2 **MR HOWARD:** Yes, that's the rather pessimistic view.
 3 **MR WILLIAMS:** I think at the moment I expect that we will
 4 finish Mr Eastwood comfortably, certainly from my point
 5 of view, tomorrow and the question is how much further
 6 than that we get, whether we are able to deal with the
 7 Safeway opening and even whether we get onto Mr Culham.
 8 It may be unrealistic to think that we will get onto
 9 Mr Culham, but it may well be that Mr Culham is finished
 10 by, for example, Thursday lunchtime.
 11 **THE CHAIRMAN:** So Mr Hall should be available on Thursday
 12 afternoon at least?
 13 **MR HOWARD:** Yes.
 14 **THE CHAIRMAN:** Yes, Mr Flynn.
 15 **MR FLYNN:** Yes, I think we are just going to have to play
 16 this by ear, aren't we, and Mr Jolliff will certainly be
 17 available, indeed it was only earlier today that we
 18 stopped him coming on the train tonight, so he will
 19 certainly be available then. I think we were intending
 20 that I would say a few words about Asda before he comes
 21 on. I don't think that will be particularly lengthy,
 22 but I think it would be appropriate. So that sounds as
 23 if it might be done on Thursday.
 24 **THE CHAIRMAN:** What might be useful is if, after we have had
 25 the, made the enquiries about moving First Quench and

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1	that reorganisation, if someone could produce a revised	1	INDEX
2	timetable showing both what has in fact happened would	2	PAGE
3	quite useful to have for future reference and now what	2	
4	we expect to happen from here on in.	3	MR PAUL MATTHEWS (continued)1
5	Which brings me back to my question about what time	4	
6	should we start tomorrow? Is 10.30 all right? All	5	Cross-examination by MR WILLIAMS1
7	right. Someone then needs to tell Mr Eastwood we will	6	(continued)
8	meet again at 10.30 tomorrow morning.	7	
9	MR HOWARD: Could I just raise something that we have been	8	Cross-examination by MR SAINI40
10	thinking about, and it might be helpful if the Tribunal	9	
11	gave an indication: we obviously want to say something	10	Questioned by THE TRIBUNAL46
12	about Safeway tomorrow and something in due course about	11	
13	Asda, but assuming we move First Quench, which looks	12	Re-examination by MR HOWARD51
14	very likely, we could, rather than having a mini opening	13	
15	then for each of the subsequent appeals, try and take it	14	Further questioned by THE TRIBUNAL121
16	all together. That would mean obviously it would take	15	
17	slightly longer, but then we could just go through	16	Further cross-examination by MR WILLIAMS123
18	evidence. One of the reasons there is an advantage in	17	
19	that, First Quench and T&S and TM Retail fall into	18	Further opening submissions by MR127
20	a similar category, but there are also, as you may	19	SAINI
21	appreciate, some evidential points that we specifically	20	
22	want to raise about those retailers, bearing in mind	21	MR GRANT EASTWOOD (sworn)135
23	that we are not going to hear any evidence from the	22	
24	retailers or from Gallaher or from anybody other than	23	Examination-in-chief by MR SAINI135
25	ITL witnesses.	24	
		25	Cross-examination by MR WILLIAMS139
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1	THE CHAIRMAN: Yes. I agree that would be sensible, subject	1	
2	to the timing of that extended combined opening not	2	Discussion re timetable179
3	disrupting the table so far as Mr Matthews or Ms Bayley	3	
4	are concerned.	4	
5	MR HOWARD: I think the way perhaps we could leave it -- no,	5	
6	it certainly wouldn't disrupt them because it would be	6	
7	the week after, so it may be therefore that on that	7	
8	final week we would spend slightly longer but try and	8	
9	just address some of the points, particularly because	9	
10	some of them are common points about absence of	10	
11	evidence.	11	
12	THE CHAIRMAN: The revised table would also need to reflect	12	
13	the points we made previously about the November day now	13	
14	being called into operation, and Professor Shaffer being	14	
15	moved over to the Monday from the Friday.	15	
16	Thank you, everybody, we will see you again at 10.30	16	
17	tomorrow.	17	
18	(4.45 pm)	18	
19	(The court adjourned until 10.30 am on	19	
20	Wednesday, 19 October 2011)	20	
21		21	
22		22	
23		23	
24		24	
25		25	
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