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IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19 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 16)

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 Wednesday, 19 October 2011
 2 (10.30 am)
 3 MR GRANT EASTWOOD (continued)
 4 **THE CHAIRMAN:** Good morning. I remind you you are still on
 5 oath, Mr Eastwood. Mr Williams.
 6 Cross-examination by MR WILLIAMS (continued)
 7 **MR WILLIAMS:** Good morning, Mr Eastwood.
 8 **A.** Good morning.
 9 **Q.** Could you turn to paragraphs 17 and 18 of your witness
 10 statement and read those to yourself, please.
 11 (Pause)
 12 **A.** Yes.
 13 **Q.** So, jumping straight to the end of 18 for the minute
 14 where you say you could safely put the trading
 15 agreements in a drawer and forget about them, I think
 16 you were asked a question about this by Dr Scott
 17 yesterday, and I don't think you say he did forget about
 18 them; this is a figure of speech, isn't it, I think?
 19 **A.** I wouldn't be -- it wouldn't be forefront of mind in
 20 terms of parity or pricing or the agreement in whole, it
 21 would be the annual sum that we had agreed twice a year,
 22 that's the only time it would be reflected on.
 23 **Q.** We can perhaps start to explore some of the reasons why
 24 you might say that in a moment. Looking at the file we
 25 have of communications between ITL and Morrisons,

1

1 I don't suppose you are saying that the buyer forgot
 2 about the agreements or might have forgotten about the
 3 agreements, given that ITL was writing to the buyer week
 4 in, week out, making reference to its requirements?
 5 **A.** I wouldn't have said that the buyer forgot about them,
 6 but it wouldn't have been the whole discussion week in,
 7 week out, no.
 8 **Q.** So we covered some of this ground yesterday about what
 9 actually happened in practice and I wondered if I could
 10 just try and pull some of this together and see if you
 11 agree with my interpretation of the evidence.
 12 We looked yesterday at paragraph 15 which says that
 13 your pricing generally reflected the differentials?
 14 **A.** Correct.
 15 **Q.** I think what paragraphs 17 and 18 are saying against
 16 that background are that if Gallaher decided to fund
 17 lower prices, using a tactical bonus, which would
 18 disturb the differentials, then whether parities and
 19 differentials would be maintained would depend on
 20 whether ITL responded with an offer of tactical funding?
 21 **A.** That's correct.
 22 **Q.** We saw yesterday that that scenario was catered for in
 23 the trading agreements through the opportunity to
 24 respond clause?
 25 **A.** That is correct.

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1 **Q.** As we saw, it was up to ITL whether it would fund
 2 a counter promotion, if I can put it that way, but if it
 3 did, you could be expected to accept that offer of
 4 tactical funding because it would lower your prices and
 5 that was good for you?
 6 **A.** That's also correct.
 7 **Q.** Just focusing on some of the specific points you make in
 8 these paragraphs, in 17 can I focus on the words: "I saw
 9 them simply as expressing ITL's own desired position
 10 reflecting the state of the market at the time the
 11 agreements were entered into"?
 12 **A.** Yes.
 13 **Q.** Are you saying that the agreements only reflected the
 14 state of the market at the time the agreements were
 15 entered into, as in that they didn't bite when market
 16 conditions changed?
 17 **A.** I'm saying that, as per yesterday, at the point we
 18 signed the agreement the pricing was already there, so
 19 nothing ... so nothing changed.
 20 **Q.** But that's a slightly different point, isn't it?
 21 Because I am just trying to unpack what you are saying
 22 "I saw them simply as expressing ITL's own desired
 23 position, reflecting the state of the market at the
 24 time". Perhaps if we put this in the context of the
 25 agreement, you will see what I mean. Could you turn to

3

1 tab 85, please. Under the heading "Pricing" on the
 2 second page, do you see in the second line there is
 3 a reference to "natural price list differences"?
 4 {D17/85}
 5 **A.** Correct.
 6 **Q.** So obviously the price lists changed from time to time,
 7 and the differentials were affected by changes in the
 8 price lists?
 9 **A.** The prices changed at Budget time and at manufacturers'
 10 price increase and it is correct that the differentials
 11 could change, depending what increase was applied.
 12 **Q.** They were often very stable but they could vary with the
 13 price lists?
 14 **A.** The differentials were stable.
 15 **Q.** In fact I think what I am saying is that in practice we
 16 see that for example on certain brands, the differential
 17 was very stable over time?
 18 **A.** That's correct.
 19 **Q.** But at least the way this is written, the differentials
 20 adapt to market conditions, it's not simply a factor of
 21 the state of the market at the time the agreements were
 22 entered into, just to pick up the language you use in
 23 your witness statement?
 24 **A.** The point I make was that, as we entered into the
 25 agreement, those prices were there, which were, if not

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1 very similar to points in time thereafter. As you have
 2 just demonstrated, the movement was very consistent, so
 3 the answer is yes, it was already there and those
 4 differentials were already there.
 5 **Q.** Yes, but all I am saying really is the agreement did
 6 adapt to the market, it was a living agreement, it
 7 wasn't simply a static --
 8 **THE CHAIRMAN:** Do you mean that there were further
 9 subsequent schedules, changing the differentials?
 10 **MR WILLIAMS:** I think I am just saying, I'm making the point
 11 that one can't simply see the agreement as a snapshot at
 12 a particular point in time. The way the agreement works
 13 is it tended to adapt to, for example, changes in the
 14 price list, so that I'm just trying to understand the
 15 significance of the words "the state of the market at
 16 the time the agreements were entered into", that's all.
 17 I think we have explored that. I think we are agreed
 18 that if price lists change, that has implications for
 19 what the agreement requires.
 20 **A.** Yes, yes.
 21 **Q.** We see similar provision in 17/4, but I don't think we
 22 need to go to that.
 23 Can we turn to 17/4 on a different point, please,
 24 it's tab 4 of the file you have there. {D17/4}. I just
 25 want to come back to the idea that Morrisons could

1 forget about the agreements. I think you said yesterday
 2 that the intent was to honour the agreements?
 3 **A.** Correct.
 4 **Q.** We see in section A under the heading "Pricing" it says:
 5 "WM Morrison to confirm instore promotional
 6 activities which may affect pricing strategy."
 7 I think you agreed yesterday that was an obligation
 8 on Morrison?
 9 **A.** Yes, so as we promoted a product in store, when it was
 10 in store we would have notified Imperial.
 11 **Q.** Yes, so that's something you had to do under the
 12 agreement?
 13 **A.** That's right, and it also worked to our advantage if, as
 14 in further paragraphs in my statement, where we
 15 manufactured a promotion in terms of it was neither
 16 agreed with another manufacturer and then we would
 17 reduce the retails of our own accord and then start
 18 a dialogue with Imperial suggesting that there was
 19 an agreed promotion to force them to react, therefore to
 20 get lower funding and then reverse it out on the
 21 previous manufacturer, if that makes sense.
 22 **Q.** We will come on to explore that in just a minute. I was
 23 focusing on the question of whether you could forget
 24 about the agreement and I was really just putting to you
 25 that you couldn't forget about the agreement, at least

1 to this extent: there was an obligation on you to notify
 2 ITL of a promotion on a Gallaher brand?
 3 **A.** It's one point of the whole agreement, so that is
 4 correct, yes.
 5 **Q.** One thing you say in paragraph 18 of your statement,
 6 that putting Gallaher prices down wouldn't have been
 7 a breach of the agreement; do you remember saying that,
 8 seeing that a minute ago?
 9 **A.** Absolutely clear.
 10 **Q.** Would you accept that putting Gallaher prices down
 11 without telling ITL was a breach of the agreement?
 12 **A.** No, not at all. We would never have to discuss Gallaher
 13 pricing with Imperial.
 14 **Q.** Sorry, it says here:
 15 "WM Morrison to confirm instore promotional
 16 activities which may affect pricing strategy."
 17 **A.** The word "promotion" is key here. If I had a promotion
 18 of Gallaher or Rothmans I would automatic -- we would
 19 have notified Imperial to allow them to react. If
 20 I changed Gallaher pricing for other than a promotion,
 21 I would not expect my buyers to be discussing the price
 22 with Imperial, unless it was for their own negotiation
 23 tactic.
 24 **Q.** Perhaps my question wasn't clear. I was only asking
 25 whether you would agree it would be a breach of the

1 agreement to not notify ITL of a promotion on a Gallaher
 2 brand?
 3 **A.** With a Gallaher brand, it is correct that we would
 4 notify ITL.
 5 **Q.** And you did do that from time to time?
 6 **A.** On promotions, yes.
 7 **THE CHAIRMAN:** Sorry, I didn't understand that answer then.
 8 When you talk about a promotion or promotional activity,
 9 to which this obligation to notify ITL applies, is that
 10 a promotion sponsored or funded by Gallaher as opposed
 11 to one decided by Morrisons of its own accord?
 12 **A.** We use the word "promotion" as a short period of time,
 13 in essence, and it was usually reflected in store points
 14 of sale that said "was" and "now", and therefore
 15 encouraged the customer to purchase. So it's only those
 16 type of activities that we were, as I read, agreed we
 17 were obliged to notify Imperial.
 18 **THE CHAIRMAN:** Regardless of who was funding that
 19 short-term?
 20 **A.** Regardless, yes.
 21 **THE CHAIRMAN:** But if there was a longer term decision to
 22 change the price of a Gallaher brand --
 23 **A.** There would be no discussion.
 24 **THE CHAIRMAN:** Right.
 25 **DR SCOTT:** So we assume that because the merchandisers were

1 watching what was going on, they would soon notice; yes?
 2 **A.** Absolutely, and for the buyer to ring up and say "We
 3 have done a promotion on a Gallaher brand and you can
 4 see it in store today as you go in", you are absolutely
 5 correct, they would have already noticed it themselves.
 6 **DR SCOTT:** But we are talking now about what you are
 7 describing as a non-promotional price change?
 8 **A.** Yes, and they would notice that as well.
 9 **DR SCOTT:** You may not know the answer to this, but do we
 10 have an example of that in the papers so that we can
 11 understand how people reacted, because presumably there
 12 would be some reaction when people saw that happening?
 13 As I say, you may not know the answer to that.
 14 **A.** I can't answer that.
 15 **DR SCOTT:** Mr Saini, do we --
 16 **MR WILLIAMS:** I think there is an example in the Richmond
 17 and Dorchester context, but it's from the Gallaher
 18 perspective, because we see that ITL's strategy by late
 19 2000 is to match Richmond and Dorchester, and we see
 20 that by some time early the following year that's become
 21 Gallaher's strategy too, and so just the pattern of the
 22 documents tends to suggest that Gallaher has picked up
 23 what ITL is doing rather than the other way around and
 24 adopted the same strategy. I think that might provide
 25 an example of the sort of thing you have in mind,

1 Dr Scott.
 2 **MR SAINI:** I think it might help, I do not want to interrupt
 3 my learned friend's cross-examination, just to clarify
 4 with Mr Eastwood what you means by promotional
 5 activities here.
 6 **THE CHAIRMAN:** I think that's what we just did. As
 7 I understood it, what you mean is a short-term special
 8 offer, if I can call it that --
 9 **A.** Correct.
 10 **THE CHAIRMAN:** -- regardless of who is funding that 2p or
 11 5p off but it doesn't cover longer term decisions --
 12 **A.** Price reliant.
 13 **THE CHAIRMAN:** -- about what the price should be.
 14 **MR SAINI:** My only query was in the kind of argot of this
 15 case, where would a tactical bonus fall within that, so
 16 if for example Gallaher had a tactical bonus on
 17 a particular product, say Dorchester, and that was
 18 adopted by Morrisons, they would use the price, is that
 19 a promotional activity or is that a longer term ...
 20 **A.** You are absolutely correct. Some of the tactical
 21 bonuses were short-term, some were medium term and some
 22 were long-term. So depending on if we knew the period
 23 in advance, then it would depend on the conversation we
 24 are having.
 25 **DR SCOTT:** I think if I explain my concern: part of the

1 reason why the manufacturers are concerned to agitate
 2 about differentials is they don't want to be
 3 disadvantaged in respect of the pricing of their product
 4 compared to that of their rivals. The price change that
 5 you are envisaging is one in which in that case Gallaher
 6 are getting an advantage over ITL, and what we are
 7 trying to understand is how you understood the agreement
 8 in that context.
 9 **A.** Other than promotions?
 10 **DR SCOTT:** This is other than promotions.
 11 **A.** Other than promotions we had no obligation to tell
 12 Imperial that we had moved prices down or up, whichever.
 13 **DR SCOTT:** But leaving aside informing them, did you see any
 14 reason ... well, yes, okay.
 15 **MR WILLIAMS:** I think where you and I had gotten to is you
 16 had agreed it would be a breach of the agreement not to
 17 tell ITL that there was a promotion on a Gallaher brand?
 18 **A.** I wouldn't say it was a breach, but yes, we had agreed
 19 to inform them of a promotion.
 20 **Q.** The agreement contemplates that you will do that?
 21 **A.** Correct.
 22 **Q.** Would you agree that in similar vein it would be
 23 contrary to the agreement to tell ITL that there was
 24 a promotion on a Gallaher brand when there wasn't
 25 a promotion on a Gallaher brand?

1 **A.** Not at all, this is normal day to day trading, cat and
 2 mouse trading, we would manufacture as many scenarios as
 3 we possibly could in order that we could reduce the cost
 4 to reflect in the retail to pass onto the customer.
 5 **Q.** I think you deal with this in paragraph 24 of your
 6 witness statement, so do you want to read that to
 7 yourself.
 8 **MR HOWARD:** If it's being suggested that's a breach of the
 9 agreement, I think Mr Williams ought to identify the
 10 term that he says is being breached.
 11 **MR WILLIAMS:** Sorry, I thought we had just been discussing
 12 "WM Morrison to confirm instore promotional activity
 13 which may affect pricing strategy."
 14 **MR HOWARD:** Yes, but you are putting a different point,
 15 which is it is a breach to say something that there is
 16 a promotion when there isn't. If that's the sentence he
 17 is relying on, fine, but I just wanted to know whether
 18 there was anything else --
 19 **THE CHAIRMAN:** Well, I think he may well argue that in order
 20 to give business efficacy, if that's not an old
 21 fashioned phrase, to that sentence it's an underlying
 22 assumption that they will --
 23 **MR WILLIAMS:** Tell the truth.
 24 **THE CHAIRMAN:** -- tell the truth, but that may be for
 25 future reference, but Mr Eastwood is saying that wasn't

1 his understanding as to the commercial realities of the
2 situation.
3 **MR WILLIAMS:** And we were going to move on to paragraph 24,
4 I think, where he deals with this issue in his witness
5 statement.
6 **A.** (Pause) Yes.
7 **Q.** I just wanted to put this paragraph of your witness
8 statement in the context of what you have said so far.
9 I think you have said so far that you generally priced
10 on the basis of price list differentials, unless there
11 was a promotional activity which disturbed those
12 differentials?
13 **A.** That's correct.
14 **Q.** So the sort of scenario that you are describing here
15 I think would involve a departure from the price list
16 differentials without there being a manufacturer
17 promotion to create that departure from the
18 differentials?
19 **A.** As I described yesterday, if we priced well below that
20 of the bonus level, so if we were given 5p for example
21 and we went to 6p, Imperial, from my point of view,
22 would be elated. The paragraph here describes Morrisons
23 forward buying stock at Budget time, which allowed us to
24 hold the price further down for a longer period, so the
25 differentials would have been disturbed and therefore

1 the gap could have been bigger and Imperial would have
2 been very elated.
3 **Q.** I think what you are contemplating in 24 is that you
4 hold down the price of the Gallaher brand without
5 funding from Gallaher, so I am not sure that's something
6 which would cause ITL to be elated?
7 **A.** It's already being funded. The forward buy proposal
8 works on the basis that the Chancellor announces the
9 Budget, at 6 o'clock that evening the costs go up. I am
10 already sat on X amount of weeks' stock. Rather than
11 reflect the Chancellor's request to put the price up by
12 Xp, I continue to hold the price down. And invariably,
13 as I recall, and we kept -- if we ever did it, and we
14 did do it several times -- all cigarettes from all
15 manufacturers down rather than reflect the manufacturer
16 -- the Chancellor's Budget.
17 **Q.** Did you talk about forward buy then, sorry?
18 **A.** Yes.
19 **Q.** I think you deal with forward buys in paragraph 22.
20 **A.** Sorry.
21 **Q.** I am looking at paragraph 24. I was just reacting to
22 something you said. I think you said that in this
23 situation ITL would be elated, because its price was --
24 were you just reading the wrong paragraph? Should we
25 start again?

1 **A.** Sorry, I read paragraph 22.
2 **Q.** Sorry, if we start again on 24, we might make better
3 progress this time?
4 **MR HOWARD:** Perhaps you should read it and then ask the
5 question, Mr Williams.
6 **MR WILLIAMS:** I thought I did ask --
7 **THE CHAIRMAN:** Yes, he is reading it.
8 **MR HOWARD:** No, no, it's just a misunderstanding. It was
9 evident from the whole discussion that we were talking
10 about different paragraphs.
11 (Pause)
12 **MR WILLIAMS:** So, as I say, I just wanted to put this
13 paragraph in the context of what we have heard so far
14 about your approach to pricing. I think generally you
15 have said that you would price on the basis of the price
16 list differentials. We covered this ground. And you
17 would depart from those differentials when there was
18 a promotion and then the opportunity to respond clause
19 would bite and so on.
20 **A.** Correct.
21 **Q.** I think what you contemplate here is a departure from
22 the price list differentials without there being
23 a promotion by Gallaher?
24 **A.** Correct.
25 **Q.** So this would be an exception?

1 **A.** Hypothetical promotion.
2 **Q.** That's right, but I think this is a sort of exception to
3 your general practice, I think?
4 **A.** This would be us hypothetically creating a promotion,
5 yes.
6 **Q.** But it would be an exception to the general practice of
7 pricing --
8 **A.** Yes, correct, absolutely.
9 **Q.** If we can just explore what you say in this paragraph,
10 you say:
11 "We would also play the manufacturers off against
12 each other, for example at the end of a promotion
13 I might hold down the price."
14 Is this a decision you would make or a decision the
15 buyer would make?
16 **A.** That's -- the buyer may make the decision or, as I had
17 the final say, I could have made that decision, so it
18 would be based on a recommendation, I would be looking
19 at profitability, the sales of the whole department and
20 in some cases I had the opportunity to cross-fund
21 profits from one category to another, because my targets
22 were based on total department profit, not necessarily
23 just tobacco.
24 **Q.** I just wanted to explore what you are saying here. You
25 are saying if you hold down the price on a Gallaher

1 product after Gallaher has ended the promotion, that
 2 might cause ITL to think there is a Gallaher promotion
 3 and offer at that point a funded reduction?
 4 **A.** What I am suggesting here is, if the promotion had ended
 5 and it was a national promotion and it continued with
 6 Morrisons for longer, it almost would get Imperial
 7 nervous thinking that we had got an extended promotion,
 8 therefore would create a chain reaction where they may
 9 have to fund their brand back down or -- to compete.
 10 **Q.** Are you talking about a situation where ITL has been
 11 matching a Gallaher promotion already?
 12 **A.** Yes, and then remove the bonus accordingly and the
 13 retails have gone up.
 14 **Q.** I just wanted to check that against the way you express
 15 yourself here. You say:
 16 "That would put pressure on ITL to offer a funded
 17 reduction if ITL provided that additional funding."
 18 So you are talking about -- I think you have
 19 explained now -- a continuation of a previous offer?
 20 **A.** Correct.
 21 **Q.** Rather than a new offer?
 22 **A.** The bonus is removed and it's to put pressure on them
 23 back to put the bonus back on.
 24 **Q.** So you have given ITL the opportunity to respond to
 25 a Gallaher promotion and it has responded, and you are

1 now dealing with a situation where the question is: is
 2 ITL going to continue to offer funding even though the
 3 Gallaher promotion has ended?
 4 **A.** Yes.
 5 **Q.** Could you turn to tab 85, please, and just read to
 6 yourself the first bullet point which we looked at
 7 yesterday. {D17/85}.
 8 **A.** Which bullet point?
 9 **Q.** Sorry, under the heading "Pricing".
 10 (Pause)
 11 **A.** Yeah.
 12 **Q.** So this does have two parts, doesn't it? The first part
 13 is the opportunity to respond, and the second part says:
 14 "Should any additional funding be agreed to support
 15 a response to competitor activity, it should be removed
 16 once that activity has ended."
 17 So the agreement contemplates in this situation that
 18 you will tell ITL effectively -- I think this is the way
 19 it has to work -- that the Gallaher promotion has ended
 20 so that they can end the funding that they were
 21 offering?
 22 **A.** This is -- may I just read again.
 23 **Q.** Of course.
 24 (Pause)
 25 **A.** This is suggesting to me that once the promotion's

1 ended, that they will remove their bonus accordingly,
 2 and that would be the case.
 3 **Q.** But for that to work, you would have to tell them the
 4 promotion's ended, because if you did what you describe
 5 in paragraph 24, they could be led up the garden path
 6 endlessly?
 7 **A.** In many cases this is public information, a great
 8 example would be DFS, you see it many times on the
 9 television when it says "Promotion ends 31 January".
 10 Many supermarkets' signage as you walk in today has
 11 a start and end date on the signage, so it would be
 12 public information. We would encourage our customers
 13 specifically, towards the end of a promotion, to make
 14 the most of this advantageous price, and you will see on
 15 many occasions additional signs going "hurry while
 16 stocks last" or "offer ends this weekend". So it was
 17 something that we wouldn't necessarily have to ring up
 18 and say "the promotion ends"; you could see it by just
 19 reading the signage.
 20 **Q.** And that would apply in tobacco as well?
 21 **A.** Correct, we had something which we called a hymn board
 22 because it reflected a church hymn board, and it stood
 23 either side of the kiosk which we put promotions on. If
 24 I recall correctly it had ten slots on each side of
 25 which promotional point of sale used to be placed within

1 that. And at the actual point of purchase, before it
 2 was banned, it used to have a shelf barker which had "6p
 3 off" or whatever the offer was, with the dates and the
 4 brand.
 5 **Q.** Doesn't that mean that this strategy in paragraph 24
 6 could never work, because ITL would know that the
 7 Gallaher promotion had ended?
 8 **A.** What ITL wouldn't know is whether we have had a separate
 9 discussion to extend the offer for whatever reason.
 10 Sometimes when you go into a promotion in many
 11 categories just because you have excess stocks or you
 12 have a different tactical reason to promote, and
 13 therefore at the end of promotions you sometimes see in
 14 stores where it says "Offer extended for two weeks or
 15 things like that. So the answer is no, they wouldn't
 16 always know whether the promotion did end on that
 17 specific date.
 18 **Q.** In that case I go back to the agreement, and if there
 19 are going to be promotions which are going to continue
 20 beyond the published date, if I can put it that way, in
 21 order for this provision "should any additional funding
 22 be agreed to support a response to competitor activity
 23 it should be removed" et cetera, in order for that to
 24 work at all, you have to tell ITL when the Gallaher
 25 promotion comes to an end?

1 A. If the Gallaher chose to extend the promotion
 2 themselves, then it would be in our interests to also
 3 tell Imperial "we would like you to extend the
 4 promotion" and therefore we could be the only retailer
 5 at that time to have a longer overall promotion than any
 6 other. So yes, we would share that information with
 7 Imperial if Gallaher had decided to extend it
 8 themselves.

9 Q. But you are talking there about them extending the
 10 promotion, I am making a different point which is about
 11 the end of the promotion, because what this contemplates
 12 is at the end of the promotion, ITL will withdraw the
 13 additional funding it's been offering and it can only do
 14 that at the end of the promotion if it knows when the
 15 promotion has ended?

16 A. We wouldn't normally ring them up in advance and say
 17 "this promotion has ended" or "ends on Monday", they
 18 would go into the store, as we have discussed
 19 previously, and notice that the price has changed and
 20 then there will be a confirmation thereafter, usually,
 21 "Yes, the promotion has now ended", which gave Imperial
 22 usually a lag of one week or two weeks.

23 Q. I understand that's the way it works when everything is
 24 working as it's supposed to work, but in paragraph 24,
 25 you are talking about a different situation, which is

21

1 a situation in which the Gallaher promotion has ended
 2 and yet you don't put the Gallaher price back up,
 3 because you are trying to extract additional funding
 4 from ITL --

5 A. Correct, so --

6 Q. I am saying that in order for you to do that you have to
 7 disregard the bit of the agreement which says implicitly
 8 or explicitly, depending on how you read it, that you
 9 have to tell them when the promotion comes to an end, if
 10 they have not figured it out for themselves from
 11 publicly available information?

12 A. And the whole of this exercise could have been done
 13 within one phone call within ten minutes, so at
 14 9 o'clock on Monday morning we may not have removed the
 15 Gallaher promotion and then we could have had the phone
 16 call with Imperial. So there is not huge amounts of
 17 time, we are trying to manufacture -- we could have also
 18 been talking to Gallaher to say --

19 THE CHAIRMAN: I think the point that's being put to you, as
 20 far as I understand it, is that you are under
 21 an obligation in the contract to tell them when the
 22 Gallaher promotion is ending because the likelihood is
 23 they will want to end their own promotion.

24 A. Absolutely correct.

25 THE CHAIRMAN: And that seems to be something you have

22

1 agreed that you will do. But what you seem to be saying
 2 in paragraph 24 is: "sometimes we would not tell them
 3 and in fact, by keeping the price low ourselves, even
 4 though Gallaher are no longer funding it, we would lead
 5 them to believe that we were still being funded by
 6 Gallaher and therefore we would not tell them, as we
 7 were supposed to, that the Gallaher funding was ended".
 8 Is that the point?

9 A. That's absolutely correct, and then at the same time we
 10 would then do the reverse to Gallaher and try and expect
 11 a promotion thereafter, and thus we would end up in
 12 a situation where we would have them both funded again.

13 MR WILLIAMS: Would you deliberately breach the agreement?

14 A. We would deliberately manufacture situations like this,
 15 yes.

16 Q. Would you deliberately breach the agreement?

17 A. I wouldn't use the word "breach", but yes, the scenario
 18 I have just described, we would deliberately do that to
 19 extract longer promotions.

20 Q. Can I just understand what's at stake in this situation
 21 for you? At the point when you have persuaded ITL to
 22 continue funding the promotion, in the scenario you
 23 describe here, I think it's right to say you are losing
 24 money, aren't you, because you are making the same
 25 margin on the ITL brand as you would have done at

23

1 a higher price, but they have just funded the lower
 2 price, but you are out of pocket on the Gallaher brand
 3 because you are funding that yourself?

4 A. That could be the case, yes.

5 Q. That does seem to be the logic of what you are saying in
 6 paragraph 24?

7 A. We would be looking at a longer term gain, so if in one
 8 week we lost some money, but for the longer term for
 9 three or four weeks we gained more and a sharper price,
 10 then the overall cash profit would be positive.

11 Q. So you only roughly break even -- I am not being precise
 12 about the maths -- at the point when you do persuade
 13 Gallaher to re-fund the promotion which it's just
 14 decided to terminate; is that right?

15 A. Well, "break even" I would challenge --

16 Q. Sorry, I don't mean "break even" in absolute terms,
 17 I mean break even relative to the margin you would have
 18 made if you hadn't engaged in this game?

19 A. Here we seem to be talking about margin, there is
 20 a perception thing which is critical to Morrisons, that
 21 customers see that we have promotions and lower prices
 22 than anybody else, it was not always just about a break
 23 even situation on absolute cash profit.

24 Q. I think you said earlier on that these promotions would
 25 tend to be short-term?

24

1 A. You would hope some -- most -- in the main they were
 2 four weeks but as you can see from all the evidence,
 3 particularly around a Budget or a manufacturer's price
 4 increase, some of these got continually extended to
 5 four weeks, eight weeks, 12 weeks.
 6 Q. It just all seems like quite a lot of effort for
 7 a fairly modest prize, really, which is the ability to
 8 be slightly cheaper than your rivals potentially, if all
 9 of this comes off, for a short period?
 10 A. I think that's how competition works within
 11 supermarkets, it's the sum of all the small parts that
 12 make the bigger picture. So yes, whilst we may have
 13 done this on tobacco, somebody could have been doing it
 14 on beans, somebody else could have been doing it on
 15 teabags and then the whole picture then generates that
 16 perception to the customer that Morrisons is a very
 17 competitive business.
 18 Q. Anyway, I do not want to get too distracted by this
 19 because I think we agreed earlier on that this would be
 20 an exception to your normal pricing in line with RRP
 21 differentials?
 22 A. That's correct.
 23 Q. Can we now move to look at some documents in the file
 24 which show how all of this actually worked in practice.
 25 Could you turn to tab 2 of annex 17, please. Do you

25

1 want to read that to yourself. {D17/2}.
 2 (Pause)
 3 A. Yes.
 4 Q. So these are minutes of a meeting between Colin Wragg
 5 and Justin Addison, and they are the minutes prepared by
 6 Morrisons. We can see various objectives and agenda
 7 listed in the main part of the minutes. But actually
 8 when you look at the right-hand side there is a heading
 9 "Action"?
 10 A. Correct.
 11 Q. So are these actually action items rather than a list of
 12 the objectives or agenda?
 13 A. May I just explain the purpose of this document? This
 14 document was a minute and an aide memoire to the buyer.
 15 In a typical buyer's day they would go into six or seven
 16 meetings back-to-back, so it wouldn't be something where
 17 you would sit in a meeting and write there and then, it
 18 could be something that he wrote in an evening, it could
 19 be a message back to himself. So invariably what would
 20 happen is he would have the meeting, he would then go
 21 back to his desk, write some notes, record some facts of
 22 points discussed in the meeting or indeed write some
 23 notes back to himself, of which he would then tend to
 24 action -- or not action if they needed none --
 25 accordingly some days after, or there and then if it was

26

1 that important.
 2 Q. That's helpful, thank you.
 3 So I think from what you just said then, focusing on
 4 item 3, that is an action on Justin Addison arising from
 5 the meeting, it's something that would have been
 6 discussed at the meeting?
 7 A. So when I look at the date, the date of the meeting is
 8 10 April, which, when I also look at the chronological
 9 document there was a Budget increase on 21 March. This
 10 date would suggest this is the first meeting that
 11 Justin's had with Imperial roughly after the Budget. It
 12 would be normal that they would be looking at the
 13 bonuses to make sure all the bonuses are correct and all
 14 his retros are set up. Retrospective bonusing was
 15 a hugely administrative process, but financially was
 16 a lot of money. This could be a note from Justin back
 17 to himself having gone through all the bonuses,
 18 et cetera, that he needs to look at his hand rolling
 19 tobacco versus anything he had seen as he went through
 20 those schedules regarding the Budget.
 21 Q. So on the basis that this has in some way come out of
 22 this meeting, it looks like an issue arising from the
 23 meeting somehow is that he is going to realign hand
 24 rolling tobacco retails, so that looks like something he
 25 is going to do in order to implement parity and

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1 differential requirements?
 2 A. I totally disagree. That absolutely says
 3 "Justin Addison to realign HR tobacco retails", it
 4 doesn't say regarding what. That could be a message to
 5 himself, because it's just after the Budget.
 6 **THE CHAIRMAN:** But realigning them with what --
 7 A. It could well be, as an example, we had 12.5 gram,
 8 25 gram, and 50 gram packets, that could be a message to
 9 Justin himself where he has the pro ratas wrong, it
 10 could be many things, but it doesn't simply mean this is
 11 reflective of a trading -- the trading agreement.
 12 **MR WILLIAMS:** You would agree that "realign" is the sort of
 13 language we see, in, for example, the second trading
 14 agreement, it was the sort of language that was used to
 15 describe implementation of parities and differentials?
 16 A. I disagree that in this particular instance this is
 17 aligned to a trading agreement. This is Justin's
 18 language, it's a note back to himself talking about what
 19 I can't really comment on, but given the comment that
 20 I made earlier about the 12.5, 25 and 50 gram
 21 differentials, it could well just be about realigning
 22 those differentials.
 23 Q. It does arise from a meeting with ITL, doesn't it?
 24 A. Correct, and it also arises from a meeting which I would
 25 suggest was the first meeting after a Budget, which

28

1 there would be a phenomenal amount of paperwork.
 2 **Q.** Could we move to document 9, please. {D17/9}.
 3 First of all, do you want to read the section
 4 relating to L&B and JPS under the first heading.
 5 (Pause)
 6 **A.** Yes.
 7 **Q.** So this relates to the end of a period during which
 8 Imperial had paid retro bonuses on L&B and JPS to
 9 maintain a lower price against Mayfair?
 10 **A.** Yes.
 11 **Q.** Which were linked brands under the first trading
 12 agreement at this time?
 13 **A.** Yes.
 14 **Q.** What it looks like, and you can tell me if you agree, is
 15 that Imperial has picked up some intelligence about
 16 what's happening on Mayfair from some of its other
 17 customers or from some sort of other, and it's passing
 18 that intelligence on to Morrisons. I'm focusing there
 19 on the first sentence:
 20 "I understand that Mayfair brands are moving up from
 21 Monday, 2 October. I believe this is a general increase
 22 in the multiple retailers."
 23 **A.** If I may just refer back into the chronological --
 24 **Q.** Please do, because I was going to go there in a minute,
 25 actually, so if you want to ...

1 **A.** Because --
 2 **Q.** There is no MPI or anything at this time, I don't think.
 3 **A.** No, but I do believe in the previous MPI Mayfair had
 4 announced that it wasn't going to move any prices,
 5 and --
 6 **THE CHAIRMAN:** Do you mean Mayfair or Gallaher?
 7 **A.** Mayfair as in -- sorry, Gallaher announced on the
 8 Mayfair brand that there was no movement. If I refer to
 9 document 3 in the Gallaher file, annex 7: {D7/3}
 10 "Dear Justin, I write to confirm the following price
 11 changes and bonuses for Mayfair. These are to be in
 12 store from Monday, 5 June until further notice and the
 13 bonuses applicable."
 14 **MR WILLIAMS:** I am not sure whether any of this is answering
 15 my question, I am afraid.
 16 **THE CHAIRMAN:** Just take it one step at a time, Mr Williams
 17 will ask you a question.
 18 **A.** Sorry.
 19 **MR WILLIAMS:** We are going to go through the various
 20 different things that are happening in this document,
 21 and if you want to make points of that sort, we will get
 22 there, don't worry. I was asking you something about
 23 the first line under "Pricing Movements" where it
 24 says --
 25 **MR HOWARD:** I wonder if I could just rise to raise a point

1 of clarification just bearing in mind I think the
 2 timetable issues. We have not actually established
 3 whether the witness contemporaneously saw this letter.
 4 Unless one establishes that, we are into really what is
 5 an argument between counsel and the witness as to what
 6 was going on. Now, it may be Mr Eastwood knows his way
 7 around the files and can provide that argument, but
 8 I just wonder what the evidential value is unless we
 9 establish first whether he had seen the letter at the
 10 time.
 11 **THE CHAIRMAN:** Well, is this challenging something that
 12 Mr Eastwood has said in his statement, either generally
 13 or about this particular document?
 14 **MR WILLIAMS:** Not about this particular document, Madam, but
 15 it goes to the question of whether the differentials
 16 were maxima and whether they were operated as maxima in
 17 practice, which is something Mr Eastwood does say in his
 18 statement. You know, we did discuss yesterday the
 19 extent of Mr Eastwood's involvement in the account, the
 20 closeness of his supervision over the buyers, and his
 21 familiarity with the documents. He comments in his
 22 witness statement on annex 1 to Morrison's notice of
 23 appeal and says "I agree with everything that's said in
 24 it".
 25 So we do find ourselves once again in a slightly

1 invidious position where if we don't put the documents
 2 to the witness we will be criticised. If we do put the
 3 documents it's obviously laborious, because we are
 4 asking the witness to think themselves into a position
 5 they weren't in at the time --
 6 **MR HOWARD:** My point was just a simpler one. Mr Williams
 7 can do what he likes. My point is surely one first
 8 establishes with the document whether the witness
 9 actually saw it at the time. If the answer is yes,
 10 fine, go into questions. If the answer is "actually, no
 11 I saw it when preparing for the case", then that's
 12 a different matter. At the moment we simply don't know
 13 the basis on which the discussion is taking place.
 14 **DR SCOTT:** We do know one important factor here, and it
 15 relates to whether these were maxima or were being
 16 treated as fixed and that factor is this: what we have
 17 heard is that you have two levels, you have the buyer
 18 and you have the superintending layer where targets are
 19 set for the whole department, as I understand it.
 20 **A.** Correct.
 21 **DR SCOTT:** Now, why does that matter? It matters because if
 22 Mr Addison and later Mr Giles are being judged on the
 23 margins they make in tobacco, but Mr Eastwood is being
 24 judged on the margin he makes across his department,
 25 then they have rather different perspectives on how the

1 pricing is done.
 2 **MR HOWARD:** That may be an appropriate matter, I am not
 3 rising to make submissions at this stage, I am really
 4 making a very simple point, which is -- there is a big
 5 danger in this case that somebody whose practice is not
 6 based in competition is in commercial practice, it's
 7 essential in cross-examination or in any evidence to
 8 establish actually whether what you have is evidence or
 9 not. That's all I am making, it's a very simple point.
 10 We just need to understand what the witness knows about
 11 this document. In relation to Dr Scott's point, if
 12 there is a more general point as to how this is all
 13 working, that's fine, but we need to be clear what is
 14 being asked and what is then being elicited.
 15 **MR WILLIAMS:** Mr Howard is quite right, but I was rather
 16 working on the basis that Mr Eastwood didn't check every
 17 letter that Mr Addison sent or received at the time, and
 18 to some extent this is necessarily a retrospective
 19 exercise.
 20 **THE CHAIRMAN:** The question is: Mr Eastwood, this letter
 21 that we are looking at, is it a letter that you would
 22 have seen at the time?
 23 **A.** No.
 24 **THE CHAIRMAN:** It's not, so it's being put to you, because
 25 as I understand it, you make comments in your witness

1 statement about whether the agreements set maximum
 2 relativities or fixed relativities; you understand that?
 3 **A.** Correct.
 4 **MR WILLIAMS:** I was actually starting with what I thought
 5 was a more straightforward point, which is about the
 6 first sentence, but the main reason for going to the
 7 document is the point you have made, Madam.
 8 **THE CHAIRMAN:** This gets us back to the question of whether,
 9 in order to challenge that part of his witness
 10 statement, it's necessary for the OFT to put every
 11 document on which they wish to rely as showing that the
 12 price schedules set fixed rather than maxima to the
 13 witness, even if the witness has never seen that
 14 document before, in order then to say "Does that cause
 15 you to change your mind about what you said in the
 16 witness statement?"
 17 Now, this is a point we raised quite early on in the
 18 case on the basis that it was going to take a long time
 19 if every document needed to be put to the witness in
 20 order for the OFT then to challenge a statement which is
 21 made very generally in these witness statements about
 22 whether these are fixed or maxima.
 23 Now, I don't know whether any discussion took place
 24 between you on that point, but it certainly would speed
 25 things up if we could agree that, when the OFT wishes to

1 submit at the end of the day that Mr Eastwood is wrong
 2 about what he says about these being maxima and they
 3 were in fact fixed, ITL or Morrisons are not going to
 4 jump up and say "Oh, well, you didn't put that letter to
 5 Mr Eastwood" --
 6 **MR HOWARD:** If I can make clear my position --
 7 **THE CHAIRMAN:** -- then that's the situation we are in.
 8 **MR HOWARD:** -- it depends really what you are putting the
 9 letters to the witness for, and it really arises in
 10 a way from what Dr Scott was saying. If one is wanting
 11 to say to the witness, "Look, as a matter of practice,
 12 the way everything worked was that the maxima were
 13 treated as fixed, and here is a whole lot of instances",
 14 I am not going to argue why they are wrong about that,
 15 but they say, "Here are a whole lot of instances where
 16 it's fixed", or to take Dr Scott's point, "There is some
 17 other basis on which it must have been fixed", then you
 18 can put that to the witness.
 19 If, on the other hand, what you are doing is saying
 20 to the witness, "Look at this letter, doesn't this mean
 21 the following textually, and let's have a discussion
 22 about textually what was happening", that seems to me to
 23 be completely inappropriate and unhelpful. I certainly
 24 don't say they need to put letters which a witness
 25 hasn't seen. If they want to run an argument at the end

1 of the day, which is I think what they are saying, to
 2 say "Although the agreements say maxima, actually look
 3 at what happened, here is all the correspondence and we
 4 say this is only consistent with a fixed case", we can
 5 deal with that, but that's really just an argument on
 6 what was happening in the correspondence. I am not
 7 really sure why you are assisted in debating the point
 8 with the witness beyond perhaps challenging by saying
 9 "Look, there are a number of instances where this is
 10 what happened".
 11 **THE CHAIRMAN:** What we seem to be doing is putting each of
 12 those instances or alleged instances to the witness by
 13 showing him the particular letter, and that is what is
 14 taking such a lot of time. If we could find a way
 15 through that, then things would speed up.
 16 **MR HOWARD:** That's my point. I am trying to be helpful to
 17 say that I just cannot believe for the next two to three
 18 weeks more of this, that we need to go through every
 19 letter, particularly where you are doing it with
 20 a witness who didn't actually see it at the time.
 21 **MR SAINI:** Could I respectfully suggest that there is a way
 22 through this which is I am not going to submit at the
 23 end of this case that documents that Mr Eastwood was not
 24 a party to should have been put to him. There are
 25 a large documents to which Mr Eastwood was a party,

1 where he is not just the party named because he has the
 2 email address, but the letters are to him. To take
 3 an example, document 31 where there is a reference to
 4 prices, Mr Williams can put to Mr Eastwood this is
 5 a document he received, for his attention, was that
 6 a fixed or a maximum price. But in case Mr Williams is
 7 worried that he has to put every document, I am not
 8 going to suggest that he has to put every document to
 9 this witness.
 10 **THE CHAIRMAN:** Is that helpful, Mr Williams? If we can
 11 limit the cross-examination where you are challenging
 12 statements that are made very generally, as I accept, by
 13 witnesses and the witnesses are not, when they are asked
 14 about it, necessarily limiting what their evidence to
 15 even the time that they were involved with tobacco but
 16 are saying as far as they know it applied both before
 17 and after, not necessarily Mr Eastwood but generally, it
 18 seems now to be agreed that you need only put to the
 19 witness documents of which he clearly has knowledge at
 20 the time, because he sent them or received them, in
 21 order to challenge those statements. If, at the end of
 22 the day, you wish to rely on other elements or other
 23 incidents over the period which you say show that these
 24 were operated as fixed rather than maxima, you will not
 25 be picked up as not having put that case to the witness.

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1 Is that where we are, then, at the moment?
 2 **MR HOWARD:** I think there is a sort of nuance to it. It's
 3 not for me to teach somebody how to cross-examine, but
 4 what would have thought you would be saying to the
 5 witness is "You say this was operated on a maxima basis,
 6 what's the basis for your saying that?" That's the sort
 7 of first factual question you have to identify. In the
 8 light of that you have to decide what you have to do in
 9 cross-examination. If he says, "Actually because I was
 10 fully aware of everything that was going on, including
 11 all these letters", then you may have to go to the
 12 letters. If on the other hand, he says "Actually,
 13 I don't really know, it's just based upon those letters
 14 I was involved in", that's a different matter. One has
 15 to first have the basic premise question to the witness
 16 and then you go from there.
 17 **MR WILLIAMS:** I thought we had that exchange yesterday,
 18 Madam, that was the purpose of the opening four or five
 19 questions of my cross-examination. It obviously doesn't
 20 follow from that that Mr Eastwood has seen every letter
 21 but I was trying to get to the bottom of how far he
 22 understands how it works, and he said he understood it
 23 very well and in detail. So I do think that that's
 24 something we explored yesterday.
 25 I wasn't planning to mechanically put every document

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1 to the witness. I have chosen a selection of documents
 2 which I thought clearly illustrated the points I wanted
 3 to make and documents which Mr Eastwood was party to,
 4 and that was the approach I was going to take.

5 **THE CHAIRMAN:** Let's limit it, if we may, to documents to
 6 which he is a party on the basis of what we have
 7 discussed this morning.

8 **MR WILLIAMS:** I can certainly do that. Would that be
 9 a convenient moment to have a ten minute break and then
 10 I can look at my notes and make sure we work through the
 11 documents as efficiently as possible?

12 **THE CHAIRMAN:** Yes. We will come back at 25 to 12.
 13 (11.25 am)

14 (A short break)

15 (11.40 am)

16 **THE CHAIRMAN:** We are considering, Mr Williams, Mr Howard,
 17 Mr Saini, whether it would be helpful for the Tribunal
 18 to issue a direction or a ruling of some kind as to the
 19 scope of cross-examination that's necessary in the light
 20 of the discussion we had before the break, and we may
 21 propose some wording which we will put together over the
 22 short adjournment, to see if that would enable us to
 23 shorten the proceedings somewhat, without of course
 24 having any adverse effect on the thoroughness of the
 25 analysis of the relevant documents, if the parties would

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1 consider that helpful. I see lots of nodding going on.

2 Mr Howard, you are not nodding.

3 **MR HOWARD:** I am not necessarily disagreeing, I suppose it
 4 rather depends on the nature of the direction. What
 5 I would suggest is perhaps we need to start having
 6 perhaps some guillotines on the timetable, and that may
 7 be the way one actually focuses the mind. What is
 8 happening with the timetable is we fall behind and we
 9 are pushing more and more into a sort of concertinaed
 10 period, and either we will have to have a guillotine or
 11 we are going to have to basically extend the time of the
 12 hearing. That becomes an unavoidable consequence.

I would suggest probably, at least in relation to
 the factual evidence, we have to now basically adhere
 very strictly to the timetable unless something really
 goes wrong, and therefore people can formulate their
 cross-examination -- particularly the OFT -- in the
 light of that. I think where things have gone wrong is
 their estimates have not taken account of the
 possibility of re-examination, and that's what one needs
 to factor in.

22 **THE CHAIRMAN:** Well, it's not the re-examination that's
 23 particularly been the difficulty, it's the time that
 24 it's taken to put each small point, because the letters
 25 need an explanation as to what the letter is, then

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1 questions about the letter, then questions about what
 2 happened as a result of the letter, that's all been
 3 rather more laborious than we foresaw, and that's why it
 4 may assist if the number of items that have to be put to
 5 the witness can be reduced.
 6 But proceed for the moment, Mr Williams, thank you.
 7 **MR WILLIAMS:** Madam, I was going to start with a document
 8 that was not sent to Mr Eastwood but just to ask him
 9 a question about whether he had any involvement with it.
 10 Could you turn to tab 16, please. {D17/16}. Before
 11 we spend too much time on it, is this a document you
 12 would have seen at the time?
 13 **A.** Not at all.
 14 **Q.** Do you see in the second paragraph, there is a sentence
 15 which says:
 16 "You are probably aware that the broad marketplace
 17 has moved ... you may remember from my presentation on
 18 the Richmond repositioning and launch of Superkings that
 19 our strategy is parity with Dorchester."
 20 **A.** Yes.
 21 **Q.** Do you know anything about that presentation?
 22 **A.** I wouldn't have been at the presentation, no.
 23 **Q.** Did Mr Addison report back to you from the presentation?
 24 **A.** I couldn't recall.
 25 **Q.** So could we move to tab 26, please. {D17/26}. Do you

1 want to read that to yourself. This is a letter to you.
 2 This is in the period we discussed yesterday when you
 3 were holding the fort.
 4 **A.** Yes. (Pause). Yes.
 5 **Q.** So this letter refers to one of the schedule of costs,
 6 bonuses and margins that we saw referred to in the
 7 second trading agreement yesterday and which, under the
 8 second trading agreement -- although that wasn't in
 9 application here -- you were paid a bonus to price in
 10 accordance with.
 11 I just wanted to focus on the third point, first of
 12 all: would you agree that the prices referred to in the
 13 third point -- that is Drum 12.5 grams -- are prices
 14 which Mr Matthews or Mr Carroll had added into the
 15 schedule in order to maintain parities and differentials
 16 with Gallaher brands?
 17 **A.** Reading this paragraph, it's about increasing a bonus to
 18 maintain a parity with Amber Leaf, yes.
 19 **Q.** Yes, and I think what it says is that:
 20 "Although not discussed yesterday, I would be
 21 grateful for a parity position on 25, a shelf price of
 22 3.84."
 23 So the way this seems to have worked is there was
 24 a conversation on Tuesday, we see from the line "as
 25 Tuesday's conversation"?

1 **A.** Yes.
 2 **Q.** And quite a lot of what is in this letter reflects that
 3 conversation, so I think so had been discussed. What we
 4 see in point 3 is slightly different, and this is
 5 probably why it's in bold, that Mr Matthews has taken
 6 the liberty of making a change to the schedule which
 7 hadn't been discussed, and we can see over the page, if
 8 you look, you can see that the 3.84 is in the schedule,
 9 so he has actually made the change?
 10 **A.** So with -- what he has actually done, he has made the
 11 change in terms of reflecting the bonus. The reason,
 12 I guess -- and it is a guess -- he hasn't discussed
 13 them, by default if he gives us a 12.5 gram reduction,
 14 which we have discussed, then Morrisons have a strict
 15 pro rata basis, so if you have a 25 gram or a 50 gram,
 16 a bonus should reflect that. So we always reward the
 17 customer for buying more. So whilst he may not have
 18 been explicit in mentioning the 25 gram or 50 gram, it
 19 would be taken as read that we would automatically
 20 reflect that bonus accordingly.
 21 **Q.** I think what the third point is actually saying is "Drum
 22 to be at parity with Amber Leaf, this is a 10 per cent
 23 reduction"?
 24 **A.** Yes.
 25 **Q.** And then:

1 "Although not discussed yesterday, I would also be
 2 grateful for a parity position on 25."
 3 So he has come up with the number of 3.84 on the 25,
 4 because it's parity with Amber Leaf?
 5 **A.** It's the -- if we look to the reverse of the page, the
 6 schedule, he has also give me a bonus of £1.87, so
 7 that's what it's reflecting. So that bonus reflects
 8 what he's expecting.
 9 **Q.** Yes. The way I read this, he says, for example in
 10 relation to 12.5 grams:
 11 "This represents a 10p reduction per SKU
 12 necessitating an additional bonus per outer."
 13 So he wants to be at parity with Amber Leaf, he
 14 identifies the price he needs to price at to be at
 15 parity with Amber Leaf, he calculates the bonus he needs
 16 to pay you in order to make sure that you are happy to
 17 price at parity with Amber Leaf?
 18 **A.** Yes.
 19 **Q.** And that's all on 12.5 grams, and that's all it seems
 20 had been discussed?
 21 **A.** Correct.
 22 **Q.** But in relation to 25 grams, he didn't have the same
 23 conversation with you about 25 grams and he is applying
 24 the same logic to 25 grams?
 25 **A.** And he is correct to apply the same logic, will be a

1 pro rata basis on the cost. I wouldn't necessarily --
 2 if I had a bonus on a 25 gram that equalled £1, it would
 3 be a minimum expectation that on a 25 gram it would be
 4 £2, and therefore we wouldn't necessarily have to have
 5 a detailed conversation about doubling the number.
 6 **DR SCOTT:** But what's happening at the 50 gram is you appear
 7 to be getting a lower margin and the customer appears to
 8 be getting poorer value.
 9 **A.** Sometimes that happens across all categories that I've
 10 worked within. I would like to say that all my margins
 11 were higher as we went bigger, but sometimes that's not
 12 the case.
 13 **DR SCOTT:** I was trying to understand what you meant by
 14 "pro rata".
 15 **A.** We try as best we possibly can, where if a customer buys
 16 one -- sorry, buys twice the amount, he or she gets some
 17 reward. If he buys four times the amount, he gets some
 18 reward. It may not always work out specifically the
 19 same. Yes, in some cases, and you will see in all
 20 supermarkets now, the bigger the pack the reward has
 21 been diluted.
 22 **MR WILLIAMS:** I was really just reading what the document
 23 says, which is that Mr Matthews came up with the price
 24 of £3.84 because he wants to be at parity with
 25 Amber Leaf, and actually Dr Scott is right, you can't

1 get to the price of £3.84 by pro rating, it's quite
 2 clear that it's driven by the price of Amber Leaf rather
 3 than some pro-rated calculation, because wouldn't 196 --
 4 **A.** The point I make on pro rata is for buying two, I am not
 5 talking about pence per mil, I am talking about the
 6 number of packs, ie if you double the quantity you buy,
 7 then you should be rewarded as such. It does not
 8 necessarily always as an exact --
 9 **Q.** Do you mean you or the customer, sorry?
 10 **A.** The customer.
 11 **Q.** But they aren't rewarded here, are they, because it
 12 would be ... I beg your pardon, £3.92.
 13 **DR SCOTT:** It's when you go to the £7.94 that they are
 14 paying 12p more than they would if they bought twice
 15 the ...
 16 **A.** Yes, and sometimes that would happen, unfortunately.
 17 **MR WILLIAMS:** The simple point that I was getting at really
 18 is that Mr Matthews has come up with £3.84 because it's
 19 parity with Amber Leaf.
 20 **A.** And that could well be, I can't recall, the point I am
 21 making is that it specifically -- he's talked about
 22 12.5 gram and then realised automatically that there is
 23 a pro rata situation and he would have to offer a bonus.
 24 **Q.** What he said about this is that he had made
 25 an assumption that if he was funding the £3.84 price,

1 then you would be happy with that, you would be happy to
 2 go with that and he put it in the schedule for that
 3 reason. Do you agree with him that that's what happened
 4 there?
 5 **A.** No, I stand by that he has offered me 12.5 gram bonus
 6 and therefore by default I would be expecting a 25 gram
 7 one.
 8 **Q.** He does say "I would be grateful for a parity position
 9 on 25 gram, a shelf price of £3.84"?
 10 **A.** Correct.
 11 **Q.** So that's why he has put £3.84 in, and that's the reason
 12 why he has put £3.84 in.
 13 **A.** Yes.
 14 **Q.** Could we then turn to tab 28, please. {D17/28}. So this
 15 is a series of schedules that were sent to you. Are you
 16 familiar with this document?
 17 **A.** I am familiar with the document, yes.
 18 **Q.** I wanted to focus on the fourth period, which is covered
 19 in the last line of the block there, the fourth covers
 20 the period from 9 April 2001. If you turn to the
 21 schedules, I think we have worked out that they are in
 22 reverse order, or at least the fourth schedule is first.
 23 Because if you look at the price of Richmond Kingsize,
 24 it's £3.39, in about the middle of the page on the first
 25 schedule, you see. In the second schedule, it's £3.34.

1 So it looks as though the 5p increase is from £3.34 to
 2 £3.39. That's what this is referring to.
 3 **A.** Yes.
 4 **Q.** The start of the letter says:
 5 "With reference to yesterday's telephone
 6 conversation, please find attached two new schedules of
 7 costs, bonuses and margins."
 8 The letter is dated 6 April, and actually it's only
 9 the fourth period that is looking forward, really,
 10 because that starts on 9 April.
 11 **A.** Yes.
 12 **Q.** Would you agree that this is -- just to go back a stage.
 13 So ITL gets to the price of 3.39 by reducing the
 14 tactical bonus that it's paying you on Richmond?
 15 **A.** Yes.
 16 **Q.** And the assumption seems to be that you are going to
 17 price at 3.39. Is that something you would have
 18 discussed or agreed in the telephone conversation?
 19 **A.** I can't actually remember the telephone conversation.
 20 If I give you some background to the document, though,
 21 it was unusual to see so many schedules, 6 April I think
 22 I have been holding the fort now for about two weeks in
 23 Justin's absence, as he's moved on, and I would have
 24 called all of the tobacco manufacturers to give me
 25 an absolute up-to-date status of where we are in terms

1 of retrospective bonuses, et cetera, because, as Justin
 2 exited the business there and then, then there was lots
 3 of administration to pull together.
 4 So hence this is why I've asked for a February,
 5 March, April, and then I would have laboriously sat down
 6 and tried to work through all of the schedules to see
 7 exactly what bonuses were reflecting what, et cetera, to
 8 make sure that we had accrued all the correct monies.
 9 So I can't remember the exact conversation other than it
 10 was more about good housekeeping.
 11 **Q.** There are two different things going on, aren't there,
 12 because the first three schedules are looking backwards
 13 and the fourth schedule is looking forwards?
 14 **A.** Correct.
 15 **Q.** What I am asking you is whether you have any
 16 recollection as to whether the 5p shelf increase on
 17 Richmond in the fourth schedule, forward looking move,
 18 whether that had been agreed with you?
 19 **A.** I don't have a recollection whether it had been agreed
 20 in terms of the conversation. I can't recollect that
 21 conversation.
 22 **Q.** But we do know that ITL wanted to see the price at
 23 £3.39, that's what we get from the fourth schedule,
 24 which is the first schedule?
 25 **A.** Yes.

1 **Q.** We also know that that reinstated parity between
 2 Richmond 20s and Dorchester 20s, we know that because if
 3 we look at annex 7 and turn to document 10 -- it might
 4 be useful for the Tribunal to have annex 7 not very far
 5 away while we are dealing with Mr Eastwood -- so we
 6 could see this is a fax dated 26 March? {D7/10}.
 7 **A.** Yes.
 8 **Q.** Which is dealing with a price move on Dorchester,
 9 a price increase to £3.39. I think if you go back
 10 a tab to tab 9, we can see that it was at £3.34?
 11 **A.** Yes.
 12 **Q.** So that's a 5p --
 13 **A.** Differential.
 14 **Q.** -- increase in the price of Dorchester --
 15 **A.** Yes.
 16 **Q.** -- in document 10 there in the fax of 26 March.
 17 So just coming back to tab 28 of the ITL file, which
 18 we were looking at, would you agree that the reason why
 19 ITL is increasing the price of Richmond is to reinstate
 20 parity with Dorchester 20s?
 21 **A.** I would suggest that Gallaher have bonused the
 22 Dorchester brand, whether it be a short promotion from
 23 this snapshot is hard to tell, that they have removed
 24 the bonus and Dorchester has gone back up. And in
 25 response, Imperial bonused the Richmond brand to match

1 Dorchester, and as the promotion ended or as the bonus
 2 was removed, in this particular instance Imperial have
 3 also chosen to remove the bonus to return back to £3.39.
 4 **Q.** So they were reducing the level of the bonus essentially
 5 so that you would then move the price to £3.39 and price
 6 the brands at parity?
 7 **A.** As I'm saying, it could well have been a promotion but
 8 it's very difficult to read from that snapshot. It
 9 could have been a promotion on Dorchester to which they
 10 reacted -- sorry, which they reacted and then the bonus
 11 was removed, as I said, and then subsequently Imperial
 12 followed suit.
 13 **Q.** Yes, well, I can give you a little bit of context if
 14 that's helpful. There were bonuses being paid on
 15 Dorchester and Richmond at this point in time.
 16 What we see here is I think a removal of part of
 17 that bonus rather than the whole of it?
 18 **A.** Which was normal practice.
 19 **Q.** Yes. What I am asking you about is whether your
 20 understanding of this document would have been that ITL
 21 wanted the brands to go to parity at £3.39, so it
 22 removed the bonus which it was paying to subsidise the
 23 lower price, working on the basis that by taking that
 24 bonus away you would then move to the parity price of
 25 £3.39?

1 **A.** The word "parity" is your specific word. What I would
 2 say is, did Imperial want to remove the bonus and
 3 therefore, you know, I would reflect whatever price
 4 I wanted to go to, then the answer is clearly yes. But
 5 not necessary was it parity. I could have gone lower,
 6 I could have gone higher, and if I went higher, I fully
 7 accept that some of the bonus may have been removed.
 8 **Q.** That's not what they are aiming at, though, is it, they
 9 are aiming at £3.39, they are aiming at the parity
 10 price?
 11 **A.** In this particular schedule, £3.39 is the maximum, yes,
 12 so if I went to £3.38, as we discussed yesterday, or any
 13 other number lower, Imperial would have been very happy.
 14 **Q.** Can we move on, then, to tab 31, please. {D17/31}. You
 15 can cast your eye over the whole document if that's
 16 helpful, but I wanted to focus at the moment on
 17 a discrete part of it on the second page, which doesn't
 18 seem to be connected with anything on the first page.
 19 I was interested in point 2.
 20 **A.** Yes.
 21 **Q.** Now, I think you said a minute ago when we were looking
 22 at the last document that if Imperial -- sorry, if you
 23 put Imperial at a price which was lower than £3.39, they
 24 would be very happy?
 25 **A.** Correct.

1 Q. Looking at the second point here, ITL's talking about
 2 cigar band prices and it says:
 3 "As per the message I left some weeks ago, your
 4 current shelf prices on our cigar brands are still below
 5 those outlined in the last schedule. All brands are 6p
 6 below where they should be."
 7 So it doesn't look in this instance as though ITL is
 8 very happy to see that the prices of the cigars are
 9 lower than where they should be?
 10 A. If I may, referring back to the context in which I took
 11 the role on, I specifically asked the tobacco
 12 manufacturers to go through all the schedules with all
 13 the bonuses applicable. There was a Budget increase
 14 that was around about that time, of which I think cigars
 15 were 6p. As I have gone through, it would be -- it
 16 could well have been, and I can't remember specifically,
 17 they said "All your bonuses have now changed, as per the
 18 Budget increase", and subsequently there was
 19 a manufacturers' price increase. This was purely
 20 highlighting to me, as I read it now, "We have removed
 21 our bonus or at that point if you choose your -- you
 22 know, the Chancellor put 6p up, your margin will be, you
 23 know, substantially less than what you were enjoying
 24 previously".

25 Q. The Budget was on 8 March, I think. This is three

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1 months after the Budget?
 2 A. Clearly.
 3 Q. It's just that you said a minute ago that there was
 4 a Budget around this time. But --
 5 A. Sorry, I --
 6 Q. -- it was three months before?
 7 A. Yes, and that could well have been the case. I was
 8 managing a whole team of beers, wines and spirits, I was
 9 trying to do a tobacco buyer's job, which is a full-time
 10 job, this --
 11 THE CHAIRMAN: Are you saying then that you had erroneously
 12 not implemented a 6p Budget increase on cigars?
 13 A. It could have been absolutely a mistake in terms of, you
 14 know, having tried to implement so many hundred retails
 15 at once, this purely is, you know, an oversight, and you
 16 know, I've asked both the manufacturers to confirm
 17 schedules, and as he said some weeks previous I reminded
 18 you, this to me is just me trying to get my
 19 administration back in line to make sure I had accrued
 20 all the right bonuses, et cetera.
 21 DR SCOTT: Sorry, the 6p relates to what size of cigar
 22 packaging?
 23 A. If I refer to -- the Imperial had an MPI on the 29th in
 24 the chronological document, on 29 January 2001, and it
 25 says Classic and King Edwards Coronets, 6p for five.

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1 MR WILLIAMS: Sorry, what date was that?
 2 A. 29 January 2001.
 3 Q. Yes, and then there was a Budget after that?
 4 A. Sorry, yes, there was a Budget --
 5 Q. Then this is three months after that again.
 6 A. Yes, and then we have got various numbers, so I could
 7 well have missed, if the 6p just coincidentally ties up
 8 to the Imperial MPI, which is a couple of days after
 9 Justin leaves, therefore it could have been missed from
 10 then, I have gone into -- I have gone from
 11 manufacturers' price increase end of January and then
 12 a couple of weeks later on on 8 March -- sorry, 7 March
 13 I have a Budget, on 8 March Imperial manufacturers'
 14 price increase. In the space of five weeks I am faced
 15 with a phenomenal amount of change and retail change.
 16 It just fits, reading the document now, that 6p and that
 17 6p tie back up, and it is purely an administrative call.
 18 Q. Does it fit, though, because I think you have this
 19 schedule in front of you and I don't know if you are
 20 saying that this could be connected with something in
 21 January or February, or whether you are saying that it
 22 could be connected with something in the Budget, I think
 23 you were saying the Budget originally?
 24 A. I am clearly saying in this period and up to this period
 25 from the point that Justin left to now, that I would

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1 have been going through many administrative tasks in
 2 terms of ensuring that we were collecting all the right
 3 bonuses, et cetera, so specifically when he mentions the
 4 6p on the cigars, I can't comment exactly what he was
 5 referring to, other than we were in a period of --
 6 I would call was, you know, very tense administration.
 7 Q. You have the schedule there, haven't you, the schedule
 8 at the front of the MPI list file?
 9 A. Yes.
 10 Q. If you look at the ITL MPI on 8 March -- do you have
 11 that on page 4 of the document?
 12 A. Yeah.
 13 Q. I don't see it that any of them changed by 6p.
 14 A. No, and I refer back to what I've previously said. On
 15 29 January there was a 6p increase on cigars, of which
 16 was about the time Justin left, it could well have been
 17 lost in that particular period, because it would be
 18 some weeks before I managed to get any start into the
 19 paperwork that was left behind.
 20 Q. That's six months ago, though, isn't it?
 21 A. That's not unusual, it wouldn't be a high priority,
 22 I would have assumed at this point that Justin was up to
 23 date, and it's not six months, it's four months, we are
 24 talking at the end of 29 January. I would have assumed
 25 he was up to date, until I sat down and went through all

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1 of his paperwork bearing in mind -- may I say it was the
 2 corporate year end as well, it was at the end of
 3 January, so I would be doing the year end results for
 4 the previous year, I had also had to march one of my
 5 buyers out of the building, I was faced with a price
 6 increase on 29 January, a couple of weeks later I was
 7 faced with a Budget increase and on 8 March I was faced
 8 with more manufacturers' price increase. I believe the
 9 6p is reflected somewhere in the myriad of all these
 10 changes that there was some administration to be caught
 11 up.
 12 **Q.** I think on the logic of what you are saying, really you
 13 are saying it's a matter for you and ITL has brought
 14 this to your attention and it's up to you if you want to
 15 do something about it?
 16 **A.** I have gone to them, as you can see by the previous
 17 letter with all the schedules that they pull out, to say
 18 "Can I ensure that I am claiming all the correct
 19 bonuses, et cetera". So this is them bringing to my
 20 attention these bonuses have been removed, et cetera,
 21 and that's it from my -- for me to deal with
 22 accordingly, as and when.
 23 **Q.** Can you turn to tab 32 then. {D17/32}. There is
 24 another list of various items in this memo, and just
 25 look at the last line.

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1 It's really starting to look as though this isn't
 2 for you to deal with accordingly because they are making
 3 the same point to you again and they are assuming you
 4 have increased shelf prices of cigars, and it does look
 5 as though they are concerned about their own interests
 6 here, that's the way this reads, "I assume you have
 7 increased the shelf prices of cigars", and this isn't
 8 really looking out for you and your margin, this is
 9 looking out for their own interests?
 10 **A.** I would be very surprised if ever Imperial would be
 11 upset that their prices were cheaper than their
 12 competitors', so I go back to the point, if anything,
 13 the relationship I had with Paul Matthews was quite
 14 tense and he knew as well as I knew in a couple
 15 of weeks' time, when I got on top of it, if my margin
 16 looked lower than it should be, there would be
 17 a discussion.
 18 **Q.** When you say you would be very surprised, is that you
 19 now superimposing a view on this document with
 20 hindsight? Is that something you are saying with
 21 hindsight, rather than something you specifically recall
 22 about this exchange?
 23 **A.** I don't specifically recall this exchange. I am merely
 24 generalising that if Imperial had competitor advantage
 25 and it was done through my cost and not their cost, they

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1 would be -- generally I would have thought they would be
 2 happy.
 3 **Q.** If they were happy, they could have left it there,
 4 couldn't they? They could have left it with the
 5 document in tab 31 and not written to you again?
 6 **A.** I can't comment why he continues to mention it in
 7 another email -- another fax, sorry.
 8 **MR SUMMERS:** May I just ask: in those circumstances, might
 9 there not have come a point at which you would have
 10 written to him asking for support for the period during
 11 which your prices were below?
 12 **A.** At this particular -- very rarely does many
 13 correspondence go outwards, it's more inwards, I would
 14 be dealing with many, many hundreds of suppliers. If
 15 anything there would have been a conversation, I guess,
 16 and I don't recall this, but --
 17 **MR SUMMERS:** I asked because we have heard evidence from the
 18 manufacturers saying that this was really very much
 19 a normal reaction that people take, this is why they
 20 reminded them that their prices were not what they
 21 should be.
 22 **A.** I really can't recall this, sorry.
 23 **MR SUMMERS:** Thank you.
 24 **MR WILLIAMS:** Just so I've made it clear what I am saying,
 25 the letter at tab 31 says "as per the message I left

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1 some months ago", so there has already been a message,
 2 then you are asked in this letter at tab 31 to increase
 3 the price to where they should be, and tab 32 makes the
 4 same point again. So it looks like ITL is really
 5 insisting on an increase in the price of its brand, it's
 6 not looking out for your interests, it's looking out for
 7 its own interests. The reason it's doing that is
 8 because it wants to be at a fixed relativity to its
 9 competitors.
 10 **A.** I can't really comment why there is two quotes of the
 11 6p, other than I would like to reiterate, at the period
 12 we are looking at, there is potentially three or four
 13 increases going on and I have just marched my buyer out
 14 of the building.
 15 **Q.** Could we turn to tab 41, please. {D17/41}. I think
 16 this is unique in the sense that it's a letter to you
 17 and Paul Giles?
 18 **A.** It could well have been, because I was in a handover
 19 meeting with Paul -- to Paul.
 20 **Q.** This letter is written in the context of forthcoming
 21 MPI?
 22 **A.** Yes.
 23 **Q.** It says that -- sorry, I wanted to focus on the
 24 paragraph that says "We are also looking at holding
 25 Richmond Kingsize", do you want to read that paragraph

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1 to yourself?
 2 **A.** Yes.
 3 **Q.** Feel free to look at the letter as a whole if that's
 4 helpful.
 5 **A.** Thank you. (Pause). Yes.
 6 **Q.** So I think we saw yesterday that -- we can look at this
 7 if it's helpful -- ITL was positioning Richmond at 5p --
 8 the differential of 5p more expensive than Sterling. Do
 9 you remember that?
 10 **A.** Yes.
 11 **Q.** So working on that basis, because this paragraph is
 12 talking about holding Richmond relative to Sterling,
 13 I am working the basis that Sterling is at £3.34, £3.35,
 14 does that seem like a sensible assumption?
 15 **A.** When I read the sentence, it's talking about the MPI, so
 16 I am expecting an increase. And it says, "We are
 17 looking at holding the Richmond Kingsize and Superkings
 18 brands at those specific prices", therefore it would
 19 suggest by that first sentence to me that they are going
 20 to bonus back the manufacturers' price increase.
 21 **Q.** Yes. But if you read on, it says:
 22 "Of course, if the market price for Sterling moves
 23 up, we would wish to do the same."
 24 So it looks like they are maintaining their position
 25 relative to Sterling; do you agree?

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1 **A.** I can't comment at that point, because however with
 2 Sterling only just being about to launch in your
 3 business, I haven't actually got it in my business at
 4 that point.
 5 **Q.** Yes, well, that's a fair point.
 6 So I really wanted to focus on the words "of course
 7 if the market price for Sterling moves up, we would wish
 8 to do the same". Do you understand that as a reference
 9 to ITL's parity and differential strategy?
 10 **A.** I understand by reading that they are trying to, as you
 11 say, parity with that brand. However, to talk to me
 12 about a price move in the market on a brand that I do
 13 not have, I don't understand why that conversation would
 14 even be there.
 15 **Q.** It looks as though you are about to put Sterling into
 16 your business, and they are pricing Richmond with
 17 reference to Sterling, and, as I mentioned a few moments
 18 ago, we know that the relativity between Richmond and
 19 Sterling settled at 5p, 5p above, and so I read this as
 20 ITL choosing the point that the price of £3.39, £3.40
 21 with reference to the price of Sterling. That's what it
 22 looks like?
 23 **A.** Reading it and logically, I would see that they have
 24 seen Sterling in the market already in other competitors
 25 and they have chosen to bonus their manufacturers' price

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1 increase back down to those levels to compete with
 2 Sterling, if that's what I would suggest.
 3 **Q.** Just focusing on the words "Of course if the market
 4 price for Sterling moves up, we would wish to do the
 5 same", so that's telling you that if, once you have
 6 launched Sterling, if you haven't done it already, when
 7 the price of Sterling, when the market price of Sterling
 8 moves up, I think that's the shelf price, do you agree?
 9 **A.** Yes.
 10 **Q.** So if the shelf price of Sterling goes up, they would
 11 want to do the same, ie they would want to move the
 12 shelf price of Richmond up?
 13 **A.** Or remove the bonus to reflect that, yes.
 14 **Q.** They would probably do both, they would probably remove
 15 the bonus as part of that, but what they are actually
 16 saying is they would want the shelf price to move up
 17 commensurately with a shelf price increase in Sterling;
 18 do you agree?
 19 **A.** With regards to the market?
 20 **Q.** The shelf price, the market price.
 21 **A.** Yes. Yes.
 22 **Q.** Now, in terms of what happens next, you are not part of
 23 that series of events, but I think it would be just
 24 helpful to look at it, because it does follow on from
 25 this letter.

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1 **THE CHAIRMAN:** What does this point go to, then,
 2 Mr Williams?
 3 **MR WILLIAMS:** What it goes to is that Mr Eastwood has been
 4 told in this letter that they would want to follow
 5 Sterling up, and that's exactly what we see in the next
 6 four documents. So I wanted to then come back to this
 7 document, which is a letter to Mr Eastwood.
 8 **THE CHAIRMAN:** Perhaps you can summarise the facts that you
 9 would establish from those other documents, and see if
 10 Mr Eastwood is able to agree or disagree.
 11 **MR WILLIAMS:** What happens, Mr Eastwood, is that I've made
 12 an assumption in this document that Sterling is at
 13 £3.34, £3.35, because that's 5p below the Richmond
 14 price. We see from document 12 in annex 7 -- feel free
 15 to open it if that's going to be helpful to you -- that
 16 Sterling moves to £3.39, £3.40, which looks like a 5p
 17 price increase, working out where we seem to be in the
 18 letter at tab 41.
 19 That's followed, four days later, by ITL sending you
 20 a new schedule, which we see at tab 50, from which we
 21 can see that Richmond was moving to £3.44, £3.45, which
 22 reinstates a 5p differential above Sterling.
 23 What we see then is that, in document 14 in the
 24 Gallaher bundle, which is annex 7, {D7/14}, Gallaher
 25 doesn't put up Kingsize but it does put up Superkings

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1 2p. So you have Sterling at £3.39, £3.42.
 2 The last document in the sequence is one of these
 3 emails that's a message for Paul Giles but which arrived
 4 in your inbox, that's at tab 56, and that says:
 5 "Paul" -- do you have 56?
 6 **A.** Yes.
 7 **Q.** "Paul, with reference to our recent conversation
 8 concerning the forthcoming price moves, I too would like
 9 to move the shelf price of Richmond Superkings up 2p to
 10 £3.47."
 11 Have you any recollection of whether you saw this at
 12 the time?
 13 **A.** I definitely have no recollection.
 14 **Q.** This letter is explicit that ITL want to move the shelf
 15 price of Richmond Superkings up 2p to £3.47 because
 16 Sterling is about to move up 2p, Sterling Superkings are
 17 about to move up 2p as well; do you agree?
 18 **A.** Reading this, yes, it would say that he wants to move
 19 the price of Richmond up 2p to £3.47. I would have --
 20 without reading all the schedules, I would assume he has
 21 therefore removed bonuses, et cetera.
 22 **Q.** Would you assume that he has removed bonuses so that
 23 your margin is maintained at £3.47, so that there is no
 24 disadvantage to you in moving to £3.47?
 25 **A.** Yes.

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1 **Q.** So just going back to tab 41, would you agree with this:
 2 when Mr Matthews says "of course, if the market price
 3 for Sterling moves up, we would wish to do the same",
 4 what that reflects is that ITL's strategy was that it
 5 would make sure that Richmond was 5p above Sterling at
 6 all times, it would want the price of Richmond to move
 7 up so that it was 5p above the price of Sterling?
 8 **A.** I can't say from that particular paragraph because
 9 I don't know the facts, but Sterling could have been
 10 bonused down at that particular time and if Sterling
 11 bonus is removed and the market moves, then Richmond
 12 would move up again. But without reading all of the
 13 documents, it's very difficult to say.
 14 **Q.** When you read a letter which said: "of course, if the
 15 market price for Sterling move up, we would wish to do
 16 the same", wasn't that telling you that ITL wanted its
 17 brands to be at a particular interval to the competing
 18 Gallaher brand, at a specific interval, at a fixed
 19 interval?
 20 **A.** The only thing I would have read in this letter, and by
 21 this stage Paul has arrived, Paul Giles, so I would have
 22 naturally passed all correspondence to do with tobacco,
 23 even if they are written to myself, because I would be
 24 saying "Paul, could you read this letter, if we need to
 25 do anything, come back to me", et cetera. All I read in

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1 this letter is Richmond is looking now to compete with
 2 the Sterling brand.
 3 **Q.** When you say "compete with", it says it wants to follow
 4 it up?
 5 **A.** Compete in terms of whatever it chooses, it pegs itself
 6 against, whether it be 5p, 10p, it sees Sterling as
 7 a suitable alternative that customers may choose.
 8 **Q.** And they were pegging themselves against that?
 9 **A.** All I can say from here is, in this paragraph, that
 10 Richmond sees Sterling as a competitive brand.
 11 **Q.** What the letter doesn't say is: "of course, if Sterling
 12 moves up we would want to reduce the level of the bonus
 13 that we are paying on Richmond, we would want to reduce
 14 the investment so that we are no longer funding
 15 a particular low price". What it says is "we want to
 16 see the shelf price go up".
 17 **A.** We are talking about Sterling, we hadn't even launched
 18 the product at this stage, we wouldn't have had a debate
 19 about a competitor's brand that you don't even stock.
 20 **Q.** I am just really asking you what this told you about
 21 ITL's strategy, and I think what you have said is that
 22 it tells you that ITL wanted to peg Richmond against
 23 Sterling?
 24 **A.** To compete with Sterling, yes.
 25 **Q.** I am just going to ask you a few questions about the

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1 sequence of documents that we have just seen, the
 2 pattern that we see in the correspondence. Could you
 3 just look at paragraph 25 of your witness statement,
 4 please. On the second page, it says "both manufacturers
 5 would often write in tones". Do you have that sentence?
 6 **A.** Yes.
 7 **Q.** Do you want to just read that, the next three sentences,
 8 down to "I didn't have time or consider it necessary to
 9 respond" and so on.
 10 (Pause)
 11 **A.** Yes.
 12 **Q.** Really, what I wanted to ask you was this: you talk here
 13 about ITL issuing you with orders, but I had rather
 14 thought that what we see in the correspondence is ITL
 15 writing to you in relation to price moves that are
 16 needed or that form part of the pricing strategy that
 17 you had agreed to support and which we looked at
 18 yesterday; do you agree with that?
 19 **A.** I would just like to point out, with regards to the
 20 pricing, in every case they would have had a discussion
 21 with the buyer, the buyer would make the decision.
 22 **Q.** That was part of the point I was going to put to you.
 23 In most of the documents we have seen the letter follows
 24 on from a conversation?
 25 **A.** Correct.

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1 Q. So what it looks like is ITL has had a conversation with
 2 the buyer and then the buyer might have said "Can you
 3 put it all in writing, can you follow up in writing" and
 4 set out details of the bonus, whatever it is. The
 5 letter was an extension of the phone conversation. ITL
 6 wasn't spontaneously issuing you with orders and
 7 instructions, this was part of a dialogue with
 8 Morrisons?
 9 A. Correct.
 10 Q. I just go back to the point I asked you about: this is
 11 not ITL writing in tones which issue you with orders;
 12 I would agree some of the correspondence is a bit terse,
 13 but it's written against the background, which is that,
 14 you, Morrisons, have agreed to support their pricing
 15 strategy based on particular differentials?
 16 A. With regard to some of the tones in the letters, that's
 17 not the case, no, they were written in strong, tense and
 18 combative manners and not always what we had discussed.
 19 Q. Do you agree that the letters that we have just been
 20 looking at, the selection of letters which were sent to
 21 you at the time, ITL were sending you those letters in
 22 the context of its pricing strategy of maintaining
 23 pricing differentials?
 24 A. With regards to those particular letters, I would agree.
 25 With regards to my statement in terms of our

1 relationship, it's not specifically focusing on those
 2 three letters. This is about a relationship that has
 3 gone on for many years, and it was very tense, and, you
 4 know, that's how it was.
 5 Q. Because the observation I was going to make in relation
 6 to at least the letters we have looked at is there is no
 7 sign of you pushing back or complaining about the manner
 8 of ITL's correspondence, you say you didn't have time to
 9 deal with that, and I can understand that, but there is
 10 another explanation, which is the point we were talking
 11 about yesterday, which is that you have agreed to
 12 support the strategy and actually there is a resonance
 13 between what ITL's asking you to do and what you were
 14 going to do anyway. So it's not really right to
 15 characterise this as the issuing of instructions or
 16 orders, this is just the implementation of the agreement
 17 and it's something which you are happy to do?
 18 A. I refer back to my previous comment, this statement
 19 reflects more than a three year relationship, I am not
 20 specifically talking about just pricing in general.
 21 Q. Just focusing on the letters which we saw which show ITL
 22 asking you or telling you that you needed to increase
 23 prices to maintain parities and differentials, would you
 24 agree that those documents indicated to you and to
 25 Morrisons at the time that ITL wasn't looking to

1 maintain price ceilings, if I can put it that way, it's
 2 looking to maintain fixed specific intervals or fixed
 3 parity relationships between its brands and Gallaher's
 4 brands?
 5 A. With regards to fixed pricing, I totally disagree.
 6 There has never been a discussion about fixed pricing --
 7 Q. I am not talking about fixed pricing in the sense of --
 8 A. An absolute price.
 9 Q. -- fixing the price, I am talking about the relativity.
 10 ITL's not just saying to you, "Please make sure that we
 11 are no worse off than parity", it's saying, "We want to
 12 be at parity, can you move our price to parity"?
 13 A. Parity was the maximum. As I've said on several
 14 occasions, if I was cheaper, then I still maintain if
 15 I was investing in Morrison's margin to be cheaper, then
 16 Imperial would have been happy.
 17 Q. What we see is ITL asking you to move to the specific
 18 price which maintains the particular differential?
 19 A. Which in most of these cases means removing or adding
 20 a bonus.
 21 Q. What I am putting to you is it must have been clear to
 22 you in Morrisons, and certainly to the buyers that were
 23 dealing with all of these instructions day-to-day, that
 24 the strategy that you were agreeing to support really
 25 involved fixed differentials rather than maximum

1 differentials or price ceilings?
 2 A. No, I maintain it was maximum differentials, not fixed.
 3 Q. Would you agree that as long as Morrisons was given the
 4 right incentives by changing the level of the tactical
 5 bonus, you were very happy to maintain the specific
 6 intervals, the fixed differentials, both by way of price
 7 increase and price decrease?
 8 A. Not necessarily fixed, as I have said on several
 9 occasions, if we chose to go deeper and particularly
 10 post Budget where I may have enjoyed some additional
 11 stock profit, then that was something we would be doing.
 12 Q. Could we turn to tab 67, please. {D17/67}. I'll just
 13 ask you whether this is a document you would ever have
 14 seen. This is a draft of the trading agreement which we
 15 saw yesterday, it's an earlier draft. Is this
 16 a document you would have seen at the time?
 17 A. Not at all.
 18 Q. I wanted to move on to Gallaher, then, if I can. Do you
 19 want to look at paragraph 20 of your statement.
 20 A. Yes.
 21 Q. I just wanted to ask you: were you aware that Gallaher
 22 had a strategy of maintaining pricing differentials in
 23 the same way that ITL was -- ITL did, I should say.
 24 A. I was not formally aware, no.
 25 Q. You weren't formally aware?

1 A. As in there was nothing that I had ever received or
 2 presented to them that said "This is what we plan to
 3 do".
 4 Q. Do you mean there wasn't a document?
 5 A. Correct. I had had no document or discussions.
 6 Q. But I asked you a slightly different question, which
 7 was: were you aware that Gallaher had the strategy of
 8 maintaining pricing differentials?
 9 A. No is the answer.
 10 Q. I'll tell you that Gallaher did have a strategy of
 11 maintaining certain pricing differentials, like ITL, and
 12 under that strategy Embassy and Regal were linked to
 13 B&H, which is a pricing relationship we saw yesterday in
 14 the ITL trading agreement. Do you want to refresh your
 15 memory in relation to that?
 16 MR SAINI: Madam, I am not sure what the evidential basis is
 17 for these questions.
 18 THE CHAIRMAN: Where is this going, Mr Williams, if he says
 19 he was not aware at the time of the Gallaher pricing
 20 differentials?
 21 MR WILLIAMS: I wanted to put to him one document from the
 22 top which is dealt with in annex 1 of Morrison's notice,
 23 and I just wanted to ask him a couple of short questions
 24 about it. I am not planning to take up a lot of time.
 25 THE CHAIRMAN: Perhaps you could rephrase your question by

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1 saying that it's the OFT's case that the Regal and ...
 2 MR WILLIAMS: Sorry, I thought I was just reciting the terms
 3 of an internal Gallaher strategy document, and I wasn't
 4 talking about Morrisons, I was simply articulating it in
 5 the terms in which it appears in the Gallaher strategy
 6 document. But I can make that clearer by saying: the
 7 OFT has documents which it's obtained from Gallaher,
 8 which at least the OFT appear to say that Gallaher had
 9 a pricing strategy of maintaining pricing differentials
 10 very much like the strategy we have just been looking at
 11 in the context of the ITL documents, and under which, as
 12 I say, Regal and Embassy were linked to B&H in the same
 13 way that ITL linked those brands.
 14 For completeness, the differential between Embassy
 15 and B&H was Embassy 3p under B&H, at least at one
 16 particular point, and Regal it was minus 5. So that's
 17 the context of the question I am just about to ask you.
 18 Could you turn to document 5 in annex 7. {D7/5}.
 19 Actually, there are two documents in my 5.
 20 A. That's correct.
 21 Q. Do you want to read that to yourself?
 22 It's not a document Mr Eastwood is party to, but
 23 it's an important document in this part of the case and
 24 I wanted to ask him about it.
 25 (Pause)

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1 A. Yes.
 2 Q. So focusing on point 2 --
 3 A. Yes.
 4 Q. -- "Justin Addison to review retail pricing on Embassy
 5 and Regal", and then there is a reference to Sobranie,
 6 Pantellas and miniatures. Focusing on the first part of
 7 that, those are ITL brands?
 8 A. Correct.
 9 Q. And in much the same way as the last similar document we
 10 looked at, it does look as though the need for
 11 Justin Addison to review the pricing on Embassy and
 12 Regal is an action arising from, here, a meeting with
 13 Gallaher?
 14 A. I would like to reiterate these are minutes and
 15 aide memoires to Justin. If we look at the date, the
 16 document is dated 7 September. There was an Imperial
 17 price increase on 3 September -- sorry, apologies.
 18 There was a Gallaher increase on 8 August, and
 19 an Imperial one on 21 August. Justin could have well
 20 come back from the meeting he had had with Gallaher and,
 21 as I said, this is an aide memoire, he would have been
 22 going through all his bonus schedules for everything and
 23 he has just wrote a note to himself, he may have noticed
 24 that his margin is unduly low or whatever, and it's just
 25 a point of reference for himself to do something --

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1 Q. Sorry, but it is a point of reference to himself which,
 2 looking at this document, is something arising from the
 3 meeting he had with Gallaher?
 4 A. Correct, but he would have taken into the meeting his
 5 full margin documents that would include every brand
 6 that he stocked.
 7 Q. Yes, but the obvious way to read this is that this came
 8 up at the meeting?
 9 A. I wouldn't say it was obvious, I would like to
 10 reiterate, these are sometimes aide memoires back to
 11 themselves to do an action. As I said, in some cases
 12 they would go from 8 o'clock to 4 o'clock without any
 13 breaks, in back-to-back meetings. They would write some
 14 notes, messages back to themselves, to action on their
 15 return.
 16 Q. Really the obvious way to read this is that at the
 17 meeting Gallaher asked Mr Addison to have a look at the
 18 pricing of Embassy and Regal. That's what this document
 19 really shows?
 20 A. I can't comment, and I won't speculate on that.
 21 Q. Would you agree that the obvious, if not the only
 22 reason, why Gallaher would be asking Mr Addison to
 23 review the retail pricing on Embassy and Regal is
 24 because it's concerned about the position of Embassy and
 25 Regal relative to its own brand?

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1 A. I can't comment on what the conversation was.
 2 I maintain --
 3 Q. But I am not asking you to comment on what the
 4 conversation was, I am just asking you to comment on
 5 a dialogue between a buyer and a supplier.
 6 A. Isn't that a conversation?
 7 **THE CHAIRMAN:** What you are being asked is: do you accept
 8 that the inference to be drawn from this document is
 9 that there was a discussion between Mr Addison and the
 10 Gallaher representative about the pricing of Embassy and
 11 Regal?
 12 A. No, I don't. I refer back to, this could be a memo back
 13 to Justin, as he has gone through in the meeting, where
 14 he notes his abnormal margins, et cetera, and put it
 15 down as a note to himself to review.
 16 **MR WILLIAMS:** I understand your saying that, but I do think
 17 there is a meaningful question that I can ask
 18 Mr Eastwood on assumption, which is that if you are
 19 wrong in that assumption, and this is recording that
 20 there was some discussion at the meeting of the need for
 21 Morrisons to review the retail pricing on Embassy and
 22 Regal, that the obvious reason why Gallaher would have
 23 brought that up with you, with your buyer, is because
 24 they are concerned about the pricing of Embassy and
 25 Regal relative to their competing brand?

1 A. If I may finish, then, if that is the obvious, then
 2 Sobranie is a no brand. There would have been no
 3 discussion, so why would he mention that himself? We
 4 focused on the realignment of Embassy and Regal but
 5 clearly it says "Sobranie, Panatellas" which is a no
 6 brand, so Justin would have not sat in a meeting talking
 7 about Sobranie and realigning Sobranie with Gallaher.
 8 **THE CHAIRMAN:** It's a what brand, sorry?
 9 A. It's a very small insignificant brand.
 10 **THE CHAIRMAN:** It's not a Gallaher brand?
 11 A. So it would be no.
 12 **MR WILLIAMS:** I am not sure that you did answer my question,
 13 but I do not want to labour the point.
 14 **THE CHAIRMAN:** I think his answer was that, no, he didn't
 15 accept that that was necessarily the reason.
 16 **MR WILLIAMS:** Right.
 17 **MR SUMMERS:** Mr Eastwood, may we just be absolutely certain
 18 what the status of the minutes is? Was a copy of this
 19 document sent to the Gallaher people?
 20 A. Never, no, this was --
 21 **MR SUMMERS:** Although in fact you have noted that certain
 22 actions are required by them?
 23 A. That was a note for, so if I take here -- I am not
 24 certain. Simon Davis, in number 1, "Kiosk roll-out,
 25 full surveys forward to Simon Davis. Where it has

1 "action" there, "SD", Justin would then have had
 2 a conversation with Simon Davis to say "I have been in
 3 a meeting with Gallaher, et cetera, can you have a look
 4 at the surveys for this", so it was a purely internal
 5 document, invariably to himself.
 6 **MR SUMMERS:** Right, so "AS" is actioned, that's not a memo
 7 to AS that he should initiate?
 8 A. No, he would expect and in his next meeting, he would
 9 refer back to these just to recall "are you outstanding
 10 an action", or you know, "I need to ask you something",
 11 or whatever he wrote, it was a memoire to himself at the
 12 next meeting to ask this.
 13 **MR SUMMERS:** Who was John Spurs?
 14 A. John was the trading director, so my boss.
 15 **MR SUMMERS:** Thank you very much.
 16 **MR WILLIAMS:** Madam, we have now worked through the ITL
 17 material quite quickly, and more quickly than I had
 18 anticipated, actually, and we have now got to the
 19 Gallaher bit of the case. I had perhaps hopefully
 20 thought when we had the short adjournment I would have
 21 the opportunity at lunchtime to work out what to do
 22 about Gallaher, because we don't have documents to which
 23 Mr Eastwood is a party, and I haven't yet worked out how
 24 best to put the case to him. I don't know what the best
 25 thing to do about that is, all that occurs to me is that

1 if we rise for five minutes now it will then be 10 to 1
 2 and we will be coming back for 10 minutes. It might be
 3 that we could then finish my cross-examination before
 4 lunch. What I do not want to do is simply flounder
 5 through my notes.
 6 **THE CHAIRMAN:** Let's take a break, then, for you to
 7 reorganise yourself.
 8 **MR WILLIAMS:** If we could just take five minutes, that would
 9 be very useful, thank you.
 10 **THE CHAIRMAN:** We will come back in five minutes then.
 11 (12.43 pm)
 12 (A short break)
 13 (12.50 pm)
 14 **MR WILLIAMS:** Mr Eastwood, before the short break I asked
 15 you various questions about the ITL account.
 16 A. Yes.
 17 Q. I think where we had got to is that in relation to the
 18 documents which you weren't a party to at the time, you
 19 weren't able to say anything very much about those
 20 documents, and even in relation to the documents you did
 21 see at the time, there is a very limited amount that you
 22 can recall about what was happening at the time; is that
 23 fair?
 24 A. That's correct, yes.
 25 Q. So thinking then about the Gallaher account --

1 A. Yes.
 2 Q. -- looking at this file, there are fewer although
 3 a small number of documents in which you were involved?
 4 A. Yes.
 5 Q. Is it the case that Gallaher may have been employing
 6 a particular strategy in Morrisons stores and working
 7 with Morrisons to achieve that strategy, and you simply
 8 wouldn't have been aware of that? Is it possible that
 9 Gallaher was doing that and you wouldn't have been aware
 10 of it?
 11 A. Doing what?
 12 Q. That Gallaher was employing a particular pricing
 13 strategy in relation to pricing differentials as ITL was
 14 and you wouldn't have been aware of that?
 15 A. Correct.
 16 THE CHAIRMAN: That's a slightly different question from the
 17 first way you phrased that, which was: was there
 18 a particular strategy that they had agreed with
 19 Morrisons rather that they were operating?
 20 MR WILLIAMS: Sorry, that's the question I meant to ask,
 21 Madam, you are quite right, so I'll put the question
 22 again.
 23 Is it possible that Gallaher was employing
 24 a particular strategy in Morrisons and there was
 25 an agreement or understanding with the buyers that they

1 would co-operate in this strategy, as you co-operated
 2 with ITL's strategy, and that you, as the trading
 3 manager, wouldn't have been aware of that?
 4 A. It's not possible, in that as a buyer moves prices there
 5 was a formal sign-off, so by default I would be asking
 6 very pushing questions, why are we moving something, if
 7 there was no obvious -- I would say anything is
 8 possible, but it's very, very small chance.
 9 MR WILLIAMS: If Mr Eastwood is going to say it's not
 10 possible, then I am have to go to some documents that he
 11 was not party to at the time, Madam, unless the Tribunal
 12 is going to disregard that evidence, because ...
 13 MR SAINI: Madam, I may be able to assist on this point:
 14 there are documents in bundle 7 to which Mr Eastwood is
 15 a party, take randomly document 10.
 16 MR WILLIAMS: We have been to document 10.
 17 MR SAINI: The questions that need to be put in relation to
 18 those documents -- and again I hesitate to interrupt the
 19 cross-examination -- are questions such as when Gallaher
 20 identify a selling price for 3.39, is that a fixed or
 21 a maximum price? Now, that type of case has to be put,
 22 I accept that case does not have to be put when
 23 Mr Eastwood is not a party, but it has to be put where
 24 he has received these documents.
 25 THE CHAIRMAN: Well, let's go through the documents

1 Mr Eastwood is a party to.
 2 MR WILLIAMS: It's quite difficult to cross-examine on the
 3 basis of one document in isolation from everything else,
 4 though, Madam --
 5 THE CHAIRMAN: Yes, it is --
 6 MR SAINI: Madam, there's more than one document, with
 7 respect.
 8 THE CHAIRMAN: Yes, I can see the dilemma, that if you are
 9 saying, Mr Eastwood, that you weren't aware, but you
 10 would have been aware, that some pricing strategy was
 11 being operated as between Morrisons and Gallaher, then
 12 Mr Williams does need to show you some documents which
 13 may indicate to you that actually there was something
 14 going on of which you were unaware, but it may be that
 15 not every document needs to be put.
 16 MR WILLIAMS: No, I wasn't going to put every document,
 17 Madam.
 18 Could you turn to, in the ITL bundle, document 19,
 19 please, which I think is a letter we have not looked at
 20 yet today. The only thing I wanted to pick up from this
 21 document is at this point ITL is funding a particular
 22 price, £16.25 on the 100s. Do you see that?
 23 A. Yes.
 24 Q. Can you then turn to annex 7, please, and turn to tab 8.
 25 {D7/8}. We only have a selection of documents over time

1 here, but this is 14 November, and the Dorchester 100s
 2 are at £16.45. If you turn over the page to tab 9,
 3 {D7/9}, Dorchester 100s move to £16.25, and this is on
 4 9 February, so Gallaher are moving Dorchester 100s to
 5 parity with Richmond 100s, and we saw from tab 19 that
 6 at this time Richmond 100s were at £16.25 as well. Do
 7 you see that?
 8 A. Correct.
 9 Q. Now, if we then, in this sequence, turn to document 31
 10 in the ITL file. {D17/31}.
 11 A. Yes.
 12 Q. We see here, from this document -- you can look at it --
 13 on the first page ITL moved Richmond from £16.25 to
 14 £16.75?
 15 A. Yes.
 16 Q. And the packages there.
 17 A. Yes.
 18 Q. If you then turn to tab 11 in annex 7, {D7/11}, this is
 19 one of the documents which is copied to you at the time.
 20 A. Yeah.
 21 Q. We can see that Dorchester moves up to £16.75 as well?
 22 A. Correct.
 23 Q. So at the time, it would have been apparent to you that
 24 Gallaher was seeking to move Dorchester up to parity
 25 with Richmond at "16.75?"

1 **A.** May I point out something that's missing? This is
 2 talking about price marked packs. There was an influx
 3 of price marked packs in the industry, Imperial launched
 4 price marked packs, so if we look at document 18 -- was
 5 it document 19 that we first started on, you may
 6 remember that in my recent note, I wrote Richmond 100
 7 price marked packs. What actually happened was, and
 8 this I can recall because you will see in the evidence
 9 I used the words, I think it was a tense relationship,
 10 price marked packs caused some issue with Morrisons.
 11 **THE CHAIRMAN:** So on that, is that 100 MP, is that --
 12 **A.** PMP, price marked pack. So this is a pack that on it
 13 has £16.25.
 14 **THE CHAIRMAN:** It just says "MP".
 15 **A.** Sorry, it says "PMP". In the first sentence, "You may
 16 remember that in the recent note about Richmond 100
 17 PMP". This is document --
 18 **MR WILLIAMS:** 17/19, Madam.
 19 **THE CHAIRMAN:** I was looking at annex 7.
 20 **A.** Sorry, Madam, this is the Imperial document, 17/19.
 21 **THE CHAIRMAN:** Yes, I can see that.
 22 **A.** So what actually happened was Imperial brought out, if
 23 I recall, a £15.99 price marked pack, it was
 24 a considerable saving from a standard price, and over
 25 the period of about -- and I am guessing now -- 6 to

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1 12 months they reintroduced price marked packs going
 2 back up to their standard price. So it would be quite
 3 right that, as we refer to Gallaher, that Dorchester
 4 would -- or Gallaher would have seen that, because it
 5 was in every supermarket other than Morrisons at that
 6 point, and they too would be reflecting -- as each price
 7 marked pack flushed out, they would be following that.
 8 So Dorchester would have had to have bonused its
 9 products down considerable pounds when that first
 10 arrived.
 11 **MR WILLIAMS:** So are you talking about £16.25 or 16 --
 12 **A.** If I generalise, and I don't know the exact detail, but
 13 we could work through it, but it would be quite
 14 laborious. It would be normal for Richmond to have been
 15 about £18. At some point they brought the price -- they
 16 launched a price marked pack down to £15.99. They did
 17 a set run, as in a production run, and then the next run
 18 was £16.25, and the next run was £16 ... all the way
 19 back, I guess -- and I am guessing -- back to £18 so the
 20 customer had been rewarded with promotions.
 21 Dorchester would have -- or Gallaher would have seen
 22 that, because every supermarket would have seen these
 23 big packs, and similarly then, because they didn't have
 24 price marked packs, would have bonused the price down
 25 accordingly.

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1 So as they saw each price marked pack flushed
 2 through, yes I can see that Gallaher would adjust the
 3 bonus accordingly versus the price marked pack that was
 4 visible at that time.
 5 **THE CHAIRMAN:** Because their strategy was to match Richmond.
 6 **A.** Was to match, yes.
 7 **MR WILLIAMS:** I don't know if that's a convenient moment,
 8 I don't think we will be very long after lunch, Madam,
 9 and then we can move on.
 10 **THE CHAIRMAN:** 2 o'clock then, and let me remind you,
 11 Mr Eastwood, you mustn't speak to anybody about your
 12 evidence during the break.
 13 **A.** Thank you very much.
 14 (1.00 pm)
 15 (The short adjournment)
 16 (2.00 pm)
 17 **THE CHAIRMAN:** Good afternoon. We have circulated a draft
 18 of a proposed direction following on from the
 19 interchange we had this morning on whether we can
 20 establish some ground rules which might enable
 21 cross-examination to be shortened somewhat.
 22 I appreciate that you have only had a few moments to
 23 consider the draft.
 24 If anyone has any comments that they would like to
 25 make at this stage, we can hear those, or it might be

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1 best if we finish Mr Eastwood's cross-examination at
 2 least, if you are not going to be very much longer.
 3 That's probably the best way to proceed, rather than
 4 keep Mr Eastwood waiting. So let's proceed with that,
 5 and then we can consider the direction a little bit
 6 later.
 7 **MR WILLIAMS:** Mr Eastwood, so picking up where we were just
 8 before lunch, I think you were telling the Tribunal that
 9 Gallaher had the strategy of maintaining parity between
 10 Dorchester and Richmond.
 11 **A.** No, what I had actually said, that it was Richmond price
 12 marked pack had been produced, that was in the industry,
 13 and Dorchester it would appear had reduced their retails
 14 as we went through the document and it was removing
 15 bonuses as each new price marked pack came into the
 16 supermarkets.
 17 **Q.** When I think what you actually said in response to a
 18 question from the Chairman, the Chairman said "Their
 19 strategy was to match" and you said "Yes" --
 20 **A.** Evidently from what we just looked at and at price marked
 21 pack, yes.
 22 **Q.** But if it's evident now to you looking at those
 23 documents, then presumably it was evident to you at the
 24 time as well?
 25 **A.** Could well have been, yes, but I wasn't -- at that --

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1 that's the first time I've looked at those documents,
 2 but consecutively, yes.
 3 **Q.** Yes, but I am simply saying that's what was happening in
 4 the business at the time?
 5 **A.** Correct, yes.
 6 **Q.** And I think the inference you have drawn from what was
 7 happening is that they were matching?
 8 **A.** In that particular instance, yes.
 9 **Q.** If you could open annex 7, please, and turn to tab 10,
 10 or actually possibly tab 11, tab 11 is a better one.
 11 {D7/11}
 12 So this is a fax containing the £16.75 selling price
 13 that we were looking at before lunch?
 14 **A.** Yes.
 15 **Q.** I think one of your general comments before lunch was
 16 that these faxes didn't come out of the blue, there
 17 tended to be a conversation and so on. It seems pretty
 18 likely, doesn't it, that as part of these exchanges, it
 19 would have become apparent to -- well, it's you, it's
 20 Mr Eastwood in this case, but certainly to the buyers
 21 dealing with the account day in, day out, that Gallaher
 22 was making particular price moves for particular
 23 strategic purposes, such as -- as we saw before lunch --
 24 matching Richmond 100s down and then matching Richmond
 25 100s back up?

1 **A.** The discussion that would have been had would have been
 2 around their brand specifically, so it would be -- and
 3 I generalise here, "As you recall we gave you a bonus of
 4 X and you reduced it, we now want to remove some of the
 5 bonus", et cetera, et cetera. It wouldn't be say
 6 specifically, "We want to match that brand, that brand".
 7 The conversation was more about the Gallaher brand or
 8 whoever's brand we were discussing at that point.
 9 **Q.** Wouldn't it, because we have seen a great many ITL
 10 documents where that's exactly the nature of the
 11 conversation you were having with them, ie they were
 12 saying "We want to go to this price to match Gallaher"?
 13 **A.** I can only tell you specifically about it here, and
 14 I don't recall the conversation, and I generalise again,
 15 it would have been: we want to discuss about the bonus
 16 and therefore we would be discussing about Dorchester
 17 specifically.
 18 **Q.** If we look at the way the fax works, it says:
 19 "Please find attached price changes and retro
 20 bonuses from a particular date."
 21 When we turn over, the date is July 16 until further
 22 notice. Then what it says is:
 23 "The selling price [and we were focusing on £16.75
 24 at the moment] is £16.75", and it sets out the bonus
 25 associated with that.

1 So that is telling you what Gallaher thinks the
 2 selling price should be and the bonus it's willing to
 3 pay at that selling price?
 4 **A.** The 16th of the 7th is the date that I would expect the
 5 bonuses to be changed accordingly, not the sale price
 6 from that date.
 7 **Q.** I was saying 16.75.
 8 **A.** Sorry, I thought you said --
 9 **Q.** All of these prices are selling prices is really what it
 10 says?
 11 **A.** Absolutely correct, the selling price, yes.
 12 **Q.** They are not maximum prices, it's envisaged these are
 13 the selling prices?
 14 **A.** It's envisaged those are the proposed selling prices
 15 with the bonus reflecting that.
 16 **Q.** Exactly, so essentially as we have seen in the ITL
 17 documents there is a package which consists of
 18 a particular bonus which corresponds to a particular
 19 selling price, and the bonus is paid on the basis that
 20 you are going to that selling price?
 21 **A.** In this particular instance we would have gone from
 22 £16.25 to £16.75, therefore 50 pence of that would have
 23 been removed, and there was an expectation I reflect
 24 that to the new price of £16.75.
 25 **Q.** And ITL expected you to go to £16.75 -- sorry, Gallaher,

1 I beg your pardon.
 2 **A.** Yes.
 3 **Q.** If you turn back to tab 10, {D7/10}, it's the same sort
 4 of document, it works in the same way, doesn't it?
 5 **A.** Very similar, it would be a removal of a bonus.
 6 **Q.** So what Gallaher are saying here is:
 7 "As we have discussed [this is with you again] the
 8 prices are moving to particular selling prices."
 9 And you seem to have agreed or discussed a move to
 10 a particular selling price on the basis at which
 11 a particular level of bonus will be paid?
 12 **A.** We have certainly discussed the removal of a bonus which
 13 would reflect in the £3.39, that's correct, yes.
 14 **Q.** They go hand in hand?
 15 **A.** It would be in the same conversation, removal of bonus,
 16 and by sheer coincidence, but with removing the bonus
 17 would reflect the difference back upwards form our
 18 current selling price.
 19 **Q.** To £3.39 in this instance?
 20 **A.** Yes.
 21 **Q.** So what these sorts of documents show us is that, around
 22 the times of these sorts of communications, there is
 23 an understanding between you and the manufacturer that
 24 you are going to price at the prices we see in these
 25 documents?

1 **A.** I think that's too generic. I think there was
 2 an understanding that we reflect the bonus move and it
 3 would come to that price. Would we sit there
 4 specifically saying "And therefore it will be 3.39"?
 5 The answer would be no, but there would be a generalised
 6 understanding "if I remove 5p, you will add 5p back on".
 7 **DR SCOTT:** One of the things that we see from the schedules
 8 is that the margins get mentioned, and both
 9 manufacturers seem concerned in the way that they bonus
 10 to maintain your margins.
 11 **A.** It's a requirement, a trading requirement that with all
 12 categories, not just tobacco, invariably we would ask
 13 that our margin would be maintained on any promotion.
 14 **DR SCOTT:** So the concomitant of that, therefore, is that
 15 you do actually expect the prices to move like that
 16 with --
 17 **A.** Correct.
 18 **DR SCOTT:** Thank you.
 19 **MR WILLIAMS:** So moving back to tab 11, when you have
 20 a price communication like this, it works really in
 21 a very similar way to the way that we saw the ITL
 22 relationship working this morning, except that we don't
 23 know that this happened against the background of
 24 a trading agreement. What we can see is that Gallaher
 25 has a strategy of maintaining parity between, in this

1 case, Dorchester and Richmond. It seems almost
 2 impossible to believe that in the context of the
 3 discussions between Morrisons and Gallaher at the time,
 4 Gallaher won't have conveyed that that was its strategy.
 5 We can see that there is an understanding between you
 6 and Gallaher that you are going to price at the price
 7 point that will fulfil that strategy?
 8 **A.** I think I need to be extremely clear. I've not had
 9 a discussion about a strategy, even with this document
 10 in front of me, with Gallaher or Imperial together that
 11 would suggest that that was the case. This is merely
 12 a discussion about Dorchester is at X price, we want to
 13 move or increase our bonus, and accordingly I have
 14 therefore agreed that I will move the retails
 15 accordingly to the bonus. Could have been more, could
 16 have been less, but in essence it was always about
 17 Dorchester, not the relationship to any other brand.
 18 **Q.** Can we take that in stages, though, because we have
 19 already seen in relation to ITL that that wasn't ITL's
 20 view of the world, that it didn't just look at the
 21 pricing of its own brands without reference to the price
 22 of a linked Gallaher brand, that was the whole basis of
 23 its pricing strategy; do you agree?
 24 **A.** Correct.
 25 **Q.** When you talked to ITL about what ITL was doing with its

1 pricing and what it wanted you to do with your pricing,
 2 that strategy loomed large, it was part of what ITL was
 3 trying to get across to you?
 4 **A.** It was known, yes.
 5 **Q.** I think you said a few moments ago that, just based on
 6 seeing a few of these documents in sequence, it jumps
 7 off the page that Gallaher is pursuing a matching
 8 strategy as between Richmond and Dorchester?
 9 **A.** Correct.
 10 **Q.** That won't have been any less obvious at the time to
 11 people who were living and breathing these accounts, day
 12 in, day out, whether it was Mr Addison or Mr Giles or
 13 you?
 14 **A.** But if there was an introduction of new brands or
 15 a change in strategy, I've not seen anything that
 16 suggests we are now moving from matching this brand by
 17 5p or 4p to matching that brand. And at the time we are
 18 talking about, there were several new introductions of
 19 brands. So --
 20 **THE CHAIRMAN:** But just focusing on this 100 multipack,
 21 16.75, did you understand at the time that the reason
 22 why they were suggesting that price and reducing their
 23 bonus was because Richmond 100 multipacks had moved to
 24 that price?
 25 **A.** I don't recall the exact conversation, but I think

1 that's a fair summary of what went on, yes, ie they saw
 2 the Richmond price marked pack and therefore would want
 3 to have a discussion.
 4 **THE CHAIRMAN:** But do you remember whether that's something
 5 you understood at the time, or at the time did that
 6 16.75 not ring any bells as having any significance as
 7 regards Richmond?
 8 **A.** It would have had significance, yes.
 9 **MR WILLIAMS:** You would have understood how it fitted into
 10 Gallaher's strategy: in the same way that you were
 11 talking to ITL about what it was doing strategically,
 12 you would have had the same sorts of conversations with
 13 Gallaher?
 14 **A.** I didn't have a pricing strategy discussion with
 15 Gallaher. If you look at the period we are talking
 16 about, it's a short period. I never had that
 17 discussion, I was more interested in the administrative
 18 work, and I don't believe subsequently the buyers that
 19 worked for me had a discussion about a Gallaher pricing
 20 strategy.
 21 **Q.** Would you agree with this: for someone like Mr Giles,
 22 who was working with these accounts day in, day out,
 23 communicating with the manufacturers on a regular basis,
 24 if not day in, day out, about what they were doing with
 25 their prices, it is not a great leap of imagination to

1 think that he will have developed a pretty good
 2 understanding of what Gallaher was seeking to achieve
 3 through discussions with Gallaher and through
 4 discussions about particular price moves for particular
 5 purposes?
 6 **A.** I think it is fair to say that, if we use Mr Giles as
 7 an example, would he realise that Gallaher were
 8 sensitive on certain price moves of Imperial brands
 9 through, you know, actions have been taken, and the
 10 answer is clearly yes.
 11 Would he know the precise strategy, I stand by --
 12 I don't think he would.
 13 **Q.** I should make it clear at this point that I have already
 14 put to you that I think the document at tab 5 says
 15 something very different about the way in which these
 16 interactions were working, and that it would have been
 17 absolutely clear, for example, to Mr Addison at the time
 18 that Gallaher was interested in the pricing relativity
 19 between these brands. I am now simply asking you
 20 questions based on the sorts of documents we see at
 21 tabs 10 and 11.
 22 What I am putting to you, Mr Eastwood, is that we
 23 have a situation here where Morrisons must have
 24 appreciated, and did appreciate, that both of the
 25 manufacturers were pursuing mutually reinforcing

1 strategies, essentially the same strategies on the same
 2 brands, or at least some of the same brands.
 3 Here we are looking at documents relating to
 4 Richmond and Dorchester, but those weren't the only
 5 brands that their strategies overlapped in relation to,
 6 and that that will have been obvious certainly to the
 7 buyers, Mr Addison and Mr Giles, in dealing with the
 8 manufacturers as regularly as they did?
 9 **A.** I go back to: yes, Mr Giles would know that this was
 10 sensitive, but it's no different than any other category
 11 I can think of. Do I know Fosters lager would be
 12 sensitive to the pricing or activity of Carling lager?
 13 The answer is yes. Doesn't mean I need to know the
 14 strategy, but what's going on, I know the two are always
 15 competing, and it is fair to say, as you say, that
 16 Mr Giles would know that these brands were competing
 17 with other brands, yes.
 18 **Q.** And he would have appreciated that the manufacturers
 19 were both pursuing the same strategy; that's the other
 20 point I am putting to you?
 21 **A.** He would certainly appreciate that each one would want
 22 a competitive advantage over the other, yes, because
 23 that's how they were going to move their market share.
 24 **Q.** I am putting something a bit different to you, which is
 25 that we know exactly what ITL's strategy was because we

1 have seen the trading agreement, we have seen all the
 2 documents around that and I am putting to you that
 3 Mr Giles and Mr Addison before him would have understood
 4 that Gallaher was pursuing the same strategy in
 5 Morrisons stores and that the relationship between him
 6 and Gallaher crystallised into co-operation in that
 7 strategy?
 8 **A.** I disagree. The Imperial strategy is clear, and we have
 9 discussed it at great length. The Gallaher one is by
 10 association of, I would say, more sensitivity. Do
 11 I believe that Paul or Mr Giles or Mr Addison knew
 12 specifically it was 2p, 3p, 5p, versus this brand or --
 13 no, I don't, but do I believe that he knew that Embassy
 14 and Benson & Hedges were sensitive to each other,
 15 et cetera, or Dorchester and Richmond in this case, then
 16 the answer is clearly yes.
 17 **Q.** Which tab do you have open, is it 10 or 11?
 18 **A.** 10.
 19 **Q.** So we looked at tab 10 earlier on, because this was
 20 a Dorchester move to £3.39, which we saw, followed by
 21 a Richmond move to £3.39, we saw that in document 28 of
 22 annex 17. We don't need to go back to it now. What
 23 I am putting to you is that it would have been obvious
 24 to the manufacturers, to Gallaher and to ITL, that when
 25 one of them put their prices up -- here Gallaher putting

1 its price up to £3.39 -- it would have become obvious to
 2 you through experience that Morrisons was co-operating
 3 with their respective strategies so that when one brand
 4 went up, the linked brand went up to the same price. It
 5 would have become obvious to them over time that
 6 Morrisons was co-operating with both manufacturer in
 7 those strategies?
 8 **A.** Are you saying there is a link without the bonus being
 9 discussed, are you saying that there was an automatic
 10 move, because categorically I am stating there isn't.
 11 The discussion was: we have given you a bonus of Xp,
 12 would you reflect it? We reflected it. We have removed
 13 the bonus of Xp, we have reflected it. Is there an
 14 automatic link, and I think that was the wording that
 15 was used? The answer is clearly not.
 16 **Q.** I don't think I used the words "automatic link",
 17 I didn't mean to suggest that. I think what I am saying
 18 is that even in circumstances where we don't have
 19 a trading agreement in Gallaher, I am saying that custom
 20 and practice will have evolved to a point where ITL
 21 would have been able to look at what Morrisons was doing
 22 with prices of the Gallaher brand and ITL will have been
 23 confident that when it put its prices up, for example,
 24 to 16.75, if it went first, then it would expect the
 25 price of Dorchester to follow. And likewise, when

1 Gallaher put its prices up to £3.39 in this document,
 2 Gallaher would have been confident that Richmond was
 3 going to follow, which indeed it did, we saw that this
 4 morning?
 5 **A.** I can't comment on what Imperial/Gallaher thought about
 6 their assumptions in the market, I can only tell you
 7 what the facts are I was faced with. If the bonus was
 8 given, we took it; if the bonuses was removed, we
 9 reflected that. I can't comment on Gallaher or
 10 Imperial's assumption about what they thought.
 11 **Q.** You can't comment on their state of mind, but Morrisons'
 12 dealings with each of the manufacturers will have
 13 generated that confidence; that's what I am putting to
 14 you: Morrisons' willingness to move prices to particular
 15 price points on the basis of the level of bonus it was
 16 being paid at that point in time will have generated
 17 a custom and practice which each manufacturer would have
 18 been able to see in the market and which would have
 19 given it confidence that when one of them went up, you
 20 could be expected to put the linked brand up too?
 21 **A.** It would also suggest that if one continues to go up we
 22 would end up at the manufacturers' recommended price,
 23 which we never did. There was always a case of just
 24 reflecting the bonus that was passed on or removed at
 25 that point in time.

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1 **Q.** Just to be clear, as I said a few minutes ago, this is
 2 not limited to the scenario that we see in these
 3 documents relating to Richmond and Dorchester, because
 4 the minute of the meeting at tab 5 tells us that this
 5 isn't just about promotional bonuses and so on, actually
 6 Gallaher expected Morrisons to price its brands and ITL
 7 brands at particular relativities, in other words the
 8 relationship between Gallaher and Morrisons was to all
 9 intents and purposes the same as the relationship we
 10 have seen with ITL, that is a co-operation around the
 11 maintenance of P&Ds, parities and differentials, whether
 12 or not that was in the context of a trading agreement?
 13 **MR SAINI:** Can I just say that that's an extremely unclear
 14 question, if one looks at it on the transcript. It may
 15 be helpful if the questions are broken down into smaller
 16 chunks.
 17 **THE CHAIRMAN:** Let's see if Mr Eastwood is prepared to --
 18 did you understand the question, which is broadly that
 19 the --
 20 **A.** We are using -- I think that I answered this prior to
 21 lunch, in that this particular document is a minute and
 22 an aide memoire to Justin, in this particular instance,
 23 and I thought I had answered it. Does this mean that
 24 Justin had a discussion with a Gallaher representative
 25 about Embassy and Regal? The answer is no, I stand by

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1 that previous comment.
 2 **MR WILLIAMS:** Thank you very much, Mr Eastwood.
 3 **THE CHAIRMAN:** Mr Howard, you have some questions of
 4 Mr Eastwood?
 5 **MR HOWARD:** I do.
 6 I have a concern about the questions that have just
 7 been put and the lack of clarity in the Office of Fair
 8 Trading's case. I think, particularly in the light of
 9 the way questions were put, it is essential that we do
 10 get some clarity as to what the OFT believes they are
 11 asking.
 12 Amongst the last questions that Mr Williams put, he
 13 said:
 14 "You can't comment on their state of mind, but
 15 Morrisons' dealings with each of the manufacturers will
 16 have generated that confidence; that's what I am putting
 17 to you: Morrisons' willingness to move prices to
 18 particular price points on the basis of the level of
 19 bonus it was being paid at that point in time will have
 20 generated a custom and practice which each manufacturer
 21 would have been able to see in the market and which
 22 would have given it confidence that when one of them
 23 went up, you could be expected to put the linked brand
 24 up too?"
 25 The point that's totally unclear, and this is yet

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1 another retailer where it's unclear, whether the OFT is
 2 intending to put a case to a witness that when, for
 3 instance, Gallaher withdrew its bonus so that the price
 4 of its product went up as a result of the reduced bonus,
 5 whether ipso facto as a result of that Morrisons was
 6 obliged to put up the price of the Imperial product.
 7 Now, I do respectfully say we have to get some
 8 clarity as to whether that is the case that the OFT is
 9 intending to put. If they are intending to put it, it
 10 has to be put properly, fair and square.
 11 So before I start my cross-examination, I would ask
 12 you to direct Mr Williams to make clear what it is he is
 13 seeking to put.
 14 **THE CHAIRMAN:** Yes. As I understand it there is some
 15 confusion in that question that you asked, Mr Williams,
 16 as to whether we are only dealing with responses to
 17 changes in bonus by the respective manufacturers and
 18 Morrisons responding to that, or whether the question
 19 that you were putting was whether there was a custom and
 20 practice that if Gallaher's bonus was reduced, say, and
 21 the price of the Gallaher brand went up, that Morrisons
 22 would then put up the price of the Imperial product
 23 without there having been any action on the part of
 24 Imperial. Is that the clarification you are seeking,
 25 Mr Howard?

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1 **MR HOWARD:** Yes.

2 **THE CHAIRMAN:** Is that the case? Because the preceding

3 questions all seemed to relate to the manufacturers

4 altering their bonuses in response to each other and

5 Morrisons reflecting those bonus changes in their retail

6 prices, rather than Morrisons making changes in their

7 retail prices without that trigger of a bonus change?

8 **MR WILLIAMS:** Should I answer you, Madam, or should I put

9 the question to the witness?

10 **THE CHAIRMAN:** Well, I hope you can put a question to the

11 witness which makes it clear to everybody what case the

12 OFT is putting as regards the arrangement between

13 Gallaher and Morrison, at least.

14 **MR WILLIAMS:** What I am putting to you, Mr Eastwood, is that

15 there was an understanding between Gallaher and

16 Morrisons that Morrisons would support its pricing

17 strategy of maintaining parities and differentials in

18 the same way that you had an agreement to that effect

19 with ITL, and that the documents we have been looking at

20 with Richmond and Dorchester, they are the same sorts of

21 documents as we see in relation to the ITL account; that

22 is to say Gallaher providing you with pricing

23 instructions which are the implementation of that

24 understanding, that agreed strategy, but that the

25 agreement wasn't so limited, and the reason we know it's

1 not so limited is from the document at tab 5, which

2 tells us that Gallaher believed that Morrisons should be

3 pricing ITL brands and Gallaher brands with reference to

4 one another, and there is no suggestion that that's in

5 the context of a promotion, it's not limited to moving

6 bonuses around and all the rest of it, there is

7 an understanding that that's what you will do, and that

8 the --

9 **THE CHAIRMAN:** Well, that's not really clarified matters.

10 As far as I understand your evidence, Mr Eastwood,

11 you were saying that the manufacturers could expect that

12 you would, other things being equal, respond to

13 an increase or a decrease in bonuses by adjusting the

14 retail price.

15 **A.** Absolutely correct.

16 **THE CHAIRMAN:** It probably was apparent to you that the

17 manufacturers were pursuing their own strategy of -- or

18 that their moves in bonus mapped each other in relation

19 to certain brands, because they regarded those brands as

20 competing, and you were aware of that.

21 **A.** That's correct.

22 **THE CHAIRMAN:** Was there, so far as you were concerned, any

23 obligation in relation to Gallaher that you would change

24 your retail prices, otherwise than in response to

25 a change in the bonus, in order to help them fulfil

1 their strategy as far as what parities and differentials

2 they wanted to exist between different brands?

3 **A.** None whatsoever, it was always about the functionality

4 of the bonus.

5 **THE CHAIRMAN:** Is it your case, Mr Williams, that there was

6 in relation to Gallaher a custom and practice --

7 **MR HOWARD:** Or Imperial, because he hasn't put a case based

8 on Imperial either.

9 **THE CHAIRMAN:** Well, with Imperial, we have the trading

10 agreement which has been discussed. What I thought we

11 were trying to establish is how far, even in the absence

12 of a trading agreement with Gallaher, the same thing

13 happened with Gallaher as happened with ITL, whatever

14 that is.

15 **MR HOWARD:** Well, the case that the OFT has not put to this

16 witness or to any witness is that under these agreements

17 there was any requirement, here of Morrisons, that if

18 Imperial put up its price, that there was a requirement

19 to put up the price of a Gallaher product; or if

20 Imperial put down its price, that there was

21 a requirement to put down the price of a Gallaher

22 product. I make this point because that is said to be

23 the position in the decision and in Professor Shaffer's

24 report. What appears to be something that the OFT just

25 does not want to do is to articulate this with the

1 witnesses. Why, I am not entirely clear. But we do

2 insist, if that is their case, that they put it properly

3 to the witnesses or they explain why they are not going

4 to put it.

5 **THE CHAIRMAN:** Mr Williams, is it your case still that, both

6 in relation to ITL and in relation to Gallaher, there

7 was an obligation on Morrisons to reinstate a parity or

8 differential regardless -- when there had been -- when

9 one manufacturer had moved the price, regardless of

10 whether the other manufacturer moved the price?

11 **MR WILLIAMS:** The difficulty is, Madam, that if one has

12 a scenario where tactical bonuses are being paid in

13 relation to a particular brand at a particular point in

14 time, the condition of the tactical bonus being paid is

15 that prices are at a particular level. If the price of

16 a linked brand moves up because a bonus has been

17 reduced, then, as a matter of practicality, one sees

18 communications then on the other side reducing the level

19 of the bonus. But the point that we make is that all of

20 these price moves and the dealings between the

21 manufacturers and the retailers are all in furtherance

22 of the parity and differential strategy.

23 So we don't accept that it's an objection to the

24 ipso facto point, if I can put it that way, we don't

25 accept that that's an objection to our case, and it's

1 not the way it's articulated in the decision.
 2 **THE CHAIRMAN:** Nonetheless, are you now saying that it's not
 3 your case that there was that ipso facto requirement
 4 that what was happening was that the retailers were
 5 receiving offers of tactical bonuses to reinstate the
 6 P&Ds? They may have realised that was why they were
 7 receiving them; they may not, but that that was how the
 8 system was working, rather than there being an automatic
 9 obligation to increase or decrease the competitor's
 10 price once they had accepted a bonus, or once they had
 11 changed the retail price of the other brand?
 12 **MR WILLIAMS:** Madam, the case in the decision is not made on
 13 the basis of automaticity. This is a matter that was
 14 dealt with in opening and it will be dealt with in
 15 closing. I do not want to open up a grand debate about
 16 the shape of the case as a whole with Mr Eastwood
 17 sitting in the witness box. But that isn't the basis of
 18 the OFT's decision. You have seen a great many of the
 19 documents in the case in the course of
 20 cross-examination, you have seen the way in which
 21 dealings between the manufacturers and the retailers
 22 worked. It's our case that, for example in relation to
 23 ITL and Morrisons, there is a trading agreement, there
 24 is an agreement that certain differentials would be
 25 maintained --

1 **THE CHAIRMAN:** Yes.
 2 **MR WILLIAMS:** -- and that --
 3 **THE CHAIRMAN:** Is it your case that the Gallaher agreement
 4 with Morrisons or the arrangement in the absence of
 5 a written agreement was the same as it was with ITL?
 6 **MR WILLIAMS:** Yes, Madam, I am sorry that that didn't come
 7 across in the last question. The purpose of the last
 8 question was to put to Mr Eastwood that the relationship
 9 between Gallaher and Morrisons was, to all intents and
 10 purposes, the same as the relationship with ITL, except
 11 we don't see the trading agreement, but that's the way
 12 it worked.
 13 **THE CHAIRMAN:** Well, is there any other question that you
 14 would like now to put to Mr Eastwood in response to the
 15 point that Mr Howard has made, to ensure that the case
 16 that you are going to be putting at the end of the day
 17 is a case that's been put to this witness?
 18 **MR WILLIAMS:** Yes, can I just have a moment?
 19 **THE CHAIRMAN:** Yes.
 20 (Pause)
 21 **MR WILLIAMS:** Madam, that's the case we want to put to
 22 Mr Eastwood, that the relationship with Gallaher was, in
 23 practice, the same as the relationship with ITL, that
 24 there was an understanding between Gallaher and
 25 Morrisons that Morrisons would maintain parities and

1 differentials for Gallaher and that the relationship
 2 worked in the same way as the relationship with ITL,
 3 which we explored in some detail this morning, whether
 4 or not that was against the background of a trading
 5 agreement.
 6 **A.** I say there wasn't.
 7 **THE CHAIRMAN:** There wasn't. Thank you, Mr Williams.
 8 Cross-examination by MR HOWARD
 9 **MR HOWARD:** I am simply going to make this point at the
 10 moment, because I think it is important, that it is
 11 a matter of great concern that the case that is in the
 12 decision is not actually put to the witnesses, and that
 13 when the OFT are challenged about this -- and this isn't
 14 the first time -- they are not actually able to
 15 articulate what their case is. You have to remember
 16 this has given rise to a fine of some £110 million. We
 17 are in, I think, week 4, and to simply say "Oh, well, it
 18 will all become clear in due course" we say is contrary
 19 to any fair and due process. I've made that point, and
 20 I'll now cross-examine.
 21 Just on this point, Mr Eastwood, you were being
 22 asked about price moves for strategic purposes: how
 23 usual is it, in your experience as somebody heavily
 24 involved in a supermarket, that manufacturers seek to
 25 influence the supermarket selling price in order to gain

1 a competitive advantage?
 2 **A.** It is normal that, in most categories, price could be
 3 used as a competitive advantage, and whether it be
 4 long -- sorry, long-term reduction in price or long-term
 5 promotions and things like that, then that is normal
 6 practice where one brand would want advantage over the
 7 other.
 8 **Q.** How usual is it to use bonuses in order to get shelf
 9 price reductions?
 10 **A.** It is the norm.
 11 **Q.** It's the norm, so washing powder, the two, Unilever and
 12 whoever else competes, they see one product at whatever
 13 it is and they want to get either to the same price or
 14 below; how do they do that?
 15 **A.** Through a bonus. They would offer a bonus, as --
 16 regardless what the category is, and subject to the
 17 margin, et cetera, and the -- it fits with the strategy,
 18 then, you would reflect it, that's correct.
 19 **Q.** Richmond and Dorchester, I think you told us, was it
 20 clear that Richmond and Dorchester were in the same
 21 segment of the market?
 22 **A.** I think -- I can't recall. Generally then the answer
 23 would be yes. But at the time we are looking at, we
 24 seem to be creating so many subsectors all of the time,
 25 we went from a premium sector to a mid sector to a very

1 low, and then as the climate was getting tougher then
 2 even a low sector became very fragmented, but generally
 3 the answer would be yes.
 4 **Q.** If we go back a stage, at paragraph 5 of your statement,
 5 you tell us that Morrisons' commercial strategy was to
 6 maximise long-term profitability whilst targeting low
 7 prices and maintaining the highest level of product
 8 availability. Okay? You also say a little further on
 9 about tobacco in paragraph 7 that customers are highly
 10 brand loyal and price sensitive and will potentially
 11 switch to other brands in the face of price increases?
 12 **A.** Mm.
 13 **Q.** Presumably the propensity to switch depends upon the
 14 degree of brand loyalty?
 15 **A.** Correct.
 16 **Q.** Yes.
 17 **A.** And how many brands are in that category.
 18 **Q.** Yes. So we know that there are categories, and I am not
 19 doing justice to the categories -- sorry?
 20 **DR SCOTT:** I think you were talking about switching brands
 21 whereas he is talking about switching retailers.
 22 **MR HOWARD:** No.
 23 **A.** I was talking about switching brands, so depending on
 24 the brands within the category --
 25 **DR SCOTT:** Yes, but what you say in here is:

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1 "Consumers of tobacco products are highly brand
 2 loyal and price sensitive and will change their buying
 3 habits, potentially switching to other retailers in
 4 response to price increases, particularly if they are
 5 sustained."
 6 **MR HOWARD:** You are right. Let me just follow that.
 7 There are different points being made. Brand
 8 loyalty, you talked about brand loyalty and price
 9 sensitivity and switching to other retailers. If we can
 10 focus for a moment on switching brands, we know that
 11 there are segments where there is a so-called luxury end
 12 of the cigarette market and a low price and an ultra low
 13 price, and no doubt there are others to the -- those who
 14 are involved. But the propensity to switch brands,
 15 according to a change in price, obviously will depend
 16 upon brand loyalty and which end of the market you are
 17 in?
 18 **A.** Correct.
 19 **Q.** So if you are in the low price and ultra low price
 20 that's presumably the area that's more price sensitive
 21 and price differentials will cause people to switch?
 22 **A.** Absolutely.
 23 **Q.** Now, I'll come back to this question of retailer
 24 competition separately. I am just focusing on the
 25 brand. Well, perhaps we can pursue it now. Just

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1 looking at your strategy for a moment, you also tell us
 2 that you wanted -- I think it's in paragraph 6 -- to
 3 keep your retail prices for tobacco competitive with
 4 your other competitors, who I think are Asda and Tesco;
 5 is that right?
 6 **A.** And I would include at this stage Kwik Save, because
 7 there was 1,000 stores and the profile of cigarettes was
 8 very much their shopper, if I generalise.
 9 **Q.** In relation to competitors, the reason you presumably
 10 don't want potential customers to buy their cigarettes
 11 in your rival is because you don't want to lose, one,
 12 the sale of the cigarettes, but also the sale of other
 13 products and the customer's loyalty?
 14 **A.** The customer loyalty and cigarettes are hugely key when
 15 you open a new store, within a couple of months most
 16 categories settle down in their fair share of a normal
 17 supermarket. The one that takes the longest to settle
 18 down is tobacco, so they continue to habitually shop
 19 where they used to, and eventually they like the
 20 shopping environment, they switch. So there is
 21 a loyalty. But if you upset them, as we suggest here,
 22 in terms of price of tobacco, they are unhappy, then
 23 it's safe to say that you would lose the grocery shop at
 24 the same time and it could be a considerable time before
 25 you got it back.

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1 **Q.** I think what you are telling us is that part of your
 2 strategy, an important part of Morrisons' strategy, is
 3 to keep the tobacco customer in your store?
 4 **A.** Absolutely.
 5 **Q.** Providing you can do that, and providing you can obtain,
 6 therefore, the sale of the tobacco product and earn your
 7 margin -- I'll come back to the margin in a moment --
 8 does it matter to Morrisons whether the customer buying
 9 in the segment of the market in which he is interested,
 10 does it matter to you whether he buys Gallaher's product
 11 or Imperial's product?
 12 **A.** None whatsoever.
 13 **Q.** You tell us at paragraph 15 of your statement that the
 14 differences in RRP's were already reflected in Morrisons'
 15 pricing?
 16 **A.** Yes.
 17 **Q.** I just want to try and examine this in a little more
 18 detail, if I can. In your experience, were the RRP
 19 differentials reflected in the actual net wholesale
 20 prices that Morrisons paid the manufacturers for their
 21 products?
 22 **A.** Yes.
 23 **Q.** So was it the case that pricing in accordance with the
 24 RRP differentials simply meant that Morrisons' margin
 25 policy was to apply a common margin to the competing

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1 Gallaher and Imperial products so that the net effect
 2 was that the selling prices reflected the RRP
 3 differentials?
 4 **MR LASOK:** Can I just intervene at this stage? We have
 5 already had a discussion on previous occasions about
 6 leading questions being put, even in the course of
 7 cross-examination, by a party that has the same interest
 8 as the party who has presented the witness.
 9 **MR HOWARD:** I'll rephrase the question. It wasn't actually
 10 a leading question, as it happens, but I don't mind
 11 rephrasing it.
 12 You have told us that the net wholesale prices
 13 reflected the differentials. In relation to competing
 14 products of Imperial and Gallaher, where you have
 15 already told us that you are indifferent which one you
 16 sell, what was your margin policy?
 17 **A.** The margin policy was one of the whole category, not one
 18 of a specific manufacturer.
 19 **Q.** Right. So in terms of Morrisons' policy, if we are
 20 looking at the position of the two different
 21 manufacturers, how did your policy then operate insofar
 22 as one manufacturer might be concerned about whether he
 23 was going to be disadvantaged in some way, what was
 24 actually your internal position about that?
 25 **A.** We took a base cost and reflected a retail that we were

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1 happy with the output of the margin.
 2 **Q.** Right. But your commercial strategy as to how you
 3 treated the different manufacturers, was that something
 4 confidential or was that something that you would have
 5 told the manufacturers?
 6 **A.** No, clearly not, it was something that was confidential
 7 to ourselves.
 8 **Q.** Right.
 9 **DR SCOTT:** Sorry, just to be clear about that, the schedules
 10 we have seen of costs, prices and margins do show the
 11 margins that you are achieving?
 12 **A.** Based on actual selling price in the store, yes, and the
 13 current cost.
 14 **DR SCOTT:** So that ITL could see the margins that --
 15 **A.** ITL would know their own margin, but they certainly
 16 wouldn't know what Morrison's margin was, because of the
 17 mix factor. We didn't sell EPOS data, so they wouldn't
 18 know what Gallaher brands sold or Rothmans' brands, and
 19 then you also had the mix of the tobacco, as in hand
 20 rolling tobacco and pipe tobacco, which generally --
 21 **THE CHAIRMAN:** They knew the margins that you were earning
 22 on their brands, because they saw those schedules?
 23 **A.** Yes, correct, but they would have no idea of Morrison's
 24 final margin, and indeed there was all of the internal
 25 costs that were associated with the final margin that

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1 I looked at.
 2 **DR SCOTT:** Presumably the internal costs were equivalent
 3 between an ITL cigarette and a Gallaher cigarette?
 4 **A.** Correct.
 5 **DR SCOTT:** So that, given that everybody knew the RRPs,
 6 everybody knew the Q6 pricing, they knew the margins
 7 that had been made on their own brands, there seems to
 8 be quite a lot that people know.
 9 **A.** The bit they didn't know was the other monies that --
 10 **DR SCOTT:** The bonuses, yes.
 11 **A.** Yes, and they wouldn't know to the extent and clearly
 12 the bit that Morrisons took into account with Gallaher
 13 is specifically the merchandising equipment which they
 14 invested many millions of pounds. So that equation,
 15 they definitely wouldn't know.
 16 **DR SCOTT:** That's what enabled you to gain between the
 17 manufacturers, as I understand it?
 18 **A.** Yes.
 19 **DR SCOTT:** Thank you.
 20 **MR HOWARD:** You have told us already that the net wholesale
 21 price that you were paying for the Imperial products and
 22 for Gallaher products reflected the RRP differentials,
 23 but can we just then consider how that operates for
 24 a moment, and pick up a point that Dr Scott made: we
 25 know that there is a list price; correct --

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1 **A.** Correct.
 2 **Q.** -- for cigarettes? We also know that, against the off
 3 the list price, people like Morrisons can get a bulk
 4 drop discount, which is basically just a discount for
 5 buying a lot; correct?
 6 **A.** Correct.
 7 **Q.** That's common knowledge what that is, because it's in
 8 the price list --
 9 **A.** It's on the schedule.
 10 **Q.** Right. The third element is that there is a bonus
 11 element that effectively is a further discount which is
 12 a discrete discount which each supermarket or whoever it
 13 is tries to negotiate?
 14 **A.** Yeah.
 15 **Q.** What I want to consider is that position. Let's assume
 16 we are looking at Richmond and Dorchester, where
 17 Imperial is aiming to achieve at least parity in selling
 18 prices. Let's assume -- and the RRP differential is the
 19 same for them, which I think was the case -- that as
 20 a result of your negotiations with Gallaher you manage
 21 to negotiate a situation where the net wholesale price
 22 of the Gallaher product, Dorchester, is let's say 5p per
 23 pack less than the net wholesale price of the Imperial
 24 product, Richmond. Let's assume that.
 25 Now, how, in that instance, where you have the price

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1 of one down and you have told us that you applied
 2 a common margin across the board, how in that instance
 3 would you regard your freedom to price and how would you
 4 price the two products?
 5 **A.** If you are saying there was a 5p differential between
 6 the two products --
 7 **Q.** Yes.
 8 **A.** -- firstly we would look at the competition, as in
 9 Asda, Tesco, Kwik Save, to see where they -- if -- we
 10 will assume at this point that the brands are already
 11 there, and then it would be a simple calculation based
 12 on the cost of our margin requirement, and then we would
 13 reflect that as a retail, trying -- in some cases we
 14 would want to be more competitive than Asda and Tesco,
 15 or in some others it would be parity. So it was really
 16 just a cost base exercise.
 17 **Q.** So to what extent was your decision to price in
 18 accordance with the RRP differentials dependent on
 19 whether the difference in net wholesale price, after
 20 taking account of any discounts or bonuses, reflected
 21 the RRP differentials?
 22 **A.** Could you just --
 23 **Q.** Yes. Sorry, could I explain?
 24 **A.** Literally --
 25 **THE CHAIRMAN:** I think what he is asking is: you say that

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1 you priced in accordance with the RRP --
 2 **A.** Differential.
 3 **THE CHAIRMAN:** -- differentials. Was that because that was
 4 the factor that you took into account when deciding what
 5 price to arrive at, or was that because generally the
 6 cost to you of the product reflected those RRP
 7 differentials?
 8 **A.** It was the latter, it's the cost.
 9 **MR HOWARD:** If we take the case of a tactical bonus, the
 10 tactical bonus one can see -- and again there is no
 11 magic in it so I can just say what it is -- is
 12 effectively reducing your net wholesale price, isn't it?
 13 **A.** Yes.
 14 **Q.** So in that instance, where there is a tactical bonus --
 15 we can see, we can turn up the documents, but we know,
 16 for instance, that sometimes Gallaher would provide
 17 a bonus and you would reduce the price of the Gallaher
 18 brand?
 19 **A.** Absolutely.
 20 **Q.** Right. Now, so we can see how you operated in that
 21 situation, where there is a tactical bonus. My question
 22 was just looking at it as, as it were -- well, I suppose
 23 the way to approach it is this: is there any magic in
 24 the label "tactical bonus" as opposed to simply bonus
 25 that reduces the net wholesale price?

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1 **A.** It was net cost; it was just a pure net cost.
 2 **Q.** So insofar as Gallaher gets its net cost below the net
 3 cost of the Imperial product, where Imperial had been
 4 seeking to have parity or better, if Gallaher's product
 5 is actually cheaper for you, what's the effect on your
 6 pricing decision?
 7 **A.** Assuming -- well, the margin was a set margin, then the
 8 Gallaher brand would be cheaper than the competing
 9 brand.
 10 **Q.** So in that event, where you then price the Gallaher
 11 brand below the Imperial brand, if Imperial wants to
 12 gets its brand down to the same level or lower, what
 13 does Imperial have to do?
 14 **A.** Fund the movement via an additional bonus on net cost.
 15 **Q.** To what extent is what we are talking about any
 16 different in relation to tobacco than it is in relation
 17 to baked beans, tomato soup or washing up liquid?
 18 **A.** There's none whatsoever, it is the same principle
 19 applied.
 20 **Q.** Thank you. If we can just look at a couple of other
 21 points. Could you, just so we can get this clear, look
 22 at the agreements, please. You will need file 17. You
 23 were asked a lot of questions over the course of your
 24 evidence about how the agreement operated. Can we look
 25 at tab 4 and tab 85. Perhaps go to tab 85 first.

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1 {D17/85}.
 2 We see on the third page of the trading agreement
 3 the differentials expressed in terms of things being no
 4 more expensive than and at least so much less expensive
 5 than. You see that?
 6 **A.** Yes.
 7 **Q.** Or sometimes no more expensive than.
 8 Can you tell us: is there any reason, as far as you
 9 are concerned, why we should not understand the
 10 agreement in the way that it's actually written there?
 11 **A.** Not at all.
 12 **Q.** Did you in any way, as far as you were aware, change
 13 this agreement?
 14 **A.** No, not at all.
 15 **Q.** If you would go back to tab 4, {D17/4}, at tab 4 you can
 16 see that in a couple of cases, the way the language was
 17 expressed here, if you take Superkings, it's expressed
 18 as "level with on equals", and that same language
 19 I think appears a couple of times. Can you tell us
 20 what, in terms of ITL's strategy did you understand that
 21 they were seeking to achieve?
 22 **A.** I think grammatically it's poor, but it was the same as
 23 or less for ourselves.
 24 **Q.** Right, okay. I just want to then consider how the
 25 opportunity to respond clauses operated. If you look at

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1 tab 4 on the second page, we can see what's been called
 2 the opportunity to respond clause:
 3 "William Morrison to confirm instore promotional
 4 activities which may affect the pricing strategy. ITL
 5 agree to maintain the bonus levels, should we elect not
 6 to respond to other manufacturers' pricing initiatives."
 7 Just clarify this for me: so Gallaher, let's say,
 8 decides to have a promotion of minus 5p or 5p off,
 9 I suppose one should say, a pack of Mayfair. Right?
 10 **A.** Yes.
 11 **Q.** Firstly, as far as you were concerned, were you, on
 12 behalf of Morrisons, entitled to participate in that
 13 promotion?
 14 **A.** Absolutely. It was a Gallaher/Morrisons conversation.
 15 **Q.** Yes. So would you participate in that without reference
 16 to Imperial, or did you think it was subject to
 17 Imperial's agreement?
 18 **A.** One hundred per cent just participate.
 19 **Q.** Insofar as we see this says that you are to confirm
 20 instore promotional activities, was that something that
 21 you regarded as your being required to do prior to your
 22 actually taking 5p off, or after or when?
 23 **A.** This was as it hit the store invariably there was
 24 a discussion to say, you know, as I previously
 25 mentioned, you may have seen, because we know, or if you

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1 haven't, it's there and it's a 5p promotion.
 2 **Q.** If we contrast tab 85, we don't, I think, find in that,
 3 in the relevant opportunity to respond clause, any
 4 obligation expressed for you to confirm the instore
 5 promotional activities?
 6 **A.** No.
 7 **Q.** Insofar as Gallaher had a promotion, how in practice did
 8 Imperial find out about it?
 9 **A.** Either from going to the stores themselves on the
 10 Monday, if it broke on the Monday, or once it was
 11 instore, we would then have had that discussion.
 12 **Q.** If we go back to tab 4 for a moment, I think, just so
 13 I understand, you have told Mr Williams that -- let's
 14 take it in stages. These trading agreements, were they
 15 looked at by lawyers in Morrisons?
 16 **A.** Absolutely not.
 17 **Q.** So we can see the language that's used, and slightly
 18 different language used in the two agreements, but
 19 I think you told Mr Williams, he suggested to you that
 20 these two agreements, as far as you were concerned,
 21 basically operated in the same way, you didn't see any
 22 great differential; is that right?
 23 **A.** Correct.
 24 **Q.** Okay. Now, what we also see is that ITL, in the first
 25 agreement, was saying they agree to maintain bonuses

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1 levels "should we elect not to respond to other
 2 manufacturers' pricing initiatives".
 3 So if we go back to my example, Gallaher have a 5p
 4 off a pack of Mayfair, you have told us that you were
 5 entitled to participate, so you could reduce the price
 6 of Gallaher. As far as you were concerned, was Imperial
 7 under any obligation to do anything in response?
 8 **A.** No. If it chose not to respond then it chose not to
 9 respond and that was it.
 10 **Q.** The price of Mayfair has gone from £3.60 down to £3.55,
 11 because Gallaher have paid for that. Imperial chooses
 12 to do nothing because it doesn't want to pay, and its
 13 cigarettes are at £3.60, its Richmond brand. What did
 14 you understand you were required to do in relation to
 15 Imperial's £3.60?
 16 **A.** Nothing. They had chosen not to elect to fund
 17 additional bonus to compete with the Gallaher brand.
 18 **Q.** Can we consider a different situation, it's very
 19 similar. Are you aware whether Imperial sometimes took
 20 price initiatives whereby it sought to reduce the price
 21 of its brands to get below or to get an advantage over
 22 a Gallaher product?
 23 **A.** Clearly if you look at the period we are talking about,
 24 certainly in the late 90s, Imperial's market share was
 25 considerably less than that of Gallaher, so in the

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1 period we are talking about, yes, there were many
 2 initiatives where Imperial would take the lead.
 3 **Q.** If Imperial took the initiative, let's say they said --
 4 and we know this happened -- "Right, we want to take
 5 an aggressive strategy vis-a-vis Richmond and we are
 6 going to reduce its price by 10p", and they paid you 10p
 7 per pack effectively to do it, why were they doing that?
 8 What did you understand the purpose of them paying you
 9 this money was?
 10 **A.** As I said, one, to reduce the retail, but two to
 11 actually gain market share, because at that particular
 12 point they had a poor second.
 13 **Q.** Where Imperial have done that, what did you understand
 14 Imperial required you to do with the Gallaher product?
 15 **A.** Absolutely zero, nothing.
 16 **Q.** The OFT says that in that event, although there seems to
 17 be some disclaiming, but they appear to be saying in the
 18 decision that in that event, Morrisons was required to
 19 reduce the price of the Gallaher product, that's the
 20 consequence of the trading agreement and that's what you
 21 should have understood. I would like you to comment on
 22 that, including your view as to the commercial sense of
 23 that.
 24 **A.** Categorically not, that was not the case, and why would
 25 I then want to fund something down if Gallaher then

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1 chose not to come down, why would I fund it down?
 2 **THE CHAIRMAN:** But your evidence is that sometimes Morrisons
 3 did fund price reductions.
 4 **A.** But that was more tactical based on my own decision.
 5 This could be one --
 6 **THE CHAIRMAN:** But if you had decided, without any prompting
 7 from Gallaher, to reduce the price of Dorchester, for
 8 whatever reason --
 9 **A.** Yes.
 10 **THE CHAIRMAN:** -- would you then regard this agreement as
 11 requiring you to extend the similar advantage to
 12 Imperial?
 13 **A.** No.
 14 **THE CHAIRMAN:** Well, what did you understand was the
 15 function of the agreement, then?
 16 **A.** The function of the agreement was it was reflecting, as
 17 we said, the differentials in terms of the list price,
 18 but it allowed Imperial to compete or the opportunity to
 19 compete with the Gallaher brands if they went down, but
 20 it also gave them the option not to should they choose
 21 not to.
 22 **THE CHAIRMAN:** But they had that without the agreement,
 23 surely?
 24 **A.** Yes.
 25 **THE CHAIRMAN:** So just again putting on one side bonuses, as

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1 far as the decisions that you, Morrisons, took
 2 regardless of bonuses moving about to alter the price of
 3 Richmond, say, by reducing it because perhaps you saw
 4 one of your retail competitors had or it was just
 5 a strategy you had, did you not think that because you
 6 had signed this agreement, you then had to treat
 7 Gallaher and ITL equally in relation to that kind of
 8 Morrisons inspired price move?
 9 **A.** Not really. The agreement was purely with Imperial and
 10 even though there was agreement then, we treated it as
 11 though it was a normal trading relationship.
 12 **MR HOWARD:** Let's just unpack that because there are two
 13 different things I think we might have got confused
 14 about. I was asking you about a situation where
 15 Imperial has chosen to promote a product, Richmond, by
 16 paying a bonus, to get the price of Richmond down.
 17 So I was asking you to comment on the commercial
 18 sense of the idea that Imperial, in that event, had
 19 a requirement that, having paid you 10p to get the price
 20 of Richmond down, Dorchester should come down to match
 21 it, can you tell what you think of the commercial sense
 22 of that?
 23 **A.** None whatsoever, because it would have no competitive
 24 advantage, so it wouldn't do it.
 25 **Q.** Now, to pick up the separate point which I think

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1 the Chairman was asking you about, which is: if we take
 2 it in stages, we have looked at the position, you have
 3 explained to us why you felt comfortable pricing in the
 4 way you did because of the reflection of the RRP
 5 differentials. You have also explained to us that
 6 Imperial didn't know about your strategy, and the way
 7 you worked. So to respond to the Chairman's question:
 8 what was the agreement achieving?, can you explain to us
 9 in that context you understood the agreement would be
 10 achieving from Imperial's point of view? What comfort
 11 was it giving them?
 12 **A.** It was giving them -- and I generalise -- the voice to
 13 come and talk and make sure that we reflected a bonus
 14 when they offered us a bonus.
 15 **Q.** At the prior stage, before bonusing, what comfort would
 16 it give them then about how you would margin the
 17 products?
 18 **A.** They had no -- they had less comfort.
 19 **Q.** Now, picking up the point the Chairman was asking you
 20 about, which is the position of competitors, your
 21 competitors, as opposed to the cigarette manufacturers
 22 slugging it out, let's take the situation where, at
 23 let's Tesco, just explain to us the extent to which
 24 Tesco (a) were one of your benchmark competitors and (b)
 25 what they were doing at the time in the market in terms

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1 of low price strategy?
 2 **A.** Tesco's were very aggressive in this particular time and
 3 have been for the last ten years, so it was a very
 4 competitive environment, and they could have well been
 5 targeting us directly with direct mail in -- with
 6 regards to promotions and mechanics, et cetera, so it
 7 was a very aggressive and competitive time, and still
 8 is.
 9 **Q.** Let's assume Tesco in this competitive environment
 10 decides, for whatever reason, in their internal
 11 strategisation to reduce the price of, let's say
 12 Dorchester by 2p. So prior to that, you have Dorchester
 13 and Richmond, let's say, at the same price because the
 14 RRP's were the same and the net price to you of the
 15 products was the same, and you have applied the same
 16 margin. But then you find, lo and behold, Dorchester in
 17 Tesco next door is 2p lower. Now, what then would you
 18 do if you found that Dorchester was 2p lower in Tesco?
 19 **A.** The first conversation we would have was with Gallaher,
 20 where we would pick up the telephone and suggest to them
 21 that they have funded this and that we are being
 22 disadvantaged and that we want a lower cost to remain
 23 competitive. As ever, there would be a denial that they
 24 haven't funded it, in some cases it was true and clearly
 25 in some cases not. At that point if we had been -- if

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1 Gallaher agreed, you know, to fund ours, then we would
 2 reflect that automatically the following week --
 3 **Q.** Just stop there. So if Gallaher agree to fund you, then
 4 presumably is that where, then, the opportunity -- you
 5 would fund it and the opportunity to respond clause --
 6 **A.** We would then take the funding and the following Monday
 7 would reflect that 2p bonus we have just received. If
 8 Gallaher chose not to, we would then have to make
 9 a commercial decision based on the bigger picture to say
 10 "Do we want to invest this, what commercial impact will
 11 it have", et cetera, and then a different route would be
 12 applied. It could well be that I had enough money in my
 13 total pot that I said "We can afford to do it and we
 14 should match", or it may well have been "I don't have
 15 and therefore we remain out of line".
 16 **Q.** To get back to the question I think the Chairman was
 17 asking. Let's assume you have money in your pot,
 18 whatever it is, and you say "We don't like the fact that
 19 Tesco are 2p below us so we want to match it", so decide
 20 to match it with the Gallaher Dorchester product.
 21 **A.** Yes.
 22 **Q.** Having done that, firstly, did you regard yourself as
 23 free to do that, and insofar as you did, did you regard
 24 yourself as under any requirement to do anything to the
 25 competing Imperial brand, here Richmond?

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1 **A.** Answering the two questions, we are absolutely free to
 2 do whatever we wanted with regards this scenario. Did
 3 I have an obligation to do anything to the Imperial
 4 brand, the answer is clearly no.
 5 **Q.** Now, in relation to the background to all of this, the
 6 agreements, to what extent would, as far as you were
 7 concerned, Imperial understand that you were
 8 benchmarking other supermarkets and needed this -- that
 9 that was an important driver for you, this ability to
 10 match what another supermarket did?
 11 **A.** I think all manufacturers across all categories clearly
 12 understood just purely demographically, geographically,
 13 who Morrisons, or Tesco et cetera, were targeting.
 14 **Q.** Thank you for that. Can we go back to just examine
 15 a couple of different scenarios. First I would like to
 16 ask you about the situation where what has happened is
 17 you have priced your products, the products of the two
 18 manufacturers, and you have applied your common margin
 19 to the competing products and so the prices are
 20 reflecting the differentials. You then find what
 21 happens is Imperial has an MPI, let's say for 5p across
 22 the board. Now, if Imperial has an MPI, firstly, were
 23 you under any requirement from Imperial where it's put
 24 up its prices to do anything?
 25 **A.** No, but we still had the option, if they would pass the

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1 cost on, the ultimate price decision was made by
 2 ourselves.
 3 **Q.** If you decided to protect your margin and put up the
 4 price of the Imperial product, as a result of the
 5 Imperial MPI, in the event that Gallaher didn't have
 6 an MPI which corresponded to the Imperial one, what
 7 requirement did you understand you were under from
 8 Imperial as to how you were to treat the Gallaher
 9 prices?
 10 **A.** None whatsoever.
 11 **Q.** What we sometimes see happened is that there were MPIs,
 12 say by Imperial, and then Imperial write to you saying
 13 "We are going to have a price hold". Now, why did you
 14 understand they would put up the price on the one hand,
 15 so 8 September they say there is a price increase and
 16 then a week later they say "we are going to hold the
 17 price", why are they holding the price sometimes?
 18 **A.** More tactical, or it could have been because of
 19 competitive scenarios, but it's more tactical.
 20 **Q.** Again, just tell us, as a man versed in the supermarket
 21 world, this sort of situation where manufacturers put up
 22 prices across the board on their products but then say
 23 "Actually I am going to hold the price of certain
 24 products", is that something that happens?
 25 **A.** It's very normal.

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1 **Q.** Very normal.
 2 Then could you tell me about this: so we looked at
 3 an MPI, I would like to consider the position where what
 4 has happened is Imperial has paid a tactical bonus in
 5 order to rules the price of its product. Firstly,
 6 without turning up all the correspondence, where
 7 Imperial says "I will pay you this bonus for a shelf
 8 price of £3.29, say, to go from say, £3.34 to £3.29",
 9 can you explain to us why you say that you regarded that
 10 as a maximum price rather than a fixed price?
 11 **A.** Because on occasions that we have seen, if we went to
 12 £3.28 or £3.27, that was extremely acceptable, and it
 13 was --
 14 **Q.** Sorry, I didn't mean to interrupt.
 15 **A.** It's more a case of "I've given you 5p and you pass the
 16 5p off as a minimum".
 17 **Q.** Yes. Where what happens is Imperial pays you this
 18 tactical bonus or bonus to get the price down, and then
 19 it decides it's had enough because it's costing it too
 20 much or whatever, it's just decided it's had enough and
 21 it says "I am withdrawing part, so the price of my
 22 product now if you want to retain your margin goes back
 23 up to £3.34", in that instance, what did you understand
 24 you were required to do vis-a-vis the Gallaher product,
 25 where Gallaher had provided their bonus to get it down

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1 to 3.29?
 2 **A.** The conversation was never to do with the Gallaher
 3 product, it was always about the Imperial product, so
 4 there was no requirement to do anything to a Gallaher
 5 product.
 6 **Q.** Assume conversely that Gallaher has an MPI, and again
 7 a similar situation where you have your prices and,
 8 let's say, Richmond had been priced at the same level as
 9 Dorchester, Gallaher puts its prices up across the
 10 board; firstly what would you expect to do there in
 11 respect of the Gallaher product where it puts up its
 12 prices?
 13 **A.** Exactly the same scenario as I would with Imperial. The
 14 cost would be passed on and it would be down to our
 15 individual decision whether we reflected that cost
 16 through the retailer.
 17 **Q.** What about the Imperial product where Gallaher puts up
 18 the prices of its --
 19 **A.** As per my previous answer, it was a Gallaher discussion,
 20 not an Imperial discussion, so there was no requirement
 21 to do anything to an Imperial brand.
 22 **Q.** In these two situations that we have been looking at,
 23 for instance, Imperial having an MPI or Gallaher having
 24 an MPI, did you ever find Imperial -- did you have any
 25 conversations or communications with Imperial, where

1 they said "because I put up my price, you, Morrisons,
 2 must put up the price of Gallaher"?
 3 **A.** Never in my career has that happened.
 4 **Q.** Equally, where Imperial put down the price of its
 5 product, did you ever have a conversation or
 6 communication with them where they said "You have put
 7 down the price of my product, you must put down the
 8 price of the Gallaher product"?
 9 **A.** Never at all.
 10 **Q.** No. Perhaps we don't need to go through it.
 11 Where Gallaher withdraws a tactical bonus and so the
 12 price of its product goes up, I presume in the likely
 13 answers you have given --
 14 **A.** It's exactly the same principle.
 15 **Q.** Okay. What the OFT says is that, as a result of your
 16 entering into the trading agreements -- when you say
 17 you, Morrisons -- with Imperial, that the effect of that
 18 was that you precluded yourselves, Morrisons, from
 19 favouring Gallaher. By that they mean that that
 20 precluded you from implementing price reductions at the
 21 instigation of Gallaher, where they reduced their
 22 wholesale price, or that you were required to put up the
 23 price of Gallaher's products notwithstanding that they
 24 hadn't put up their wholesale products. Could you
 25 comment on that?

1 **A.** It would be commercial suicide, given that Gallaher was
 2 the dominant manufacturer at that point, so if I chose
 3 not to work with Gallaher in terms of remaining
 4 competitive versus everybody else, Morrisons would have
 5 been a considerably smaller supermarket at that point.
 6 **Q.** Can I, I think, ask you about this: you have told us --
 7 switching topics -- about the relationship with
 8 Imperial. Your word was "tense", is that right?
 9 **A.** Correct.
 10 **Q.** I want to ask you about this question of the bonuses.
 11 What we see in the correspondence is a lot of
 12 correspondence about bonuses and across the different
 13 brands. To what extent was it a complicated matter
 14 ensuring that the bonuses that were paid correctly
 15 reflected both the products and the timing of promotions
 16 and things of that sort?
 17 **A.** Could you just repeat that?
 18 **Q.** Yes. How complicated was the whole accounting and
 19 administration of all these bonuses?
 20 **A.** Extremely complicated. I took the liberty last night
 21 and the days before of counting the number of
 22 manufacturers' price lists produced in this period. In
 23 this period alone that we are talking, there was 24
 24 price lists being produced, either to the manufacturers'
 25 price increase or because of the Chancellor's Budget.

1 Notwithstanding in the middle of all of this, there is
 2 then the option where both manufacturers -- and
 3 I include Rothmans as well -- then choose to either part
 4 pass the budget on or half. This became a full-time
 5 administrative job for any of the buying team.
 6 **Q.** This question of following the bonuses and checking that
 7 the right sums were being paid for the right periods in
 8 respect of the right products, to what extent was that
 9 a source of tension?
 10 **A.** There is millions of pounds in bonuses going around
 11 here, so it was a massive source, you know, we had to be
 12 extremely methodical tracking the costs and the bonuses,
 13 et cetera.
 14 **Q.** I think you were asked a question by the Tribunal
 15 earlier this afternoon about -- let me approach it from
 16 a different angle. I have asked you about whether there
 17 was tension. Were there periods where there were
 18 disputes about, or were there occasions, I should put
 19 it, where there were disputes about whether or not
 20 bonuses had been properly claimed for the right periods
 21 and right amounts?
 22 **A.** Many occasions.
 23 **Q.** Right, and how did that all get dealt with?
 24 **A.** It manifested itself in, usually I would see or the
 25 buyer would see in his margin report it would be

1 a discrepancy, so I generalise now, so if the average
 2 margin was 5 per cent and he sees one at 1 per cent,
 3 it's normally a highlight there is something going
 4 wrong. Then he would start digging to have a --
 5 collected all the right bonuses, et cetera, and then it
 6 would build into a big piece of accounting per se.
 7 **MR HOWARD:** Thank you very much indeed.
 8 **THE CHAIRMAN:** I think that's an appropriate moment to have
 9 a short break. How long do you think you are going to
 10 be?
 11 **MR SAINI:** I have only one question.
 12 **THE CHAIRMAN:** Perhaps you could ask that one question now.
 13 Re-examination by MR SAINI
 14 **MR SAINI:** Mr Eastwood, you may have annex 7 open still
 15 there, the Gallaher bundle, it's the slim one, I think.
 16 If you could please go to tab 11, which is a document
 17 Mr Williams took you to. {D7/11}. I think you gave
 18 evidence that these prices that we see under the heading
 19 "Selling Price" were the prices that resulted from the
 20 granting, taking away or privileging of a bonus. Do you
 21 recall that?
 22 **A.** Correct.
 23 **Q.** It was put to you by Mr Williams that these were the
 24 selling prices at which Gallaher wanted you to sell the
 25 product. Do you remember that?

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1 **A.** Yes.
 2 **Q.** What if you had sold below those prices, how would
 3 Gallaher have felt?
 4 **A.** Elated.
 5 **MR SAINI:** Thank you very much.
 6 Questioned by THE TRIBUNAL
 7 **DR SCOTT:** Can I take you back for a moment to the beginning
 8 of your involvement? Were you in court when Mr Good
 9 gave his evidence?
 10 **A.** I am not certain who was giving -- it was a Shell
 11 representative. I don't know if it was Mr Good.
 12 **DR SCOTT:** Don't worry. You said earlier on that, at the
 13 beginning of all this, Gallaher were the leading player?
 14 **A.** Correct.
 15 **DR SCOTT:** As we understand it from the evidence that we
 16 have heard so far, ITL were concerned that Gallaher were
 17 being advantaged by retailers charging a higher margin
 18 on ITL products than they were on Gallaher products. Do
 19 you remember that happening in the early 1990s?
 20 **A.** No, I think -- I certainly don't remember that. I think
 21 Imperial were complacent and Gallaher were more
 22 aggressive and their marketing support was considerably
 23 better, their execution was better, professionalism. So
 24 I don't recall it being an output of people favoured
 25 margin, it was more I think the customer was choosing.

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1 **DR SCOTT:** Right. It's been put to us that the ITL were
 2 seeking agreements of the sort that they made with you,
 3 in order to try to ensure that they were not
 4 disadvantaged.
 5 **A.** I really can't comment. If I look back and you look at
 6 the amount of sponsorship that Benson & Hedges and
 7 Silk Cut -- they were sponsoring many, many sports
 8 activities, I think the general awareness of Gallaher
 9 products was more forefront of mind than Imperial
 10 products.
 11 **DR SCOTT:** Thank you, that's a help.
 12 Two other small things. The first comes in tab 85,
 13 17/85. {D17/85/464}. On page 464 you will see that
 14 there is a passage after the differentials which says:
 15 "Morrison will continue supporting Imperial
 16 Tobacco's programme of price marked packs throughout the
 17 period of the agreement."
 18 Is there an understanding implicit in that?
 19 **A.** This is a reference to what I would describe as one of
 20 the most tense periods of our relationship.
 21 I personally stopped price marked packs coming into our
 22 business per se, not necessarily with Imperial, across
 23 the whole piece. Logistically it was very difficult to
 24 manage within our business, the IT system was not very
 25 sophisticated and it forced inevitably to have two

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1 packs, two lots of stock within the business. Having
 2 had several very tense conversations with Imperial,
 3 eventually we agreed that when they introduced flash
 4 packs or price marked packs we would allow them in the
 5 business.
 6 **DR SCOTT:** Was it implicit in that that they would provide
 7 a bonus which would sustain your margin?
 8 **A.** As it was a price marked pack, then it is implicit that
 9 the bonus would be there, yes.
 10 **DR SCOTT:** Thank you.
 11 One other question in relation to the other bundle,
 12 if you take 7, and it's in relation to tab 16. {D7/16}.
 13 Who would have prepared this, do you know?
 14 **A.** This would be -- it was prepared by Gallaher, but I am
 15 not certain who the national account manager would be --
 16 it would be Mark Rock, who was the national account
 17 manager, as the top left-hand corner has his name.
 18 **DR SCOTT:** Right. So it says "Prepared by Gallaher" and
 19 sent to you, so that you could understand the margin
 20 implications of what was proposed, including promotions?
 21 **A.** Correct.
 22 **DR SCOTT:** Right. I think those were the questions that
 23 I had, thank you.
 24 **THE CHAIRMAN:** Well, thank you, that's been a long haul for
 25 you, Mr Eastwood, but it's been very helpful for us, and

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1 I am sorry that it's been rather interrupted by
 2 exchanges amongst the lawyers involved, but again I can
 3 release you from the witness box now, thank you very
 4 much for your evidence.
 5 (The witness withdrew)
 6 We will come back in ten minutes' time, at which
 7 point I would like to discuss the proposed direction as
 8 regards the future witnesses, and I would also like to
 9 revisit the question as to how the OFT's case now stands
 10 in respect of paragraphs 40 and onwards of the skeleton
 11 argument vis-a-vis the involvement of bonuses in
 12 relation to the respective price moves.
 13 So I think it would be worthwhile having a short
 14 interchange on that when we return. We will come back
 15 in ten minutes' time, at quarter to 4.
 16 (3.35 pm)
 17 (A short break)
 18 (3.45 pm)
 19 Discussion re Tribunal direction
 20 **THE CHAIRMAN:** Now, as we discussed this morning,
 21 the Tribunal and the parties are concerned that we are
 22 falling behind on the timetable, and that is to some
 23 extent because cross-examination is proving much more
 24 time-consuming than was envisaged when the timetable was
 25 drawn up. This is in part due to the fact that

1 witnesses have included in their witness statements some
 2 general remarks about how issues such as how in practice
 3 the arrangements were operated, where that remark seems
 4 to apply to periods beyond the period when the witness
 5 was directly engaged in the tobacco sector. Some of the
 6 witnesses have also commented in their statements on
 7 what they see as the proper interpretation of documents
 8 on which the OFT relies, even if they were not a party
 9 to those documents and cannot have had any direct
 10 knowledge of the context of the document.
 11 The time taken to put each document to a witness is
 12 considerable, given the amount of background and context
 13 that needs to be established before a question can
 14 fairly be put.
 15 In order to shorten this process, the Tribunal has
 16 proposed making a direction which will limit
 17 cross-examination to those parts of the witness
 18 statements which concern documents of which the witness
 19 was either an author or a recipient, but still enable
 20 the party doing the cross-examination to submit at
 21 a later stage that the facts in relation to periods
 22 beyond those to which that witness can give direct
 23 evidence were a certain way or inviting the Tribunal to
 24 draw different inferences from documents from those
 25 which the witness invites the Tribunal to draw.

1 We handed round at lunchtime a proposed wording for
 2 such a direction, and we now invite any comments there
 3 are on that wording before making an appropriate
 4 direction.
 5 Mr Howard, would you like to kick off?
 6 **MR HOWARD:** I think my only comment would be this, I am
 7 perfectly content with the order, it seems to me very
 8 sensible, subject to one point which is really just
 9 a matter of clarification. Let's assume a witness has
 10 not in fact made it clear in his statement the basis on
 11 which he or she is able to speak to documents, but in
 12 fact he or she does have the knowledge. I think I would
 13 ask that we could amend it in such a way whereby the
 14 party calling the witness either produces a further
 15 statement just to make it clear on what basis they are
 16 talking about the further documents, or it's introduced
 17 in-chief, because it would just be unfortunate if in
 18 fact the position is, let's say, the witness says "I can
 19 talk about this", then in the course of the
 20 cross-examination they give an answer which indicates
 21 that, we would be just in a sort of muddle. So we need
 22 to deal with it.
 23 **THE CHAIRMAN:** I think probably introducing it in
 24 examination-in-chief is a little too late to give the
 25 cross-examiner adequate notice.

1 **MR HOWARD:** I agree.
 2 **THE CHAIRMAN:** On the other hand it doesn't seem to me that
 3 the whole process of producing an additional statement
 4 is necessary, but we could amend this to make it clear
 5 that some notice needs to be given before the witness is
 6 called as to whether other documents were in fact relied
 7 on by the witness in making the statement, albeit that
 8 the witness hasn't mentioned explicitly --
 9 **MR HOWARD:** I mean, that sounds ideal, that would meet my
 10 concern, so if we could come up with some wording which
 11 would provide for it to be done in correspondence.
 12 **THE CHAIRMAN:** Yes.
 13 **MR SAINI:** Can I just say we are content with the order,
 14 subject to the clarification that Mr Howard mentions.
 15 **THE CHAIRMAN:** Mr Lasok?
 16 **MR LASOK:** At this stage we are content with the order as
 17 well. I will also make the same point as Mr Howard
 18 about the first part of (a), because the difficulty is
 19 that unless the witness statement does make clear that
 20 not only the remark relates to the position outside the
 21 period, but also it is based on some identified
 22 evidential basis, the presumption must be that either it
 23 does not apply outside matters within the direct
 24 knowledge of the witness, or the statement has been made
 25 without there being adequate evidential basis for making

1 it, and in fact we have encountered plenty of examples
 2 of that already in the course of this hearing.
 3 (Pause)
 4 In relation to (b) and (c), we don't have a problem
 5 with the wording in most instances, we will not feel the
 6 need to go further than is indicated in (b) and (c).
 7 There may be occasions from time to time in which
 8 there will be a need to do so for some particular
 9 reason, but I am sure that if the Tribunal considers
 10 that we are pursuing a line of cross-examination that is
 11 either unnecessary or inappropriate, the Tribunal will
 12 draw that to our attention.
 13 **THE CHAIRMAN:** Thank you. Well, I propose to add to the end
 14 of (a) "or unless the party for whom the witness is
 15 appearing has indicated giving as much notice as
 16 practicable the documents on which the witness relied
 17 when making the statement".
 18 **MR FLYNN:** Madam, could I just make a remark from the cheap
 19 seats? Or perhaps I should say the Every Day Low Price
 20 seats.
 21 **DR SCOTT:** The dress circle.
 22 **MR FLYNN:** In relation to (a), it would seem to me
 23 unfortunate if in fact a witness did have a perfectly
 24 adequate knowledge base to make a general remark.
 25 I don't frankly know that this does apply to the Asda

1 witnesses because we have been fairly careful simply to
 2 track the correspondence that has been referred to. But
 3 if in fact it comes out in cross-examination or
 4 re-examination that they do have sufficient knowledge,
 5 it seems to me that is something the Tribunal is
 6 entitled to take account of.
 7 I think on that, we should see whether it actually
 8 comes up in the cross-examination.
 9 **THE CHAIRMAN:** Well, the aim of this is to enable the OFT
 10 primarily, as they are the ones doing most of the
 11 cross-examining, to shorten the time that they feel they
 12 need to take. If there are particular instances which
 13 crop up, then we will deal with them either by amending
 14 the direction or making some different direction, but --
 15 **MR FLYNN:** I think that that's very fair, Madam, I merely
 16 point out that (a) doesn't refer simply to
 17 cross-examination, but is an approach to the witness
 18 statements, whereas (b) and (c) specifically do refer to
 19 cross-examination. That's simply my point on that.
 20 The other matter, and this does apply very
 21 specifically to the Asda witnesses, is that they
 22 systematically went through every document that was
 23 referred to in the decision, and, as I said, in a sort
 24 of "whack-a-mole" effect, the OFT has then in the
 25 defence and skeleton referred to a whole lot of other

1 documents of which they are the author or recipient, and
 2 they of course have not referred to those in their
 3 witness statement necessarily.
 4 We say that those do need to be put to our
 5 witnesses. I don't think that's precluded by this.
 6 **THE CHAIRMAN:** No.
 7 **MR FLYNN:** I merely point that out. Its not something on
 8 which they have relied in making their statement, but
 9 it's something the OFT is going to have to press home.
 10 **THE CHAIRMAN:** No, (c) was directed at those parts of the
 11 witness statements which comment on documents and draw
 12 inferences which the Tribunal will eventually have to
 13 decide are relevant or not, but are not based and do not
 14 purport to be based on any direct knowledge of what was
 15 meant by the document when it was written.
 16 **MR FLYNN:** Yes. I think that's right, Madam, and I think
 17 I have made my point.
 18 **TRIBUNAL DIRECTION**
 19 **THE CHAIRMAN:** I will then read this direction into the
 20 transcript. So in the light of these discussions,
 21 the Tribunal directs as follows:
 22 First, where a witness makes a general remark in his
 23 witness statement about an aspect of the case, it can be
 24 assumed that he is limiting the scope of that remark to
 25 the period when he had direct knowledge of the material

1 events, unless the witness statement makes clear that
 2 the remark relates to the position outside that period,
 3 and indicates the basis on which the witness asserts
 4 that he has knowledge of the position outside that
 5 period; or unless the party for whom the witness is
 6 appearing has indicated giving as much notice as
 7 practicable to documents on which he relied for that
 8 purpose when making the statement.
 9 Second, the party cross-examining need only put to
 10 a witness documents of which he is the author or
 11 recipient unless the witness statement makes clear that
 12 there are other documents of which the witness had
 13 direct knowledge at the relevant time and on which he
 14 relied in making his witness statement.
 15 Thirdly, the party cross-examining does not need to
 16 put to the witnesses those parts of the witness
 17 statement which set out the witness's interpretation of
 18 documents of which he had no direct knowledge at the
 19 relevant time or in which he suggests inferences
 20 the Tribunal might draw from such documents, where those
 21 documents have been shown to him for comment for the
 22 purposes of the appeals.
 23 Discussion re Tribunal direction (continued)
 24 **THE CHAIRMAN:** Now, as far as the points that were made
 25 about where the OFT's case stands in respect of

1 paragraph 40 of the skeleton argument, it seems to
 2 the Tribunal that the cross-examination of the
 3 witnesses, particularly the retailer witnesses, has
 4 focused on the grant and withdrawal of bonuses and the
 5 price decreases and increases at the retail level that
 6 are linked with those changes in bonus levels. And it's
 7 not entirely clear how that cross-examination or the
 8 points which the OFT is putting to the witnesses in
 9 relation to bonuses fit in with the OFT's case, either
 10 in the decision or in paragraphs 40 and onwards of the
 11 skeleton argument, or in the factual assumptions
 12 underpinning Professor Shaffer's report and the theory
 13 of harm.
 14 In particular, if one looks at paragraph 40(d),
 15 which is the point about if the retail price of
 16 Gallaher's brands decreases, then the retail price of
 17 ITL's brands also decrease, we would find it useful to
 18 know whether the OFT's case, as I say, in the decision
 19 and in the skeleton and underlying Professor Shaffer's
 20 report, relies on that consequence of the agreement
 21 being established, even if there is no corresponding
 22 decrease in the net wholesale price of ITL's product,
 23 either as a result of an increase in a tactical bonus
 24 from ITL or not, or whether the case now does
 25 acknowledge that prices of the competitor product moved

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1 reflecting changes in bonusing and wholesale pricing.
 2 If that is the OFT's case now, if the case has moved
 3 since the skeleton was drafted or Professor Shaffer's
 4 report was written, then it is important that
 5 the Tribunal and the other parties are made aware of
 6 that, so that everyone can understand the thrust of the
 7 questions that are being put to the witnesses, and
 8 ensure that they themselves put in cross-examination any
 9 questions that they need to put having regard to that
 10 case.
 11 Mr Lasok, I don't know whether you want to respond
 12 now or whether you want to consider the matter
 13 overnight.
 14 **MR LASOK:** Madam, can I first say that paragraph (a) of
 15 the Tribunal's direction comes into operation in
 16 relation to Mr Culham, who is going to give evidence
 17 probably I would think, given the time now, tomorrow.
 18 I just mention that for the sake of the record.
 19 **THE CHAIRMAN:** Yes.
 20 **MR LASOK:** Now, coming on to the Tribunal's point, what
 21 I propose to do at this stage is to make some, I hope,
 22 relatively short observations on the Tribunal's
 23 comments. But it may be that I will think about them
 24 further after the end of today and would prefer to come
 25 back tomorrow morning and make any corrections to what

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1 I say just now.
 2 The basic position is this, as we see it: we don't
 3 understand the OFT's position to have changed since the
 4 decision, nor do we understand that the line of
 5 cross-examination has gone off in a direction other than
 6 that pointed to or signposted in the decision.
 7 In our submission, it's important to bear in mind
 8 the relationship between the decision and paragraph 40
 9 of the skeleton argument. It will be observed that
 10 paragraph 40 of the skeleton argument is nothing other
 11 than a re-statement of four points that ITL have put in
 12 their skeleton argument as their interpretation of the
 13 main lines of the theory of harm espoused by
 14 Professor Shaffer. Paragraph 40 in fact is the second
 15 paragraph in a subsection of the OFT's skeleton argument
 16 that is dealing with a riposte to a particular point
 17 made by ITL, it is introduced by paragraph 39.
 18 So what paragraph 40 is, is actually the OFT's
 19 re-statement of a case put forward by ITL which ITL say
 20 that they have derived from Professor Shaffer.
 21 Now, what we do in the skeleton argument after
 22 paragraph 40 is to address ITL's re-statement of
 23 Professor Shaffer's theory of harm. It's at this point
 24 that, in our submission, it's relevant to bear in mind
 25 how Professor Shaffer's evidence fits into this appeal.

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1 Professor Shaffer was brought along to provide an expert
 2 report in answer to the expert evidence adduced by
 3 certain of the appellants. So what he has done is to
 4 take what can loosely be described as a paradigm
 5 situation, and he has examined it, and identified that
 6 from an analytical perspective the situation is
 7 anticompetitive for the reasons that he has given in his
 8 report, and that, as I understand it, is largely agreed
 9 with by the appellants' experts.
 10 What one then does is one takes Professor Shaffer's
 11 report and drops it, as it were, into the factual
 12 context of the present case, and that is where
 13 Professor Shaffer's report comes, as it were, into the
 14 decision, because the decision itself contains findings
 15 of fact, and the setting out of a theory of harm
 16 explaining why this particular case involves an object
 17 infringement.
 18 So what we do when we look at paragraph 40, was we
 19 are looking at Professor Shaffer's theory of harm as
 20 analysed by ITL, and we take Professor Shaffer's theory
 21 of harm, drop it into the factual context of the present
 22 case. What then happens, when one is considering the
 23 validity of Professor Shaffer's theory of harm, is
 24 whether or not there is some feature of the facts of the
 25 present case that invalidates Professor Shaffer's theory

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1 of harm.
 2 Now, Professor Shaffer is not here to express
 3 an opinion about that latter stage of the process; in
 4 other words, he is not here to make findings of fact.
 5 What he is here to do is to explain his theory of harm,
 6 and it is the Tribunal's function, in our submission, to
 7 scrutinise his theory of harm and also to carry out the
 8 second stage of the exercise, which is to see whether or
 9 not, when one places that theory of harm within the
 10 factual context of the case, there is something in the
 11 facts of the present case that invalidates his theory.
 12 Now, if one looks at the facts of the present case,
 13 one sees, in our submission, that there is no relevant
 14 fact -- this of course is anticipating the conclusions
 15 that the Tribunal will eventually come to -- that casts
 16 doubt upon Professor Shaffer's theory of harm.
 17 The major, if you like, factual difference in the
 18 scenarios is the existence of the abnormally thin
 19 retailers' margins. This is a fact relating to the
 20 particular case that is before the Tribunal. What
 21 the Tribunal is going to have to do is to consider
 22 whether or not the existence of the abnormally thin
 23 margins, with the consequences that they entailed, such
 24 as the inclusion of an opportunity to respond clause in
 25 trading agreements, has such an effect as to invalidate

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1 the theory of harm. That's something that the Tribunal
 2 has to deal with.
 3 But that aspect of the case, which is -- and it goes
 4 to the more general question of what happens when there
 5 is a price reduction, and is something that the
 6 appellants place great weight upon, is not, in our
 7 submission, anything that undermines the theory of harm
 8 because what it actually is, is an additional constraint
 9 that operates in the particular circumstances of the
 10 present case on movements downwards.
 11 **THE CHAIRMAN:** Perhaps I can ask what may, in your view, be
 12 an oversimplistic question, which is: is it the OFT's
 13 case that, as a matter of fact, the retailers were
 14 required to reduce the price of an ITL brand at the
 15 retail level when they had reduced the price of
 16 a Gallaher brand, even if ITL did not adjust the bonus
 17 so as to protect their margin?
 18 **MR LASOK:** That question, in order to answer it,
 19 necessitates a distinction to be drawn between
 20 a retailer initiated price change and a manufacturer
 21 initiated price change.
 22 If you take the example of the ITL/Morrison trading
 23 agreement that we have been looking at today, in our
 24 submission it's quite clear from that agreement and from
 25 the evidence given by Mr Eastwood in cross-examination

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1 by Mr Williams, that it was understood that in the case
 2 of a retailer-initiated -- that is to say
 3 a Morrisons-initiated -- price change to an ITL brand or
 4 to a Gallaher brand, the parities and differentials
 5 would be respected whatever they were.
 6 That was the function of the agreement.
 7 **THE CHAIRMAN:** But I think what is then confusing, slightly,
 8 is that if you accept that the opportunity to respond
 9 clause indicates that, where the reduction in the
 10 Gallaher brand was the result of funding from Gallaher,
 11 that then there was no obligation on the retailer,
 12 Morrisons, to reduce the price of the ITL brand if ITL
 13 decided not to respond to the opportunity --
 14 **MR LASOK:** Yes.
 15 **THE CHAIRMAN:** -- there seemed to be a lot of questions
 16 asked, nonetheless, about movements in price resulting
 17 from changes in the bonusing of Dorchester and Richmond.
 18 **MR LASOK:** Well, could I separate those two points? If one
 19 takes first the opportunity to respond clause, the
 20 opportunity to respond clause which features expressly
 21 in some of these trading agreements made it quite clear
 22 that -- and we will take the ITL written trading
 23 agreements -- where Gallaher was funding a promotion,
 24 there was no obligation on the part of the retailer to
 25 reduce the price of the ITL brand commensurately. What

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1 there was an obligation to give ITL the opportunity
 2 to respond, and that factual situation is acknowledged
 3 and dealt with in the decision. We have had, for
 4 example -- I remember, I think it was yesterday --
 5 something like 35 or 40 minutes of so-called
 6 re-examination on that point, which is a point not in
 7 dispute in this case. It's simply astonishing, the way
 8 this case has been conducted in relation to that
 9 particular part of the case.
 10 If one goes now to the question of the bonuses,
 11 the Tribunal will bear in mind the structure of pricing.
 12 The pricing is structured in such a way by the
 13 manufacturers as to enable them to influence directly
 14 the retail pricing by --
 15 **THE CHAIRMAN:** Let me stop you there, Mr Lasok, because
 16 again that's a point which you make and is being put to
 17 the witnesses, as is points about, "Well, were they
 18 dictating to you the price which you ought to move the
 19 brand to as a fixed price rather than a maximum",
 20 whereas I am sure Mr Howard and the other appellants
 21 would say, "Well, those are allegations which are not
 22 allegations of infringement which are made in the
 23 decision and to what does that cross-examination go?"
 24 I don't wish to hear closing submissions at this
 25 stage. What I am saying is, I think, both the Tribunal

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1 and the appellants would benefit from some greater
 2 clarity as to what the OFT's case is in respect of each
 3 of these bilateral agreements is the nature of the
 4 obligation which the OFT asserts that the facts in the
 5 documents support.
 6 **MR LASOK:** In some instance it's a commitment. What occurs
 7 is that the retailer --
 8 **THE CHAIRMAN:** Well, I do not want you to say it now, but as
 9 we come to the agreements, in some manner it would be
 10 useful to understand what the OFT's case is about where
 11 the bonusing fits in, where the opportunity to respond
 12 fits in, so that we can better understand to what the
 13 questions that you are asking the witnesses are
 14 directed, and so that Mr Howard can be assured that the
 15 case which the OFT is ultimately going to put to
 16 the Tribunal, in respect of that particular agreement,
 17 has been put to the witnesses so that we avoid -- when
 18 we get to closing submissions -- appellants jumping up
 19 and saying "That wasn't what was put to the witness".
 20 **MR LASOK:** Yes.
 21 **THE CHAIRMAN:** Is there anything anybody else wants to add?
 22 **MR HOWARD:** I suppose what I ought to make clear is that my
 23 concern goes far beyond the case being put to the
 24 witnesses. My concern actually extends to what the case
 25 is and whether that is within the decision. I have to

1 say -- I am not going to argue the point now -- that
 2 I am astonished that Mr Lasok says that it's common
 3 ground that, for instance, when the retail price of
 4 Gallaher brand decreases there was no obligation to
 5 decrease the price of Imperial, because that's what it
 6 says here, that's what we see all over the place.
 7 Now, it's nonsense, I agree with that, and it should
 8 never have been part of the case, but we can only deal
 9 with what's put forward.
 10 **THE CHAIRMAN:** Well, what I am trying to achieve is
 11 a reduction in astonishment on all sides as regards the
 12 questions that are being asked, the submissions that are
 13 made in future.
 14 **MR HOWARD:** Absolutely. Perhaps if I take the heat out of
 15 the battle for a moment. The point is it's not simply
 16 the bonus point. It's also, for instance, is there
 17 a case that where there is an MPI, Imperial has an MPI,
 18 that there is an automatic or some obligation to put up
 19 the prices? Is there a case if Imperial withdraws part
 20 of its tactical bonus and its price goes up, Gallaher
 21 has to go up? Is there a case where Gallaher -- it's
 22 all the permutations.
 23 Yes, I have explored it with the witnesses because
 24 that does appear to be part of the case. If it's being
 25 said "No, no, it's some different case" -- I do stress

1 the fact this is litigation where -- it is not normal
 2 litigation, there is a regulator here who says Imperial
 3 have done something wrong and very badly wrong, so they
 4 are getting one of the biggest fines, as I understand
 5 it, in history of this sort of thing.
 6 They ought to be able to say very clearly on a piece
 7 of paper what actually it is. The fact that we are all
 8 -- Mr Lasok says we are floundering and we are not
 9 reading it properly, well, he ought to be able to say
 10 very clearly where we have got it wrong and what the
 11 true case is.
 12 **THE CHAIRMAN:** Well, conversely, Mr Saini and other
 13 retailers, it's also become much less clear to us
 14 whether the retailers and, to an extent, ITL are
 15 accepting that there was an agreement or a restriction
 16 accepted at all. In the pleadings some of the
 17 appellants claim that they are entitled to an exemption
 18 and the agreements were pro-competitive. You, in your
 19 opening, Mr Saini, said "Well, Morrisons doesn't contest
 20 the importance of this agreement", and yet Mr Eastwood's
 21 evidence seemed to be he put the agreement in a drawer
 22 and never thought about it. So there is a lack of
 23 clarity on that side as well, as to how much of the
 24 fundamentals of an article 101 infringement are being
 25 contested, as well as the contest as to the nature of

1 the restraints accepted and their economic effect. In
 2 my view, a lot of time taken up in cross-examination,
 3 has been devoted to trying to get that kind of issue
 4 clarified, which may not have been apparent from the
 5 pleadings, that there was controversy about whether
 6 these agreements had any effect at all on the parties.
 7 Now, what the legal implications are of a party
 8 signing an agreement and then saying "Actually we had no
 9 intention of abiding by it and didn't abide by it" is
 10 a separate question, which we might come to. But
 11 I think on both sides it would be useful to have some
 12 clarity about what is in issue as regards the individual
 13 agreement.
 14 **MR SAINI:** Madam, as far as Mr Eastwood is concerned, you
 15 heard him say that he considered the agreement had to be
 16 honoured, and he has given his own particular
 17 description of why he put it away in a drawer.
 18 I have a more basic point, which is that Mr Lasok
 19 has tried to distance himself now from the OFT's case in
 20 paragraph 40 by effectively saying "This is effectively
 21 a response to an ITL case", but the Tribunal will not
 22 have missed the point that paragraph 40 is supported by
 23 very detailed references in footnotes to documents,
 24 which the OFT says support its case as to these
 25 restrictions.

1 Now, we are puzzled indeed, and what we would like
 2 to see tomorrow morning if possible from Mr Lasok is
 3 clarification as to whether or not the case in
 4 paragraph 40 and a document said to support the case in
 5 paragraph 40 is still being put. Just so that Mr Lasok
 6 knows, we would also like to know whether, in the
 7 decision, paragraph 6.212 to 6.214, which is where the
 8 OFT sets out its substantial cases to the nature of the
 9 restrictions, whether or not that case is still being
 10 put. I'm not going to ask the Tribunal to turn that up
 11 now, but unless I can't read English, which may well be
 12 the position, it looks like in those paragraphs at
 13 page 131 of the decision the OFT are putting the
 14 handcuffing case; in other words, in the absence of
 15 bonuses -- I emphasise that point -- the prices of the
 16 two competing products had to move together, and we can
 17 forget how the OFT puts its case in paragraph 40 for the
 18 moment, the OFT has to explain whether or not those
 19 paragraphs in the decision are still relied upon.

20 **THE CHAIRMAN:** I don't wish to set more homework for
 21 Mr Lasok and his team, I am sure they have enough to do,
 22 but I think that you have hit the nub of it, which is it
 23 would be useful to know, as we come to the agreements,
 24 whether the OFT's case is that, even absent changes in
 25 the bonusing and movements in the wholesale price, is it

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1 the OFT's case that the restrictions accepted by signing
 2 the agreement applied, required the movements, relative
 3 movements to maintain the differentials, whether they be
 4 maxima or fixed, even if there was no corresponding
 5 change in the wholesale price.

6 **MR HOWARD:** I just think it is -- I am sorry to rise
 7 again -- important that I just make something clear,
 8 which is this: if you look at paragraph 41 of the OFT's
 9 skeleton, they there make a point that, in the second
 10 sentence, they say:
 11 "The four permutations therefore do not reflect all
 12 constraints which the infringing agreements place on the
 13 retailers' prices."
 14 Now, as I understand it, the only restraint which
 15 they point to is in fact the one in the first sentence
 16 of paragraph 41, so that in fact the way this is all
 17 drafted is that there are these four restraints, which
 18 are paragraphs 4(a) to (d), and then you can add in, as
 19 it were, a fifth, which doesn't feature in the decision
 20 which is the retailers independently moving their
 21 prices.
 22 Then when you go to paragraph 44, there is no doubt
 23 about it, that this is the OFT's case, because if you
 24 look at paragraph 44 --
 25 **THE CHAIRMAN:** Yes.

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1 **MR HOWARD:** -- they explain in the second sentence:
 2 "Where the agreements are parallel and symmetrical,
 3 all four implications of the infringing agreements set
 4 out above."
 5 If the OFT's case is now that I'm pointing to some
 6 different restraint, and you will remember I have asked
 7 on a number of occasions: what is the restraint that you
 8 say is being imposed?, because that's the fundamental
 9 thing. Their complaint in the decision was that the
 10 retailer is constrained from favouring Gallaher. That's
 11 what it was all about. So not Gallaher the brands, but
 12 Gallaher the manufacturer.
 13 So we do need to know whether that remains their
 14 case, and if it is, whether it is these constraints, and
 15 (a), (b), (c), (d) are the ones which are the constraint
 16 on Gallaher. If that is not the case, then we may well
 17 want to say the whole thing has to be dismissed here and
 18 there, and we don't need to carry on for another
 19 eight weeks, or whatever it is, joy oh joy for all of
 20 us, or we will just have to consider where we are.
 21 But it is a very odd situation where we are
 22 struggling at this stage to work -- well, we are not
 23 struggling, we can actually see, that's the point, very
 24 clearly what the case is, but we are really hearing from
 25 the OFT -- although it was sotto voce, perhaps -- "this

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1 isn't our case".

2 **THE CHAIRMAN:** I had also underlined that sentence in
 3 paragraph 44, because although, Mr Lasok, I understood
 4 that paragraph 40 was expressing ITL's case,
 5 I understood paragraph 44 of the skeleton as saying that
 6 on the OFT's case all four implications applied. But
 7 let me stress again, we do need to know how far that is
 8 still the case in relation to each of these 15
 9 agreements that we are dealing with in these appeals,
 10 and also whether it's alleged that the restraints
 11 applied independently of any movements in wholesale
 12 prices, whether by bonusing or otherwise.
 13 I think we should probably leave it there for today.
 14 Mr Williams?
 15 **MR WILLIAMS:** Only to come back to Mr Lasok's point about
 16 Mr Culham and paragraph (a) of the Tribunal's direction.
 17 You made the point earlier on, Madam, that finding out
 18 in-chief what is going to be the answer to paragraph (a)
 19 is later than is ideal, and --
 20 **THE CHAIRMAN:** Let's have a look briefly at Mr Culham's
 21 witness statement.
 22 **MR WILLIAMS:** So tab 35 of core bundle 3, Madam. {C3/35}.
 23 Mr Culham starts to deal with Safeway at paragraph 155.
 24 You can see what he says at paragraph 155. Then I was
 25 just going to suggest the Tribunal read paragraph 157

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1 and the last paragraph, 174.
 2 (Pause)
 3 **THE CHAIRMAN:** Well, thank you, Mr Williams, that's a very
 4 good example of exactly what we are dealing with in the
 5 direction that we have just made.
 6 **MR WILLIAMS:** Can I just help the Tribunal with one further
 7 observation, which is that the curiosity is then that
 8 Mr Culham only deals with documents which relate to his
 9 tenure from June 2003, so we have a strange mismatch
 10 between the general evidence and the specific evidence.
 11 **THE CHAIRMAN:** Well, Mr Saini, the effect of the direction
 12 that we have made is, as I understand --
 13 **MR HOWARD:** He is my witness, not Mr Saini's.
 14 **THE CHAIRMAN:** Yes. This is in relation to Safeway.
 15 **MR HOWARD:** I beg your pardon.
 16 **THE CHAIRMAN:** Well, both Mr Saini and Mr Howard, that
 17 unless there are some particular documents in the
 18 annexes about which he can give direct evidence.
 19 **MR HOWARD:** Can I help in this way: my understanding, having
 20 spoken to Mr Culham briefly to actually seek to
 21 understand this point, is I don't understand that he was
 22 involved in the Safeway account prior to his takeover of
 23 it, so if one is saying: was he involved in any of the
 24 correspondence prior to that date?, my understanding is
 25 no. When he took over the account, did he see the file?

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1 I haven't gone through the file with him to understand
 2 what he saw. My understanding is he would have seen the
 3 file, and therefore at that stage become aware of some
 4 of the documents in the file. I can't help you beyond
 5 that, but it may well be in the light of that that the
 6 OFT could take the view that it's not necessary to
 7 cross-examine him about documents preceding that date,
 8 since it will only be asking him what documents meant
 9 which he had not been involved in at the time. So
 10 I hope that's helpful.
 11 **THE CHAIRMAN:** Yes, I think that's right, and I think that
 12 the consequence of that is that if in due course the OFT
 13 wish to submit that in the period before Mr Culham took
 14 over, or in the period after Mr Culham took over, things
 15 were a certain way which differs from the assertions
 16 that Mr Culham has made in those two paragraphs, then he
 17 won't be criticised for not having put all those
 18 previous earlier or later documents to Mr Culham.
 19 **MR HOWARD:** That's fair enough. If they want to say these
 20 documents show Safeway being operated in some different
 21 way, I am not going to be in a position to say they
 22 can't make that submission because they didn't challenge
 23 paragraph 157 of Mr Culham's statement.
 24 **MR WILLIAMS:** The one further nuance which has occurred to
 25 us is that Mr Culham may make an assertion about the way

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1 things were during his tenure, but the best evidence to
 2 contradict the proposition that the account worked in
 3 that way may not date from the period of his tenure, and
 4 we would not want to find ourselves in the position in
 5 a sense of not having challenged his evidence because we
 6 don't have -- I mean, he ran the account for two months
 7 and we have four or five letters. We can I think put to
 8 him in general terms that that's not the way the account
 9 worked, but in a sense one is then at a stage of almost
 10 formally putting the case when the evidence relates to a
 11 different period.
 12 I do not want to make this overinvolved.
 13 **THE CHAIRMAN:** What we are trying to avoid is if you say
 14 "Well, it didn't operate like that before you took over"
 15 and he says "Well, I think it did", you then don't have
 16 to put to him all those earlier documents to say "Well,
 17 now I've shown you that, does that make you change your
 18 mind?" That is the exercise which you are not now being
 19 required to go through.
 20 **MR WILLIAMS:** I understand that. I think we would also want
 21 to make the point in due course that the way the account
 22 was run during Mr Culham's tenure was probably
 23 an extension of the way that it was run before, but the
 24 difficulty we have, as I say, is that the best evidence
 25 may relate to a different period. I am only making the

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1 point now. I do not want this to become overinvolved,
 2 but I did want to ventilate that, because if Mr Culham
 3 states proposition X, and we can show that the way the
 4 account was run in the preceding period was different
 5 from that, then we would want to draw an inference about
 6 the way the account was run as a whole.
 7 **THE CHAIRMAN:** I think you must put to him documents on
 8 which you rely which contradict how he says it ran
 9 during the time he was actively involved in it --
 10 **MR WILLIAMS:** We will certainly do that.
 11 **THE CHAIRMAN:** -- even if those documents relate to
 12 an earlier period, if you are relying on them in
 13 relation to the period when he was directly involved.
 14 What the direction we have made relates to is the more
 15 general remarks that he makes about both before and
 16 after he was responsible for the Safeway account.
 17 **MR WILLIAMS:** I am grateful for that clarification, because
 18 that's helped to indicate what we do and don't need to
 19 put, Madam, thank you.
 20 **THE CHAIRMAN:** Yes. Shall we start at 10 tomorrow morning
 21 to ensure that we get through everything?
 22 **MR HOWARD:** Yes.
 23 Shall I say what we are proposing to do? I think we
 24 will forego having a mini opening on Safeway. I can
 25 just say this: there is a discrete issue about Safeway

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1 as to whether or not there was an agreement which
 2 provided for observing differentials. But then we and
 3 Safeway say that doesn't appear to be the case; the OFT
 4 says to the contrary. After that -- that's, as it were,
 5 the discrete issue -- it's basically a very similar type
 6 to other supermarket cases, and I am not sure you are
 7 going to be assisted -- particularly bearing in mind
 8 Mr Culham is only involved towards the tail end -- by my
 9 having a discrete opening; that's one thing. The other
 10 thing is I am keen, Mr Culham has been here, to get him
 11 in the witness box and to deal with that and to get on.
 12 **DR SCOTT:** It would be helpful to us, I think, to know where
 13 you are now respectively on the fact that we thought
 14 there was once an acceptance that there was a trading
 15 agreement, we are now no longer quite sure --
 16 **MR HOWARD:** In the case of Safeway?
 17 **DR SCOTT:** In the case of Safeway. As I understand it, it
 18 was not found, any trading agreement.
 19 **MR HOWARD:** There is not a trading agreement which provides
 20 for differentials.
 21 **DR SCOTT:** That's right, so there isn't --
 22 **MR HOWARD:** I don't think in fact there was ever -- there
 23 may have been a trading agreement, but not one we say
 24 that provided for observing the differentials.
 25 **DR SCOTT:** But there seems to have been some uncertainty

1 about whether people accepted that there had been one or
 2 whether there hadn't been.
 3 **MR HOWARD:** I think there remains some uncertainty about
 4 that, although there are references to a trading
 5 agreement in the correspondence. So it seems likely
 6 there was some form of trading agreement. There is
 7 certainly reference to a trading agreement, for
 8 instance, where there was a bonus being paid for being
 9 below RRP, quite a significant bonus of [redacted], and
 10 you see it being explained on a number of occasions.
 11 That's certainly something that can be explored with the
 12 witnesses.
 13 I ought to respond to the point that the Chairman
 14 raised. We don't in any way resile from anything in our
 15 case to the effect that there were agreements.
 16 Obviously, you have witnesses who, to some extent say
 17 "Well, we put it in the drawer" or "it wasn't
 18 particularly important" and so on. All of that may be
 19 right, it doesn't mean there wasn't an agreement. The
 20 issue ultimately for you, once we have sorted out what
 21 the OFT's case is, is whether these agreements contained
 22 any relevant restrictions of the type alleged and also
 23 when they fit in with whatever happens to be the theory
 24 of harm that's being put forward.
 25 **THE CHAIRMAN:** Yes, but it was just something we noted, that

1 when you in either your cross-examination or your
 2 re-examination have put the four propositions --
 3 **MR HOWARD:** Yes.
 4 **THE CHAIRMAN:** -- you have got the answer "no" to all of
 5 them, even the two which are the maxima two as well as
 6 "no" to the fixed two, if you understand what I mean.
 7 **MR HOWARD:** No, I don't think I do.
 8 **THE CHAIRMAN:** Well, it's accepted that if the parities and
 9 differentials were fixed, then all four of those (a) to
 10 (d) should pertain. If the parities and differentials
 11 were maxima, only two of them would pertain.
 12 **MR HOWARD:** Well, Imperial's case is that whether the
 13 differentials -- we say the differentials are maxima.
 14 **THE CHAIRMAN:** Yes.
 15 **MR HOWARD:** But even if they were fixed, it doesn't
 16 actually -- we say it doesn't mean that you answer "yes"
 17 to any of 40(a) to (d). The answer is still no, because
 18 everything is subject to wholesale price changes. We
 19 say there is no obligation, but everything is subject to
 20 wholesale price changes, so if the price of Imperial
 21 comes down, there is no obligation, if there ever was,
 22 or no incentive, to reduce the price of Gallaher. And
 23 if Imperial's price goes up, equally there is no need to
 24 move the price of Gallaher. We say it's all -- and
 25 that's what we say is the complete fallacy in the OFT's

1 case. It ignores the fact that -- and all this
 2 evidence, that where the wholesale price changes whether
 3 as a result of bonusing or otherwise, then there is no
 4 expectation on anybody's part that you have any effect
 5 on the competing brand. That's why the debate about
 6 fixed or maxima, to our side, doesn't matter a great
 7 deal, although we say in fact it's absolutely clear they
 8 were maxima.

9 **THE CHAIRMAN:** Right, thank you. Well, we will reconvene,
 10 then, at 10 o'clock tomorrow morning.

11 (4.45 pm)

12 (The court adjourned until 10.00 am
 13 on Thursday, 20 October 2011)

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