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IN THE COMPETITION

APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25 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 19)

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

APPEARANCES

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

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

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

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

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

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

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1 Tuesday, 25 October 20011
 2 (10.30 am)
 3 (Proceedings delayed)
 4 (10.35 am)
 5 **THE CHAIRMAN:** Good morning.
 6 **MR FLYNN:** Good morning, Madam, sirs. Unless anyone has
 7 anything else, I think we continue with Mr Jolliff, and
 8 I'll ask that he be brought in.
 9 **THE CHAIRMAN:** Yes.
 10 MR JOHN JOLLIFF (recalled)
 11 **THE CHAIRMAN:** Good morning, Mr Jolliff.
 12 **A.** Good morning.
 13 **THE CHAIRMAN:** Thank you very much for coming back.
 14 I remind you that you are still on oath from last time
 15 you gave evidence.
 16 Cross-examination by MR LASOK
 17 **MR LASOK:** Good morning, Mr Jolliff.
 18 **A.** Good morning.
 19 **Q.** I wonder whether you could be given a copy of your
 20 witness statement, which is in core bundle 10. It
 21 starts at tab 109. {C10/109/373}. Could you possibly
 22 give Mr Jolliff annex 14, please. I wanted to ask you
 23 a couple of questions about the ITL/Asda trading
 24 agreement that was signed, I think, in June 2002. You
 25 deal with that trading agreement in paragraphs 116 to

1

1 117 of your witness statement. It might be a good idea
 2 if you could turn to those paragraphs and read them over
 3 to yourself.
 4 (Pause)
 5 If you want to cross-refer to the text of the
 6 trading agreement, it's in annex 14 at tab 53.
 7 {D14/53/148}.
 8 (Pause)
 9 **A.** And also document 44 -- sorry, 54?
 10 **Q.** If you want to look at 54, please do so.
 11 (Pause)
 12 **A.** Okay.
 13 **Q.** Okay, so, as I understand it, firstly you did sign this
 14 trading agreement on behalf of Asda?
 15 **A.** That's correct, yes.
 16 **Q.** On the third page of the trading agreement, we have
 17 a reference to a quarterly payment being made to Asda.
 18 **A.** Yes, I've got that.
 19 **Q.** So there is a quarterly payment made to Asda, and it
 20 says:
 21 "Subject to Imperial Tobacco's requirements ..."
 22 Now, the remaining phrase is, I think, confidential
 23 with the exception of the reference to strategic
 24 pricing. But the end of the phrase concludes with the
 25 words "being met". So what we can see is that

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1 a quarterly payment would be made to Asda on condition
 2 that Asda complied with ITL's requirements including the
 3 requirements relating to strategic pricing; do you
 4 agree?
 5 **A.** I agree with what it says in there, yes.
 6 **Q.** In tab 54, we have a letter setting out a revised
 7 summary of ITL's strategic pricing requirements. Now,
 8 I take it that the strategic pricing requirements that
 9 Asda was supposed to comply with, as referred to in the
 10 trading agreement, was a document like the one that we
 11 have attached to the letter at tab 54?
 12 **A.** When it was discussed, I mean, I didn't sign this
 13 document until, I believe, June, just before I was about
 14 to leave the area, so they had already been paying us
 15 the [redacted] retro for six months, and when it was
 16 discussed at first, strategic planning -- sorry,
 17 strategic pricing was based on, say, for example, if
 18 Richmond needed to come down, we would look at bringing
 19 the price down, provided that we agreed the costs and
 20 the retails. So it was myself who was agreeing to make
 21 sure that the benefit was to Asda by negotiating the
 22 costs and the retails because they were asking for these
 23 things, which basically I wouldn't follow.
 24 **THE CHAIRMAN:** When you say "the retails", what do you mean?
 25 **A.** When you have a pricing document, you would get what

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1 I call a deal sheet, I am sorry I have to call those,
 2 but I used to be a grocery buyer, so they were always
 3 "deal sheets". So you would get your cost, and the
 4 recommended retail price from, in this case, Imperial
 5 Tobacco. So it was up to me whether I accepted that
 6 price or not.
 7 **THE CHAIRMAN:** But is that what we have called the retail
 8 selling price? That's something different from the
 9 published recommended price?
 10 **A.** That's right, yes.
 11 **THE CHAIRMAN:** I think what you are being asked is: was the
 12 reference to strategic pricing here a reference to
 13 a kind of document like that?
 14 **A.** Well, I wouldn't follow that at all --
 15 **THE CHAIRMAN:** I am not asking you whether you followed
 16 it --
 17 **A.** Sorry.
 18 **THE CHAIRMAN:** -- but was it a reference to something like
 19 that?
 20 **A.** It was a reference to the strategic planning -- sorry,
 21 strategic pricing that ITL wanted but didn't necessarily
 22 get, if you can follow my ... the only way they would
 23 get it would be my getting my correct retail margin and
 24 being competitive against the rest of the market.
 25 **MR LASOK:** How did they communicate their strategic pricing

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1 requirements to you?
 2 **A.** The document that's just been sent --
 3 **Q.** Yes, that's an example of it?
 4 **A.** Yeah, days after I had signed that agreement.
 5 **Q.** In your paragraphs 116 to 117 of your skeleton argument
 6 (sic), as I understand it you say that --
 7 **THE CHAIRMAN:** Statement.
 8 **MR LASOK:** Sorry.
 9 **THE CHAIRMAN:** You said his skeleton argument.
 10 **MR LASOK:** Freudian slip there.
 11 In 116, if you go to the fourth line, you say:
 12 "I viewed the content of the trading agreement as
 13 basically irrelevant in my business."
 14 A little further down, when you are referring to the
 15 payment under the agreement, you say:
 16 "How it was assessed, whether Asda had met these
 17 requirements was not set out in the agreement and in
 18 practice, satisfaction of these criteria was not
 19 assessed."
 20 Just pausing there, are we talking about assessment
 21 of satisfaction of the criteria before or after you left
 22 the tobacco part of the business?
 23 **A.** Could you repeat the question, please?
 24 **Q.** You signed the agreement in June; right?
 25 **A.** That's correct, yeah.

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1 **Q.** And you seem to have left tobacco at about that time?
 2 **A.** In June. That's right, yeah.
 3 **Q.** So when you say "How it was assessed, whether Asda had
 4 met these requirements was not set out in the agreement,
 5 and in practice, satisfaction of these criteria was not
 6 assessed", are you talking about the period after
 7 June 2002 or the period before, or both?
 8 **A.** It's a bit of both, because I can't honestly remember
 9 that these strategic pricing ever came up, because I am
 10 not interested in strategic pricing. All I am
 11 interested in is getting the correct cost and the
 12 correct retail price to remain competitive in the
 13 marketplace. Because my brief was to make sure that
 14 Asda were the number one retailer in tobacco, ie equal
 15 to or better than Tesco, Sainsbury's, Somerfield as it
 16 was then, Safeway, and that was my brief. Now, if
 17 somebody comes along with strategic pricing --
 18 **THE CHAIRMAN:** Just pause there. Ask, if you have
 19 a follow-up question.
 20 **MR LASOK:** How do you know what happened after you left in
 21 June 2002?
 22 **A.** I don't.
 23 **Q.** Okay, fine. In paragraph 117, in the last sentence but
 24 one -- do you have that?
 25 **A.** Yes.

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1 **Q.** You say:
 2 "Payment of this bonus had no relation to my
 3 compliance with their strategic pricing."
 4 Now, you couldn't know about payment of the bonus
 5 after you left in June 2002, and after that point, there
 6 was of course no question of your compliance with the
 7 strategic pricing because you weren't there?
 8 **A.** Correct.
 9 **Q.** Isn't that so?
 10 **A.** That's correct.
 11 **Q.** So what you are talking about must be the payment that
 12 reflected the backdating of the agreement; is that so?
 13 **A.** Yes, the payment was coming in even before I had signed
 14 the agreement.
 15 **Q.** Right. Now, I want to turn to, in annex 14, tab 56.
 16 {D14/56/156}. You may not have seen this, but this is
 17 a letter from Mr Graham Hall of ITL to Mr Kevin Lang,
 18 and in the second paragraph of the letter, under the
 19 heading "Trade Development Programme Investment", he
 20 sets out -- that's to say Mr Hall sets out -- the
 21 purpose of the trade development programme, and that's
 22 a reference to the trading agreement that we have just
 23 seen. Could you read that paragraph to yourself,
 24 please.
 25 (Pause)

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1 **A.** Right, I've read it.
 2 **Q.** So what he says there -- that's Mr Hall says -- is that:
 3 "The purpose of the trade development programme is
 4 to ensure that we [and he must mean ITL] have the range
 5 of products available in your stores to meet consumer
 6 demand and on sale at prices which reflect the standard
 7 price list differentials against competing lines."
 8 Is that your understanding also of the purpose of
 9 the trading agreement?
 10 **A.** Well, that's what it says there, but when I am
 11 negotiating prices, as I've already said, I negotiate
 12 for Asda based on the cost prices. I don't look at the
 13 differentials against anybody's product, the margin has
 14 to fit the retail price. Hence if a price went up or
 15 went down, I would go out on a Monday morning, as
 16 I stated last time, to check these prices to correct --
 17 to make sure that I was in a competitive situation
 18 against my major competitors.
 19 **Q.** Now, the question I am putting to you, really, is not so
 20 much how you determined retail prices, that's to say the
 21 shelf prices at Asda stores, but whether this
 22 description of the purpose of the trade development
 23 programme coincides with your understanding of the
 24 purpose of the trade development programme?
 25 **A.** The only thing I can say is what I've already said, that

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1 that's what I did.
 2 **Q.** I am sorry, I am not asking you what you did in terms of
 3 how you sorted out retail prices, I am just asking you
 4 whether Mr Hall's description of the purpose of the
 5 trade development programme coincides with your
 6 understanding of what the purpose of the trade
 7 development programme was?
 8 **A.** The purpose of it is that they wanted us to have certain
 9 strategic prices which I disagreed with, because
 10 I looked at the margin to get the retail percentage
 11 margin.
 12 **THE CHAIRMAN:** But you knew at the time that you signed the
 13 agreement that that was what they were hoping to get out
 14 of it?
 15 **A.** That's what they were hoping to get out, but they
 16 weren't going to get it.
 17 **MR LASOK:** And you told them that at the time?
 18 **A.** Oh yes, yeah.
 19 **Q.** Oh yes. So why did you sign the agreement?
 20 **A.** Because, as long as I have been buying tobacco, the
 21 retailers, both ITL, Rothmans and Gallaher's, have
 22 always known that the retailer, in this case Asda, set
 23 the retail prices for their particular companies. So
 24 I presumed it was okay.
 25 **Q.** Well, I am putting to you that what actually happened

1 was that you read the trading agreement before you
 2 signed it, you understood what it meant, you understood
 3 that there was a provision there providing for payment
 4 to Asda by ITL of a sum of money in return for Asda's
 5 compliance with, amongst other things, ITL's strategic
 6 pricing requirements. You knew all that, and you
 7 committed Asda by signing that agreement on Asda's part;
 8 is that not so?
 9 **A.** Well, I knew what I was signing for, and you are quite
 10 correct in what you are saying, but I still reiterate
 11 back that it doesn't necessarily mean that we met that
 12 criteria, because they had already been paying us for
 13 the previous six months, and though they had sort of
 14 said to me, you know, "Your differentials are out here
 15 based on this particular document", so as far as I was
 16 aware they understood that I was setting the retail
 17 prices.
 18 **Q.** I put it to you that the reason why you got the payment
 19 backdated was because your prices weren't out of line
 20 with ITL's strategic pricing requirements?
 21 **A.** I don't know whether they were or they weren't, to be
 22 honest with you.
 23 **Q.** Because what was actually happening was that, generally
 24 speaking, you were pricing in accordance with the RSPs
 25 sent to you by ITL?

1 **A.** No, I think you are incorrect there. I was pricing
 2 based on what I've already said.
 3 **Q.** Well, you have already stated in your witness statement
 4 that generally you followed the RSPs?
 5 **A.** We followed the RSPs if we were competitive and if the
 6 percentage margin and the cost prices enabled us to do
 7 so, because I couldn't afford, because of the lack of
 8 margin, to either be -- to be below those particular
 9 prices, because I was judged on my cash margin and my
 10 percentage margin.
 11 So in my terms, I've nothing to play with, as
 12 I couldn't go below those prices because my margin would
 13 disappear quite rapidly.
 14 **DR SCOTT:** You have 56 open in front of you; yes?
 15 **A.** Excuse me taking my glasses off.
 16 **DR SCOTT:** That's all right.
 17 **A.** This is the one dated 13 August to Kevin Lang.
 18 **DR SCOTT:** Kevin Lang. If you look at the bottom of the
 19 page, I realise that some of this is marked
 20 "Confidential". It doesn't tell me on my -- I would
 21 assume that it's confidential to ITL, though in fact
 22 it's concerned with margins in Asda.
 23 I have heard what you said about the margins being
 24 thin, but according to this letter, things had actually
 25 been improving under your stewardship?

1 **A.** At least I did something right. Excuse me for saying
 2 that. I mean, that is the reason why you set your own
 3 retails, you set your own retails because you have to
 4 ensure that you get what Asda is asking for. You know,
 5 Asda's wish list is what I've already stated. So my job
 6 is to increase margins by fair means.
 7 **MR LASOK:** Can I move on to a related topic, which is ITL's
 8 wish list. Because in this letter at tab 56, at the
 9 paragraph I asked you to read, we have the phrase, in
 10 the second line of the second paragraph of the letter:
 11 "... on sale at prices which reflect the standard
 12 price list differentials against competing lines."
 13 If we go to the next page, there is a heading "Price
 14 Increase", and just below the first holepunch we have
 15 a bit where Mr Hall says to Mr Lang:
 16 "I also left you with full details of our strategic
 17 pricing requirements effective from 2 September.
 18 Philip Zentner will forward you an updated price file on
 19 27 August incorporating the changes effective from
 20 2 September."
 21 Now, is it not the case that the price file sent
 22 from time to time by ITL to Asda set out ITL's wish
 23 list?
 24 **A.** It set out the -- there was no wish list, what they did
 25 was set out with the recommended retail prices they

1 would like to see, but it doesn't necessarily mean that
 2 they are going to get those particular recommended
 3 retail prices. I mean, I'll give you a typical example.
 4 **THE CHAIRMAN:** Well, is this referring to recommended prices
 5 or is this referring to differentials between ITL and
 6 Gallaher brands?
 7 **A.** It's basically what I call a deal sheet where they are
 8 actually recommending retails which I don't necessarily
 9 have to follow.
 10 **MR LASOK:** I think that, for clarification, the price files
 11 that we have seen have been sheets that set out the name
 12 and product code of the ITL brand, when it's an ITL
 13 price sheet, and you have things like the cost price,
 14 the various bonuses, and then there is a recommended
 15 selling price. It's not the RRP.
 16 **THE CHAIRMAN:** No, but --
 17 **MR LASOK:** And there is no reference in the price files that
 18 we have seen where there is a comparison between the ITL
 19 price and the related Gallaher brand price.
 20 **THE CHAIRMAN:** When it refers in this letter to "strategic
 21 pricing requirements", is that a reference to that kind
 22 of document, or a reference to the kind of document we
 23 saw at tab 54?
 24 **MR LASOK:** Well, what I am putting to the witness is that
 25 the price file incorporated the strategic pricing

1 requirements, so what I've described as the wish list,
 2 ITL's wish list in the price file would be selling
 3 prices, shelf prices that ITL wished Asda to sell the
 4 brands at, and those prices reflected the strategic
 5 pricing requirements that ITL had.
 6 **DR SCOTT:** But in this letter, a distinction is drawn in the
 7 two paragraphs on page 88, to which you have referred,
 8 between the strategic pricing requirements in the first
 9 of them, and an updated price file to be sent on
 10 27 August in the second paragraph.
 11 **MR LASOK:** Yes.
 12 **THE CHAIRMAN:** Is the reference to the strategic pricing
 13 requirements which Mr Hall says he left with Mr Lang, is
 14 that a reference to the kind of document, an updated
 15 version of what we saw at tab --
 16 **MR LASOK:** Well, let's take it in stages.
 17 **MR FLYNN:** Wouldn't these questions be better put to
 18 Mr Lang, to whom this letter was addressed and who might
 19 actually remember?
 20 **THE CHAIRMAN:** Yes, I am just trying to work out what the
 21 OFT's position is.
 22 **MR FLYNN:** I understand that, and it would be helpful, but
 23 I just remind that of course Mr Jolliff doesn't actually
 24 know what these were.
 25 **THE CHAIRMAN:** No.

1 **MR HOWARD:** If it helps, at least from ITL's point of view,
 2 I don't think it's actually controversial. I think the
 3 strategic pricing requirements document that's being
 4 referred to in that paragraph, I think it's what Mr Hall
 5 said, is a similar document to the one that's at tab 54,
 6 it's just the one -- because you have to remember there
 7 was then I think an MPI, so it's a similar document to
 8 that. I don't think we have the document, and then the
 9 price file is the price file at the time that we have
 10 seen. I hope that helps, and I don't think it should be
 11 controversial.
 12 **MR LASOK:** The point is that, so far as you were aware, the
 13 recommended selling prices in the price file were
 14 oriented around the strategic pricing requirements that
 15 ITL had?
 16 **A.** The retail prices that they quoted were based on the
 17 margin that they were giving us, so whatever the cost
 18 price they were giving us, that's how it had come up in
 19 the retail, based on the margin, ie the percentage
 20 margin and the cash margin. So ... That's how you come
 21 to the price.
 22 **Q.** That brings me to the bit in paragraph 117 of your
 23 witness statement. If you look at page 29, it's the
 24 internal page 29, of the witness statement --
 25 **A.** In my witness statement?

1 **Q.** Yes. It should be the right-hand side at the top. It's
 2 the second half of your paragraph 117. Your
 3 paragraph 117 starts at the bottom of the left-hand
 4 side.
 5 **A.** Yeah. Where am I going to now?
 6 **Q.** If you go to the third line on the top of the next page.
 7 **A.** Yeah.
 8 **Q.** You say:
 9 "If a byproduct of this was that my price for
 10 a particular ITL brand was the same as that for
 11 a Gallaher brand, that was because the manufacturers
 12 were able to create that position by having equivalent
 13 cost prices and knowing I did not have the margin to
 14 price any differently."
 15 I just wanted to explore that with you. In order to
 16 do that, I wonder whether you could have a look at two
 17 documents side by side. One of them is in annex 14 and
 18 the other one is in annex 4. The one in annex 14 is at
 19 tab 50. {D14/50/137}. If you have tab 50, you will see
 20 that this is a letter to you dated 11 March 2002, and
 21 it's a letter that you comment on in your witness
 22 statement. Just to give you the context, the first
 23 heading is the word "Margins", and you see that the
 24 writer, who is Mr Hall, encloses a spreadsheet showing
 25 the change in margins over the three years to

1 February 2002. He refers to the substantial increase in
 2 cash margins.
 3 If you go to the last page in the tab, you will see
 4 the spreadsheet that he attaches. What he does is to,
 5 in the columns we have on the left, that's to say the
 6 far left, a date 3 February 1999 and then we have
 7 a column which starts with the word "Brand", and then we
 8 have a series of columns which sets out different
 9 brands. So we have Regal Kingsize, L&B Kingsize,
 10 Superkings, Richmond Kingsize, Classic and
 11 Golden Virginia.
 12 Underneath the brand headings you have various
 13 figures which are explained in the second column from
 14 the left. Okay? So the first group of figures relate
 15 to 3 February 1999. I wanted to look at the second
 16 group, the one with the date 25 February 2002. If you
 17 look at the second column, the first line in the second
 18 column appears to be "RSP", but if we check as against
 19 tab 11 of -- this is for the Tribunal's benefit. If you
 20 go to the file dealing with the chronology of Budgets
 21 and MPIs and go to tab 11, you will see that the RSP
 22 figures are the published RRP figures. But that's just
 23 for the benefit of the Tribunal.
 24 So if we look at 25 February 2002 figures, and just
 25 take Richmond. Do you have Richmond?

1 A. Yeah, Rich Kingsize, yeah, yeah.
 2 Q. So we have 3.59 and that's the RRP.
 3 A. Yeah.
 4 Q. The figures below it are, as I understand it,
 5 confidential. The second figure, which is expressed in
 6 pounds and pence, is the cost to Asda. So that's the
 7 wholesale price to Asda.
 8 A. Yeah.
 9 Q. Then the figure below that, which I think is
 10 unconfidential, is a figure of 3.44?
 11 A. Yeah.
 12 Q. That is described as the Asda SP. We can actually see,
 13 and then this again is largely for the sake of the
 14 Tribunal, but if we looked at tab 48 of this annex,
 15 page 3, we would see that the figure which is Asda's SP
 16 is its shelf price. So --
 17 **THE CHAIRMAN:** The cost to Asda, that's per ten packs,
 18 presumably?
 19 **MR LASOK:** Per outer.
 20 **THE CHAIRMAN:** Yes.
 21 **MR LASOK:** So that's ten packs.
 22 So we have a figure of the cost to Asda, and we have
 23 the price per pack of 20, and we have the percentage
 24 margin and the cash margin. What I want to do is to
 25 look at the confidential figure which is the cost to

1 Asda which is the per outer price, bearing in mind that
 2 the shelf price is 3.44. Okay?
 3 A. Yeah.
 4 Q. So I am just looking at those two figures, in relation
 5 to Richmond.
 6 A. Right.
 7 Q. If you now go to annex 4, tab 5. {D4/5/17}
 8 A. The letter from Chris Halford?
 9 Q. Yes, this is Chris Halford to you, and it attaches the
 10 parallel price file for Gallaher brands, because if we
 11 go to page 2, we have "Asda Limited Cost and Retail
 12 Prices Gallaher Limited". We have a date,
 13 December 2001.
 14 A. Yes.
 15 Q. Now, December 2001 is clearly not 25 February 2002, but
 16 we just have to make use of the information that we
 17 have. As far as I am aware, there wasn't any MPI
 18 between -- or relevant MPI -- December 2001 and
 19 February 2002.
 20 As I understand it, a lot of the figures in these
 21 price files are confidential. Asda obviously can see
 22 them, because this document was sent to Asda, in
 23 particular yourself, but I think they are probably
 24 blanked out as far as ITL are concerned, but Asda knows
 25 what I am talking about.

1 If we go to the fourth page --
 2 A. The fourth page of --
 3 Q. It's the fourth -- it's the last page but one. Do you
 4 have a copy that's got everything blanked out?
 5 A. It starts off "Camel Lights".
 6 Q. That's right. If you go to the middle of the page, you
 7 have "Dorchester"?
 8 A. Yes.
 9 Q. If you take the second Dorchester, Dorchester Kingsize,
 10 it's the second one listed, and you run finger along to
 11 the right, it should be a pack of 20s?
 12 A. Yes.
 13 Q. If you run your finger further along you should get to
 14 a column which is the fifth from the right, which is
 15 "Net Cost". Do you have that one?
 16 A. There is nothing in mine.
 17 Q. Right, okay. I think this is a clean copy. (Handed).
 18 **MR HOWARD:** We do not have copies of this material.
 19 **THE CHAIRMAN:** It's confidential to Gallaher.
 20 **MR HOWARD:** That may be, but I can't follow it and deal with
 21 it if I am not to see it.
 22 **THE CHAIRMAN:** Well, let's see where we get to with this
 23 first, and then we will decide what to do about it.
 24 **MR LASOK:** So we are looking at the second "Dorchester
 25 Kingsize", which is the pack of 20s. If you run your

1 finger along to the column headed "Net cost" --
 2 **A.** Yes.
 3 **Q.** -- there are actually two figures for net cost, and if
 4 you move further to the right, right to the box on the
 5 right, you will see that the reason for that is because
 6 there is a normal price and then there is a price from
 7 29 October. We are interested in the 29 October-line.
 8 Because if we look on the 29 October line, we have the
 9 net cost, we have the RSP, which is 3.44, and that's the
 10 same as the Richmond shelf price, and then we have the
 11 cash margin and the percentage margin.
 12 **A.** Yes.
 13 **Q.** But I was actually quite interested in the figure for
 14 net cost, because that is a bit below the net cost to
 15 Asda for Richmond. Now, these two figures are
 16 confidential, but I think you will agree that there is
 17 a differential between those two figures?
 18 **A.** Yes.
 19 **Q.** This is a cost per outer?
 20 **A.** Yes.
 21 **Q.** So if you then transpose that to per pack of 20, you got
 22 pretty close to a difference that would enable Asda to
 23 price Richmond and Dorchester at different prices.
 24 **A.** I presume I could, yes.
 25 **Q.** So we can't actually assume, without looking at the

1 figures, that the wholesale prices to Asda were so close
 2 together that the retail prices would necessarily be the
 3 same, can we?
 4 **A.** No.
 5 **Q.** No. But nonetheless Richmond and Dorchester are priced
 6 the same?
 7 **A.** There will always be a situation where products are the
 8 same price, but obviously in this particular case
 9 I haven't looked at it in as much detail, because
 10 I wouldn't be comparing Gallaher retails against ITL
 11 retails or Rothmans retails, which I wanted to go at.
 12 So I could only work off that scenario.
 13 **Q.** But I think one of the points that I am putting to you
 14 about this is that -- you can close the files up.
 15 **THE CHAIRMAN:** Well, let's just finish off that point. Or
 16 are you moving on to a different point?
 17 **MR LASOK:** No, it's a continuation of this point.
 18 **THE CHAIRMAN:** Okay.
 19 **MR LASOK:** The point I was going to put to Mr Jolliff is: in
 20 paragraph 117 of your witness statement, and the bit
 21 that I read out to you, you say -- and I'll read it
 22 again. I'll read the entire sentence. It starts in the
 23 second line at the top of the right-hand page. You say:
 24 "As I have said, my pricing decisions were based on
 25 my cost price, my RSP, my margin and my competitors. If

1 a byproduct of this was that my price for a particular
 2 ITL brand was the same as that for a Gallaher brand,
 3 that was because the manufacturers were able to create
 4 that position by having equivalent cost prices and
 5 knowing I did not have the margin to price any
 6 differently."
 7 When you wrote that, did you write it after having
 8 verified that this statement was actually accurate?
 9 **A.** As far as I am aware, it was accurate. I don't really
 10 know what to say. As far as I was aware, it was
 11 accurate. Because I don't compare -- when you get the
 12 price sheets and everything, I don't compare ITL's cost
 13 prices and retail prices, all I am interested in is the
 14 cost price that I am given from either ITL or Gallaher's
 15 or whoever it may be. I don't compare the cost prices,
 16 because if I am happy with the margin that I am getting
 17 from Gallaher's in this particular case, I am quite
 18 happy and I would set my retail around that. I mean,
 19 obviously if I had checked it against ITL's, I wouldn't
 20 have been happy, but I didn't. That's how it looks
 21 anyway.
 22 **Q.** The point I am putting to you is that actually what you
 23 did was price in accordance with the RSPs that were sent
 24 to you by Gallaher and ITL?
 25 **A.** But I've already stated that there could be cases where

1 I would accept those prices based on the margin that
 2 I have been given. So if my margin is the same, the
 3 likelihood is that I would follow the RSP. Because --
 4 **THE CHAIRMAN:** If your margin is the same as what?
 5 **A.** Say, for example -- I am making this up, by the way --
 6 you take Richmond Kingsize here, if your percentage
 7 margin was [redacted] and your cash margin was --
 8 **MR LASOK:** The figures I think are confidential.
 9 **A.** Sorry.
 10 **Q.** What you are there looking at is the spreadsheet in
 11 annex 14, I am not sure that that is confidential, it's
 12 the Gallaher figures that are confidential.
 13 **A.** I think it is, in the right-hand corner it does say.
 14 I apologise for that.
 15 **DR SCOTT:** It's marked "ITL Confidential", so ITL can --
 16 **MR LASOK:** Yes.
 17 **A.** So I wouldn't compare ITL's cost prices, because it's
 18 not the same brand.
 19 **THE CHAIRMAN:** But would you price in accordance with the
 20 RSP given to you by either ITL or Gallaher, provided
 21 that that gave you a satisfactory margin?
 22 **A.** Yes, and that's my decision.
 23 **MR LASOK:** But this is actually an incident in which you
 24 could have priced the Dorchester product otherwise than
 25 in accordance with the RSP that was sent to you. But in

1 fact you priced at parity with Richmond.
 2 **A.** Well, I could have done, but that wasn't because -- Asda
 3 aren't interested in parity, all we are interested in is
 4 getting the best deal for Asda. Or that's what I was
 5 employed for when I was buying tobacco.
 6 **Q.** Well, we can, I think, perhaps wind this particular bit
 7 up. You have constantly stated that you determined
 8 Asda's retail prices by reference to your examination of
 9 cost prices, the recommended selling prices proposed to
 10 you by the manufacturers, by reference to margins and
 11 what competing retailers were doing?
 12 **A.** Mm.
 13 **Q.** A constant refrain. I wonder whether you could turn in
 14 annex 14 to tab 31, please. {D14/31/77}.
 15 This is the one where, at the bottom of the page,
 16 you receive an email from Martin Downham stating that
 17 ITL would like to increase the retail price of ITL's
 18 roll-your-own range, and he sets out the price moves
 19 showing the original price and the price that he wants
 20 the roll-your-own range to move to. On the second page,
 21 he asks you to confirm a date for the change, and
 22 suggests Monday 26 March. He says a price file will
 23 follow. Then this is the email that I think we saw when
 24 you were last here, to which you replied by saying "This
 25 will be okay".

1 Now, could you just take us through the processes
 2 that you followed before you said to Mr Downham that it
 3 would be okay?
 4 **A.** Right. Amber Leaf had already gone up in price, that is
 5 a Gallaher's brand. So what I would be expecting would
 6 be that the competitor's brand would be going up in
 7 price. So they had decided to increase their cost
 8 prices to myself, because there was, I presume it was
 9 after the manufacturers' price increase, or it might
 10 have been the Budget, I am not too sure, it's 20 March,
 11 I can't really remember when the Budget day was in 2001.
 12 So what I would do then, I would await from ITL the
 13 deal sheets, as I call them, to come to me to see
 14 exactly what my cost price would be against for Drum and
 15 Golden Virginia. Because if the supplier withdrew the
 16 bonus levels, it would mean that the price had to go up,
 17 otherwise I would be losing money. I couldn't afford to
 18 do that.
 19 I would then look at whatever the recommended retail
 20 price was. I would look at the yearly costs and the
 21 margins, I would also check -- not all at the same
 22 time -- that Amber Leaf has gone up in other retailers,
 23 I would check the price of that -- hence I used to go
 24 out on a Monday afternoon checking prices to make sure
 25 they were correct -- and then I would make a decision

1 there on the retail price.
 2 **Q.** So you would make the decision after doing all those
 3 things?
 4 **A.** Mm.
 5 **Q.** How long would it take you to do all those things?
 6 **A.** Well, first of all, you would have to wait until the
 7 price file came because until you actually got the price
 8 file, you wouldn't know what you were doing, because you
 9 would expect, if Amber Leaf has gone up, that the
 10 competitors, ie Drum and Golden Virginia would be going
 11 up in price, because ITL wouldn't want to be losing
 12 money, unless they wanted to hold the price down. If
 13 they were holding the price down, I have no doubt that
 14 Gallaher's would get hold of me and say "The situation
 15 is, John, that ITL have held these prices", we now want
 16 to bring our prices down and take an overall view of it.
 17 So how long it would take, it's very difficult to
 18 put actual estimated time on it.
 19 **Q.** I am just wondering about that, because the first email
 20 is the one that requests you to move the shelf prices.
 21 You respond and you say "This will be okay" and as
 22 a result of that, we then see the succeeding two emails,
 23 which are towards the top of the page, in which
 24 internally ITL activates your agreement, because we see
 25 that there is an email from Helen Wood to yourself and

1 to Martin Downham about the pricing, and she says to
 2 you -- sorry, Helen Wood of Asda sends to you and to
 3 Martin Downham a message:
 4 "Retails on system to change in store Monday,
 5 26 March."
 6 Then what happens is that Martin Downham sends
 7 an email to Stephen Carroll, copying him in on the email
 8 exchange, and he simply says:
 9 "FYI and price file confirmation."
 10 So it looks as though what's happened is that
 11 firstly you are asked: will you move your prices? You
 12 say yes. Helen Wood of Asda confirms the date that she
 13 says "Retails on system to change", so it looks as
 14 though you have inputted it into the system, and then
 15 ITL sets about sorting out the price file. That's the
 16 sequence of events, and it happens over a very short
 17 period of time. So I was just wondering how, within,
 18 you know, that sequence of events revealed by the email,
 19 you fitted in all the things that you said that you did
 20 on this occasion?
 21 **A.** Yes, I understand what you are saying. Probably the
 22 reason being is that I was expecting Amber Leaf to move,
 23 sorry, it had already moved, so Drum and Golden Virginia
 24 would follow. It was confirmed that I would be moving
 25 the prices, but I couldn't actually move my cost prices

1 or my retail prices until I got the price file from
 2 Imperial Tobacco, because until I got the cost prices,
 3 I couldn't do my work.
 4 **Q.** Well, can I put it to you that what actually happened is
 5 what this document shows happened, and that is that you
 6 were asked to make a move, and you just did it, you
 7 agreed to it, and you cannot didn't carry out any of
 8 this complex exercise that you say you carried out, and
 9 you then no doubt waited for the price file to be sent
 10 to you, and you just followed the price file?
 11 **A.** No. I think that the situation would be, as I've
 12 already said, that I would be expecting it to move. So
 13 I've said "Yes, we will move the price", but I couldn't
 14 put the prices until I had the deal sheet from Imperial
 15 Tobacco because I wouldn't know what they were.
 16 **Q.** You see, we don't get this explanation in your witness
 17 statement. You deal with this document in paragraph 92.
 18 (Pause).
 19 **A.** Well, it states there that I will be moving my retails,
 20 and the reason I'll be moving my retails is because
 21 Amber Leaf has gone up.
 22 **Q.** The problem is that you have put to us an explanation
 23 for what happened on this occasion that doesn't appear
 24 in your witness statement. I am just wondering how that
 25 happened?

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1 **A.** This is item 92, document 31?
 2 **Q.** Yes.
 3 **A.** I've understood that the discount funding will be
 4 removed, which it states on there. I will therefore be
 5 increasing my prices which is what I've already said.
 6 We've no choice but to increase it because they were
 7 taking away the bonus.
 8 **Q.** He doesn't say that in his email. What he actually
 9 says, if you go back to tab 31, and look at the first
 10 email in the string, he says:
 11 "Hello, John. Following yesterday's increase in the
 12 retail prices of Amber Leaf, I would like to increase
 13 the retail prices of ITL's roll-your-own range as
 14 follows."
 15 He then sets out the prices. It's after that that
 16 he says:
 17 "These prices will be achieved by withdrawing the
 18 bonus support."
 19 And asks you for confirmation of the date. You
 20 don't come back to him and say, "Well, you know, I am
 21 not sure that that's actually in Asda's interests to
 22 increase the prices, what about a bit of movement on the
 23 bonus? I don't like the fact that you're simply saying
 24 that you're going to withdraw the bonus in order to
 25 achieve these prices", nor do you go, apparently,

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1 through this exercise of looking at cost prices and so
 2 on and so forth and comparing yourself with competitors;
 3 you respond immediately saying "This will be okay"?
 4 **A.** That's because Amber Leaf had increased, in the market
 5 you would be expecting Drum and Golden Virginia to
 6 increase in price. That's all I can say, really.
 7 **MR LASOK:** All right. I have no further questions.
 8 **THE CHAIRMAN:** Mr Howard.
 9 **MR HOWARD:** Yes.
 10 Cross-examination by MR HOWARD
 11 **MR HOWARD:** Just a couple of questions, Mr Jolliff.
 12 I think as well as tobacco, you worked in retail,
 13 I think, for something like 30 years; is that right?
 14 **A.** That's why I've got grey hair.
 15 **Q.** I've got grey hair too, and I haven't worked in retail,
 16 it may be something else that causes that.
 17 I think you have told us you worked in beer and soft
 18 drinks. What else did you work in, other than those?
 19 **A.** Oh, lots of things. When I first started work --
 20 I don't want to give you a life history.
 21 **Q.** I do not want a life history, I am interested in your
 22 experience in the grocery trade, in the supermarket
 23 world. Can you tell us the sort of things that you have
 24 dealt with, that's what I am interested in.
 25 **A.** Out of buying as well?

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1 **Q.** As a buyer.
 2 **A.** As a buyer, I bought Christmas puddings, sauces,
 3 pickles, that's when I first started with Asda, then
 4 they realised that I had something to offer, so they set
 5 me onto bigger things. Then I got the portfolio of soft
 6 drinks, which is one of the biggest portfolios that
 7 anybody could have, from my then boss, who was John Lee,
 8 he was the controller. I then got promoted to senior
 9 buyer, when I got that particular product.
 10 **Q.** So senior buyer, what portfolio did you have
 11 responsibility for there?
 12 **A.** I had soft drinks there, and I bought that, I can't
 13 remember, it was a long time.
 14 **Q.** You have talked about what you call deal sheets, and are
 15 they a feature of the grocery market, or at least Asda's
 16 way of running its business?
 17 **A.** Yes.
 18 **Q.** Just so we understand it, explain to us what deal sheets
 19 are, what their function is, let's say across the board?
 20 **A.** You know the sheets that Gallaher's and Imperial send
 21 in.
 22 **Q.** Yes.
 23 **A.** They were more or less single sheets of those. So every
 24 single -- take, for example, Coca-Cola. If you had
 25 Coca-Cola products and there was a manufacturers' price

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1 increase, you would get a deal sheet for every single
 2 line. So if they had 300 lines you would get 300 lines.
 3 If there was a change in bonus, so say, for example --
 4 **Q.** You are going too far. I am going to come to that, but
 5 it's helpful if we just break it down. What I am trying
 6 to find out is the extent to which these what you are
 7 calling deal sheets are a feature of the supermarket
 8 grocery business, or are they limited to tobacco?
 9 **A.** The --
 10 **Q.** That's what we are personally interested in. So can you
 11 explain to us the extent to which they apply to products
 12 generally and whether they are any different in relation
 13 to tobacco as opposed to soft drinks.
 14 **A.** It's just the way the grocery trade works, we use what
 15 we call deal sheets and tobacco uses these different
 16 kind of sheets.
 17 **Q.** Are the sheets in tobacco in any respect different from
 18 the sheets in Coca-Cola?
 19 **A.** No, it's just that they have to be single lines and not
 20 all on one --
 21 **Q.** Say that again?
 22 **A.** They have to be for single lines. So you get one for
 23 Coca-Cola 2-litre, Diet Coca-Cola, et cetera, et cetera,
 24 eight pack, 12 pack, 24 pack, and it's the self-same
 25 thing, costs.

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1 **Q.** Right.
 2 **THE CHAIRMAN:** Do they all have an Asda shelf price on them
 3 suggested by the manufacturer?
 4 **A.** Suggested but you have no need to particular to that.
 5 **MR HOWARD:** Right. Okay, we have established that, that
 6 they are essentially the same.
 7 The next thing I just want to consider with you: we
 8 know from your evidence that, and we know from
 9 everybody, one knows it from general knowledge anyway,
 10 that the supermarkets benchmark against each other. So
 11 Asda is benchmarking against Tesco, I think, and
 12 Morrisons and so on.
 13 **A.** My brief was, as I've already said, Tesco, Sainsbury's,
 14 Somerfield, Morrisons, et cetera, et cetera, and we were
 15 far cheaper than say, for example, convenience stores.
 16 **Q.** Yes. Now, we understand that, but I just want to
 17 explore this benchmarking thing a little further.
 18 Again, looking at suppliers in the supply chain in the
 19 grocery market. To what extent do suppliers monitor the
 20 selling prices of their competing products in the
 21 supermarkets and benchmark themselves?
 22 **A.** The vast majority of them do it. Obviously there are
 23 smaller companies that don't, but the vast majority.
 24 **Q.** In other words, is there anything unusual about
 25 a supplier, whether he is of tobacco, dog food, soft

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1 drinks, whatever it is, being interested in the selling
 2 price of his brand and of the competing brand?
 3 **A.** No.
 4 **Q.** The system of bonuses, can you tell us, again because
 5 you have this wider experience of the grocery market and
 6 I am interested in knowing the extent to which this
 7 system of bonuses prevails in the grocery market,
 8 bonuses in order to reduce your selling price. To what
 9 extent is that something you find?
 10 **A.** We used to promote on a two weekly or four weekly basis.
 11 So say, for example, your bonuses would be paid
 12 off-invoice and not retrospective, so the price you got
 13 was the price you paid. And I mentioned earlier, but
 14 I don't think ... say, for example, you got a two week
 15 or a four week promotional period -- I am making this
 16 up, this isn't ... say for example it's 2-litre
 17 Coca-Cola. You would have two deal sheets for it.
 18 So you would then be in a situation where the price
 19 may be coming down for, say, 99p to 87p or wherever it
 20 may be. You would then have a date when it finishes.
 21 So to make things easier, if the promotion began on
 22 1 January, the promotion would begin on Monday,
 23 1 January, and it would then finish, for example, on
 24 30 January. What you would do, you would input the cost
 25 prices for a promotion, because it was off-invoice, so

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1 there was no retros, off-invoice and then that price
 2 would revert when the bonus ended. So say, for example,
 3 it finished on 30 January, that bonus would end and the
 4 price would go up automatically on 30 January. That's
 5 why you get problems at store level where the POS might
 6 say a different price because the store hasn't removed
 7 it, but it's been removed by the computer on what you
 8 call a revert.
 9 **THE CHAIRMAN:** Is this what happened in the time we are
 10 talking about as well as now? Our understanding was
 11 that the computer systems were slightly less
 12 sophisticated at the period that we are discussing.
 13 **MR HOWARD:** I think that's only true of Morrisons. I think
 14 Morrisons had a slightly surprisingly out of date
 15 computer system. I don't think it was true for -- the
 16 witness can tell us.
 17 Asda between 2000 and 2003, to what extent, how
 18 sophisticated was the computer system that it operated
 19 at that stage?
 20 **A.** It was quite, you know, sophisticated.
 21 **MR HOWARD:** I think Morrisons were in an unusual position,
 22 because at that stage although they were a FTSE 100
 23 company, they were confined to the north of England and
 24 things changed a lot as a result of their massive
 25 expansion with the Safeway takeover.

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1 **DR SCOTT:** But I think what we are hearing is that the
 2 computer -- in other words, the price when you scanned
 3 it at the till had changed, but sometimes the price on
 4 the shelf, the little paper thingy, had not changed.
 5 I think that's the point he was making.
 6 **MR HOWARD:** Yes. That goes to really the efficiency of
 7 changing the prices.
 8 **A.** Can I explain the reason why that's done. The reason
 9 why it's done is that we don't want to create a lot of
 10 hassle between the suppliers and Asda over incorrect
 11 bonuses, because all it's doing is wasting the
 12 supplier's money and wasting Asda's money and wasting
 13 everybody's money if you have the incorrect bonus. If
 14 you've got the correct bonus up and it comes up,
 15 everybody knows they are okay, and that's why in the
 16 grocery industry you used to have these revert retails.
 17 **MR HOWARD:** Okay. We have established --
 18 **A.** For example, for example, like on beer, if you got --
 19 beer can be quite highly priced, it can be £12.99 for a
 20 12 pack, whatever it may be, or maybe a 24 pack. If you
 21 got that bonus wrong, you were in big problems. Created
 22 a lot of work.
 23 **Q.** Okay. We have a picture of the benchmarking and the
 24 bonuses. I want to then go down to another level and
 25 just see if you can assist us about this. I am moving

1 outside of tobacco, and drawing on your experience. So
 2 if we take the soft drinks market, which I think you
 3 have spoken about, and I think at one point in your
 4 evidence you gave us an example of Coca-Cola and
 5 Pepsi Cola?
 6 **A.** Yes.
 7 **Q.** To what extent -- this is perhaps a statement of the
 8 obvious, but let's extract it from you -- are Pepsi Cola
 9 and Coca-Cola in competition?
 10 **A.** They hate one another.
 11 **Q.** What?
 12 **A.** They hate one another, basically.
 13 **Q.** To what --
 14 **A.** They were very, very, how can I put it -- they watched
 15 one another like ...
 16 **Q.** Hawks I think is probably the expression one would use.
 17 **A.** Hawks, yes.
 18 **Q.** To what extent were you, as the soft drink buyer at
 19 Asda, aware (a) of their watching each other like hawks
 20 -- well, tell me that: to what extent would you be aware
 21 of that?
 22 **A.** They were equally as bad. To me it was bad.
 23 **Q.** If we take the Pepsi/Coke thing, let's take cans of Coke
 24 that you sell in a pack of six, so you have six cans of
 25 Coke of whatever the standard size is, and six cans of

1 Pepsi Cola again sold in a pack. To what extent are the
 2 two suppliers benchmarking, seeking to benchmark
 3 themselves to ensure that their prices, one doesn't have
 4 a price advantage over the other?
 5 **A.** They would look at the -- they would go out price
 6 checking to, for example, everybody, Tesco, Sainsbury,
 7 and check it out, and they would look at the retails
 8 that are out there and they would compare the retails.
 9 If, for example, I had done a deal with Pepsi, for
 10 example if I had gone down from 99p to 75p, I wouldn't
 11 go and tell Coca-Cola that I am going down in price to
 12 75p, but Coca-Cola would phone me up by saying "What's
 13 going on here, John?" And the fact of the matter would
 14 be, we have gone down to 75p because we have this price
 15 promotion on which is fully funded, and I would say
 16 "Would you like to do that?"
 17 **Q.** Yes, and what would they very often say?
 18 **A.** Well, they would say "Not at this particular time" or
 19 they might say "Yes, we will fund it".
 20 **Q.** If they did say "Yes, we will fund it", what did that
 21 mean in terms of your margin and what they had to do?
 22 **A.** They would ensure that our margins were enhanced and
 23 that it was worthwhile for Asda to bring the prices
 24 down.
 25 **Q.** Right.

1 **A.** So we didn't lose any money.
 2 **Q.** Right. If in your example Pepsi had come down to 75p as
 3 a result of the promotion, but Coca-Cola national
 4 account manager or whatever they call them has rung you
 5 up and said "What's going on?" It becomes clear there
 6 is a Pepsi promotion, and you get to a situation where
 7 he says "Okay, I want to promote as well to get to 75p".
 8 To what extent would you decide whether or not you were
 9 prepared to do that? What influences you?
 10 **A.** Well, depending on what -- how much bonus he had given
 11 me. If he had given me more than that, I would probably
 12 go to a lower price. If it was a cost price which was
 13 the same, I would probably go to the same price.
 14 **Q.** To what extent, can you explain to us, the way in which
 15 you dealt with, say, Pepsi and Coca-Cola, to what extent
 16 was that different, as far as you were concerned, to the
 17 way in which you dealt with Imperial, Gallaher and
 18 Rothmans?
 19 **A.** There was no real difference.
 20 **Q.** No real difference. Thank you. Now, the Office of Fair
 21 Trading I think today, they asked you a question which
 22 was by reference to the trading agreement which you have
 23 at tab 53. {D14/53/148}. If you turn to tab 53, you can
 24 see it says:
 25 "Subject to Imperial Tobacco's requirements on [and

1 I am going to read out what's there because I can waive
 2 the confidence] [redacted] strategic pricing being met,
 3 ITL will make a quarterly payment to Asda of [redacted]
 4 per thousand on all cigarette purchases."
 5 Now, you signed this in June 2002. What did you
 6 understand you were obliged to do, if anything, as
 7 a result of this?
 8 **A.** I wasn't obliged to do anything.
 9 **Q.** If, for instance, your strategic pricing did not comply
 10 with ITL's targets, say, did you understand that you
 11 were exposing Asda to any liability as a result of that?
 12 **A.** No.
 13 **Q.** You were then taken to, a little bit later, tab 56.
 14 {D14/56/156}. I think you were asked some questions, the
 15 question that was put to you is that there was a payment
 16 in return for compliance with strategic P&Ds, parity and
 17 differential requirements, and that you were committing
 18 Asda to comply with the parity and differential
 19 requirements.
 20 Now, the first question I wanted to just get clear:
 21 as far as you were concerned, were you committing Asda
 22 to complying with the parity and differential
 23 requirements?
 24 **A.** No, because I set the retails.
 25 **Q.** As far as you were concerned, could there have been any

1 doubt from Imperial's perspective as to whether or not
 2 you were committing yourself in any way?
 3 **A.** I don't think so, because they paid the bonuses, the
 4 reason why they have paid the bonuses.
 5 **Q.** Hidden within this question appears to be, because the
 6 case hasn't been explicitly put to you, a rather more
 7 convoluted case that the Office of Fair Trading is
 8 running. Although they haven't directly put this rather
 9 convoluted case to you, I need to just tease it out so
 10 that you can have a proper opportunity to deal with it.
 11 What the Office of Fair Trading first appear to be
 12 saying is -- I want you to comment on each one of these
 13 scenarios -- that if Imperial chose to decrease its
 14 price, so let's say Richmond was being sold by you at
 15 £3.34 as a result of the bonuses that you have been
 16 given, and they chose to promote Richmond by saying to
 17 you, "We will give you an enhanced bonus to reduce the
 18 price by 5p" and you did so, the Office of Fair Trading
 19 appears to be saying that, in that event, having reduced
 20 the price of Imperial, Imperial having paid you to do
 21 it, that it was a requirement as a result of the trading
 22 agreement that you should also reduce the price of the
 23 competing Gallaher product, here Dorchester.
 24 Firstly, could you tell us whether you understood
 25 you were under such a requirement from Imperial?

1 **A.** No, there was no requirement whatsoever.
 2 **Q.** Can you tell us what you would consider about the
 3 commercial sense of such a suggestion that Imperial has
 4 paid to reduce its price but it's being said at the same
 5 time it expects you to reduce the price of the Gallaher
 6 brand?
 7 **A.** Well, I wouldn't reduce the price of the Gallaher brand
 8 because I was getting no funding from Gallaher's to
 9 reduce the price.
 10 **Q.** Yes.
 11 **A.** So Asda would be losing money.
 12 **Q.** Now, it's then said that if Imperial, having paid
 13 a bonus to you, then withdraws the bonus -- and you were
 14 shown an example of this at tab 31 -- this was
 15 a situation at tab 31, do you remember this email, you
 16 looked at a moment ago?
 17 **A.** Golden Virginia and --
 18 **Q.** Yes. This was a situation where Imperial was following,
 19 it was withdrawing its bonus because Amber Leaf had --
 20 it would appear Gallaher had withdrawn a bonus relating
 21 to Amber Leaf, so the price of Amber Leaf had gone up.
 22 Correct? Now, what I want to ask you about, I'll come
 23 back to that situation in a moment, but assume instead
 24 of Imperial following Amber Leaf what they had decided
 25 was they had had enough of paying you all this money, in

1 respect of let's say Richmond, and they withdraw their
 2 bonus partially, so they have taken the price of
 3 Richmond down from £3.34 to £3.29, and then they put it
 4 back up again by withdrawing the bonus.
 5 If we just separate that out in stages. If they
 6 withdraw the bonus so that -- and in order to maintain
 7 your margin the price has to go up, what would you
 8 normally do?
 9 **A.** I would ask the reason why the price is going up in the
 10 first place.
 11 **Q.** Yes.
 12 **A.** And then if they give me a valid reason for putting the
 13 price up, because for various reasons --
 14 **Q.** Yes.
 15 **A.** I would take an overview as to what retail I would go
 16 to.
 17 **Q.** Yes, and if their reason was "we just can't afford to do
 18 this any more, continue paying you this bonus, so we are
 19 not going to do it" then what?
 20 **A.** I would eventually put the price up to the agreed level
 21 that I would want to go to, not what Imperial wanted to
 22 go to.
 23 **Q.** Right. Now, if that occurs, so that you have put up the
 24 price of Imperial to 3.34, and let's assume that at the
 25 same time that Gallaher have paid you a bonus to get

1 their product down to £3.29, and Gallaher don't do
 2 anything, they are still paying you the bonus, do you do
 3 anything to the Gallaher product because you have put
 4 the Imperial product up?
 5 **A.** No, because the bonus would still be in situ, which
 6 would keep the retailer at 3.29. Had we expected
 7 Imperial to come back to me and say -- we are going to
 8 have to bring it back down again.
 9 **Q.** Then take a different situation, but it is the other
 10 side of the coin: Gallaher decides to decrease the price
 11 of its product, here Dorchester, because it wants to get
 12 a competitive advantage, it says "I'll pay you 5p,
 13 Mr Jolliff, to get our product down to £3.29". Assume
 14 they do that. As far as you were concerned, if Imperial
 15 wants to come back to compete, what does it have to do?
 16 **A.** It would have to match -- if the retail price came down
 17 from -- on the Gallaher's brand, and Imperial approached
 18 me, they would have to ensure that the deal that they
 19 gave me was good enough for me to bring the price down
 20 and then I would make a decision on the retail.
 21 **Q.** Yes. If Imperial did not approach you, would you do
 22 anything to Imperial's product?
 23 **A.** No, because I couldn't afford to do it.
 24 **Q.** Right. Then if we go back to tab 31, which is actually
 25 a specific example we can see what happened.

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1 {D14/31/77}. Amber Leaf goes up because Gallaher
 2 withdraws its bonus. If Imperial do nothing, they
 3 having bonused their product to come down to compete
 4 with Amber Leaf, do you do anything to the price of
 5 their product?
 6 **A.** No, I just leave it.
 7 **Q.** Now, in relation to tab 31, Imperial having paid a bonus
 8 in respect of Drum, is there any basis on which you are
 9 entitled to say to them "you have to keep doing this,
 10 whether you like it or not"?
 11 **A.** Well, you could say that to them, but the fact of the
 12 matter is that if they couldn't afford to do it or they
 13 were withdrawing the bonus, they would withdraw the
 14 bonus and I would be left with a price that I couldn't
 15 afford the margin.
 16 **Q.** Just to consider two other final scenarios. One is the
 17 position of a manufacturers' price increase by Imperial.
 18 So Imperial decides it's going to put up, let's say,
 19 across the board the price of its cigarettes by 6p
 20 a pack, and they then produce a new price file to
 21 reflect that. As far as you were concerned, and assume
 22 Gallaher has done nothing at this stage, they haven't
 23 announced their MPI, did you have to do anything as far
 24 as you were concerned to the price of the Gallaher
 25 product?

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1 **A.** No.
 2 **Q.** Did Imperial at any stage suggest to you that "we
 3 require you to move the price of Gallaher's products if
 4 we change our price"?
 5 **A.** No.
 6 **Q.** In the case of a Gallaher MPI, so the Gallaher price
 7 goes up, did you understand -- let's say Gallaher put up
 8 their prices by 6p and Imperial hasn't yet announced
 9 whether it's having an MPI at all, were you, as far as
 10 you were concerned, required by Imperial to do anything
 11 with the price of its products?
 12 **A.** Could you just repeat that?
 13 **Q.** Yes. The OFT appears to be saying, still appears to be
 14 their case as far as we can understand it, that where
 15 Gallaher put up the price of its cigarettes as
 16 a result -- I've already discussed with you where they
 17 withdraw a bonus. So now this is where Gallaher has
 18 an MPI. So it puts up the price across the board of 6p.
 19 Again, if we take it in stages. As I understand it,
 20 what then happens is you get a price file where the
 21 prices of Gallaher products go up. Correct? If we then
 22 assume Imperial hasn't had an MPI, and it doesn't send
 23 through a price file changing the price of its brands in
 24 any way, what, if anything, did you understand you were
 25 required to do with the selling price of Imperial's

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1 products?
 2 **A.** I would just leave the prices where they are, because
 3 there was no manufacturers' price increase, it was just
 4 from Gallaher's.
 5 **Q.** Yes.
 6 **THE CHAIRMAN:** Can I just ask the question a slightly
 7 different way: what was your understanding that ITL
 8 wanted you to do, whether you were required to do it or
 9 not, what did you think they would want you to do in
 10 those circumstances?
 11 **A.** If there was a manufacturers' price increase?
 12 **THE CHAIRMAN:** The scenario that Mr Howard put to you.
 13 **MR HOWARD:** We will take the two situations. Where Imperial
 14 puts up its price, has a manufacturers' price increase,
 15 and Gallaher hasn't done anything, the Chairman is
 16 asking you: what did you understand Imperial wanted you
 17 to do to the Gallaher product in that event?
 18 **A.** Let's get this straight. Imperial have put the prices
 19 up --
 20 **Q.** Of their product.
 21 **A.** -- of their product by 6p. Provided it was verified
 22 that I could put the prices up, I could put the prices
 23 up of the Imperial product and Gallaher's products
 24 I would leave them exactly where they are.
 25 **Q.** Did you understand that Imperial had any expectation or

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1 requirement or however you want to express it, that they
 2 had an expectation that you should, in order to satisfy
 3 them, do something to the Gallaher product?
 4 **A.** No, I wouldn't move the Gallaher product, it would be
 5 uncompetitive. There would be somebody -- you just
 6 wouldn't do it.
 7 **Q.** Equally, where the Gallaher product was put up in price
 8 by an MPI, what did you understand Imperial wanted you
 9 to do to their price, their selling price, they not
 10 having had an MPI for their product?
 11 **A.** Just leave the Imperial products where they were and the
 12 Gallaher prices would go up.
 13 **Q.** Right. Then the final point I wanted to ask you about
 14 was your evidence about cost prices, and at various
 15 stages in your witness statement you explain that you
 16 set cost prices, selling prices on the basis of the cost
 17 prices and your margins. Okay?
 18 Now -- you are nodding, as I understand it that's
 19 what you have said in your witness statement?
 20 **A.** Yes, that's right.
 21 **Q.** You were then asked a question about a specific example
 22 where, in that example, I haven't actually seen the
 23 underlying figures, but the example was what was said --
 24 what you were asked to do was to compare the cost of
 25 Richmond on 25 February 2002 to the cost of Dorchester

1 in December 2001, and you were asked to explain why the
 2 selling prices in Asda were the same for those two
 3 products, although apparently the cost price of
 4 Dorchester was less than Richmond. You understand, that
 5 was the point that was being put to you?
 6 **A.** Yes.
 7 **Q.** In relation to that, I just want to see if I understand
 8 the position. Firstly, to what extent is it reliable to
 9 compare prices and costs in December 2001 with
 10 February 2002, do you know?
 11 **A.** I don't honestly know.
 12 **Q.** Let's assume that it is for a moment a reliable
 13 exercise. As I understand it, you get these selling
 14 sheets, or the deal sheets, from the two manufacturers,
 15 and in the same way you get them from Coca-Cola and
 16 Pepsi and so on when you were dealing with soft drinks.
 17 Now, what is the exercise you do when you get the
 18 Imperial sheet? What are you actually doing when you
 19 look through it and then decide what price to sell at?
 20 **A.** You would have the previous deal sheets and you would
 21 compare your costs, your margins, et cetera, et cetera,
 22 to ensure that you are getting a better deal or an equal
 23 deal to what you have, and then you would re-set your
 24 retail price around that.
 25 **Q.** Right. Of course, insofar as one finds that the selling

1 prices in Asda to -- insofar as they reflect, and there
 2 is an issue as to the extent to which they did, but
 3 insofar as from time to time they reflect the
 4 differentials that Imperial had been seeking -- sorry,
 5 let me start again.
 6 Insofar as the selling prices -- may I just look at
 7 one point?
 8 **THE CHAIRMAN:** Well, Mr Howard, I've delayed our having our
 9 mid-morning break, thinking that you were about to come
 10 to an end.
 11 **MR HOWARD:** Yes.
 12 **THE CHAIRMAN:** But perhaps if you are not immediately coming
 13 to an end, we should --
 14 **MR HOWARD:** There is a point my attention is being drawn to
 15 which I think I might want to draw the Tribunal's
 16 attention to.
 17 **THE CHAIRMAN:** Well, would it be convenient then to have
 18 a ten-minute break?
 19 **MR HOWARD:** Yes.
 20 **THE CHAIRMAN:** Thank you. We will come back at just after
 21 ten past 12.
 22 (12.04 pm)
 23 (A short break)
 24 (12.15 pm)
 25 **MR HOWARD:** Mr Jolliff, just a couple more questions.

1 I want to go back one stage, just help me with this:
 2 what did you understand was the nature of the
 3 competition between Imperial and Gallaher at the time
 4 that you were involved?
 5 **A.** They were very competitive.
 6 **Q.** How did that competition manifest itself? What were
 7 they doing in order to compete with each other?
 8 **A.** Well, they were obviously in a situation where, with
 9 these particular brands like Dorchester and Richmond,
 10 et cetera, trying to keep people smoking, and because of
 11 this they were really keen on price, which is like any
 12 other manufacturer.
 13 **Q.** Yes. Of course, other manufacturers, were they entitled
 14 to advertise? Was Coca-Cola entitled to advertise?
 15 **A.** Yes, they advertised everywhere.
 16 **Q.** The tobacco manufacturers, we know it's not a secret,
 17 they faced what was at this time the growing dark market
 18 and restrictions on their ability to advertise. So for
 19 them, in relation to this competition, how important was
 20 price?
 21 **A.** That's all they had. All they had was price. And all
 22 we had was price as well.
 23 **Q.** To what extent was price being used as far as you could
 24 see by them to achieve a competitive position?
 25 **A.** They were trying to be as competitive as possible.

1 Q. Thank you for that. If we take the situation where, you
 2 explained to us they were trying to be competitive,
 3 Gallaher puts up its price of its products which, let's
 4 say, include Dorchester. So it puts up Dorchester by
 5 6p, and Imperial doesn't do anything at that stage.
 6 Now, going back to this question that the Chairman
 7 was asking you as to what, in that circumstance,
 8 Imperial wanted, having explained to us the competitive
 9 environment, are you aware of any reason in that
 10 circumstance why Imperial would have wanted the price of
 11 its product to be put up if it hasn't done anything?
 12 A. No.
 13 Q. Moving on to a different point, you will need
 14 a different file for this, could you be given core
 15 bundle volume 1, which is the ITL appeal bundle, and for
 16 this purpose I want you to turn to tab 3, which is ITL's
 17 appeal in respect of Asda, and I want you to turn to
 18 page 23 of that, is internal page numbering 23, and
 19 page 389 of the bundle itself in the right-hand corner.
 20 {C1/3/389}.
 21 A. Is that the page with all the graphs on?
 22 Q. It is, yes. I want to set in context Mr Lasok's
 23 questions against the graph of actually what was
 24 happening. Just wait a moment while the Tribunal locate
 25 the document. (Pause). Is your copy coloured?

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1 A. It is, yes.
 2 Q. Does the Tribunal all have the relevant page?
 3 What we have here is a graph which is comparing in
 4 Asda the selling prices of Richmond and Dorchester, and
 5 zero is parity, and then where you see things going
 6 above and below the line, that tells you the extent to
 7 which, at the relevant time, actually these products
 8 were being sold at the same price. Okay?
 9 A. Right.
 10 Q. So what one sees is, between 2001 and 2002, there are
 11 periods -- considerable periods in fact -- where
 12 Richmond appears to be significantly below Dorchester,
 13 and then there are short periods where it was above
 14 Dorchester. Do you see that?
 15 A. Yeah.
 16 Q. Firstly, seeing that, you were then, if you just remind
 17 yourself about what you were asked to compare was -- you
 18 were shown the two documents, one which was I think
 19 dated December 2001, and the other was February 2002.
 20 But seeing this graph of actually what was happening,
 21 can you help us as to what it was that would motivate
 22 you to price Richmond and Dorchester in this way? What
 23 would be --
 24 A. It would be the bonuses that the suppliers were giving
 25 me.

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1 Q. Just explain to us -- it may be obvious -- how the
 2 bonuses feed through into (a) your margin and (b) then
 3 the selling price?
 4 A. If the supplier gave me a bonus to bring the price down,
 5 the price would go down. If they gave me a -- took the
 6 bonus off, the price would go up.
 7 Q. Yes. Insofar as, again if we look at this graph,
 8 Richmond is at various periods being sold for less than
 9 Dorchester. What conclusion do you draw in those
 10 periods as to the cost price of Richmond to Asda?
 11 THE CHAIRMAN: Do we see on this graph the price of
 12 Richmond?
 13 MR HOWARD: What we are seeing is a comparison of the two.
 14 THE CHAIRMAN: Well, but it's the differentials. As
 15 I understand it, this is not showing the price of
 16 Richmond and the price of Dorchester, it's tracking how
 17 the differentials between them move.
 18 MR HOWARD: Yes, but that shows you that Richmond -- where
 19 you are below the line -- is that much cheaper than
 20 Dorchester. Where it's a flat line, they are at the
 21 same price; and where it's above, then Richmond is not
 22 at parity, it's actually more expensive. That's the
 23 effect of it.
 24 THE CHAIRMAN: I am not sure that's ...
 25 MR HOWARD: Well, I am not sure I understand what ... the

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1 blue line is actual difference in retail price.
 2 DR SCOTT: To make life simpler, do we have the underlying
 3 data somewhere in the files?
 4 MR HOWARD: I don't know that we do. It is somewhere in the
 5 files, and I don't have -- all that this data is
 6 being -- it's not made up.
 7 DR SCOTT: No, we are not suggesting that. It's just that
 8 sometimes it's clearer to look at the matrix of the
 9 numbers.
 10 MR HOWARD: We can certainly try and supply you with that,
 11 but it is actually -- I am not sure --
 12 THE CHAIRMAN: Why is it you say, when the blue line is
 13 below zero, that that means that it's Richmond which is
 14 lower?
 15 (Pause)
 16 MR HOWARD: The answer is the whole of the comparison is
 17 comparing -- the blue line is always Richmond, and where
 18 Richmond starts is it's more expensive before the
 19 repositioning. That's why you start, you have
 20 a position actually which was 10p above but sometimes it
 21 was actually considerably above, and then there were
 22 periods where it drops down. What it's doing is
 23 tracking Richmond against Dorchester. So where the blue
 24 line is dropping down, the blue line is tracking
 25 Richmond. You are right, it's tracking it in terms of

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1 differentials, but if one is trying to see whether --
 2 because we know ...
 3 **THE CHAIRMAN:** So the descriptions of what the lines are is
 4 shorthand, if I can use that expression.
 5 **MR HOWARD:** Which description are you referring to?
 6 **THE CHAIRMAN:** When it says the blue line, "Actual
 7 difference in retail price".
 8 **MR HOWARD:** Yes, that's right. It's how much the actual
 9 difference was.
 10 **DR SCOTT:** So it looks as though, if one looks at the period
 11 where the Richmond has been repositioned, so it's the
 12 difference in RRP is now parity, it looks as though we
 13 have periods of a week or two of difference occurring.
 14 I was wondering how that fitted into the two week and
 15 four week promotional periods Mr Jolliff has talked
 16 about and maybe --
 17 **A.** That was on grocery.
 18 **DR SCOTT:** That was on grocery.
 19 **A.** With tobacco, that could go on for -- until further
 20 notice.
 21 **DR SCOTT:** Right.
 22 **A.** Depending when the bonuses were withdrawn or given.
 23 **DR SCOTT:** So it could be much shorter periods or a much
 24 longer period?
 25 **A.** That's right.

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1 **DR SCOTT:** Thank you.
 2 **MR HOWARD:** I think that the inference you are drawing is
 3 not necessarily correct, because in order to have got
 4 Richmond down, they paid considerable bonuses for
 5 a considerable period of time.
 6 **DR SCOTT:** Yes, that's what is puzzling me. What appears to
 7 be happening is, if you take the big spike, it goes
 8 walloping down for what looks like a week or some short
 9 period, then it --
 10 **MR HOWARD:** Well, that's because probably --
 11 **THE CHAIRMAN:** Can we limit ourselves to questions to
 12 Mr Jolliff for the moment, as we have him in the witness
 13 box.
 14 **MR HOWARD:** Of course.
 15 **THE CHAIRMAN:** So what is it you are asking him about this
 16 table?
 17 **MR HOWARD:** Just before I ask that, I don't want to ask
 18 questions without the Tribunal not understanding, or
 19 saying the draft isn't showing what I --
 20 **THE CHAIRMAN:** I understand now what it is you say the graph
 21 shows.
 22 **MR HOWARD:** Okay.
 23 Now, Mr Jolliff, looking at the graph, what one sees
 24 is that during 2001, from the middle of 2001, going into
 25 2002, that the difference in retail price between

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1 Richmond and Dorchester, for considerable periods or for
 2 certain periods, certain weeks, was favouring Richmond
 3 and for some of the time they were at the same price and
 4 some of the time it was favouring Dorchester. I just
 5 wanted you to explain to us what it would be that would
 6 cause these shifts in the differentials over this
 7 period?
 8 **A.** It would be -- with the case of Richmond, it would be
 9 the bonuses that Imperial were giving. With the case of
 10 Dorchester, it would be the bonuses that Dorchester or
 11 Gallaher's are giving, to bring down the price of
 12 Dorchester, so that we are losing sales.
 13 **Q.** Right. This, where we see things moving up and down,
 14 what does that tell us about the competitive environment
 15 as you perceived it?
 16 **A.** That is what tobacco is like. I mean, it's highly
 17 competitive because, as I've said earlier, it's the
 18 retail price which is all you have, you have no
 19 advertising at all. So it's the retail price that's
 20 driving. So the bonuses are driving the price.
 21 **Q.** So there we see differentials. Now, in periods where
 22 Asda was -- for instance, where Asda is pricing Richmond
 23 at a greater differential, in other words they are not
 24 pricing Richmond at the same price as Dorchester, they
 25 are pricing it below, what does that tell us about the

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1 cost price, the relative cost price of Richmond as
 2 against Dorchester?
 3 **A.** The cost price of Richmond should be lower than the
 4 Dorchester price.
 5 **Q.** Right. Conversely, where Richmond was being priced more
 6 expensively than Dorchester --
 7 **A.** It would be the opposite way around.
 8 **Q.** Right, and where they are being priced at the same
 9 amount, generally what is that telling us about the cost
 10 prices?
 11 **A.** The cost prices would be near as dammit very close to
 12 one another, but the margin which drives my cost price
 13 would give you that price.
 14 **MR HOWARD:** Thank you very much indeed.
 15 **THE CHAIRMAN:** We have some questions from the Tribunal
 16 before re-examination.
 17 **MR FLYNN:** Very well, Madam.
 18 Questioned by THE TRIBUNAL
 19 **DR SCOTT:** Mr Jolliff, you talked quite a lot about the
 20 margins, and how the prices went up and down, as we see
 21 on this graph, depending on the bonusing. Can we just
 22 step back from that for a moment? As we understand it,
 23 tobacco is pretty inelastic; in other words, demand
 24 hasn't slumped despite the duty going up. We do
 25 appreciate that, as between Asda and other retailers, it

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1 mattered considerably what the differential prices were
 2 between Asda, Tesco, Sainsbury's and so on. Yes? But
 3 we have also learnt that whereas some customers are very
 4 brand loyal, there are other customers who are price
 5 sensitive. From the point of view of seeking to keep or
 6 to capture price sensitive consumers, what would matter
 7 to a manufacturer?
 8 **A.** That he's got the correct retail price.
 9 **DR SCOTT:** Right, and they would be monitoring that, as we
 10 have heard.
 11 **A.** Yes.
 12 **DR SCOTT:** And their concern would be with the correct
 13 retail price or its relationship to the prices of their
 14 competitors?
 15 **A.** That's right, yeah.
 16 **DR SCOTT:** So their prime concern is the relation of the
 17 prices to their competitors. And you, as you have
 18 emphasised to us, are the person who sets the Asda
 19 prices, so if a manufacturer is trying to influence the
 20 prices in Asda, who does he come to?
 21 **A.** He comes to the buyer.
 22 **DR SCOTT:** He comes to the buyer, and if he wants to make
 23 an agreement, who does he come to?
 24 **A.** He comes to the buyer.
 25 **DR SCOTT:** He comes to the buyer. So as a buyer, you

1 expected them to come to you, and your evidence has been
 2 that prices went up and down with the bonuses. If we
 3 look at the letter in tab 2 in volume 14. {D14/2/6}.
 4 **A.** Yes.
 5 **DR SCOTT:** Here we see -- and we can probably track it on
 6 one of these graphs -- what's going to be a temporary
 7 reduction, you can see that in the last paragraph:
 8 "We would like this activity to start when
 9 Mayfair 20s price moves down and then when the price
 10 returns to its normal level."
 11 So here we have an example of one of these dips
 12 taking place, and Mr Downham writes to you:
 13 "As always, this activity will be fully funded."
 14 Does that meet your expectations of a typical
 15 instance of this happening?
 16 **A.** Yeah, it's got to be fully funded, so Asda don't lose
 17 money.
 18 **DR SCOTT:** So your expectation, then, would be that this
 19 would be a typical sort of letter in the cat and mouse
 20 procedure?
 21 **A.** Yes.
 22 **DR SCOTT:** Thank you very much. That helps me.
 23 **THE CHAIRMAN:** Just going back to the similarities or
 24 differences between tobacco and soft drinks, you have
 25 referred on a number of occasions to the thinness of the

1 margins in relation to tobacco. Would it be right to
 2 say that, in relation to soft drinks it was more likely
 3 that Asda would self-fund a promotion for its own
 4 benefit, even if it wasn't getting that funded by the
 5 manufacturers? That was more likely to happen in other
 6 groceries than in tobacco?
 7 **A.** That could be the case, because there were bigger
 8 margins, but also what you have to remember is that,
 9 with soft drinks, you can take price out of the product,
 10 whereas with tobacco you can't price out of the product.
 11 So as an example, many, many moons ago I listed the
 12 first PET bottle of lemonade at 38p. That self-same
 13 bottle of lemonade when I left soft drinks -- a long,
 14 long, while ago, I must admit -- was 19p. The reason
 15 for that was we were driving prices down because of Aldi
 16 and Netto coming in, and we were taking it -- you
 17 changed the top at the top, make it cheaper, but safer,
 18 make the bottle thinner, take the bottom off the bottle,
 19 you had got a little thin bottle. You take sugar out of
 20 the actual lemonade, if it's lemonade, and before you
 21 know where you are you have gone from 38p to 19p. But
 22 you can't do that with tobacco.
 23 **THE CHAIRMAN:** With a promotion, an Asda funded promotion in
 24 respect of another grocery product, say, Coca-Cola and
 25 Pepsi Cola, if Asda were doing their own promotion,

1 would they tend to have a promotion across all soft
 2 drinks, so bring down the price of all the brands, or
 3 would they bring down the price of one brand and not the
 4 other?
 5 **A.** It would be selected items.
 6 **THE CHAIRMAN:** Right. This point about the fact that the
 7 agreement was signed in June 2002 but applied from
 8 January 2002, and you mentioned that you had already got
 9 the two quarters' worth of retro bonus. We have seen
 10 the figure that there is set in the agreement, which
 11 I think is a confidential figure of pence per thousand.
 12 Was that the same pence per thousand as you had already
 13 been getting then in the first two quarters?
 14 **A.** Yes.
 15 **THE CHAIRMAN:** How was that pence per thousand arrived at,
 16 then, by the January 2002?
 17 **A.** I don't honestly know. It would be based on your rate
 18 of sale.
 19 **THE CHAIRMAN:** Perhaps to put the question a different way:
 20 did you understand, as from January 2002 that that pence
 21 per thousand was being given for the same things as are
 22 set down in the June 2002 --
 23 **A.** Yes.
 24 **THE CHAIRMAN:** Yes. So the June 2002 agreement, as we have
 25 seen written, was really putting in written form what

1 was already the case as far as you were concerned.
 2 **A.** Yes.
 3 **THE CHAIRMAN:** Okay. Dr Scott has asked you some questions
 4 about the fact that I think you realised that the
 5 manufacturers were looking very closely at their
 6 relative retail prices in the stores. Were you aware
 7 that the strategic pricing differentials that were set
 8 out in a document like we have seen at tab 54 -- I think
 9 you are familiar with that?
 10 **A.** Yes.
 11 **THE CHAIRMAN:** -- that those reflected the RRP's, the
 12 published RRP differentials?
 13 **A.** In some cases, but I never really went back to the
 14 document where it showed you the details. If you can
 15 understand what I mean.
 16 **THE CHAIRMAN:** Yes. Did you understand at the time that
 17 when ITL were suggesting in the deal sheets what your
 18 RSP should be, that in making that suggestion they would
 19 be taking into account what they knew about the pricing
 20 of competing brands in the market?
 21 **A.** Sorry, could you repeat that question again?
 22 **THE CHAIRMAN:** Yes. When you got the deal sheet and it had
 23 the RSP in it, which is the price that ITL were
 24 suggesting to you you should price in your stores --
 25 **A.** Yes.

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1 **THE CHAIRMAN:** -- did you understand that, as part of their
 2 calculation of that price that they are suggesting to
 3 you, that would reflect their aspirations as to where
 4 their product should be priced relative to the competing
 5 Gallaher product?
 6 **A.** That could be possible, but I would look at the margin
 7 to set my retail. I wouldn't look at --
 8 **THE CHAIRMAN:** No, just what your understanding was of how
 9 they arrived at the price that they were suggesting?
 10 **A.** It's a possibility.
 11 **THE CHAIRMAN:** Only a possibility, or would you have
 12 expected them to be setting that RSP to reflect the --
 13 **A.** It depends, because say, for example, it was
 14 a manufacturers' price increase and it went up 5p,
 15 I would expect the product to go up 5p and so would the
 16 public. Self-same thing with the Budget, if it went up
 17 10p, you would expect it to go for 10p.
 18 When the prices were going up and down, it depends.
 19 Say, for example -- again I am making these prices up,
 20 because it was a long while ago -- say, for example,
 21 Richmond was 3.49 and prior to that it was 3.69, I would
 22 expect it to go back up to 3.69. If it was going down,
 23 for example, from 3.49, I would be expecting it to go
 24 down go down to 3.29. But I wouldn't be looking at
 25 Gallaher's or anything like that, I would just be

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1 looking at the ITL pricing.
 2 **THE CHAIRMAN:** Yes, but I am just thinking of what you
 3 understood they would have been looking at in suggesting
 4 those prices. Did you understand that those prices were
 5 an expression of their hopes as to where their product
 6 would be priced in relation to --
 7 **A.** That would obviously be their hope, but it doesn't
 8 necessarily mean that it would be actually the case.
 9 **THE CHAIRMAN:** No.
 10 **A.** I mean, I can remember one incident where there was
 11 a price increase where I think it went up 6p. It went
 12 up 6p, and some of the prices went up 7p and I moved the
 13 6p and then got all the suppliers saying "Hold on
 14 a minute, you need to fund this down, because we are not
 15 going up 7p because it should be 6p in the agreement."
 16 **THE CHAIRMAN:** Thank you.
 17 Any questions, Mr Flynn?
 18 **MR FLYNN:** Just one or two, Madam.
 19 Re-examination by MR FLYNN
 20 **MR FLYNN:** Mr Jolliff, just really to clarify one or two
 21 points in your evidence.
 22 You signed the agreement in June 2002, and then the
 23 letter comes in, tab 54, the one that shows that sheet
 24 of the ITL strategic pricing aspirations.
 25 Can you just tell the Tribunal how important in your

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1 day-to-day price setting decisions that sheet would be?
 2 **A.** It was of no importance whatsoever. In fact, could have
 3 thrown it in the bin because I never looked at it.
 4 **Q.** You didn't look at it?
 5 **A.** Because I was setting the prices.
 6 **Q.** When you were setting the prices, you didn't think,
 7 "Well, one of the things I had better just check is
 8 whether this reflects that pricing issue?"
 9 **A.** No.
 10 **Q.** The agreement you signed in June 2002, it contains
 11 a bonus, a confidential but not very large amount that
 12 the Chairman has just referred to. Just to be clear,
 13 did ITL at any time before that, you know, during that
 14 six-month period, did you have any discussions with ITL
 15 about whether that bonus should be paid?
 16 **A.** You know, it was automatically payable.
 17 **Q.** You don't recall any discussion about whether it should
 18 be withheld?
 19 **A.** No.
 20 **Q.** You agreed with Mr Lasok, I think, that tobacco for Asda
 21 was not a high margin product, it was a must-have
 22 product and it drove footfall. Did that mean that you
 23 didn't drive hard bargains with the manufacturers?
 24 **A.** I drove hard bargains because I think it's been said
 25 today where the margins had gone up over three years or

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1 something, so I must have been driving bargains.
 2 **Q.** There was one point which you raised that wasn't dealt
 3 with in any detail, I think, in your witness evidence,
 4 and it may assist the Tribunal. You mentioned a solus
 5 agreement for the Sterling brand?
 6 **A.** Yes.
 7 **Q.** Could you explain very shortly what that was about?
 8 **A.** Gallaher's were our category captains, and a suggestion
 9 was put to me about a brand called -- well, in fact it
 10 wasn't Sterling, I could have selected any names, but
 11 I just happened to select Sterling, and this brand was
 12 put in just above own label and in between various
 13 brands, again to drive for six months, we had six months
 14 solus, and after that Tesco's --
 15 **Q.** What does solus mean?
 16 **A.** Solus is just to Asda.
 17 **THE CHAIRMAN:** Exclusive?
 18 **A.** Exclusive to Asda. It was six months only. I wanted
 19 a year, they wouldn't give me a year. And then Tesco
 20 got it as well in the following year, but I can't
 21 remember the exact dates.
 22 **DR SCOTT:** So this was just above Balmoral, is it?
 23 **A.** Yeah. Because Balmoral had been there for years and
 24 years and years, and nobody -- you know, people -- it
 25 was getting stale, was the brand, so we put this

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1 particular brand in.
 2 **MR FLYNN:** Madam Chairman, you will stop me if you think you
 3 didn't get a clear answer, but I thought perhaps you
 4 could have been assisted.
 5 The Chairman asked you this scenario: if Imperial
 6 have a price increase and Gallaher do that, and you put
 7 up the prices on your shelves of Imperial products and
 8 you do not move your Gallaher prices, what is Imperial's
 9 reaction? What is Mr Hall going to say to you at that
 10 point?
 11 **A.** He would want me to drive -- get hold of Gallaher's and
 12 get the prices up which it's not in my interests --
 13 **Q.** Would he have said to you "why have you not put up your
 14 Gallaher prices?"
 15 **A.** Yes, he would do, yeah.
 16 **Q.** What would your answer be?
 17 **A.** Basically it's got nothing to do with Imperial Tobacco.
 18 **Q.** There were a couple of examples --
 19 **THE CHAIRMAN:** Would he then say "Wait a minute, you signed
 20 this agreement in June 2002, why aren't you abiding by
 21 that?"
 22 **A.** I don't think so. Can I just sort of point out that on
 23 price increases, the suppliers have to give four weeks'
 24 notice to Asda for a price increase. So the likelihood
 25 is that I would know that there is a price increase

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1 coming down the track, and there is probably a distinct
 2 possibility that either one of the two parties that we
 3 are talking about would know that within a certain, you
 4 know, period, that one or the other would be going up.
 5 Not at the same time, but ...
 6 **MR FLYNN:** But would Mr Hall say "Look, you have put my
 7 price up and I would expect you to put Gallaher prices
 8 up as well."
 9 **A.** Well, Imperial Tobacco wanted to put the prices up,
 10 because there was a manufacturers' price increase, it
 11 had been agreed by myself as a manufacturers' price
 12 increase so --
 13 **Q.** That's for their prices but what about the Gallaher
 14 prices? Is Mr Hall going to say to you "I expect, when
 15 I increase my prices and you correspondingly put up the
 16 Imperial brands, you should put the Gallaher brands up
 17 as well, that's what I expect, it's our deal?"
 18 **A.** Well, he would probably expect it but he wouldn't get it
 19 because the cost prices haven't gone up and we wouldn't
 20 be stupid enough to put the prices up if we hadn't got
 21 a price increase.
 22 **Q.** There were just a couple of points of detail. There
 23 were a couple of examples when Mr Lasok effectively said
 24 "Well, you could have tried harder", the Amber Leaf and
 25 Drum thing, you didn't say to Mr Downham, I think it

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1 was, at the time, "Why are you withdrawing this bonus?
 2 I want to keep it" or "I want to keep some of it".
 3 The other example which was the rather more
 4 elaborate one was the difference between cost prices
 5 between Gallaher's Dorchester brand and Imperial's
 6 Richmond brand, if you remember those.
 7 In the case of the Amber Leaf and Drum one,
 8 something is happening on a Tuesday, 20 March 2001, and
 9 you put into effect price increases in the Imperial
 10 brands with effect from the following Monday.
 11 Is there something magic about Monday?
 12 **A.** Monday is the day all the prices move. Or it was then.
 13 I believe it's changed now, I think they move at any
 14 other time.
 15 **Q.** When you say "all prices move"?
 16 **A.** Well, grocery prices, tobacco prices.
 17 **THE CHAIRMAN:** If they are going to move, they will move on
 18 a Monday?
 19 **A.** They will move on a Monday.
 20 **MR FLYNN:** They will move on a Monday.
 21 What would have happened if you had that Monday got
 22 in your car and gone round and seen that they had not
 23 moved in Tesco?
 24 **A.** I would have been onto Imperial Tobacco like a shot
 25 saying "What on earth's going on here? I want funding

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1 back down to that previous retail because so-and-so are
 2 at that price".
 3 **Q.** In respect of the Richmond/Dorchester example that
 4 Mr Lasok gave you where in fact your cost price for
 5 Dorchester was a bit better than that for Richmond, and
 6 he says "Well, you could have sacrificed a bit of margin
 7 rather than going on the shelves at 3.44", what if you
 8 had seen that Dorchester was priced at 3.43 or 3.40,
 9 say, in Tesco or Morrisons?
 10 **A.** I would have been onto Gallaher's because Dorchester is
 11 a Gallaher brand.
 12 **Q.** And if they said "Well, I am very sorry, we have given
 13 you a good price, we are not giving you any bonus, we
 14 are not going to give you any more" --
 15 **A.** Because of the lack of margin I would have to stay where
 16 I was, couldn't afford to go down in price.
 17 **Q.** You would stick at 3.44, even if Tesco were at 3.40,
 18 say; is that what you would do?
 19 **A.** Yeah. And it used to word vice versa as well. I would
 20 phone up about Tesco and Tesco would say, whatever it
 21 is.
 22 **Q.** You would try and get a better margin --
 23 **A.** You'd try and get a better margin.
 24 **Q.** A better bonus out of the manufacturer?
 25 **A.** Yeah.

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1 **MR FLYNN:** I don't think I have any more questions at that
 2 point, Madam. Thank you, Mr Jolliff.
 3 **THE CHAIRMAN:** Just wait one moment. (Pause). Thank you
 4 very much, Mr Jolliff --
 5 **A.** Thank you.
 6 **THE CHAIRMAN:** -- for your evidence, and I can release you
 7 from the witness box.
 8 **A.** Thank you very much indeed.
 9 (The witness withdrew)
 10 **MR FLYNN:** Our next witness is Mr Mason, Madam.
 11 **THE CHAIRMAN:** Yes, but we will take our break. We will
 12 come back then at five to 2.
 13 (12.55 pm)
 14 (The short adjournment)
 15 (1.55 pm)
 16 **MR FLYNN:** Madam, with the Tribunal's permission, we will
 17 call Mr Mason.
 18 **THE CHAIRMAN:** Yes.
 19 MR GUY HURLSTONE MASON (sworn)
 20 Examination-in-chief by MR FLYNN
 21 **THE CHAIRMAN:** Good afternoon. Please sit down, Mr Mason.
 22 **MR FLYNN:** Mr Mason, would you please just give the Tribunal
 23 your full name for the record?
 24 **A.** It's Guy Hurlstone Mason.
 25 **Q.** Could Mr Mason be given core bundle 10. Within that

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1 file, Mr Mason, could you turn to tab 110.
 2 {C10/110/406}. Do you see there a witness statement?
 3 **A.** I do.
 4 **Q.** If you turn to the end, the last page of that tab, is
 5 that your signature?
 6 **A.** It is.
 7 **Q.** I think you said that you needed to update paragraph 1
 8 of your witness statement, if you would turn back to the
 9 beginning.
 10 **A.** Yes.
 11 **Q.** If you could tell the Tribunal what you are currently up
 12 to?
 13 **A.** Yes, I am now employed on a permanent basis by
 14 William Morrison Supermarkets as head of government
 15 affairs.
 16 **Q.** Otherwise, is this your evidence in these proceedings?
 17 **A.** It is.
 18 **Q.** And is it true?
 19 **A.** It is.
 20 **MR FLYNN:** Then Mr Lasok will have some questions for you on
 21 behalf of the Office of Fair Trading.
 22 Cross-examination by MR LASOK
 23 **MR LASOK:** Mr Mason, I think that you were the Asda tobacco
 24 buyer from summer 2002?
 25 **A.** I was.

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1 **Q.** Can you remember approximately when in the summer?
 2 **A.** I think it was around about May or June 2002.
 3 **Q.** If you have your witness statement, could you possibly
 4 go to paragraph 10, please.
 5 I just want to run through certain parts of the
 6 witness statement, just to see that I've got what you
 7 are saying right.
 8 In this paragraph 10, you are referring to the RRP's
 9 and then the separate recommended selling prices or
 10 RSPs. In the final sentence you say:
 11 "Asda generally priced below RRP on all brands,
 12 although often priced at its RSP."
 13 Then in paragraph 11 you refer to the fact that the
 14 manufacturers would frequently refer to pricing
 15 particular brands at parity or within the given
 16 differential. In paragraph 12 you set out how you say
 17 the parities and differentials worked from your
 18 perspective. You talk about the parities and
 19 differentials being the aspirations of the
 20 manufacturers, and you say in the middle of the
 21 paragraph:
 22 "However, it was never the case that Asda would
 23 alter a price at its own expense in order to maintain
 24 a brand at parity with another brand or at a fixed
 25 differential to that brand."

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1 Is that a reference to Asda moving the price
 2 downwards?
 3 **A.** It is.
 4 **Q.** Yes. Then you say:
 5 "We would only increase price if the manufacturer
 6 effectively altered the net cost price and thus forced
 7 us to raise our retail prices in order to maintain our
 8 margins, which were already very slim. Again, because
 9 of the thin margins, we would not routinely discount
 10 from RSP at our own expense as this would wipe out our
 11 profit, but we would look to the manufacturers for
 12 promotional discount funding so that we could lower the
 13 price to consumers."
 14 Then if you go to paragraph 15, here you start off
 15 by saying that the actual cost prices received by Asda
 16 were some degree lower than RRP. Can I just pause
 17 there? Is that the wholesale price?
 18 **A.** Yes. From that, the RRP, they published cost prices
 19 which relate to the RRP, which are then the published
 20 price lists, so that's what I meant by that.
 21 **Q.** When you talk about the actual cost prices, are you
 22 talking about the actual price that Asda had to pay to
 23 ITL or Gallaher?
 24 **A.** Correct.
 25 **Q.** Then you say that the actual cost prices were lower than

1 the RRP and:
 2 "... were designed to encourage Asda to sell at the
 3 RSP specified in pricing schedules received from the
 4 manufacturers."
 5 You refer to the RSPs as only being recommended, but
 6 then in the next sentence you say:
 7 "As the percentage margin was so small on tobacco
 8 products, we would normally look to price at RSP if this
 9 was competitive against the other retailers because
 10 otherwise we would not make any money on our sales."
 11 Now, am I right in thinking, therefore, that Asda
 12 would normally or routinely price at the selling price
 13 indicated by the manufacturer in the price file?
 14 **A.** In paragraph 15 I am using the RSP as a maximum. That's
 15 how I understand it.
 16 **Q.** Well, my question wasn't directed at that. I was simply
 17 asking you this: am I right in thinking that Asda would
 18 normally or routinely price at the selling price
 19 indicated by the manufacturer in the price file?
 20 **A.** That would most often be the case.
 21 **Q.** Yes. Now, in paragraph 67 of your witness statement,
 22 right at the end of it, in the last sentence, you say:
 23 "Typically pricing at RSP would mean that ITL's
 24 strategic pricing parity positions against Gallaher
 25 would also be satisfied as they set their cost prices at

1 levels that would enable this to happen, and often
 2 pricing at the Asda RSP was the most sensible commercial
 3 position for us."
 4 Now, I am right in thinking, therefore, that Asda
 5 knew at the time that the recommended selling prices --
 6 **THE CHAIRMAN:** Well, ask him what he knew rather than what
 7 Asda knew.
 8 **MR LASOK:** I am sorry.
 9 Do I take it, therefore, that you knew at the time
 10 that the RSPs communicated to you, as the buyer, by the
 11 manufacturers were oriented around the manufacturers'
 12 parities and differentials?
 13 **A.** Yes.
 14 **Q.** By the time you appeared on the scene, the written
 15 trading agreement with Asda that was signed by
 16 Mr Jolliff was already in play.
 17 Now, just so that you know what I am talking about,
 18 could you be given annex 14, please, and could you go to
 19 tab 53. {D14/53/148}. Could you cast your eye over
 20 this. Have you seen this before?
 21 **A.** I have, yes.
 22 **Q.** At the time when you were tobacco buyer, that's to say
 23 from June 2002, would you have seen it then?
 24 **A.** I can't specifically remember, but perhaps. It is
 25 likely.

1 **Q.** Right. We have on the third page of this document,
 2 under the heading "Trading Agreement Package", a little
 3 bit. Could you read that to yourself, please.
 4 (Pause)
 5 Have you finished reading it?
 6 **A.** Yes.
 7 **Q.** Thanks. Now if you go to tab 56, {D14/56/156}, we have
 8 here a letter dated 13 August 2002 to Mr Lang from
 9 Imperial. Mr Lang was, I think, your superior, wasn't
 10 he?
 11 **A.** He was, yes.
 12 **Q.** Did you see this letter at the time?
 13 **A.** More than likely.
 14 **Q.** Could you look at the second paragraph of the letter,
 15 it's the one under the heading "Trade Development
 16 Programme Investment".
 17 **A.** Okay.
 18 **Q.** Now, the writer of the letter talks about the purpose of
 19 the trade development programme as being to ensure that
 20 "... we [and he seems to be referring to ITL] have
 21 the range of products available in your stores [that's
 22 to say the Asda stores] to meet consumer demand and
 23 onsale as prices which reflect the standard price list
 24 differentials against competing lines."
 25 Was that also your understanding of the purpose of

1 the trade development programme?
 2 **A.** It was what they stated was a part of it, yes.
 3 **Q.** Well, I am actually asking whether it was your
 4 understanding?
 5 **A.** I understood that it was written down, but it wouldn't
 6 really have affected the way I ran the department.
 7 **THE CHAIRMAN:** You understood that at the time, that that
 8 was what they saw as the purpose of --
 9 **A.** It's what they saw as the purpose, yes.
 10 **MR LASOK:** Right.
 11 If we go to the next page, there is a bit with the
 12 heading "Price Increase", and after the first holepunch
 13 there are a couple of sentences there which I'll read
 14 out. The writer of the letter says:
 15 "I also left with you [that would be Mr Lang] full
 16 details of our strategic pricing requirements effective
 17 from 2 September. Philip Zentner will forward you
 18 an updated price file on 27 August incorporating the
 19 changes effective from 2 September."
 20 Now, I think that you already told us that you knew
 21 that the price files took into account the strategic
 22 pricing requirements of the manufacturers. So you would
 23 therefore expect, wouldn't you, that Mr Zentner would be
 24 forwarding updated price files that took those ITL
 25 strategic pricing requirements into account?

1 **A.** Yes.
 2 **Q.** I want to move on to your understanding of how this
 3 worked, because we have an agreement, a written
 4 agreement, in which ITL is going to pay Asda a certain
 5 amount of money quarterly in return for Asda meeting
 6 certain requirements, that's the third page of the
 7 agreement at tab 53. If you want to turn back to that,
 8 please do. So a payment is going to be made, subject to
 9 Asda's compliance with a number of requirements, one of
 10 which is strategic pricing.
 11 We have the purpose of the agreement being
 12 communicated to Asda in the letter at tab 56 and we know
 13 that -- or rather Asda knew, you knew -- the price files
 14 communicated to Asda by ITL incorporated ITL's strategic
 15 pricing requirements. So isn't the deal that ITL
 16 expected that Asda, when it priced, would price in
 17 accordance with ITL's strategic pricing requirements?
 18 **A.** It was our aspiration, but we ignored it.
 19 **Q.** Let's take it in stages, but I think you -- the
 20 understanding between ITL and Asda was that Asda would
 21 price in accordance with ITL's pricing requirements?
 22 **A.** It was their understanding, but we just ignored it.
 23 That's all I can --
 24 **THE CHAIRMAN:** Just listen very carefully to the questions
 25 you are being asked, because you are running ahead

1 a little bit.
 2 **MR LASOK:** You are inheriting a situation, because it's
 3 Mr Jolliff who signed the trading agreement; right?
 4 **A.** Yes.
 5 **Q.** So you are coming into the position after the trading
 6 agreement has been signed, but we have ITL informing
 7 Mr Lang what the purpose of the agreement was, and I am
 8 putting to you that that was the understanding reached
 9 between ITL and Asda, and I think thus far you have said
 10 to me "but we, Asda, didn't perform it". I am not
 11 asking about that. I am asking you about the
 12 understanding.
 13 At this point, we are talking about the point when
 14 you were the buyer, the understanding was that Asda
 15 would price in accordance with ITL's strategic pricing
 16 requirements, wasn't it?
 17 **A.** It's the word "agreement" that I can't -- just doesn't
 18 ring true, because it was in the agreement, but we all
 19 knew in Asda that we were never going to abide by that.
 20 **THE CHAIRMAN:** You knew that in Asda, but we are just now
 21 thinking about what the ITL/Asda understanding was as it
 22 might have appeared to ITL or to somebody, an external
 23 person who wasn't privy to whatever Asda thought
 24 secretly or whatever that they were going to do. That's
 25 what we are trying to nail down at the moment.

1 **A.** I understood it was in the agreement and I understood it
 2 was in the letter, but I also understood that it was
 3 just something that they put in their agreement in order
 4 to trigger that payment to us on a quarterly basis, but
 5 was never something that we were going to abide by.
 6 **DR SCOTT:** When you took over, you didn't write any letter
 7 saying, or email saying "You may have done this with
 8 Mr Jolliff, but things are different now"?
 9 **A.** Not to the best of my knowledge, no.
 10 **DR SCOTT:** So they would have expected things to continue as
 11 they expected things to continue before?
 12 **A.** That would follow, yes.
 13 **DR SCOTT:** Thank you.
 14 **MR SUMMERS:** May I just ask: you took over from Mr Jolliff,
 15 so there was a handover period?
 16 **A.** A brief one.
 17 **MR SUMMERS:** Yes. Did he make you aware of the agreement?
 18 **A.** Of that agreement? There was a file that he handed over
 19 to us, and I would assume that it was in that file --
 20 **MR SUMMERS:** Did he draw your attention specifically to the
 21 agreement, as you remember?
 22 **A.** Not as I remember, no.
 23 **MR SUMMERS:** So you received no briefing from him as to how
 24 the agreement had come about or how it was intended to
 25 be implemented?

1 A. We really talked about the product ranges, the different
 2 manufacturers, the practicalities of pricing and
 3 ranging.
 4 **MR SUMMERS:** So to that extent it was not the most detailed
 5 of handovers with regard to the agreement, it doesn't to
 6 me indicate that the agreement was a very essential part
 7 of the knowledge that you were expected to acquire to
 8 run the department to fulfil your role as tobacco buyer?
 9 A. Correct.
 10 **MR SUMMERS:** When you say that "we all knew that we weren't
 11 going to implement it, we were going to ignore it", how
 12 did you reach that decision, if you hadn't been briefed
 13 by him?
 14 A. Well, because Mr Lang and myself discussed it. But over
 15 time, so this is not something that happened, say, in
 16 May or June of 2002. Over time.
 17 **MR SUMMERS:** Thank you. Sorry, Mr Lasok.
 18 **MR LASOK:** Well, now, the combined effect of the trading
 19 agreement and this letter at tab 56 is that if Asda kept
 20 to the RSPs in the price file communicated to it by ITL,
 21 it could be sure that it was complying with ITL's
 22 pricing requirements; is that not so?
 23 A. That would follow, yes.
 24 Q. Yes. The understanding with Gallaher was the same,
 25 wasn't it?

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1 A. I was aware of aspirations from both sides to have
 2 a parity.
 3 Q. Now, could you look at paragraph 54 of your witness
 4 statement, please. Could you just read paragraph 54 to
 5 yourself, please. You are commenting here on the
 6 document at tab 56 that we have just been looking at.
 7 (Pause)
 8 A. Okay.
 9 Q. What I just wanted to explore with you is this: in the
 10 middle of that paragraph you say:
 11 "Our pricing decisions were based on analysis of our
 12 cost price, our margin and our competitors' positions."
 13 Then you refer to Gallaher's desire to align a brand
 14 against a Gallaher brand, and you say that it was able
 15 to encourage this by setting its cost price and RSP at
 16 equivalent levels. You then say:
 17 "They knew we would not price above RSP for fear of
 18 being uncompetitive against the other retailers and we
 19 would seldom price below RSP as we did not have the
 20 margin to be able to afford to."
 21 Now, I am just slightly puzzled about the earlier
 22 sentence talking about pricing decisions based on
 23 analysis of cost price, margin and the competitors'
 24 positions. Did you actually do this, or did you just
 25 follow the RSPs?

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1 A. No, we did that as well, so we set up a spreadsheet
 2 which had all the products in and gave us our margin as
 3 well, so we did it independently of the pricing sheets
 4 which had RSPs on them.
 5 Q. So was this just a sense check of the RSP? In other
 6 words, unless the RSP cut across Asda's interests, Asda
 7 would follow the RSP?
 8 A. Sorry, perhaps can you just rephrase that? Sorry.
 9 Q. Yes. I am putting to you this scenario: you looked at
 10 the RSP, you did a sense check on it, so you looked at
 11 cost prices, margins, competitors' positioning, unless
 12 the RSP simply cut across your interests, you would go
 13 along with it?
 14 A. Yes. I mean -- yes. We are talking hundreds of
 15 products and lots of price changes throughout the year,
 16 so quite often that would be the case, yes.
 17 **THE CHAIRMAN:** Quite often what would be the case?
 18 A. That you would take the -- the RSP would be there, and
 19 you would -- unless it was commercially unviable to do
 20 so, you could take the RSP, but it wouldn't always be
 21 the case.
 22 **MR LASOK:** I am putting to you that basically you have the
 23 RSP, unless there is some very good reason to use
 24 another price, you just go with the RSP?
 25 A. More often than not.

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1 Q. Now, the only contemporary evidence that we have of Asda
 2 qualifying its commitment to price in accordance with
 3 a manufacturer's parity and differential requirements is
 4 the document that we have in annex 14 at tab 58. Could
 5 you have a look at that, please. {D14/58/160}.
 6 You should have at the top of the page the name
 7 Philip Zentner and then you see it's an email from
 8 Eddie Oram sent on 29 August 2002?
 9 A. Yes.
 10 Q. I am sure you will appreciate as this is an email
 11 string, the earliest email starts off at the very end,
 12 so you have to read it backwards, and the first email
 13 starts at the bottom of the page. It's from Graham Hall
 14 to Kevin Lang, dated 29 August 2002. So perhaps if you
 15 read that email and then work your way back up the first
 16 page.
 17 (Pause)
 18 A. Okay.
 19 Q. You commented on this email exchange, I think, in your
 20 witness statement at paragraphs 56 to 57, but I just
 21 wanted to clarify the position. You are not mentioned,
 22 I think, as a recipient of any of these emails. Were
 23 you aware of this exchange at the time?
 24 A. Well, I think I may have been on holiday, looking at the
 25 dates. I am not 100 per cent certain. But I am often

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1 away in August. So I think I may have been away.
 2 **Q.** Do you remember this incident?
 3 **A.** Not specifically, no.
 4 **Q.** If you don't remember it, I don't think it's appropriate
 5 to ask you questions about it.
 6 If you go to tab 62, {D14/62/167} we have here two
 7 emails, the first which starts round about the first
 8 holepunch is an email from Graham Hall sent on 7 October
 9 2002 to you, copied to Mr Lang. Then we have, at the
 10 top of the page, an internal ITL response which you
 11 would not have seen at the time. But the original
 12 message, which is from Mr Hall to you, is about moving
 13 prices up in the market. We don't see you responding to
 14 Mr Hall saying -- I was going to say "saying get lost"
 15 but that would be a particularly impolite way of doing
 16 it.
 17 Shall I put it this way: you don't reply, as far as
 18 we know, to this email qualifying Asda's position
 19 regarding following ITL's pricing requirements, do you?
 20 **A.** I don't recall doing, no.
 21 **Q.** No. Similarly the next tab, tab 63, {D14/63/168},
 22 I think the first email is the same one, but this time
 23 we have another email at the top, because Mr Hall comes
 24 back to you and he asks you to delay implementation of
 25 the price change. Again, we don't see you responding

1 saying that Asda prices independently and makes its own
 2 decisions?
 3 **A.** No.
 4 **Q.** If we go back to your witness statement, I would just
 5 like to ask you something about promotions. If you go
 6 to paragraph 13 of your witness statement --
 7 **A.** Sorry, can you just help me find that?
 8 **Q.** Yes, your witness statement is in tab 110. It's not in
 9 annex 14, which I think is the file you have on your
 10 right. I wanted to have a look at a bit in
 11 paragraph 13. It's a bit in paragraph 13 that is at the
 12 top of the fourth page of your witness statement. At
 13 the top of page 4 you say:
 14 "If at a given time both brands were priced at the
 15 same level and Gallaher then offered Asda promotional
 16 funding to discount the retail price of Benson & Hedges,
 17 Asda would not itself fund any discount of Marlboro to
 18 ensure that the pricing requirements were met."
 19 But I noted that in paragraph 39 of your witness
 20 statement -- perhaps if you could read paragraph 39 to
 21 yourself.
 22 (Pause)
 23 **A.** Okay.
 24 **Q.** In the middle of that paragraph you say:
 25 "Due to their concern to remain competitive, they

1 would normally respond to each others' promotions and
 2 give us funding to allow us to discount the rival brands
 3 to match the promoted ones."
 4 So it looks as though the scenario that you posit in
 5 paragraph 13 was either theoretical or a wholly
 6 exceptional case, because normally the manufacturers
 7 would be funding promotions. Is that correct?
 8 **A.** They would normally spot that and respond with
 9 a promotion of their own.
 10 **Q.** Now, in paragraph 40 -- again perhaps you could read the
 11 whole of paragraph 40.
 12 (Pause)
 13 The bit that I was interested in was the penultimate
 14 sentence, where you say:
 15 "We were very clear on numerous occasions that we
 16 would tolerate no interference in our retail pricing and
 17 we would always make the final decision."
 18 I think that that can't be right, as a result of the
 19 answer that you gave to a question put to you by
 20 Dr Scott.
 21 **A.** It's not in writing, if that's what you are asking me.
 22 **Q.** So these communications were -- how were they done?
 23 **A.** Verbally.
 24 **Q.** Verbally.
 25 **THE CHAIRMAN:** Wait a minute. When you say "we were very

1 clear", are you saying it was very clear within Asda or
 2 are you also saying it was made clear to ITL?
 3 **A.** Both.
 4 **MR LASOK:** I did take you to two documents, tabs 62 and 63,
 5 in which we saw nothing in terms of you making clear to
 6 ITL that you would tolerate no interference in retail
 7 pricing and you would always make the final decision.
 8 If you would go to annex 14, and turn to tab 69,
 9 {D14/69/131}, again you have here an email string, the
 10 first email starts on the second page, and is an email
 11 from Stephen Carroll to you sent on 29 January 2003.
 12 I wonder whether you would be kind enough to just read
 13 the sequence of emails to yourself, please.
 14 (Pause)
 15 **A.** Okay.
 16 **Q.** Now, I just want to see whether my understanding of what
 17 happened here is correct. As I read it, ITL raised with
 18 you a query about pricing. They were expecting Asda to
 19 price in line with the price files. You don't disagree,
 20 you don't say that their expectation was misconceived.
 21 You give an explanation of what the position was, and it
 22 turns out that there was simply a misunderstanding. But
 23 the point here that I am trying to get across is that
 24 again this is an incident in which we have a clear
 25 expectation on ITL's part that you would price in

1 accordance with the price file, we know that ultimately
 2 it's a misunderstanding, but you don't come back to them
 3 and say that Asda tolerates no interference in retail
 4 pricing and makes the final decision itself, do you?
 5 **A.** In document 69 these are all about the Small Classic
 6 Cigars and it's a string of emails about price marked
 7 packs, so it's when one price marked pack at one price
 8 runs out and is replaced by a new price marked pack, so
 9 these are all -- this whole exchange is about price
 10 marked packs, where we would always sell at the price
 11 that was on the pack, because otherwise it's very
 12 confusing to colleagues working on the kiosks and
 13 customers if you don't do that.
 14 **THE CHAIRMAN:** But it's not, is it, because the email at 132
 15 was talking about the move of the price of the plain
 16 pack, the Small Classic Filter 10, when the price marked
 17 pack has run out. It's whether the plain pack would
 18 move up to 2.69 after the exhaustion of the 2.55 price
 19 marked packs, and in fact you are selling it at 2.73.
 20 **A.** Because on Classic cigars we have had lots of different
 21 barcodes all running against the same products and there
 22 were a few different prices in for the different
 23 barcodes. So in that instance it was one that hadn't
 24 been selling that was still on the system at 2.73, and
 25 as I understand this, he was saying back to me that

1 bonuses are going to be in place to make that packet
 2 2.69, a maximum RSP of 2.69. But then he goes on to
 3 talk about another price marked pack towards the top.
 4 So it was a -- Classic cigars was -- it stands out
 5 in my mind, because I remember how confusing Classic
 6 cigars were, because there were lots of different lines
 7 all running at the same time and you might have a packet
 8 of cigars in one particular store with a certain barcode
 9 on them which sold at a certain price.
 10 **THE CHAIRMAN:** The point that I think Mr Lasok is asking
 11 is -- well, you say in your witness statement "we were
 12 very keen that everyone should know that we made our own
 13 pricing decisions and would tolerate no interference",
 14 and yet he has put to you a number of instances where it
 15 looks like ITL is trying to interfere with your pricing
 16 and you are not pushing back saying "Mind your own
 17 business, we will do as we please".
 18 Now, why is that?
 19 **A.** I understand. The way I would explain it on this
 20 particular instance was because it was all about price
 21 marked packs and because we were talking about price
 22 marked pack I wouldn't go back and say that anyway on
 23 that occasion.
 24 On the other examples that were pointed to, it is
 25 because I knew the cost prices were moving, and as the

1 cost price moves, we move the retail price in store to
 2 match that differential, to keep the differential the
 3 same, so that we were making the same amount of money,
 4 and because there are so many price changes so
 5 frequently, it would be -- if the cost price moved up
 6 6p, you will often move the selling price up by 6p,
 7 unless you went out into a competitor, for example, and
 8 saw that it was at a different price, in which case you
 9 would have to think again.
 10 **DR SCOTT:** So as you said earlier on, more often than not
 11 you would be following the RSPs?
 12 **A.** That's correct.
 13 **MR LASOK:** I was interested more particularly in your reply
 14 to the first email. If you go to page 2, your reply to
 15 Mr Carroll's first email, and your reply was sent on
 16 Friday, January 31, 2003.
 17 After the subject line, you say:
 18 "In PF158 it shows Classic filter plain as 2.73 post
 19 PMP."
 20 I have to say that I read PF158 as referring to
 21 a price file. Is that correct?
 22 **A.** That is correct.
 23 **Q.** So what you actually do is, in response to the query
 24 from Mr Carroll, you give the explanation as something
 25 in the price file, you say that you are pricing in

1 accordance with the price file?
 2 **A.** The way I read it is I am questioning a price in the
 3 price file.
 4 **Q.** I think I put it slightly inaccurately, because what you
 5 are doing is you are using the price file to give
 6 an indication of what the Small Classic 10s should be
 7 priced at.
 8 **A.** I am working with the price file, I am working from the
 9 price file.
 10 **Q.** Yes.
 11 **A.** Yes.
 12 **Q.** So this is, though, yet another instance in which you
 13 are working with the price file and you are not
 14 indicating to ITL that Asda makes the final decision.
 15 (Pause). That was a question.
 16 **A.** That was a question?
 17 **Q.** Yes.
 18 **A.** Can you just repeat it? I am sorry.
 19 **Q.** Yes. You are working from the price file. It is yet
 20 again another situation in which you do not say to ITL
 21 that Asda tolerates no interference in its retail
 22 pricing policy and will always make the final decision?
 23 **A.** That's correct.
 24 **Q.** That's correct. Now, if you move to tab 79, now this
 25 again is an email string. {D14/79/231}. The emails

1 here are quite lengthy. The first one starts on the
 2 third page with an email from you sent on August 8th
 3 2003 to Mr Batty and Mr Hall of ITL. This is in
 4 connection with the negotiation of a new trading
 5 agreement with ITL, as I understand it. Is that
 6 correct?
 7 **A.** Yes.
 8 **Q.** Although these were rather long emails, I am only
 9 interested in certain bits in your first email -- I am
 10 quite happy if you would prefer to read all the emails
 11 in totality, if that's what you would prefer to do.
 12 I was only going to focus on one particular bit in your
 13 first email, it's on the last page of the tab. It would
 14 be the second full paragraph down from the top, the one
 15 starting off "Pages 3 and 4 ..." Do you have that?
 16 **A.** Yes.
 17 **Q.** Could you read that paragraph and the paragraph
 18 immediately following it, please.
 19 (Pause)
 20 **A.** Okay.
 21 **Q.** Now, am I right in thinking that when you use the phrase
 22 "Pages 3 and 4 -- ITL's strategy pricing", you are
 23 referring to a draft of the trading agreement that was
 24 floating around at that stage?
 25 **A.** I think so.

1 **Q.** Here you are focusing on the strategy pricing aspect in
 2 the proposed trading agreement, and it's at this point
 3 that you state categorically:
 4 "We cannot and will not however be dictated to on
 5 price."
 6 But we don't get any communication in writing along
 7 these lines before this point in time. It arises only
 8 in connection with the negotiation of the trading
 9 agreement. So the point that I am putting to you now is
 10 that we see you now, in August 2003, objecting to Asda
 11 being dictated to on price, and that was a concern that
 12 you had had in the situation that was then prevailing
 13 under the 2002 trading agreement, and you wanted to
 14 bring that position to an end; is that correct?
 15 **A.** No, that's not how I see it, because we were negotiating
 16 a new -- well, I was negotiating along with Kevin and
 17 Paul on a new trading agreement, and as that section was
 18 still in, we said "Well, that section where you talk
 19 about how we must price is not acceptable".
 20 **Q.** The point I am putting to you is that it's at this point
 21 that you are, as it were, kicking against the traces.
 22 You have been operating under the 2002 trading agreement
 23 regime, and it's now that you want to bring it to
 24 an end. Is that true or not?
 25 **A.** That's not how I see it, no. I was negotiating a new

1 trading agreement which was fresh, it was in front of
 2 me, and I knew that I had to put my signature on it, and
 3 that section, I had to clarify it.
 4 **Q.** Could you turn to paragraph 77 of your witness
 5 statement, please. Now, this actually refers to
 6 a document at tab 77, {D14/77/226}, so perhaps what you
 7 might want to do is to look at tab 77. Tab 77 appears
 8 to be a case of a Mr Mancey in Asda who is forwarding to
 9 you an email that Mr Mancey has received from
 10 Roger Batty of ITL.
 11 You have in Mr Batty's email numbered points.
 12 Number 9, which is the one that you are referring to in
 13 paragraph 77 of your witness statement, is on the
 14 penultimate page. It's a very short paragraph.
 15 (Pause)
 16 Now, at the beginning of paragraph 74 of your
 17 witness statement, just so we get the full picture, you
 18 say that:
 19 "The email exchange [this is the very, very
 20 beginning of paragraph 74] between ... Mr Mancey and ITL
 21 showed tensions between Asda and ITL as Asda tried to
 22 formalise some of the terms of our relationship through
 23 persuading us to sign up to the trading agreement."
 24 This is the new trading agreement for 2003. In
 25 paragraph 77, when you turn to consider ongoing pricing,

1 if you go to a sentence just beyond the halfway point in
 2 the paragraph beginning "There was some
 3 misunderstanding ..." Do you have that?
 4 **A.** Yes.
 5 **Q.** You say there in the following line:
 6 "We were pushing a position that they were less able
 7 to influence our retail price as we wanted greater
 8 freedom."
 9 You go on to say:
 10 "The position eventually reached was the basic
 11 position that had always existed. The manufacturers
 12 would continue to recommend prices through RSPs, but we
 13 would be free to set our own prices and discount further
 14 if we wanted."
 15 But I was puzzling about why you said that Asda was
 16 pushing a situation that they were less able to
 17 influence Asda's retail price as Asda wanted greater
 18 freedom, because that suggests to me that what was
 19 happening at this stage, in 2003, was that Asda was
 20 pushing ITL to get greater freedom than it had under the
 21 2002 trading agreement.
 22 Am I wrong on that?
 23 **A.** "Greater freedom than", you would read from that
 24 aspirations in the 2002 trading agreement.
 25 **Q.** Well, greater freedom than was -- let's be a bit more

1 refined about it. Greater freedom than was envisaged
 2 under the 2002 trading agreement?
 3 **A.** By them.
 4 **Q.** And that's correct?
 5 **A.** That's correct.
 6 **Q.** So you wanted greater freedom than was envisaged under
 7 the 2002 trading agreement?
 8 **A.** By Imperial Tobacco.
 9 **DR SCOTT:** Sorry, it was a signed agreement?
 10 **A.** It was.
 11 **DR SCOTT:** Mr Jolliff has given us very, very, very strong
 12 evidence that he was in control, and so if there was to
 13 be an agreement on pricing, it had to be made with him,
 14 when he was your predecessor?
 15 **A.** Right.
 16 **DR SCOTT:** This wasn't an offer by ITL, this was
 17 an agreement which Mr Jolliff signed. So it wasn't
 18 simply an aspiration, was it? It was a document that
 19 Mr Jolliff signed, it was an agreement, an offer,
 20 an acceptance.
 21 **A.** I mean, I can't really speak for how John operated at
 22 the time. Obviously it was before my time.
 23 **DR SCOTT:** But he was acting on behalf of Asda.
 24 **A.** He was.
 25 **DR SCOTT:** He was the duly authorised person on behalf of

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1 Asda?
 2 **A.** He was.
 3 **DR SCOTT:** So Asda agreed it, and you have told us you
 4 didn't then countermand that until this -- in writing,
 5 until we see this point where you are negotiating the
 6 next agreement.
 7 **A.** We didn't tear up the 2002 agreement, we didn't see any
 8 point in doing that.
 9 **DR SCOTT:** Thank you.
 10 **MR LASOK:** I would like to move on to another point. Could
 11 you look at paragraph 35 of your witness statement,
 12 please. Could you read that to yourself, please.
 13 (Pause)
 14 **A.** Okay.
 15 **Q.** I just wanted to look at the second sentence where you
 16 say:
 17 "Where the manufacturer was being unreasonable, we
 18 would threaten to delist its products."
 19 Did you make that comment in connection with tobacco
 20 or other products?
 21 **A.** I made that comment for all products, really.
 22 **Q.** Because the oddity is that Mr Jolliff seems to take
 23 a rather different view of that. If you go to tab 109,
 24 the preceding tab, now, there is pagination here which
 25 is the sort of pagination in the bundle, and if you look

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1 at the bottom you see a printed number. If you could go
 2 to page 377. {C10/109/377}.
 3 **A.** Okay.
 4 **Q.** There is a bit, it's actually paragraph 14(b), and it's
 5 the penultimate sentence in 14(b). So if you are on
 6 page 377, go up to the top of the page, you see there is
 7 a paragraph there, and if you look at the second to last
 8 sentence, it's the one that goes:
 9 "If I took out a product line in tobacco, however,
 10 I would never get any greater negotiating power with the
 11 supplier."
 12 What he does with his experience is compare tobacco
 13 products with other products, and the point that he is
 14 making -- at least as I understand it -- is that
 15 delisting was fruitless in relation to tobacco. It
 16 might be useful in relation to other products, but not
 17 in relation to tobacco. But I think you are saying that
 18 the position was different?
 19 **A.** Well, so let's say, for example, it was Lambert &
 20 Butler, you wouldn't really threaten to delist something
 21 like Lambert & Butler because they would know full well
 22 that there was no way you could afford to do that,
 23 either monetarily or in goodwill to customers. What
 24 I meant when I said "all products" was -- I mean, you
 25 might think about some of the lesser known cigarette

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1 brands or you might think about some cigar brands, or
 2 you might think about some filter papers, for example.
 3 That's what I meant when I said "all products".
 4 **Q.** But we have no evidence of this ever being done in
 5 relation to tobacco products?
 6 **A.** No written evidence, no, that I can see.
 7 **Q.** Did you ever do it?
 8 **A.** Did we ever delist a brand?
 9 **Q.** Did you ever say to ITL or Gallaher "you are being
 10 unreasonable, we are going to delist one or more of your
 11 products"?
 12 **A.** As I say in the statement, it was mainly posturing, but
 13 it was done verbally, so we would frequently meet with
 14 Graham Hall or Chris Halford, in Asda House, and have
 15 discussions all the time. And often in those
 16 discussions they were the kinds of things that you would
 17 talk about.
 18 **Q.** And it never found its way into a written document?
 19 **A.** Not that I can see in the evidence that's been put in
 20 front of me, no.
 21 **Q.** Okay. Now could you go to paragraph 43. Perhaps you
 22 could read 43 to yourself, please. It relates to
 23 a document that is in annex 4 at tab 8. {D4/8/26}.
 24 (Pause)
 25 **A.** Okay.

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1 Q. The point I am interested in was a reference, I think
 2 it's in a "Confidential" box in paragraph 43 of your
 3 witness statement. But it refers there to
 4 a particular -- shall we call it a technique that Asda
 5 had, and I just wondered when this technique was adopted
 6 by Asda?
 7 A. I always remember it being in place, really.
 8 Q. Always from when, from June 2002?
 9 A. From when I was a buyer.
 10 Q. Because I think part of the problem that we have is
 11 that, if we look at -- let's take, in annex 14, if we go
 12 to 49, it is a document that goes back to March 2002.
 13 You have an original message. This is Graham Hall
 14 relaying to Roger Batty and the NAMs within ITL, Asda
 15 pricing. But we don't see this technique being employed
 16 by Asda.

(Pause)

We have various other examples of this, because if
 you go, for example, to 52(a), it is an internal ITL
 document but the third page of it is a list of Asda
 prices. We have been told that these prices were
 communicated by Asda to ITL. If we look at these Asda
 prices in the right-hand column, we don't see this
 technique being used there.

A. It's very difficult for me to be exact on when exactly

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1 that policy started, but in paragraph 43 where I talk
 2 about it, I use that price quite deliberately, because
 3 that's exactly the kind of thing that I did.
 4 Q. If we look at tab 59, here we have under the heading
 5 "Asda Stores Proposal" -- tab 59 is a letter, by the
 6 way, from Mr Hall to Mr Lang dated September 2002.
 7 A. Mm.
 8 Q. Towards the bottom of the page you have a heading "Asda
 9 Stores Proposal", and you have a selling price there.
 10 This technique doesn't seem to be employed.
 11 A. That was an RSP for a new product that Graham Hall was
 12 trying to sell into us. So he is putting that as his
 13 RSP. This particular product is an example of where we
 14 were not bullied by the manufacturers, because he put
 15 Davidoff to us, and we rejected it, said it wasn't
 16 something we wanted to take. So if we had decided to
 17 take it, then we may well not have priced at 4.49. That
 18 was just his proposal to us as a suitable retail selling
 19 price.
 20 Q. If you go to tab 60, {D14/60/165}, we have an email
 21 here, it's the very first one, it's Mr Hall sent on
 22 Tuesday, September 17th to Roger Batty, and he professes
 23 to be reporting shelf prices in Asda, and we don't see
 24 this technique being employed there.
 25 A. Well, I can't tell whether we do or we don't there,

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1 because there are prices which look to follow that
 2 technique. Well, all of them do.
 3 Q. That's the point, though, isn't it? If you go to
 4 tab 62 --
 5 THE CHAIRMAN: Well, where is this getting us, Mr Lasok,
 6 whether this technique applies or not?
 7 MR LASOK: Well, it's getting to the submission that this
 8 technique wasn't applied. I think there was a sort of
 9 great deal of mumbling.
 10 THE CHAIRMAN: I think the mumbling was "yes, and?"
 11 MR LASOK: Well, there we are.
 12 THE CHAIRMAN: You have been shown various examples where it
 13 doesn't seem to be applied, and yet you have said in
 14 your witness statement that it was. Do you have any
 15 explanation for that apparent contradiction?
 16 A. Without a doubt what I say in paragraph 43, an example
 17 I give, I mean, I remember that very clearly, and we
 18 didn't use it on every single product but it's
 19 an example of where we used to sell below the RSP by
 20 using that technique.
 21 THE CHAIRMAN: Well, that technique may have been the reason
 22 why, in some instances, you didn't price at RSP?
 23 A. Correct.
 24 THE CHAIRMAN: But didn't ITL know that you had that
 25 technique, wouldn't they have taken that into account

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1 when they were setting the RSP in the price file?
 2 A. No. No. They would put their RSP at their -- if you
 3 like, the price they were suggesting to us, and then we
 4 would take it and say "Well, is that the price we want
 5 to go with or do we want to take a penny off or 2p off,
 6 whether we want to 10p off because it is a multipack,
 7 particularly to annoy one of our competitors. Which is
 8 exactly what I am trying to get across in paragraph 43.
 9 That was just the kind of technique that we did, and we
 10 picked random prices, often either to give a slight
 11 encouragement to our customers or to annoy or frustrate
 12 our competitors.
 13 DR SCOTT: If we take the 34.88 price, if you had priced one
 14 manufacturer's multipack at 34.88, but you had actually
 15 done the other one at 34.90, what would have happened
 16 then?
 17 A. You would annoy one of the sides.
 18 DR SCOTT: So to keep the peace, you would price both at
 19 34.88?
 20 A. No, no, we would probably let that --
 21 DR SCOTT: Probably let that go.
 22 A. -- continue.
 23 DR SCOTT: How would they react then? Would they bonus you
 24 down again?
 25 A. Sometimes.

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1 **DR SCOTT:** Or take away the bonus, if they were the other
2 way?
3 **A.** If anything, they would probably try and bonus you down
4 to match it.
5 **DR SCOTT:** Thank you.
6 **MR LASOK:** If you would go to tab 62, {D14/62/167} and this
7 is one of the instances we have looked at before where
8 an email is sent to you, and a price is indicated by
9 ITL, and you haven't responded, can we infer that you
10 would in fact have priced in accordance with the ITL
11 email?
12 **A.** Not necessarily. I mean, I would read that and I would
13 know the cost prices were going to increase or, in this
14 case ...
15 **Q.** Well --
16 **A.** Or, sorry, that the bonuses were going to be removed, in
17 which case I would need to change the retail price, but
18 I wouldn't go back and say what I was going to put that
19 to, I would just do it, at whatever I wanted to put it
20 to.
21 **Q.** Well, you say wherever you would want to put it to, but
22 we saw from tab 69 that ITL -- tab 69, you might just
23 want to refresh your memory. You have looked at it
24 before. This was the incidence when they raised
25 a failure to comply with the price files with you. If

1 you weren't complying with the price files, they would
2 have been on at you, wouldn't they?
3 **A.** I go back to the point about tab 69, was about Classic
4 cigars, which was a very confused situation because
5 there were so many price marked packs, and different
6 barcodes of plain packs all in the same discussion. So
7 because it was about that, I would get into
8 a discussion, because I knew it was about price marked
9 pack. But there were other instances that we have just
10 been talking about where I wouldn't respond because I
11 would know either the bonus is being removed or the cost
12 price was going up and I would have to have to re-set
13 the retail price that I was charging in store.
14 **Q.** Can I put it to you fairly bluntly: this is all odd
15 because we have very few instances in which ITL raises
16 with you a query about your pricing, and this particular
17 instance in tab 69 is one where it resulted simply from
18 a confusion in the price files.
19 I put it to you that the reasonable inference to
20 draw from that is that generally you did price in
21 accordance with the prices set out in the price files,
22 and that if it was the case that you had this particular
23 technique that you refer to in paragraph 43 of your
24 witness statement, you just didn't apply it in such
25 a way as to interfere with the prices in the price

1 files. That's what I am putting to you as
2 a proposition.
3 **A.** Right.
4 **Q.** In other words, compliance with the price files is the
5 reason why we don't find more complaints from ITL such
6 as the one that we have in tab 69.
7 **A.** It's not my recollection of events. There is
8 a particular discussion over this one because it was all
9 about PMPs -- price marked packs, sorry -- but often it
10 would either be done by -- they might phone up and say
11 "We have noticed that X" and I would respond, so they
12 might phone up and say, "We have noticed that, for the
13 sake of argument, Lambert & Butler is £4.16 but it's
14 in -- we have a retail -- a recommended selling price of
15 4.17" and I would say, "Yes, we have done that." And
16 that's where the conversation would end.
17 **Q.** Can you just explain to me why tab 69 didn't take the
18 form of a telephone conversation of that nature?
19 **A.** Because it's complicated. And because it was
20 Stephen Carroll who worked for Graham, rather than
21 Graham himself.
22 **Q.** What about your paragraph 81 of your witness statement?
23 I am particularly interested in a sentence that starts
24 on the last but one line on page 430, but if you want to
25 read the entire paragraph to yourself to refresh your

1 memory, that's fine with me.
2 (Pause)
3 **A.** Okay.
4 **Q.** I was rather curious about the bit, as I said, in the
5 last couple of lines on page 430 where you say:
6 "Graham Hall of ITL would sometimes have said that
7 Asda needed to keep parity on prices because the trading
8 agreement said so, but we did not take any notice as
9 this would have restricted Asda's pricing freedom and
10 would not have made any commercial sense."
11 I just wanted to explore that with you. When you
12 say "Graham Hall of ITL would sometimes have said", what
13 did you mean?
14 **A.** Just what I was saying before, so he might phone and say
15 "We have noticed that" ...
16 **THE CHAIRMAN:** What's your recollection, do you remember him
17 on one or more occasions speaking to you and saying
18 this?
19 **A.** Yes.
20 **MR LASOK:** So he would sometimes speak to you about the need
21 to keep parity on prices because the trading agreement
22 said so?
23 **A.** He would refer to the trading agreement, yes.
24 **Q.** Can I be a bit more precise about that, because you say
25 here that Graham Hall of ITL would sometimes have said

1 that Asda needed to keep parity on prices because the
 2 trading agreement said so. I just want to focus on
 3 that. As I understand it, you are saying that on
 4 occasion Graham Hall would speak to you and he would say
 5 to you that Asda needed to keep parity on prices because
 6 the trading agreement said so?
 7 **A.** Well, he would be referring to a particular example, he
 8 wouldn't just say that sentence, he would use it when
 9 talking about an example.
 10 **Q.** But then you say:
 11 "We did not take any notice."
 12 Does that mean that you turned a deaf ear to what he
 13 was saying to you.
 14 **A.** You mean as opposed to saying --
 15 **THE CHAIRMAN:** Well, how did you reply to him when he said
 16 something like that to you?
 17 **A.** Literally I would just ignore it.
 18 **MR LASOK:** So effectively, as I understand it, from time to
 19 time Graham Hall would say to you "you need to be
 20 keeping parity"?
 21 **A.** As I say, he wouldn't just say that sentence apropos of
 22 nothing, he would say something like "we have noticed
 23 that you are selling X at Y price, don't forget the
 24 parities that are in the agreement", to which I would
 25 either move on or say "Thank you, Graham" or something

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1 similar.
 2 **Q.** But your evidence is that you would not challenge him on
 3 that?
 4 **A.** Well, I may have done, I may not have done.
 5 **Q.** Can you remember whether you did or you didn't?
 6 **A.** No.
 7 **Q.** Could you go back to your paragraph 62, please.
 8 **THE CHAIRMAN:** When we get to a convenient moment for our
 9 break --
 10 **MR LASOK:** This is probably the last question. Subject to
 11 my junior instructing me -- as she almost certainly
 12 will -- this is likely to be the last one.
 13 Paragraph 62 in your witness statement. This refers
 14 to the documents at tabs 61 and 62. If you go to 61,
 15 this is in annex 14, and just read that to yourself.
 16 {D14/61/166}.
 17 (Pause)
 18 Then 62 you have already seen. {D14/62/167}.
 19 (Pause)
 20 **A.** Okay.
 21 **Q.** What puzzles me slightly is why you say in line 3 of
 22 paragraph 62 of your witness statement:
 23 "We understood the prices mentioned in these emails
 24 to be recommended maximum prices. (RSPs)"?
 25 **A.** (Pause). I am sorry, I don't understand the question.

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1 **Q.** Well, what words in the documents at 61, 62 and at -- 63
 2 is another one that you are referring to in your
 3 paragraph 62, what words in those documents are the ones
 4 that gave you the understanding that the prices
 5 mentioned in those emails were recommended maximum
 6 prices?
 7 **A.** Just because we were doing this all the time, so we are
 8 seeing RSPs were changing all the time, so just --
 9 that's how I would read that, just from the fact that
 10 I was doing this day in, day out.
 11 **THE CHAIRMAN:** Why do you read them as being recommended
 12 maximum prices rather than recommended selling prices?
 13 **A.** Well, because we wouldn't -- because of what I said
 14 before, about we would not go over that price because
 15 then we would be uncompetitive in the market, but we may
 16 decide to go under that price, and I would understand
 17 that the prices mentioned in the emails would appear in
 18 a price file to follow under the RSP column.
 19 **MR LASOK:** This is what puzzles me. Perhaps it's clearer if
 20 we look at tab 63. {D14/63/168}. If we look at the
 21 email at the top of the page, where Mr Hall says to you:
 22 "Apologies for the change but please delay
 23 implementation of the 3.59 and 3.63 prices until
 24 21 October."
 25 What puzzles me is that, on an ordinary reading of

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1 that, he is talking about a move to 3.59 and 3.63, he is
 2 not talking about some other move. If you look at the
 3 earlier email which is on that page, and go to the
 4 second paragraph of it, he says:
 5 "As part of our pricing strategy we will be moving
 6 prices up in the market from 14 October to 3.59 for
 7 Richmond Kingsize and 3.63 for Richmond Superkings."
 8 Then in the next paragraph, he says that:
 9 "ITL are anticipating that Gallaher will follow by
 10 moving Dorchester up by 5p."
 11 So these are all references to specific price points
 12 and specific price moves. He is not saying "As part of
 13 our pricing strategy, we will be moving prices up to
 14 a maximum of £3.59 but it could be less", is he?
 15 **A.** He is not saying that, that's exactly how I would
 16 understand it, I would read that and say "Right, that
 17 means that bonus is being removed or cost price is going
 18 up, I am going to get a new price file and in that price
 19 file there is going to be a column of recommended
 20 selling prices and as far as I am concerned, I can
 21 charge whatever I like".
 22 **THE CHAIRMAN:** But what he seems to be saying is that they
 23 want you to move the prices up as a signal to Gallaher
 24 so that Gallaher will then follow up. Now, if you don't
 25 move your prices up, then Gallaher are not going receive

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1 that signal and they are not going to move their price
 2 up and therefore prices won't move up generally.
 3 Did you not understand that was what he was wanting
 4 you to do?
 5 **A.** I understand what you are saying, but he is not
 6 saying -- but what he is saying from that is "if you
 7 don't" -- well, the truth behind that is "if you don't
 8 move your prices, you are going to start losing money
 9 because we are going to remove the bonus or going to
 10 push the cost price up". So as the buyer I would know
 11 that I had two choices, one to either push the RSP --
 12 push the retail price up to whatever I wanted it to be,
 13 or not to touch the retail price at all in which case
 14 you are absolutely right, Gallaher would not get that
 15 signal, but I would be losing money on the product.
 16 **THE CHAIRMAN:** It's as much in your interests as in ITL's
 17 interests, isn't it, that Gallaher receive that signal
 18 and everybody's prices move up?
 19 **A.** But if I don't move the retail price, I'm losing margin.
 20 **DR SCOTT:** In your witness statement, you put it like
 21 this -- this is paragraph 21, subparagraph (d):
 22 "Of course the thin margins available to retailers
 23 on tobacco products meant that when tactical discount
 24 funding was discontinued, Asda would normally revert to
 25 the pre-promotional retail price to maintain its

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1 margin."
 2 **A.** Yes.
 3 **DR SCOTT:** When Mr Jolliff was giving evidence we were shown
 4 some of the diagrams which showed that things sometimes
 5 went off key for a week or two, but then quickly came
 6 back on track with this Richmond and Dorchester
 7 business. Does that square with your recollection?
 8 **A.** Yes. Sorry, I thought I was saying the same thing.
 9 That from that email from tab 63, you know, there -- how
 10 I read that when I am just reading it now and how
 11 I remember reading it then, "Right, the bonus is being
 12 removed or the cost price is going up, I need to move my
 13 retail price if I want to keep my margin the same".
 14 **DR SCOTT:** You were bonused on achieving your margin? You
 15 personally, rather than --
 16 **A.** Yes.
 17 **DR SCOTT:** So margins mattered?
 18 **A.** Margin was -- well, sales and margin combined were
 19 everything, yes.
 20 **DR SCOTT:** Yes, thank you.
 21 **MR LASOK:** This is the final question, I think: in the
 22 period that we are looking at, which is from when you
 23 became the tobacco buyer until August 2003, which was
 24 the point at which this case ceases to be of relevance,
 25 because post August 2003 things move on, but in the

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1 period that we are looking at, Asda was operating under
 2 a trading agreement with ITL, and under that trading
 3 agreement, the deal was that unless ITL told Asda
 4 otherwise, Asda was going to move around prices in
 5 accordance with the price file that ITL sent to it from
 6 time to time. That was the deal, wasn't it?
 7 **A.** I understood that trading agreement to be in place, but
 8 I paid it in mind is the best way I can put it.
 9 **Q.** You had a private mental reservation about implementing
 10 this agreement, but that was not communicated to ITL?
 11 **A.** I guess ... do you mind if I ask a question? Are you
 12 referring to the 2003, the new trading agreement?
 13 **Q.** No, I am talking about the period from when you took
 14 over as tobacco buyer until August 2003.
 15 **A.** The 2002 agreement that was in place, I just put no
 16 significance on it, as far as I was concerned there was
 17 a monthly payment coming off that, whether we abided by
 18 everything that was in there or not.
 19 **Q.** And the truth is that, as you say in your witness
 20 statement, Asda routinely, because you use that word, or
 21 generally or normally did comply with the RSPs in the
 22 ITL price file and you also did the same for the RSPs in
 23 the Gallaher price file?
 24 **A.** Well, I object to the word "comply", but we more often
 25 than not priced at the RSP to protect the margins.

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1 **Q.** And the result was that Asda complied with the parity
 2 and differential requirements of the two manufacturers?
 3 **A.** That was the end result.
 4 **MR LASOK:** Thank you. No further questions.
 5 **THE CHAIRMAN:** Well, we will take a break there before you
 6 ask your questions, if you have questions, do you,
 7 Mr Howard?
 8 **MR HOWARD:** I just want to say this, because it does go to
 9 the points that I would want to cross-examine about, and
 10 it goes to points that we discussed before: you will
 11 again, I think, observe that the case as to what the
 12 requirements are, as set out in paragraph 40, does
 13 not --
 14 **MR LASOK:** Could I just say that I am not too sure that the
 15 witness should be here when hearing legal submissions of
 16 this nature.
 17 **THE CHAIRMAN:** Perhaps, could we just ask you to step
 18 outside? You can start your break a little earlier than
 19 the rest of us.
 20 **A.** Sure.
 21 (In the absence of the witness)
 22 **MR HOWARD:** The very simple point I was just making is this:
 23 you are now very familiar with paragraph 40, we have had
 24 Mr Lasok's explanation, such as it is, as to what the
 25 case is by reference to that, and I may want to say

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1 something about that at a convenient juncture, but it
 2 appears to us -- certainly it appears to me -- that the
 3 case that's being put to this witness actually doesn't
 4 seem to have anything whatsoever to do with that
 5 paragraph or with the explanations that were put by
 6 reference to it, in that the case that has been put to
 7 this witness or built up, really I think the repeated
 8 point was that you were pricing in accordance with the
 9 price file, that is of course -- for instance, you have
 10 to remember paragraph 40 is all about price increases
 11 and decreases and the effect that that is supposed to
 12 have on the competing brands.
 13 Now, in my submission, the case that's being put
 14 doesn't seem to have anything to do with that, it's
 15 quite a different point.
 16 Now, I don't propose to go through with the witness
 17 the paragraph 40 points because in my submission it is
 18 abundantly clear that Mr Lasok is not putting a case
 19 that has anything to do with that to the witness. It's
 20 not even -- we have variants on the style. Sometimes we
 21 have a style which is -- and I don't know, maybe he
 22 thinks he is fitting into this, which is --
 23 **THE CHAIRMAN:** Never mind about the style so much, but at
 24 the moment as far as the Tribunal is concerned, we are
 25 anxious to understand how the pricing worked in this

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1 market, and what the witnesses have to say about what
 2 they knew at the time, what they understood they were
 3 agreeing to or would or wouldn't do, and once we have
 4 established what was actually going on, then we will
 5 need to decide what is the law and how does that law
 6 apply to these facts as we find them, and then where are
 7 we as regards the appeals.
 8 **MR HOWARD:** Well, where are we as regards the appeals, but
 9 also -- one may say that one possibility is that once
 10 there is the divergence between what the decision says
 11 and the evidence is so enormous that really it's quite
 12 impossible to see how it continues. I certainly say
 13 that is a view one should be taking. There is also,
 14 even if one is not taking that view, and the reason I am
 15 making this point now, we are coming towards expert
 16 evidence and the expert evidence is addressing a rather
 17 different case. It is addressing the case that is put
 18 forward in the decision and there is genuine puzzlement
 19 as to what the case actually is that the experts should
 20 and shouldn't be addressing, and it does arise out of
 21 what we have heard this afternoon, but it is a general
 22 concern that I have, but for present purposes, I do not
 23 believe that Mr Lasok has put a case to this witness
 24 which actually relates to essentially the theory of harm
 25 and the basis of the requirements that were being said

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1 to form part of the case, and I do not think it is
 2 incumbent upon me to keep cross-examining the witnesses
 3 to put a case that the OFT doesn't want to put. Because
 4 what Mr Lasok I think said to you the other day, and
 5 again this is slightly puzzling, that we are not going
 6 to say which of the 40(a) to (d) have to be present, it
 7 may be one, it may be more, we don't know where their
 8 case is. But it's perfectly clear to this witness he
 9 has not put any of it, and I am not going to do his job
 10 for him.
 11 **THE CHAIRMAN:** No, well, I don't see that anyone could
 12 criticise you for that, Mr Howard. Let's take our break
 13 now, and we will come back at 20 to 4. In the light of
 14 that, how long are you going to be, Mr Howard?
 15 **MR HOWARD:** I don't think very long, no more than 20
 16 minutes, maybe less.
 17 **THE CHAIRMAN:** Mr Flynn?
 18 **MR FLYNN:** I imagine much the same, Madam, so we should
 19 be --
 20 **THE CHAIRMAN:** We should be finished by this afternoon with
 21 this witness.
 22 **MR FLYNN:** Certainly I imagine Mr Mason will be able to be
 23 released this afternoon.
 24 **THE CHAIRMAN:** Yes, thank you. We will come back at 20 to
 25 4.

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1 (3.32 pm)
 2 (A short break)
 3 (3.45 pm)
 4 Cross-examination by MR HOWARD
 5 **MR HOWARD:** Mr Mason, can I ask you firstly this: you were
 6 the tobacco buyer, you tell us, from 2002 to 2005; what
 7 did you do before 2002 at Asda?
 8 **A.** I was a systems manager and just before doing tobacco
 9 buying I worked in the petrol team, who took tobacco
 10 under their responsibilities.
 11 **Q.** Then after 2005 to 2010, what did you do?
 12 **A.** I was a public affairs manager at Asda for several years
 13 before I left.
 14 **Q.** Okay, so your period as a buyer was really just this
 15 period of 2002 to 2005?
 16 **A.** Correct.
 17 **Q.** We have heard about how price files fit in, and you tell
 18 us in your statement that the manufacturers, you say at
 19 paragraph 12, you say to Asda, in the second sentence:
 20 "The parities and differentials were aspirations of
 21 the manufacturers, positions they tried to achieve to
 22 remain competitive with each other. They did this
 23 through manipulating their net cost prices including
 24 through the use of promotional discount funding which
 25 I discuss further below."

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1 Then a bit further on you say:
 2 "We would only increase price if the manufacturer
 3 effectively altered the net cost price and thus forced
 4 us to raise our retail prices in order to maintain our
 5 margins, which were already slim."
 6 The margins that you were seeking to earn on
 7 tobacco, who determined what the margins should be?
 8 **A.** Well, it was set through a business plan, first of all,
 9 set as -- in Asda overall and then down to category
 10 level. So the business plan was already set for us for
 11 the year. And really that would be a percentage margin
 12 leading to a cash profit figure.
 13 **Q.** Right. So we have been told -- so that comes from on
 14 high, presumably?
 15 **A.** Yes.
 16 **Q.** We have been told by you and others that one of the
 17 things that Asda wants to do is remain competitive with
 18 the other supermarkets who you viewed as your
 19 competitors. We have also been told that the margins on
 20 tobacco, you tell us, are very slim. Now, I just wonder
 21 if you can explain to us a little bit about why it is
 22 the margins on tobacco, in particular, are slim. Why is
 23 it you can't, say, charge -- we see that the margins
 24 appear to be 4, 5 per cent, something like that, why is
 25 it you can't say "Well, I want a margin on tobacco of

1 20 per cent"? What's the problem with doing that?
 2 **A.** The only way of getting a margin of 20 per cent would be
 3 to hike your prices up very high, which would obviously
 4 make you extremely uncompetitive in the market, and
 5 customers are reasonably sensitive to tobacco prices, so
 6 if they saw that their packet of Lambert & Butler which
 7 they may buy one or two packets a day were suddenly 10p
 8 more expensive in Asda than it was in other
 9 supermarkets, (a) they would go and shop in other
 10 supermarkets to buy their tobacco, and (b) they would
 11 obviously be very vociferous with the store colleagues
 12 about the fact that their tobacco had suddenly become
 13 much more expensive.
 14 **Q.** We know, for instance, there are other types of stores
 15 like convenience stores or the newsagent, for instance,
 16 where people might go and buy their cigarettes, that may
 17 charge RRP or above; what is it that's inhibiting Asda
 18 from charging RRP plus 10p?
 19 **A.** The supermarkets charged at a very different level to
 20 convenience, which really (a) fits with the volume that
 21 we sell, so we sell a huge volume of tobacco, which does
 22 allow you obviously to negotiate better cost prices with
 23 the manufacturers, which customers also do expect you to
 24 pass onto them through lower retail prices. Obviously
 25 the stores are more efficient as well, so you are not

1 just running one store where you are only selling
 2 tobacco, it's part of your whole offer, so you can
 3 afford to make less money on tobacco in a supermarket
 4 than you could if you were running a convenience store
 5 and it was your entire livelihood.
 6 **Q.** Is it really the decision of Asda as to what margin it's
 7 going to set based on what it's trying to achieve in its
 8 competitive setting?
 9 **A.** Yes.
 10 **Q.** Now, was the fact that Asda was competing with the other
 11 supermarkets something that would be known to ITL or
 12 Gallaher when preparing the price files?
 13 **A.** Definitely, yes.
 14 **Q.** And the margins, if we just take Imperial, that we see
 15 that they assume for the purposes of the price file,
 16 where would they get the knowledge of what your margin
 17 expectation was?
 18 **A.** I would say probably their main way of getting that
 19 would be historical, so they would know over a period of
 20 time what margins were being made by every line that
 21 they gave you.
 22 **THE CHAIRMAN:** How would they know that?
 23 **A.** In a sense of they have their own historical data, of
 24 course, they have half the market almost and Gallaher
 25 have half the market, so they have been doing this for

1 many years, and they know the general overall margin,
 2 but we wouldn't say -- we wouldn't tell ITL or Gallaher
 3 the specific overall margin figure that we were going
 4 for.
 5 **MR HOWARD:** So obviously if one looks back, if one were
 6 looking back, say, into history, Imperial has supplied
 7 products to Asda, so it knows Asda's cost price on
 8 Imperial's products, obviously?
 9 **A.** Yes.
 10 **Q.** And it can look into your store price and see what your
 11 selling price is; correct?
 12 **A.** Yes.
 13 **Q.** If you have those two pieces of information, can you
 14 then determine historically what the margin is that you
 15 have been seeking to achieve?
 16 **A.** Yes.
 17 **Q.** Yes.
 18 **THE CHAIRMAN:** So that's the gross margin?
 19 **A.** Correct.
 20 **MR HOWARD:** Yes, the gross margin, but what we are talking
 21 about here is gross margin, is it not?
 22 **A.** Yes.
 23 **THE CHAIRMAN:** But in your business plan, when you are
 24 looking at the percentage margin that you have to
 25 achieve, is that a gross margin or is that the margin

1 taking into account other costs than just the purchasing
 2 of the cigarettes?
 3 **A.** At a category level it's gross margin.
 4 **THE CHAIRMAN:** It is, okay.
 5 **MR HOWARD:** Yes. In terms of what you are doing, obviously
 6 there are net margins of the business after taking
 7 account of all sorts of costs, but in relation to
 8 an individual line of business such as you, as a tobacco
 9 buyer, you, as I understand it, are given a target of
 10 gross margins which then feed through into net margins
 11 and net profits of the whole group at the end of the
 12 day?
 13 **A.** Correct.
 14 **Q.** Yes, and just thinking about it, just to pursue this,
 15 just to knock it on the head, it would be obviously
 16 completely impossible for you to be working on the basis
 17 of net margins, because that depends on how you allocate
 18 overheads, employee costs of all sorts of people, and so
 19 on?
 20 **A.** Yes, and lots of things that are outside our control,
 21 yes.
 22 **Q.** If we go back to what you are saying at paragraph 12,
 23 the supplier of here tobacco who wants to try to
 24 influence you to achieve a retail selling price of his
 25 product, and he is preparing the price file, what does

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1 he have to do about his cost price in order to try to
 2 achieve what he regards as a desired retail selling
 3 price?
 4 **A.** Well, if he wants the retail selling price to increase,
 5 he obviously has to increase that cost price or remove
 6 a discount that's in place.
 7 **Q.** And if he wants to reduce it?
 8 **A.** He needs to either reduce cost price or more likely, as
 9 time goes on, he would be adding bonuses in to help you
 10 reduce the selling price.
 11 **Q.** So is this saying other than that he needs to set his
 12 cost price to you at a level which I believe he believes
 13 will allow you to earn the margin he expects to allow
 14 you to get to what he regards as the desirable selling
 15 price?
 16 **A.** That's right.
 17 **Q.** The price file, so we are clear about it, you have told
 18 us that it's a recommended selling price for Imperial's
 19 product, we will see it all set out. Does it say
 20 anything at all about the selling prices for Gallaher's
 21 product?
 22 **A.** No.
 23 **Q.** Could you go to --
 24 **THE CHAIRMAN:** Could we just clarify that answer? It
 25 doesn't include on it any information for Gallaher

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1 products, there are no lines on that relating to
 2 Gallaher products?
 3 **A.** Correct. There are no lines.
 4 **MR HOWARD:** Yes. So just to follow that through, so we are
 5 absolutely clear about the position, you have told us
 6 that you regarded the price files as containing
 7 recommended selling prices, but let's just not worry
 8 about the detail for a moment, let's assume there is
 9 an RSP for Richmond of £3.34, and you decide, in the way
 10 you have explained, that you are going to price Richmond
 11 at £3.34. Having done that, does that in any way affect
 12 your pricing decision in respect of Dorchester?
 13 **A.** No.
 14 **Q.** Is there anything in the price file to suggest that you
 15 have to do anything about Dorchester?
 16 **A.** No.
 17 **THE CHAIRMAN:** But I think you did agree, but correct me if
 18 I am wrong, that you did understand that in setting the
 19 price on the price file, ITL may have had regard to its
 20 own aspirations in relation to the price relationship
 21 between Richmond and Dorchester?
 22 **A.** Yes, and the reason I say no to the question is because,
 23 going back to what I said earlier on, it might be that
 24 we are in a circumstance where (a) we want to put the
 25 cat amongst the pigeons, for want of a better phrase,

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1 one supplier over another, or we might want to be saying
 2 something to our competitors, so we might want to be
 3 causing them confusion.
 4 **Q.** And just -- sorry, go ahead?
 5 **A.** Sorry, if I may just add something to that. And that
 6 often relates to southern versus northern brands as
 7 well, so for example we may do something on
 8 Benson & Hedges because we had many fewer stores in the
 9 south, and that was very much a southern brand. So you
 10 might reduce the price of Benson & Hedges independently
 11 because you know that your competitors that are more
 12 southern based will have to respond, and that's going to
 13 hurt them more than it's going to hurt you.
 14 **MR HOWARD:** To what extent did you understand that when the
 15 manufacturers set their recommended retail prices, their
 16 RRP's which they have to publish by law, that that also
 17 reflected their aspirations as to the positions of the
 18 two brands?
 19 **A.** Yes, that's how I understood it, yes.
 20 **Q.** That's the RRP's, and so were the RSP's doing any -- when
 21 Imperial gives you the RSP, we know that you sell
 22 historically below the RRP's and they also give you
 23 a contribution to do that, but insofar as the RSP
 24 reflects their aspiration, is it doing anything
 25 different to the RRP?

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1 A. Sorry, could you just ...
 2 **THE CHAIRMAN:** You don't learn anything more from looking at
 3 the RSP than you would learn from looking at the
 4 published RSPs about what Gallaher and ITL think about
 5 which of their brands compete with each other?
 6 A. Correct.
 7 **MR HOWARD:** Now, can I then ask you about paragraph 57,
 8 which I think you were asked about, of your witness
 9 statement. Paragraph 57 you tell us relates to
 10 documents at tabs 57 and 58. I think particularly 58
 11 you were being asked about.
 12 Let's look at 58 for a moment. This is an internal
 13 communication at -- I think in fact this is when you
 14 were away. We see what was being referred to was:
 15 "... our new man at Asda refusing to accept a margin
 16 reduction on Drum and it looks likely I will have to put
 17 some bonuses back in place to maintain certain prices to
 18 match Amber Leaf prices or move selling prices up
 19 slightly to restore the margin."
 20 What appears to be happening is that ITL were saying
 21 they wanted to remove a -- I am sorry, I think what was
 22 happening is they had changed the bonuses, and the
 23 result was that Asda were complaining that they were
 24 going to suffer a margin reduction as a result of this,
 25 and Asda were kicking up a fuss. Do you remember this,

1 either this episode or this type of episode?
 2 A. I recognise the type of episode.
 3 Q. Can you put some flesh on the bones and explain to us
 4 why you would be resisting this type of thing?
 5 A. On a product like this, as on any product, we couldn't
 6 really afford to lose the margin, either from losing the
 7 bonus -- from losing the bonus.
 8 Q. What's being said is, well, you did -- we are here
 9 talking about a situation where there is movement in
 10 bonuses, bonuses here I think are getting withdrawn and
 11 it affects your margin. I think it's in percentage
 12 terms rather than cash terms. Is that what the problem
 13 is?
 14 A. Yes. Well, particularly following a --
 15 **THE CHAIRMAN:** I am not sure this is a bonus point. My
 16 understanding was that -- is it right that generally
 17 margins on lower cost brands are generally narrower than
 18 they are on premium brands?
 19 A. Yes.
 20 **MR HOWARD:** You are quite right. What has happened --
 21 sorry, it's over the page -- actually is rather
 22 interesting. What's happened is Imperial has actually
 23 reduced the cost price, and you can see that on the
 24 second page, and the effect of reducing the cost price
 25 is causing you, Asda, to have a lower margin, and that's

1 what you are upset about, and so they have to think
 2 about restoring your margin by adding a bonus.
 3 (Pause)
 4 I think that's what's happening, isn't it, and
 5 that's what the margin reduction --
 6 A. Yes. They haven't quite -- yes. They have reduced --
 7 **THE CHAIRMAN:** As I understand it, what was happening was
 8 that Amber Leaf was becoming a cheaper brand, and
 9 therefore Drum was going to become a cheaper brand, and
 10 they would reduce the cost, and also reduce the price,
 11 but the margin that you ended up with would be narrower
 12 just because margins are narrower on a cheaper product?
 13 A. They've not quite got their figures right so they've not
 14 quite delivered the margin that we received --
 15 **THE CHAIRMAN:** Right, but they were saying "Well, you can't
 16 expect to have that margin that you used to get because
 17 this is now an ultra low type product".
 18 A. Probably.
 19 **MR HOWARD:** So here, in other words, in the price file,
 20 Imperial is trying to reduce the price, but --
 21 **MR LASOK:** Forgive me, but there are two points about this.
 22 Firstly I myself did not cross-examine the witness on
 23 this because he said he didn't know the incident. My
 24 learned friend is cross-examining, so that's for him.
 25 But we already established on Friday that the price

1 changes had already occurred. This relates to what had
 2 happened in June and July.
 3 **MR HOWARD:** The latter point is correct and I don't think it
 4 actually goes to anything.
 5 The point I was asking about, despite Mr Lasok's
 6 intervention, is whether this type of episode was one
 7 that you were familiar with?
 8 A. Yes.
 9 Q. What I was asking you to do is to explain to us what the
 10 relevance of this is in relation to the price files and
 11 your evidence that you didn't always go along with the
 12 price files; can you explain how this fits in with that?
 13 A. So following this change, a new price file would come
 14 with a new set of cost prices and a new recommended
 15 selling price, but this clearly wasn't delivering the
 16 margin that we would expect from this product. So we
 17 were asking for additional funding to increase the
 18 profit margin.
 19 Q. This sort of discussion where you would be saying "Well,
 20 if you want the price to come down here in this way, we
 21 require additional margin", how frequent did these sorts
 22 of discussions take place?
 23 A. All the time. When you think that if -- obviously you
 24 had a price change following a Budget decision, that
 25 would be followed later on in the year by

1 a manufacturers' price increase, but then you would have
 2 bonus discussions throughout the year and promotional
 3 discussions throughout the year, as products moved
 4 about.
 5 **Q.** Then I wanted to ask you about the interaction between
 6 the national account manager, here Mr Hall, and you.
 7 You have told us that there were discussions by phone,
 8 and we have a certain amount of correspondence. Can you
 9 tell us: what was the form in which communications
 10 generally were taking place?
 11 **A.** Normally we would speak on the phone.
 12 **Q.** How often were you speaking on the phone?
 13 **A.** I would speak to every national account manager every
 14 week.
 15 **Q.** The topic of conversation, other than these questions
 16 about price, what else were you talking about?
 17 **A.** We would talk about ranging, we would talk about
 18 legislation, we would talk about packaging, might talk
 19 about position on the shelf, availability.
 20 **Q.** How much of the discussion was about the pricing? In
 21 other words, how significant a feature of these oral
 22 discussions was pricing?
 23 **A.** I mean, you would only talk about it if there was
 24 a reason to talk about it. So if it was following
 25 a duty increase or it was following an MPI or it was

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1 following a tactical bonus.
 2 **Q.** Then if we go back to your witness statement at 56 and
 3 57, at 56 you referred to the communication at document
 4 58, but I am really interested in what you have said at
 5 57, which was where you are talking about basically the
 6 bonusing that was going on.
 7 You say:
 8 "This kind of competition between the manufacturers
 9 to offer us bonus money was of course good for customers
 10 as it drove retail prices down. It would make no
 11 commercial sense for Asda to decline the offer of
 12 discount money that would enable it to sell at a lower
 13 retail price while maintaining our margin all the more
 14 so, given Asda's commitment to Every Day Low Prices."
 15 From your perspective, what I wanted to ask you
 16 about is the competitive dynamic that was going on
 17 during 2002 to 2003. What was your impression of the
 18 extent to which these manufacturers were seeking to
 19 compete on price?
 20 **A.** It was extremely competitive, constantly, which of
 21 course we recognised very closely because we were the
 22 same way with our competitors.
 23 **Q.** I think you also told us that you gave us examples,
 24 I think you have talked about where -- I think you put
 25 it as "annoying the opposition" by pricing, taking

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1 a couple of pence or 10p off the price of cigarettes,
 2 and you also said you used that to sometimes annoy the
 3 manufacturers.
 4 Now, in terms of the manufacturers, can you explain
 5 to me what you were trying to do when you were, say,
 6 putting down the price of Gallaher, what were you trying
 7 to do vis-a-vis Imperial?
 8 **A.** It might be that you perhaps were having a discussion
 9 about, let's say for example multipacks, and you were
 10 saying "We think multipacks are not performing in our
 11 stores the way they should be, can we look at doing some
 12 promotional funding so that we are able to reduce the
 13 retail price in stores". We might say, "We will meet
 14 you halfway on that, we will do some of that funding if
 15 you do some of that funding" and perhaps one of those
 16 manufacturers said, "Well, no, we don't want to do any
 17 promotional funding on multipacks at the moment or in
 18 the foreseeable future", and then we might therefore
 19 change a couple of the retail prices of their
 20 competitors to make it look like we were getting bonus
 21 funding from their competitors rather than from them, to
 22 try and stimulate a bit of activity.
 23 **Q.** Now, where a manufacturer is offering a bonus in order
 24 to get the price down of its product, providing your
 25 margin is maintained, seeing what you say in

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1 paragraph 57, would there actually be any reason that
 2 you can think of why you wouldn't take the bonus and put
 3 the price down?
 4 **A.** No.
 5 **Q.** Where a manufacturer has provided a bonus in order to
 6 get his price down, what obligation is he under to
 7 maintain that situation?
 8 **A.** He is under no contractual obligation, so if we came to
 9 an agreement that he was going to bonus us so that we
 10 could reduce the retail price of a particular product,
 11 and he said he wanted to do it for 12 weeks, we would
 12 obviously expect him to stick to that agreement. But
 13 then if we said "Can we do it for another four weeks?"
 14 And he said "No, I can't, this is as far as I can go",
 15 then we would stop at 12 weeks.
 16 **Q.** In relation to -- you have described and we know that
 17 the bonusing often takes place here in a competitive
 18 environment where one manufacturer is trying to compete
 19 with the other, but where the bonus hasn't been
 20 expressed to be for any definite periods, an indefinite
 21 period, is there any restriction on the manufacturer's
 22 entitlement to say "Well, I am now going to withdraw the
 23 bonus either in part or in whole"?
 24 **A.** No.
 25 **Q.** Let's move on to something else. Actually, we can pick

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1 this point up at tab 62 and tab 63, so we can see what
2 was happening. You were asked some questions both by
3 Mr Lasok and the Chairman about this. Let's just break
4 it down as to the stages of this.

5 At tab 62, {D14/62/167}, we see at the first
6 paragraph:

7 "Current prices for Richmond Kingsize, 3.54, and
8 Richmond Superkings, 3.58, reflect additional price
9 support of [redacted] per pack."

10 Stopping there for a moment, what had Imperial been
11 doing in order to achieve those prices?

12 A. So they had been providing us with a bonus to be able to
13 reduce the selling price to what's there.

14 Q. Right. Then in the second paragraph we can see what
15 they are talking about doing, which is moving the price
16 up. Then it says that Stephen Carroll is going to
17 forward an updated price file detailing these changes.

18 What would you then anticipate to see in the price file
19 about this change in the bonus?

20 A. So I would expect that bonus to be removed.

21 Q. Right. Now, if we look at tab 63, originally at tab 62
22 they were contemplating this happening on 14 October,
23 and then at 63 they are contemplating delaying things
24 until 21 October with then an amended price file to show
25 the revised date. So can you explain to us what's

1 happening in terms of the price files in terms of the
2 bonusing and then the revision?

3 A. So I understand from that that the bonus will continue
4 for an additional week, which allows us to keep the
5 price lower for that additional week.

6 Q. Why, from your understanding of the position, would
7 Imperial need to hold down the price and continue this
8 bonusing for an extra week? What would be the
9 commercial reason that would be driving that?

10 A. For competition reasons.

11 Q. Right.

12 A. So they have seen that a competitor is holding out the
13 prices.

14 Q. Right, okay. Then you were asked some questions about
15 paragraph 13 of your witness statement and paragraph 39.
16 I am not sure I quite understood what the point was
17 here, that you were ... I think what Mr Lasok said to
18 you is that it looked as if the scenario in paragraph 13
19 was theoretical as the manufacturers normally fund
20 promotions.

21 What I would like to ask you about is this: if there
22 is a promotion by Gallaher so that they reduce here the
23 price of Benson & Hedges, that was the example you gave,
24 was Imperial under an obligation to have a promotion for
25 Marlboro?

1 A. No.

2 Q. So whose choice was it as to whether they did that?

3 A. It was their choice.

4 Q. Right. What would be the factors which would determine
5 whether they chose to follow or to seek to compete with
6 Gallaher?

7 A. They would be monitoring their sales and they would be
8 watching for customers switching brands.

9 Q. Where one of the manufacturers decided to have
10 a promotion, did the other manufacturer always respond
11 competitively?

12 A. More often than not.

13 Q. Right. So in relation to what you say at paragraph 57
14 of your statement, to what extent was this, so far as
15 you saw, driving prices down?

16 A. It briefly drove prices down, and if I may just add to
17 the point you made before, we would obviously -- we
18 would also point out, we would say "do you want to bonus
19 a particular product to reduce the prices", we were
20 always looking for opportunities in a market where
21 prices were continually being increased by Budget
22 increases all the time, we were always looking for some
23 opportunity to try and make things a bit cheaper for the
24 customers.

25 Q. That leads me to tab 69, {D14/69/186}, which you were

1 asked a lot of questions about. This was the Small
2 Classic Cigars. If we pause for a moment to see what
3 the exchange of emails was about, the first one on
4 page 132 was Mr Carroll, Stephen Carroll, complaining
5 that the price of the cigars had moved after the price
6 marked pack ran out from 2.55 to 2.73 rather than 2.69.

7 You then I think explained that you had had a price
8 file which showed 2.73, and then you also made a point
9 as to why you thought these particular cigars should be
10 more expensive, due to the greater weight of tobacco.

11 Then if you go back to page 131, the email from
12 Mr Carroll at the foot of the page made the point that
13 a bonus had been paid of 34p per outer to have a price
14 reduced to 2.69. Okay?

15 Now, you have explained to us also that the RSPs you
16 regarded, you have told us, as maximum selling prices,
17 but leaving that on one side for the moment, I just want
18 to ask you about the bonus: where you have been paid
19 a bonus, here of 34p, to achieve either a specific or
20 maximum price, it doesn't matter, of £2.69, to what
21 extent was Imperial entitled to complain if you were
22 selling above that price?

23 A. They would complain if we were selling above that price.

24 Q. If we then go to paragraph 77 of your witness statement,
25 which concerned the new trading agreement, and if we

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1 just put this in context: where bonuses are being paid,
 2 then ITL -- why are they paying a bonus? What are they
 3 trying to do?
 4 **A.** To help us to achieve a lower retail price.
 5 **Q.** Right. Now, paragraph 77, Mr Lasok asked you some
 6 questions towards the end, but let's just see what you
 7 are saying at the beginning of the paragraph:
 8 "At item 9 there is a reference to ongoing pricing
 9 and how we should communicate on such issues. This
 10 comment reflects a nervousness about competition on
 11 ITL's part which I believe we may have raised with
 12 them."
 13 **THE CHAIRMAN:** "Competition law on ITL's part".
 14 **MR HOWARD:** I am sorry, I didn't mean to misread it,
 15 I apologise if I did. "Competition law on ITL's part".
 16 "Their concern was to ensure that where they
 17 discounted cost prices, this discount was passed on to
 18 customers. They did not want their funding of
 19 aggressive pricing initiatives against Gallaher to be
 20 absorbed by the retailers as extra margin."
 21 Those two sentences, the one beginning "their
 22 concern" and "they did not want", can you explain, just
 23 tell me how this arose and what the nature of the
 24 discussion was?
 25 **A.** I mean, I think really that they were just -- they

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1 wanted to -- when they are talking about pricing, they
 2 want to make it clear that whenever they are offering
 3 discounts they expect those discounts to be passed on to
 4 consumers. And occasionally of course there will be
 5 mistakes like that, the Classic example, where it was
 6 a clerical error because of the number of products that
 7 were out there, where the price wasn't right. But
 8 fundamentally they wanted to be able to say "If we are
 9 paying you discounts -- paying you bonuses, the
 10 understanding is that you will then follow that with
 11 a reduction in retail price to, at the very least, the
 12 maximum RSP".
 13 **Q.** Right. When you say, then, there was some
 14 misunderstanding on all sides as to how competition law
 15 applied to supplier/retailer communications, can you
 16 just tell us -- you are describing it as
 17 a misunderstanding -- what was this misunderstanding
 18 about supplier/retailer communications, what was it,
 19 particularly in this context of bonusing, that you were
 20 concerned about?
 21 **A.** I think because when you are talking about bonusing you
 22 are also in the same context talking about retail
 23 prices, it's a fundamental part of the discussion, that
 24 I think that was where the questions were arising about
 25 Competition law around that.

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1 **Q.** So if the supplier is saying to the retailer "I'll pay
 2 you a bonus of 5p to reduce the price of Dorchester from
 3 £2.34 to £2.29", assume that was it, was it your concern
 4 that they shouldn't be able to say that?
 5 **A.** That's what's behind that paragraph.
 6 **Q.** Right. You then tell us that, in the last bit:
 7 "The position eventually reached was the basic
 8 position that had always existed. The manufacturers
 9 would continue to recommend prices but we would be free
 10 to set our own prices and discount further if we wanted
 11 to."
 12 So the net position that you reached in relation to
 13 this, to what extent did you actually have any
 14 difference between that position and the 2002 position?
 15 Was there a change?
 16 **A.** Not for us, no. It was the same for us.
 17 **Q.** We know that --
 18 **THE CHAIRMAN:** Do you think it was the same for ITL?
 19 **A.** Perhaps our feelings were clearer.
 20 **MR HOWARD:** Let's just have a look at the agreement that was
 21 actually executed. It's at tab 80. If you go to the
 22 page marked 22, the final page in the tab, you see ITL's
 23 strategy pricing requirements:
 24 "The strategy pricing requirement is a part of this
 25 trading agreement, but Asda stores is at all times free

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1 to set its own retails for products stocked in its
 2 stores."
 3 Do you see that? We see it's different language,
 4 and that last clause wasn't set out in the 2002
 5 agreement. As far as you were concerned, was this
 6 changing the way in which you or Imperial behaved?
 7 **A.** No. No, it was to clarify the wording.
 8 **Q.** Sorry, it was clarifying ...
 9 **A.** The wording.
 10 **Q.** Thank you.
 11 Just on a separate point about delisting, I think
 12 you were told there was no evidence at all about
 13 delisting. Could you go to tab 70, just as an example.
 14 This is an Imperial internal document. If you would go
 15 to page 233, under "RYO sales 2001", roll-your-own, do
 16 you see that paragraph, under the paragraph it says:
 17 "After a poor launch" --
 18 **A.** Sorry.
 19 **Q.** It's the last sentence, I beg your pardon. I didn't
 20 realise you weren't there.
 21 **A.** Sorry, it's page 233?
 22 **Q.** 233.
 23 **A.** Okay.
 24 **Q.** You will see it says "RYO sales" and then various
 25 information about Golden Virginia and Drum and

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1 Amber Leaf, and so on. Then the last sentence refers to
 2 a product called Raw, which was delisted. Do you know
 3 anything about that?
 4 **A.** That was before my time.
 5 **Q.** I see, okay. But we also see other references in here
 6 to products being delisted. This document may be all
 7 pre-dating your involvement. Although it's dated
 8 3 March.
 9 At 232, at the foot of the page, you will see
 10 a list, it says:
 11 "The following brands have either been
 12 delisted ...", and a whole lot of brands are listed at
 13 the top of page 233. Was that in your time, the
 14 delisting of those brands?
 15 **A.** The Embassy, I think the Embassy was at the beginning of
 16 my ...
 17 **Q.** Was that your decision, I mean Asda's decision to
 18 delist?
 19 **A.** Yeah, and it was low sales, Embassy, yeah, of those
 20 packs of Embassy.
 21 **Q.** Also Rizla on page 234, I think we see in the second
 22 paragraph under "Rizla, Other", something about the
 23 rolling machines being delisted. I think the rolling
 24 machines are the machines that you roll your own in,
 25 I suppose?

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1 **A.** Yes.
 2 **Q.** Was that something you were aware of?
 3 **A.** This was before my time, looking at the dates.
 4 **Q.** These sort of examples of products being taken out,
 5 whose decision would that be?
 6 **A.** Asda's.
 7 **Q.** That would be on the basis of what sort of
 8 consideration?
 9 **A.** Sales normally.
 10 **Q.** Right. From the manufacturers' point of view, what was
 11 generally his strategy about having his products listed?
 12 What would he want?
 13 **A.** He would want all products to be listed.
 14 **THE CHAIRMAN:** When you discussed delistings, these
 15 delistings, were they resistant to you delisting them,
 16 or did they see the writing on the wall? Can you
 17 remember?
 18 **A.** It's a little bit of both. So sometimes as a company,
 19 they would take a product out of circulation, and other
 20 times it would be you would just say "I am really sorry,
 21 there is only limited space on the gantry. We need to
 22 delist this product as the sales just aren't there."
 23 **MR HOWARD:** Just finally, sorry, and it's going slightly
 24 backwards, paragraph 62 of your witness statement, you
 25 say in the second sentence:

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1 "In this case it appears ITL did delay
 2 implementation of the price increase, presumably they
 3 were nervous about whether or not Gallaher would also
 4 increase the Dorchester prices."
 5 Can you just explain this to me: why would Imperial
 6 be nervous about this?
 7 **A.** Because these are two brands where customers might
 8 switch between brands, because the prices were similar.
 9 **Q.** If Gallaher chose not to put up the price of the
 10 competing Gallaher brand, from a competitive point of
 11 view, in what respect would Imperial suffer?
 12 **A.** A loss of sales.
 13 **MR HOWARD:** Thank you very much.
 14 Questioned by THE TRIBUNAL
 15 **DR SCOTT:** Mr Mason, you have talked quite a lot about
 16 margins and the need to sustain them, therefore not
 17 reducing prices at the expense of Asda, and one of the
 18 things that we learnt from Mr Jolliff and indeed if you
 19 take the bundle again and turn to tab 50 first, this is
 20 just before you are taking over, and Mr Jolliff was very
 21 pleased with himself because he must have done something
 22 right, he told us, margins had increased. You will
 23 see -- I am not going to read it out, but you can read
 24 for yourself what is said under "Margins" on page 80
 25 there.

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1 (Pause)
 2 So you were inheriting a good patch, and that's
 3 reiterated, you will find when we come to 56, tab 56.
 4 This is a letter to Mr Lang. I think by now you have
 5 arrived; yes?
 6 **A.** Yes.
 7 **DR SCOTT:** So there has already been an improvement, and in
 8 this letter Mr Hall is noting -- and again I am not
 9 going to read it out, but you can read for yourself the
 10 passage marked with a box, then "from tobacco"?
 11 **A.** Yes.
 12 **DR SCOTT:** So what appears to be very clear to us is that
 13 ITL were concerned with the margins that you needed to
 14 get your bonuses, and we will come back to that in
 15 a moment.
 16 If you would turn to your statement and to
 17 paragraph 63 where you are commenting on document 64, if
 18 you turn the page to page 20 or 425 --
 19 **MR HOWARD:** Can I just interrupt to say when you said that
 20 ITL is very concerned with the margins you needed to get
 21 your bonuses, did you mean your profits?
 22 **DR SCOTT:** No. We established earlier on that there were
 23 personal bonuses at stake from achieving margins.
 24 **MR HOWARD:** I don't think it's been suggested that ITL was
 25 aware of the personal bonuses that individuals were

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1 going to earn. It hasn't been suggested to anybody that
 2 they were aware of that.
 3 **DR SCOTT:** Yes. We have established that there were
 4 personal bonuses, bonuses paid by Asda to Mr Mason.
 5 **MR HOWARD:** But it's not suggested that Imperial was aware
 6 of the terms of Mr Mason's employment.
 7 **DR SCOTT:** No, there are two distinct things here. One is
 8 that ITL were aware of the margins improving under the
 9 stewardship of Mr Jolliff.
 10 **MR HOWARD:** Yes.
 11 **DR SCOTT:** And that Asda had an intention of trying to
 12 improve the profitability of tobacco.
 13 **MR HOWARD:** Yes, absolutely. That was my ...
 14 **DR SCOTT:** At the personal level, we have seen that within
 15 Asda there was bonusing going on for maintaining and
 16 improving those margins.
 17 **MR HOWARD:** Yes. It's just putting the two together,
 18 Imperial had no reason to know.
 19 **DR SCOTT:** Yes, I --
 20 **MR HOWARD:** It's just your question -- I'm not trying to be
 21 difficult, your question was I think on the basis that
 22 Imperial were aware of the individuals' bonuses.
 23 **DR SCOTT:** No, no, I am not suggesting, I am just thinking
 24 about your situation, sitting in Asda, but you are
 25 recognising that Imperial are concerned about those

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1 margins, whether they know about your personal bonusing
 2 or not. However, if we go back to 63, you were:
 3 "... trying better to understand ITL's cost prices,
 4 but they refused to share this information with us as it
 5 was confidential. This was typical of ITL, they were
 6 not transparent and we always had a sense, reaffirmed by
 7 the profits announced in their annual accounts, that
 8 they were making a lot more money than we were on
 9 tobacco products."
 10 You looked at their annual accounts, presumably?
 11 **A.** Yes. Yes. Well, top line, yes.
 12 **DR SCOTT:** Do you happen to remember what the margins were?
 13 **A.** No, I don't, I'm afraid.
 14 **DR SCOTT:** But you felt --
 15 **A.** It was really an overall cash profit in comparison to
 16 the cash profit that retailers made from selling
 17 cigarettes, really was the comparison.
 18 **DR SCOTT:** Mr Howard, would you mind if I shared the numbers
 19 with him?
 20 **MR HOWARD:** Well, no.
 21 **DR SCOTT:** The numbers that he would have read.
 22 **MR HOWARD:** If the numbers are taken from public documents,
 23 then I couldn't possibly object, they are public
 24 documents.
 25 **DR SCOTT:** The operating profit on tobacco in the UK seems

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1 to have been 390 million, representing a 51 per cent
 2 margin net of duty and a 9 per cent margin including
 3 duty. So you are absolutely right in remembering that.
 4 From that point of view you presumably expected them to
 5 be able to afford to bonus you.
 6 **A.** Yes.
 7 **DR SCOTT:** Now could you turn to tab 2. This is sometime
 8 before your time, so it reflects a situation before any
 9 of the negotiations had taken place on the agreement
 10 that you were participating in. But Mr Downham ends his
 11 letter to Mr Jolliff:
 12 "As always, this activity will be fully funded."
 13 What this activity involves, as you will see, is
 14 a move to prices which are related to, in this case,
 15 Mayfair, an activity that's to start when Mayfair moves
 16 down and end when the price returns to its normal level
 17 and as usual an updated price file will follow.
 18 What it suggests is a pattern in which the prices go
 19 up and down and the margin that we talked about is
 20 maintained by bonuses being added or withdrawn when
 21 those prices change. Is that ...
 22 **A.** Yes.
 23 **DR SCOTT:** Is this the sort of letter that -- this doesn't
 24 surprise you, this letter?
 25 **A.** No. No.

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1 **DR SCOTT:** If you had received this letter after the
 2 negotiations in which you took part, how would you have
 3 viewed it?
 4 **A.** I would still have viewed any communication like this as
 5 they were talking about maximum RSPs. I would view any
 6 communication like that in that way, at whatever time.
 7 **DR SCOTT:** Okay, but both you and they would have regard to
 8 the fact that you needed to make margins both to achieve
 9 the objective within Asda to push up the profitability
 10 of tobacco and to achieve your personal bonus?
 11 **A.** Whenever we were thinking about moving retail prices up
 12 or down, we had to be very mindful of the margins.
 13 **DR SCOTT:** Thank you very much indeed.
 14 **THE CHAIRMAN:** Just one question, going back right to the
 15 beginning of what Mr Howard was asking you about: why
 16 were margins on tobacco so thin? I understand the
 17 comparison with why margins in the supermarkets on
 18 tobacco are thin compared with in convenience stores,
 19 but my understanding was that even if you look across
 20 the range of different kind of groceries within
 21 supermarkets, say comparing tobacco and soft drinks and
 22 baked beans or whatever, supermarkets earn more profits
 23 on other items than they do on tobacco, that of the
 24 profits that Asda earns per category, tobacco are
 25 thinner than other products; is that right?

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1 A. That's correct.
 2 **THE CHAIRMAN:** Well, why is that, given that the answer that
 3 you gave as to why margins are thin -- namely that yes,
 4 we are all competing like mad with other supermarkets --
 5 presumably applies to all those other grocery items, so
 6 why is it that with tobacco the competition between the
 7 supermarkets beats the margin down to a thin level,
 8 thinner than it does in relation to other products that
 9 you all sell?
 10 A. You can get to a position where you have a very low
 11 margin on tobacco because the volumes are so high, so
 12 the cash margin you can generate can still be quite
 13 substantial, even though the percentage margin is fairly
 14 low.
 15 **THE CHAIRMAN:** So is what you are saying really that it's
 16 a small high value product, so the amount of shelf space
 17 that's taken up per pound, as it were, by a packet of
 18 cigarettes compared to a bottle of Coca-Cola is much
 19 smaller, you have to devote a lot more shelf space to
 20 earn a pound from selling baked beans or soft drinks
 21 than you do to selling tobacco? Is that the way to look
 22 at it?
 23 A. Of course it's not a discretionary spend, either, if you
 24 smoke Lambert & Butler and you smoke them every day,
 25 then you are going to need to buy them every day and you

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1 are going to make some purchasing decisions based on
 2 that, so where you go to buy that product from, so
 3 obviously price is so very important as well, whereas if
 4 its a packet of biscuits, it's a discretionary spend, so
 5 the pricing structure is much different.
 6 **THE CHAIRMAN:** So you can afford to have a bigger margin on
 7 a discretionary spend item than you can on a must-buy
 8 item?
 9 A. Because it's not discretionary, you have to buy it every
 10 day, that makes the pricing very, very keen. It's a mix
 11 of factors, and that also relates to the fact that it's
 12 very high volume as well. So if they were 5p, for
 13 example, and it was a very, very low volume area and
 14 people weren't needing to buy them every day, then the
 15 whole market would operate in a very different way.
 16 **THE CHAIRMAN:** Right.
 17 **MR SUMMERS:** Just noting that comparison with other areas of
 18 supermarket activity, do you have any returns on
 19 cigarettes, returns to the manufacturers because the
 20 stock is out of date or ...
 21 A. Yes.
 22 **MR SUMMERS:** Oh, really?
 23 A. Yes. Sorry, not from customers.
 24 **MR SUMMERS:** No, no, but from you --
 25 A. To manufacturers, yes.

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1 **MR SUMMERS:** And for what reasons, other than -- it's an out
 2 of date reason or are there other reasons?
 3 A. Yes, it could be out of date, so there's only so much
 4 shelf life for tobacco, and also there was of course the
 5 legislative changes, so they change the marking fairly
 6 frequently on a packet of cigarettes. I did mention,
 7 partly through the statement, the 10 being a classic
 8 example of that, where they changed the levels of tar,
 9 for example, and of course because it was a duty paid
 10 product, so there is already a huge amount of duty money
 11 tied up in the product we have in store, if you send
 12 that back to the manufacturer, the manufacturer can
 13 claim that duty back, prove to Customs & Excise that
 14 they have received X amount of product back and then
 15 destroy it, normally by fire.
 16 **MR SUMMERS:** Thank you very much indeed.
 17 **THE CHAIRMAN:** I see we are at quarter to 5, Mr Flynn.
 18 Unless you are going to be very brief, would it be
 19 better to come back tomorrow? Or would you prefer to
 20 continue?
 21 **MR FLYNN:** I was going to be brief, Madam, but it depends on
 22 what one means by brief. I was going to ask about three
 23 or four questions, but it depends on the length of the
 24 answers and maybe Mr Mason will take note of that.
 25 **THE CHAIRMAN:** Well, Mr Mason, we can either continue this

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1 afternoon and then you will be free to go --
 2 A. If possible.
 3 **THE CHAIRMAN:** If possible. Okay. Let's carry on, then,
 4 and see if we can finish this afternoon.
 5 **MR FLYNN:** Let us see.
 6 Re-examination by MR FLYNN
 7 **MR FLYNN:** Mr Mason, I think what the Tribunal is interested
 8 in, your evidence about the status of the agreement, the
 9 2002 agreement I think you said in answer to Mr Summers,
 10 it was probably in a file but you weren't very sure; is
 11 that right? What sort of part did that play in your
 12 daily decision-making when deciding to accept or
 13 otherwise the recommendations that Imperial were putting
 14 forward to you on a price file?
 15 A. None at all.
 16 Q. If Gallaher made some change, upwards or downwards,
 17 doesn't really matter, the MPI or bonus going down for
 18 the revised price file to them, in deciding whether to
 19 accept that recommendation for your shelf price, would
 20 you ever get out the Imperial strategic pricing
 21 requirements for those differentials and parities?
 22 Would you ever check that against the Gallaher proposal?
 23 A. No.
 24 Q. Was it any concern to you if you were out of line with
 25 what Imperial hoped in those strategic pricing

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1 requirement sheets?
 2 **A.** No.
 3 **Q.** Mr Lasok put to you, I think, as really the bottom line
 4 at the end of his questioning what he said was the deal,
 5 and you balk at the word "compliance". Was the
 6 position that, say Imperial expected you by and large to
 7 comply to follow through with the RSPs, or was it that
 8 they thought they had a deal with you under which they
 9 did? I am asking you about the Imperial perspective as
 10 far as you are concerned.
 11 **A.** They expected us to follow it purely to maintain margin.
 12 **Q.** Let's just be clear about expectation, they thought that
 13 was what was going to happen, or they thought you were
 14 required to do that?
 15 **A.** They thought that was what was going to happen.
 16 **MR FLYNN:** Thank you very much.
 17 **THE CHAIRMAN:** Can I just clarify this point about why you
 18 didn't feel the need to consult the trading agreement?
 19 Did you appreciate at the time that the differentials
 20 that were expressed, the "no more than", "this p less or
 21 more than the competing Gallaher brand", that those were
 22 going to be in any event reflected in the RSPs and in
 23 the retail selling prices? What I am trying to get at
 24 is: was the reason that you say you didn't need to refer
 25 back to the agreement because you entirely disregarded

1 that agreement and what was the understanding that
 2 appeared to be reflected in it; or was it because you
 3 didn't need to go back to that page of differentials
 4 because you knew that most of the time you were pricing
 5 at RSP and that ITL would have ensured for their own
 6 interests that the RSPs were consistent with the
 7 differentials in that page? Do you understand the
 8 question I am asking?
 9 **A.** I think so. I think the best way to describe it is you
 10 had an appreciation of the products that were linked,
 11 and that you knew that if one had been bonused down,
 12 that it wouldn't take very long for their competitors to
 13 notice that that product had been bonused down and then
 14 come to you and offer a similar kind of bonus. So it
 15 was more that you had an appreciation day to day in your
 16 head and also from what you are seeing in front of you
 17 on your own spreadsheets and on your own sales figures,
 18 because we had a system which showed all sales figures
 19 for every store and at the same time shows the current
 20 retail price in that store, so you had an appreciation
 21 of the way that there these products were linked and you
 22 knew that a bonus was coming, but if a price file came
 23 through and said "We would like to bonus Benson & Hedges
 24 down by 5p", would I get out a trading agreement and say
 25 "Well, it says here it should be no more than 1p

1 different than", I would not do that.
 2 **THE CHAIRMAN:** No, but you realised at the time that if you
 3 more or less stuck with the RSPs and if you accepted and
 4 implemented the bonuses that you were being offered,
 5 then in fact your prices would be consistent with that
 6 schedule that had been attached to the earlier
 7 agreement?
 8 **A.** They would more often than not end up in that
 9 situation --
 10 **THE CHAIRMAN:** In a correct relationship.
 11 **A.** -- which you know the products that are linked.
 12 **THE CHAIRMAN:** Yes.
 13 **A.** But it would not always be that case.
 14 **THE CHAIRMAN:** No. Thank you very much, Mr Mason, that's
 15 been extremely helpful, and I can release you from the
 16 witness box now. Thank you.
 17 (The witness withdrew)
 18 Housekeeping
 19 **MR HOWARD:** Before we rise, could I raise one point?
 20 **THE CHAIRMAN:** Yes.
 21 **MR HOWARD:** It simply relates to the position on Sainsbury
 22 and Fiona Bayley.
 23 **THE CHAIRMAN:** Yes.
 24 **MR HOWARD:** You may remember Addleshaws and Sainsbury's
 25 intervention, as it were, at an earlier stage.

1 **THE CHAIRMAN:** Yes.
 2 **MR HOWARD:** In order to ensure that we don't get some
 3 procedural hiccup, we think the sensible thing would be
 4 to sit in camera on Thursday, and then at a later stage
 5 you can perhaps consider the extent to which any of it
 6 is in camera, but what we don't want and, in fact,
 7 nobody wants is Sainsbury's and Addleshaws popping up
 8 saying this is all confidential and so on. We don't
 9 accept it is, but it would be a lot easier to avoid
 10 wasting time having a debate about it.
 11 **THE CHAIRMAN:** If tomorrow afternoon we are going to get on
 12 to your Sainsbury's mini opening --
 13 **MR HOWARD:** Yes.
 14 **THE CHAIRMAN:** -- does that apply to that as well as to
 15 Ms --
 16 **MR HOWARD:** It probably would, although as I said the other
 17 day, it may well be that we will dispense with that
 18 depending on how much time is available.
 19 **THE CHAIRMAN:** Okay.
 20 Yes, presumably Sainsbury know that Ms Bayley is
 21 appearing on Thursday?
 22 **MR LASOK:** Yes, they are aware of that.
 23 **THE CHAIRMAN:** Will they be attending then?
 24 **MR LASOK:** We think so.
 25 **MR HOWARD:** This would put them off from attending because

1 I think they wanted to know whether -- their expressed
 2 concern is confidentiality, so if we tell them we are
 3 sitting in camera, then I think they will not need to
 4 attend.
 5 **THE CHAIRMAN:** Does anyone have any objection to sitting in
 6 camera for the Sainsbury's evidence?
 7 **MR LASOK:** We have no objection.
 8 **THE CHAIRMAN:** I think that does make sense.
 9 **MR HOWARD:** I should make it clear I don't accept, it's just
 10 as it were a pro tem.
 11 **THE CHAIRMAN:** It's a logistical practicality.
 12 **MR HOWARD:** Yes, then the court will have to consider in due
 13 course whether actually -- I mean, as it were, for
 14 public disclosure points of view, whether it remains in
 15 camera.
 16 **THE CHAIRMAN:** Yes.
 17 So tomorrow we have Mr Lang in the morning and then
 18 any Sainsbury's opening in any space that's left apart
 19 from that?
 20 **MR FLYNN:** Yes.
 21 **THE CHAIRMAN:** So if we start at 10.30 tomorrow morning, is
 22 that going to be all right? Very well, we will resume
 23 at 10.30 tomorrow morning. Thank you.
 24 (5.00 pm)
 25 (The court adjourned until 10.30 am on

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