

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

**IN THE COMPETITION**

**APPEAL TRIBUNAL**

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

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

28 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

---

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

---

## **HEARING (DAY 20)**

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

## **APPEARANCES**

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

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

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

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

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

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

—

1 Wednesday, 26 October 2011  
 2 (10.30 am)  
 3 (Proceedings delayed)  
 4 (10.37 am)  
 5 Housekeeping  
 6 **THE CHAIRMAN:** Before we call the next witness, Mr Flynn --  
 7 **MR FLYNN:** I should just say the witness is present in the  
 8 room, if you were going to say anything where that's  
 9 problematic.  
 10 **THE CHAIRMAN:** No, I don't think so. There was some  
 11 discussion yesterday afternoon about how the factual  
 12 evidence that we have heard affects the usefulness of  
 13 what the experts have to say when it is their turn to  
 14 give evidence in the week commencing 8 November. By  
 15 that time, of course, we will not have made any findings  
 16 of fact, and I want to make it absolutely clear that we  
 17 still have not reached any conclusions on the facts in  
 18 this case.  
 19 However, it may well be useful for us to understand  
 20 what the experts have to say about how the economic  
 21 theories they have discussed in their reports would  
 22 apply if the facts were different in one or more  
 23 respects from the factual matrix that underlies their  
 24 reports. Otherwise, there is a risk that if we  
 25 eventually find that the factual matrix was somewhat

1

1 different from that put forward either by the OFT or by  
 2 the appellants, we will not have a clear idea of how, if  
 3 at all, that affects the analysis of the theory of harm  
 4 by the appellants or the OFT's expert.  
 5 What we envisage might be helpful, therefore, is  
 6 that there should be some additional factual scenarios  
 7 which can be put to the experts for them to comment on.  
 8 If this is to be done, it would be best if they had some  
 9 advance notice of this, rather than it being put to them  
 10 either in cross-examination or in questions from  
 11 the Tribunal.  
 12 Ideally we would like the parties to produce some  
 13 draft scenarios for us to look at, along the lines, for  
 14 example, if the evidence establishes that the agreed  
 15 differentials were achieved solely or mainly by the  
 16 grant or withdrawal of bonuses of the same value as the  
 17 desired change in retail price, how would that affect  
 18 the theory of harm?  
 19 We think it would be useful to do this whilst at the  
 20 same time stressing that the scenarios we would ask them  
 21 to consider are not to be regarded as any indication of  
 22 the findings that we are likely to make ultimately.  
 23 Similarly, we would not regard any additional  
 24 scenarios drafted by the parties as in any way  
 25 undermining that party's case that the Tribunal should

2

1 conclude that the facts are on all fours with those that  
 2 the experts rely on in their respective reports.  
 3 Further, it should not also be seen as any  
 4 indication that we regard a particular scenario as  
 5 amounting to an infringement of the Competition Rules,  
 6 the characterisation in law of any particular factual  
 7 scenario is an entirely separate matter. We are simply  
 8 eager to make sure that the economic evidence we receive  
 9 will be useful, whatever we eventually find to be the  
 10 factual matrix in this case.  
 11 Now, I've made those comments to give you advance  
 12 notice of how we are thinking about this issue. No-one  
 13 need comment now, and I think it would be best actually  
 14 if we went straight on with Mr Lang's evidence. But  
 15 that's something that people may want to consider, and  
 16 perhaps we could discuss it this afternoon if we have  
 17 time after Mr Lang has finished.  
 18 **MR FLYNN:** Well, thank you, Madam. I won't react on the  
 19 hoof, save to say that of course I think in the room we  
 20 only have the Office of Fair Trading, Asda and Imperial,  
 21 so reaction this afternoon may not be a practicable  
 22 proposition for the entire case, as it were.  
 23 **THE CHAIRMAN:** Yes.  
 24 **MR FLYNN:** I simply make that point.  
 25 **MR HOWARD:** I think I probably ought to just rise, because

3

1 it follows on from that.  
 2 **THE CHAIRMAN:** Yes.  
 3 **MR HOWARD:** I obviously need to read carefully what you have  
 4 said, but you won't be surprised to know that the  
 5 appellants are very concerned that this case, as it  
 6 seems to be advancing, does not seem to be advancing by  
 7 reference to the theory of harm in the decision. And  
 8 the theory of harm in the decision is critical to any  
 9 proper and fair disposal of the case, because in this  
 10 inquiry the investigation has been going on now for  
 11 eight years, and for us midway through the hearing in  
 12 front of you to be presented with a different theory of  
 13 harm would be something which we say is totally unfair  
 14 and inappropriate for all sorts of reasons.  
 15 Now, that is something that I was intending to  
 16 address you on, because it is clear, at least in part,  
 17 that there is a new case being articulated by the OFT,  
 18 but without any theory of harm having been identified in  
 19 the decision or even today. That's a matter of concern.  
 20 We would certainly resist the idea that what one can  
 21 do, as it were, is proceed to new theories of harm by  
 22 identifying different factual scenarios from that which  
 23 the OFT has put forward. Or that the OFT or  
 24 the Tribunal should regard it as appropriate, as it  
 25 were, with an expert in the box to say "Let's think

4

1 about this, what is the effect of that". That isn't  
 2 really the way in which expert evidence should be  
 3 elicited. The reason one has expert economists is that  
 4 they have thought about this, investigated it  
 5 thoroughly, and it's really not a fair way to deal with  
 6 this case that literally we are now on the eve of the  
 7 expert evidence, but we may find some new point being  
 8 put forward.  
 9 **THE CHAIRMAN:** We are not envisaging new theories of harm  
 10 being explored: what we are envisaging is working out  
 11 how the theory of harm which is relied on, that theory  
 12 of harm applies or is affected by a different factual  
 13 matrix from the one, say, that the OFT has put forward,  
 14 whether if one said to the expert, whoever's expert  
 15 "well, if the facts were this, do you still say that the  
 16 harm would result?" Or "do you accept that the harm  
 17 would no longer result", or "it wouldn't result to the  
 18 same degree". It's that kind of stress testing of the  
 19 existing theory of harm that we are looking at, not  
 20 saying "well, if the facts were these, would those harm  
 21 the competitive dynamic in some way", even if that's  
 22 a different way from the theory of harm put in the  
 23 decision.  
 24 **MR HOWARD:** It's the latter point that I am particularly  
 25 concerned about.

5

1 **THE CHAIRMAN:** Yes. That's not at all what we are  
 2 envisaging.  
 3 **MR HOWARD:** I am concerned, and I am not sure -- we have not  
 4 yet discussed this -- that there are aspects of the  
 5 case, both questions from the OFT and sometimes from  
 6 the Tribunal, in the light of what the OFT have said,  
 7 which are actually directed at a different theory of  
 8 harm to that which is in the decision, which we don't  
 9 quite -- at the moment we don't even know what it is,  
 10 that's one of the difficulties, that people ask  
 11 questions which seem to suggest they are saying "Well,  
 12 this could be harmful", but no identification of the way  
 13 in which it could be harmful. For instance, there are  
 14 questions that appear to go to -- well, I won't go into  
 15 it now. This is a point I was intending to address on  
 16 Monday.  
 17 **THE CHAIRMAN:** Yes. Well, what we are saying is: we think  
 18 this would be useful to see how the experts respond to  
 19 questions along the lines, "Well, suppose the facts were  
 20 this, how would that affect your theory?", and we want  
 21 to be able to do that without people reading too much  
 22 into the fact that we are asking that question, to make  
 23 clear that in asking that question, we are not saying  
 24 that that's where our minds are currently tending --  
 25 **MR HOWARD:** I understand that, and I am not seeking to

6

1 delimit, nor could I properly do so, what questions  
 2 the Tribunal is entitled to ask. But I do put down  
 3 a firm marker that there is a danger, particularly with  
 4 a long case where what we call pleadings are about  
 5 a million miles from what I, as a commercial  
 6 practitioner, recognise as a pleading in the sense of  
 7 something that properly identifies and clearly  
 8 identifies the issues, and that we seem to have in the  
 9 decision that is rather elastic.  
 10 At the end of the day, the litigation, this hearing  
 11 has to be conducted by reference to the decision, and  
 12 the OFT, they can argue what the decision means and so  
 13 on, but what they can't do is go outside of that  
 14 decision, or if they are seeking to do so, they have to  
 15 actually come out and say "I am going outside it and  
 16 I should have leave to do so, and this is the new theory  
 17 of harm".  
 18 **THE CHAIRMAN:** Well, my comments this morning were expressly  
 19 designed to try and raise this issue without causing  
 20 alarm to start ringing. I have clearly signally  
 21 failed in that attempt. Nonetheless --  
 22 **MR HOWARD:** It's not that you have failed, it is that -- and  
 23 I am sorry I have taken more time than I should, but it  
 24 is really that I wanted to make clear that there is  
 25 a point I am intending to raise, and I am not doing it

7

1 this week because of the tightness of time, but I am  
 2 going to do it on Monday morning, where I will be  
 3 seeking to identify one particular problematic area, and  
 4 also -- which I say is simply not part of the case, and  
 5 then also seeking clarification that the OFT's case and  
 6 the case that the experts have to meet is that within  
 7 the decision.  
 8 I quite accept that you can say, for instance in  
 9 relation to 40(a) to (d) of the skeleton of the OFT,  
 10 that one may need to test the evidence in the sense of  
 11 saying -- Mr Lasok has said it's any one of those  
 12 points, as far as I understand his case now. Again  
 13 I have something to say about that, but if one wants to  
 14 test Professor Shaffer's theory to say "Well, what is  
 15 the effect if you are only looking at one ingredient  
 16 here of 40(a) to (d), what does that do?" I accept  
 17 that's a question you will be interested in. You won't  
 18 be surprised to know we say it knocks his theory out of  
 19 the window. But that's for another day.  
 20 My point is really just a two-fold point. One is  
 21 that the OFT cannot go outside of the theory of harm in  
 22 the decision, and that there are aspects in which they  
 23 are doing so, and I understand you are not intending by  
 24 what you said this morning to go outside of the theory  
 25 of harm in the decision.

8

1 **THE CHAIRMAN:** No. All we are intending is to give the  
 2 experts some advance notice of the possibility of  
 3 questions along the lines, "Well, if it should turn out  
 4 that the facts are this, how does that affect what you  
 5 have said about the impact of these agreements on the  
 6 market?"  
 7 **MR HOWARD:** Okay, I've probably said enough.  
 8 Just while I'm on my feet on a totally separate  
 9 point, just so you know about it, Sainsbury's are  
 10 bubbling away in the background, threatening to come  
 11 along tomorrow via Addleshaws or Addleshaw Goddards,  
 12 whatever they call themselves, and there is a risk that  
 13 they are going to seek to interfere in the course of  
 14 cross-examination.  
 15 Now, in my view that would be entirely inappropriate  
 16 and unfortunate, but it's just something I thought I had  
 17 better tell you, and that could upset the timetable.  
 18 **THE CHAIRMAN:** Well, we have had some indication of that.  
 19 Our view is that their application to intervene, as  
 20 I recall it, was specifically relating to this issue and  
 21 there has been plenty of time for the parties to sort  
 22 out what the issue is. As I understand it, it's to do  
 23 with certain paragraphs of the draft witness statement,  
 24 and whether it's intended that the cross-examination  
 25 will go beyond those, we certainly had no intention of

1 allowing it to disrupt the timetable tomorrow, and all  
 2 efforts that the parties can make to ensure that doesn't  
 3 happen will be time well spent, as far as we are  
 4 concerned.  
 5 **MR HOWARD:** Yes. We will try to sort it out. As I say, it  
 6 would be unfortunate if we ended up with Fiona Bayley in  
 7 the witness box with Addleshaws popping up and down  
 8 really for no real purpose, is what it amounts to, in  
 9 that the confidence -- as you have seen from most of the  
 10 confidence in these documents, it really is overblown.  
 11 There is nothing truly --  
 12 **THE CHAIRMAN:** Let's cross those bridges when we come to  
 13 them.  
 14 **MR HOWARD:** Yes.  
 15 **THE CHAIRMAN:** Yes.  
 16 **MR FLYNN:** Madam, in that case, I think this morning's  
 17 bridge is Mr Lang, and with your permission we will call  
 18 him.  
 19 **THE CHAIRMAN:** Yes.  
 20 MR KEVIN LANG (affirmed)  
 21 Examination-in-chief by MR FLYNN  
 22 **THE CHAIRMAN:** Thank you, Mr Lang, please sit down.  
 23 **MR FLYNN:** Could Mr Lang please be handed bundle 10, core  
 24 bundle 10. {C10/111/433}. Mr Lang, right at the end of  
 25 that file there is a tab 111. Do you have that? Is

1 that your witness statement?  
 2 **A.** It is.  
 3 **Q.** Would you turn to the end of that, is that your  
 4 signature at the end of the witness statement?  
 5 **A.** It is.  
 6 **Q.** I think if you turn back to the beginning, you will see  
 7 paragraph 1 of your witness statement, "I am employed by  
 8 Asda Stores". Perhaps you could tell the Tribunal what  
 9 your current position is?  
 10 **A.** I am now retired since 6 May.  
 11 **Q.** 6 May of this year?  
 12 **A.** Of this year.  
 13 **Q.** Yes.  
 14 Mr Lang, I am going to put, with Mr Lasok's  
 15 permission, one question because I think there was a bit  
 16 of confusion about this yesterday. Mr Lang, could you  
 17 just explain from your recollection what Asda's personal  
 18 bonus policy was for people in your position and that of  
 19 Mr Mason and Mr Jolliff?  
 20 **A.** It would be actual bonus goes down the company, straight  
 21 from top to bottom. It was installed by Archie Norman  
 22 back in 19 whatever, and was taken on board by Wal-Mart  
 23 when they purchased Asda, and the bonus is a percentage  
 24 of salary and it's payable against the company overall  
 25 performance for the majority of people. If you work in

1 an individual store, then it would be based upon the  
 2 profit performance of that individual store, rather than  
 3 the total for the group.  
 4 **Q.** In relation to a category like tobacco or kiosk, is your  
 5 bonus based on the performance of that category?  
 6 **A.** No, it's the total performance of the company against  
 7 business plan, the business plan profit line would be  
 8 agreed with Wal-Mart, and if that were exceeded, then  
 9 a percentage would be payable of salary.  
 10 **MR FLYNN:** Is that sufficient information --  
 11 **A.** The kiosk obviously would roll into the total, but it  
 12 wouldn't be a determining factor.  
 13 **DR SCOTT:** So in terms of personal objectives, did you and  
 14 your colleagues, like Mr Mason --  
 15 **A.** Yes.  
 16 **DR SCOTT:** -- have personal objectives?  
 17 **A.** We have -- everyone in the company would have KRAs, key  
 18 performance indicators, and the performance indicator,  
 19 the key one, would be profitability of Guy Mason,  
 20 profitability of his section; mine would be the  
 21 profitability of the total of the four areas that  
 22 I covered. And there would be other people skills  
 23 et cetera beneath that as well. But there would be  
 24 a summary of KRAs and your actual grading would be given  
 25 on the basis of performance against the KRAs. and that

1 would impact salary probably.  
2 **MR FLYNN:** Perhaps you can just explain what KRAs are,  
3 because I think you said key performance indicators?  
4 **A.** KPIs, KRAs, I'm not sure what that stood for.  
5 **Q.** What does KRA --  
6 **A.** Let's call them KPIs instead.  
7 **Q.** Perhaps it doesn't matter. Just to be clear, I think  
8 you are saying that you would be assessed against those  
9 criteria but you wouldn't be bonused against those  
10 criteria?  
11 **A.** We wouldn't be bonused against them, your salary  
12 performance -- your salary increase for next year would  
13 be -- may be influenced by your overall grading. But  
14 that would include other things other than just profit  
15 performance.  
16 **Q.** As part of your annual assessment?  
17 **A.** Yes.  
18 **MR FLYNN:** That's it from me, then, Mr Lang. Mr Lasok will  
19 have some questions for you on behalf of the OFT.  
20 Cross-examination by MR LASOK  
21 **MR LASOK:** Good morning, Mr Lang.  
22 **A.** Good morning.  
23 **Q.** As I understand it from your witness statement, more  
24 particularly paragraph 2, tobacco came within your  
25 sphere of responsibilities only in summer 2002?

1 **A.** Correct.  
2 **Q.** Do you happen to remember when in the course of the  
3 summer?  
4 **A.** I don't remember exactly. I only really remember the  
5 date because immediately after taking over the category  
6 Gordon Brown decided to increase the duty allowances, so  
7 my sales headed south at a rate of knots -- the Sun  
8 newspaper thing about "Save Our Booze Cruises". So  
9 that's the significant event I remember.  
10 **Q.** Right. I think that that may give some people a fairly  
11 precise indication, but I am afraid it doesn't give me  
12 one.  
13 **A.** It was the Sun, I think.  
14 **Q.** Anyway, it's ascertainable. Do I take it that before  
15 then you weren't involved in tobacco at all?  
16 **A.** That's correct.  
17 **Q.** Does that mean that the contents of your witness  
18 statement are really concerned only with the period from  
19 the point at which you took over?  
20 **A.** That's correct.  
21 **Q.** I want to ask you a question about effectively the level  
22 of responsibility. It emerges from paragraph 26 of your  
23 witness statement. Could you possibly look at  
24 paragraph 26, please? Your witness statement is in  
25 tab 111.

1 **A.** Right. 26?  
2 **Q.** Yes. About four lines from the bottom of the page -- do  
3 you have it? -- there is a bit where you say:  
4 "Tobacco buyers would use the RSPs as a guide price  
5 and then deviate from that only where they wanted to  
6 promote a particular brand."  
7 I read that as indicating that it was in your day  
8 the buyer, Mr Mason, who would be dealing with pricing  
9 and you would be dealing with things at a higher level;  
10 is that correct?  
11 **A.** He would have day-to-day control of pricing, but we sat  
12 immediately next door to each other, so whatever Guy was  
13 doing, then I was aware of it, and also Guy was junior  
14 to the role, therefore I would look over his shoulder  
15 anyway. So while Guy was the day-to-day contact, and he  
16 was putting the prices through, then I would be aware --  
17 maybe decreasing over time, but I would be aware of what  
18 he was doing.  
19 **Q.** Yes. I think in paragraph 35, towards the end of that  
20 paragraph, you are referring to -- it's the bit where  
21 you say:  
22 "I would never spend more than 20 seconds looking at  
23 a manufacturer's list of parity positions and our  
24 pricing decisions did not involve any consideration of  
25 these parities and differentials."

1 **A.** Correct.  
2 **Q.** And reading paragraph 26 and paragraph 35 together,  
3 I rather drew the inference -- and you will correct me  
4 if I am wrong -- that the reason why you would only  
5 spend 20 seconds or thereabouts looking at these parity  
6 positions is because it was Mr Mason who was dealing  
7 with the pricing; would that be correct?  
8 **A.** Not entirely, no. The parity -- the list of parities  
9 which were issued by both -- by Imperial, but I think by  
10 Imperial and by Gallaher's at the same time, were to my  
11 mind of no importance to ourselves. They were how they  
12 were going to play football on our gantry in terms of  
13 relative price positions of their brands. It was  
14 relevant to them, it wasn't relevant to ourselves.  
15 In terms of the retail selling prices then those  
16 would be moved up and down in relation to the bonuses,  
17 or not bonuses, short-term line discounts, if they  
18 applied. The RSPs would move in line with that. At all  
19 times if discounts were given, then we obviously passed  
20 those discounts on to customers; if they were withdrawn  
21 then our retail prices would go upwards again to reflect  
22 the withdrawal of that retail price. How that squared  
23 up with their published parities and differentials was  
24 not material to Asda.  
25 **Q.** Can I take now a step backwards. You were operating

1 when you first arrived in the summer of 2002 in the  
 2 context of a trading agreement that had been signed by  
 3 Asda with ITL; that's so, isn't it?  
 4 **A.** I presume so, yes, which one it was. This is  
 5 John Jolliff's trading agreement.  
 6 **Q.** If you look at annex 14, and go to tab 53. {D14/53/148}.  
 7 **A.** Yes.  
 8 **Q.** Did you see this at the time?  
 9 **A.** It would have been passed over to me, a copy of, by  
 10 John Jolliff.  
 11 **Q.** So you would have seen it?  
 12 **A.** I would have seen it.  
 13 **Q.** Did he explain to you what the agreement was all about?  
 14 **A.** He would have gone into some detail, although I don't  
 15 recall exactly at the time what was said.  
 16 **Q.** If you look at page 3, you should have a very short bit  
 17 of text under the heading "Trading Agreement Package"?  
 18 **A.** Yes.  
 19 **Q.** If you could just read that to yourself so that you know  
 20 what it says.  
 21 (Pause)  
 22 **A.** Yeah.  
 23 **Q.** If you go to the next tab, tab 54, {D14/54/152}, this  
 24 wasn't a letter addressed to you, it's dated  
 25 11 June 2002, addressed to Mr Jolliff, and it notifies

1 Asda of a change in relative price positions for ITL  
 2 brands versus Gallaher. You have on the second page  
 3 a document headed "ITL's strategic pricing requirements  
 4 from 20 June 2002". Is that the kind of thing that ITL  
 5 would send round from time to time to Asda while you  
 6 were concerned with tobacco?  
 7 **A.** They would send notification of reductions in retail --  
 8 in cost prices and consequent movements in RSPs. They  
 9 wouldn't materially attach the differentials to it.  
 10 **Q.** I am asking specifically about this page headed "ITL's  
 11 Strategy Pricing Requirement". Did they send that kind  
 12 of --  
 13 **A.** They wouldn't particularly send that round. I didn't  
 14 notice it apart from the contract.  
 15 **Q.** Apart from in the contract?  
 16 **A.** Yeah, I wouldn't notice it ... they didn't send it every  
 17 time they sent a change in RSP. Or I didn't see them  
 18 anyway.  
 19 **Q.** The next thing I wanted to draw your attention to is at  
 20 tab 56. {D14/56/156}. If you have that tab, this is  
 21 a letter dated 13 August 2002 addressed to you, and it's  
 22 sent by Mr Hall of ITL. Have you read this letter  
 23 recently?  
 24 **A.** I believe so, yes. Yes, yes.  
 25 **Q.** Would you like to read it in total to refresh your

1 memory?  
 2 **A.** No, I think if you want to ask these further questions,  
 3 please do so.  
 4 **Q.** In the second paragraph of that letter under the heading  
 5 "Trade Development Programme Investment", Mr Hall  
 6 describes the purpose of the trade development  
 7 programme. He says that its purpose is:  
 8 " ... to ensure that we have the range of products  
 9 available in your stores to meet consumer demand and on  
 10 sale at prices which reflect the standard price list  
 11 differentials against competing lines."  
 12 Now, we don't have, in the file at any rate,  
 13 a letter from you to Mr Hall disagreeing with that  
 14 purpose of the trade development programme. Do I take  
 15 it that his letter reflects your understanding of the  
 16 purpose of the programme?  
 17 **A.** The trade development programme has no meaning to me as  
 18 a term. There wouldn't be a response to it that I'm  
 19 aware of, and it would have no meaning to me at all.  
 20 **Q.** Well, it's clearly an allusion to the trading agreement  
 21 back at tab 53.  
 22 **A.** Right.  
 23 **Q.** Which also has a reference, on the third page, to the  
 24 trading agreement package. Isn't it a reference to the  
 25 trading agreement?

1 **A.** Well, if you say so, but if the question is would  
 2 I adhere to the pricing differentials, then the answer  
 3 is no.  
 4 **Q.** Well, no, I wasn't actually asking you about that. If  
 5 we go back to this letter of 13 August, it starts off  
 6 with a reference to a meeting on 9 August. Can you  
 7 remember what that meeting was about?  
 8 **A.** It would have been one of the first meetings I had with  
 9 him. I can't recall the details of it.  
 10 **Q.** Wouldn't there have been a discussion about the trading  
 11 agreement that was in existence at that time?  
 12 **A.** There would be a general discussion about the trading  
 13 relationship between Asda and Imperial Tobacco.  
 14 **Q.** Right. If you hadn't understood what on earth he was  
 15 talking about in his letter, wouldn't you have written  
 16 back to him?  
 17 **A.** Not necessarily.  
 18 **Q.** Not necessarily?  
 19 **A.** No. I would have made the comments at the time of the  
 20 meeting, with respect to what I felt was the case, and  
 21 I wouldn't necessarily have written back to Imperial  
 22 Tobacco.  
 23 **Q.** I am slightly puzzled about this, because in the first  
 24 sentence of this letter of 13 August Mr Hall says:  
 25 "Further to our meeting on 9 August, I would like to

1 take the opportunity of clarifying our position on  
 2 a number of the issues which we discussed."  
 3 But if you didn't understand what he was talking  
 4 about, wouldn't you have responded to say "Well, your  
 5 attempt at clarification has misfired, can you please  
 6 explain what it is that you are on about?"  
 7 **A.** I don't recall the meeting, I would not necessarily have  
 8 responded.  
 9 **Q.** All right. Let's put it in a slightly different way.  
 10 I've drawn your attention to page 3 of the trading  
 11 agreement, which is at tab 53.  
 12 **A.** Yes.  
 13 **Q.** Perhaps if you just want to have a look back at it  
 14 again, it says that subject to Imperial Tobacco's  
 15 requirements on a number of things, some of which are  
 16 confidential, but one of them that isn't confidential is  
 17 strategic pricing, and it goes on to say that subject to  
 18 those requirements being met, ITL will make a quarterly  
 19 payment to Asda. So just reading the agreement, it  
 20 looks as though ITL is committing itself to make  
 21 a payment to Asda on condition that Asda complies with  
 22 ITL's strategic pricing requirements?  
 23 **A.** That is what it states, yes.  
 24 **Q.** Now, that was your understanding too of the trading  
 25 agreement, wasn't it?

1 **A.** I would ignore that -- no, it wouldn't be. My  
 2 assumption would be that the monies would be paid  
 3 subject to whatever ranging agreements we agreed with  
 4 ITL. As far as I was concerned, the strategic pricing  
 5 requirement --  
 6 **THE CHAIRMAN:** Subject to whatever what agreements?  
 7 **A.** We would have ranging agreements with them.  
 8 **THE CHAIRMAN:** Ranging?  
 9 **A.** We would agree certain products that we would carry.  
 10 **THE CHAIRMAN:** But that's also set out on the second page of  
 11 this agreement, but do you say you would have ignored  
 12 that entirely as well?  
 13 **A.** No, we would attempt to -- we would have an agreement  
 14 with them that we would carry certain of their products  
 15 across our stores, and we would stick to that, that part  
 16 of the agreement.  
 17 **THE CHAIRMAN:** Is that as set out on that page?  
 18 **A.** No, that's the pricing parities --  
 19 **THE CHAIRMAN:** No, it's not. I am looking at the --  
 20 **A.** The actual ranges themselves, we would agree to, there  
 21 may be some variations in this in terms of different --  
 22 because we had sort of five different ranges, depending  
 23 on the store but generally speaking, we would carry  
 24 these lines somewhere, not in every store.  
 25 **THE CHAIRMAN:** What about on page 4 of the agreement where

1 it deals with [REDACTED]? Would you have paid any  
 2 attention to that part of the agreement?  
 3 **A.** No, the [REDACTED] we -- the ranging for [REDACTED]  
 4 [REDACTED] was done basically by Gallaher's in terms of  
 5 the units we had there, and they were a very limited  
 6 range that we carried. So I am not sure what the  
 7 [REDACTED] was about, to be honest. The [REDACTED]  
 8 [REDACTED] range was set by me many years before, to go  
 9 with the tobacco category.  
 10 **THE CHAIRMAN:** What about on the first page under  
 11 "Advertising", you are paid a certain amount per store  
 12 per month, as long as a certain percentage are  
 13 displaying ITL point of purchase items. Is that  
 14 something you paid attention to?  
 15 **A.** Not really. The ITL -- I am not sure what the point of  
 16 purchase items is, but ITL basically, the ranging of ITL  
 17 products generally was not in line proportionate to  
 18 market share. It never was, it tended to be under  
 19 because ITL products tend to be lower margin.  
 20 **THE CHAIRMAN:** Do you know whether you got that amount per  
 21 store per month paid to you by ITL?  
 22 **A.** We must have -- we will have had that amount paid  
 23 irrespective, but it's unlikely at any time that our  
 24 displays were proportional to market share for ITL  
 25 product. Apart from anything else, the actual range

Confidential  
Asda

1 planograms were done by Gallaher's and they tended to  
 2 obviously increase the proportion of their product.  
 3 It's very unlikely it was proportional to market share  
 4 at any time. We tended to put market share -- any  
 5 influence -- we had to influence the Gallaher's pricing  
 6 planograms down to increase ITL market share -- sorry  
 7 ITL share of space to keep it on sale, but it still  
 8 wouldn't be in line with their overall market share.  
 9 **DR SCOTT:** So if you were having a meeting with ITL, ITL  
 10 would presumably be in an unhappy state with Asda?  
 11 **A.** They would always be generally unhappy. The meetings  
 12 with them would always tend to be more combative than  
 13 anything else, and they would always feel aggrieved that  
 14 the space given to their product was less than they were  
 15 entitled to.  
 16 **DR SCOTT:** And Mr Jolliff then signs an agreement which, so  
 17 far as ITL seem to be concerned, is designed to redress  
 18 something of the balance?  
 19 **A.** Possibly, but as far as Asda was concerned, those  
 20 parameters that ITL put in those agreements wouldn't be  
 21 met. Never would be.  
 22 **DR SCOTT:** Was Mr Jolliff entitled to sign the agreement on  
 23 behalf of Asda?  
 24 **A.** He would be, yes, and the monies due were always paid.  
 25 There has never been a write-off for any agreement for

Confidential  
Asda

1 any monies with ITL in our company accounts, so every  
2 amount of monies being accrued in the accounts has all  
3 been paid, so everything has gone through. It would be  
4 better if the agreement was agreed first rather than  
5 signed and argued about later. There is a minimum  
6 per cent of our range currently available on sale in all  
7 stores. Our availability rates were always per cent  
8 plus in all products. That would be their, presumably  
9 a catch-all for ...

10 **THE CHAIRMAN:** So they always were exceeding that  
11 availability?

12 **A.** That would be a failsafe in an agreement to ensure that  
13 we didn't delist their product. But obviously  
14 availability was always higher than that.

15 **THE CHAIRMAN:** Yes, you need to speak up a little bit, and  
16 a little more slowly, so the transcript writers can  
17 catch what you say.

18 **MR LASOK:** Mr Lang, can I put the position to you as I see  
19 it, and you will tell me whether it's right or wrong.  
20 We start off, so far as you are concerned, with  
21 a trading agreement signed by ITL and Asda which  
22 contains a provision for the payment of money to Asda on  
23 condition, amongst other things, that Asda complies with  
24 ITL's strategic pricing requirements, because that's  
25 what it says.

1 **A.** Yes.

2 **Q.** The next stage is that you take over responsibility for  
3 tobacco from Mr Jolliff, and you have a meeting on  
4 9 August with Mr Hall from ITL, and as I understand it  
5 from an answer that you gave a little while ago, at that  
6 meeting you would have discussed the trading  
7 relationship between ITL and Asda?

8 **A.** Correct.

9 **Q.** Then on 13 August Mr Hall writes you a letter for the  
10 purpose, he says, of clarifying ITL's position on  
11 a number of issues. In that letter, in the second  
12 paragraph, he sets out an understanding that ITL had.  
13 So far as we are concerned, it was an understanding that  
14 the ITL products available in Asda stores would be on  
15 sale at prices reflecting the standard price list  
16 differentials against competing lines.

17 So that's what he is telling you is his  
18 understanding?

19 **A.** Yes. My understanding would be that they would pay --  
20 they would put in promotional discounts to achieve their  
21 required parities, and we would reflect those in our  
22 retail prices. That's it.

23 **Q.** And that was how the trading agreement was to work?

24 **A.** That is how it worked in practice.

25 **Q.** And that is how it worked in practice?

1 **A.** Correct.

2 **Q.** But that was also how it was intended to work?

3 **A.** That is my understanding as to how it was intended to  
4 work. There was one occasion when that understanding  
5 was stretched.

6 **Q.** Right. Let's take things in stages, because Mr Mason  
7 said that in the trading agreement it was envisaged that  
8 Asda would price in accordance with ITL's strategic  
9 pricing requirements, and for the Tribunal's reference  
10 that is Day 19, page 83, line 13 down to page 84,  
11 line 12. What he then added was that Asda was not going  
12 to abide by the trading agreement.

13 Can I just carry on with what he said, because he  
14 then said -- and this, for the Tribunal's note, is in  
15 the transcript Day 19 at page 85, lines 14 to 16 -- that  
16 the decision not to abide by the trading agreement was  
17 reached over time in discussions between you and him.

18 So it was a decision that wasn't made, as it were,  
19 immediately; it was something that, according to him,  
20 emerged over a period of time after you had taken over  
21 responsibility for tobacco and he had become the tobacco  
22 buyer.

23 Now, does that correspond to your recollection of  
24 events?

25 **A.** If the implication from that is that we moved our retail

1 prices in line with the parities and differentials,  
2 without any movement in cost terms, I would refute that.  
3 We never did that. We would always reflect any  
4 short-term discounts or removal of discounts in our  
5 retail prices, and we would expect the market to do the  
6 same. And the only change was that, after a period of  
7 time, we put more variations in it in terms of if the  
8 reduction was, say, the equivalent of 10p, then we would  
9 make it 11p, when we moved to odd price points.  
10 Obviously we then move into an area where we started to  
11 actively seek discounts on multipacks, et cetera. So we  
12 became more at variant with, over time, but we never  
13 moved our prices other than when there was some kind of  
14 cost price movement either up or down. So we never at  
15 any stage, under instruction, moved retail price of  
16 an ITL product on the basis of an agreement on parities  
17 and differentials.

18 **THE CHAIRMAN:** When you say you always moved in line with  
19 the cost price, is that the same thing, in effect, as  
20 saying you always priced at the RSP in the price file  
21 provided by ITL?

22 **A.** I think initially we would have had -- we would be new  
23 to the market, and therefore we would have followed the  
24 RSPs that we were doing.

25 **THE CHAIRMAN:** When you say "initially", you mean over what

1 period?  
 2 **A.** Well, initially over the first two, three months until  
 3 we actually had an understanding of how the market works  
 4 and met everyone et cetera, and then we would have  
 5 decided upon a process going forward, and then we would  
 6 then have started to bring in variations and we started  
 7 to looking at what we could do with the category to grow  
 8 sales and to grow profit.  
 9 **THE CHAIRMAN:** The first two or three months of you being in  
 10 post?  
 11 **A.** Yes, because it would be just getting feet under the  
 12 table. I think that would be my recollection of how  
 13 things operate. So for a period of time RSPs would have  
 14 just moved in line with the information provided, so if  
 15 it was 10p down, it was 10 down; if it was 10p up, it  
 16 was 10p up. The day after there would be variation.  
 17 But at no stage did we ever accept an instruction to  
 18 move a retail price on the basis of no cost price  
 19 movement. We have never ever done that, impossible. It  
 20 would be economically impossible and we would never do  
 21 it. There was only one occasion --  
 22 **THE CHAIRMAN:** Just wait for Mr Lasok to ask you the  
 23 questions.  
 24 **MR LASOK:** I wanted to get on to the question of pricing in  
 25 a little while. You have rather, as it were, taken me

1 by surprise and marched on ahead.  
 2 **THE CHAIRMAN:** Go back to what you were asking.  
 3 **MR LASOK:** I wanted to go back to the agreement with ITL,  
 4 because we have got, I think, to the point at which you  
 5 and I agree that the agreement involved a commitment in  
 6 the contract at any rate on the part of Asda to pricing  
 7 in line with ITL's strategic pricing requirements, it  
 8 was just that you didn't want to abide by it, I think.  
 9 **A.** No, we would -- our agreement would be that if ITL move  
 10 the cost price of a product to reflect their parities  
 11 and differentials, then we would be duty bound and would  
 12 reflect that in our retail price, and we would expect  
 13 that to be market wide in any event, to maintain our  
 14 competitive position. So we would not take the discount  
 15 in cost and leave the retail where it was.  
 16 **Q.** Forgive me, but you are now focusing solely on downwards  
 17 movements, aren't you, because in the case --  
 18 **A.** No, same would be true up as well. If it were  
 19 withdrawn, we would do the same.  
 20 **Q.** An upward movement wouldn't cause you a problem at all,  
 21 would it?  
 22 **A.** It would, yes.  
 23 **Q.** Particularly if it's across the market?  
 24 **A.** No, no, an upward movement would mean that we would --  
 25 our options would be to move our price up to maintain

1 margin parity or to accept a margin cut, and margins  
 2 being so slim, that wouldn't really be an option.  
 3 **Q.** Let's have a look at this, because a movement upwards  
 4 doesn't depress your margin, does it?  
 5 **A.** A movement upwards in cost would.  
 6 **Q.** No, a movement upward in the shelf price.  
 7 **A.** No, I was referring to the cost price movement.  
 8 **Q.** I am sorry. I'll try and be a bit more precise about  
 9 which prices I am referring to.  
 10 Let's go back to the strategic pricing requirements,  
 11 because the explanation given by Mr Hall in tab 56, that  
 12 doesn't refer to cost prices, because he is talking  
 13 about shelf prices reflecting standard price list  
 14 differentials?  
 15 **A.** Yes.  
 16 **Q.** Yes?  
 17 **A.** Right, and I am saying that our movement in our retail  
 18 prices would be dependent on movement in cost prices,  
 19 solely on movement in cost prices. We would not move  
 20 retail prices except as a result of a cost price  
 21 movement, either up or down.  
 22 **Q.** Well, now, let's have a look. Rather, let's focus in on  
 23 the agreement. Where in the agreement and in this  
 24 explanation of the agreement that we have at tab 56 do  
 25 we find a reference to cost price movements?

1 **A.** The movement in the RSPs is -- there is always  
 2 a movement in the cost price as a result of it; if there  
 3 is a movement in the recommended selling price, there  
 4 would always be one. There has been no instance, apart  
 5 from one, that I can recall of there ever being  
 6 a movement in RSPs without movement in cost.  
 7 **Q.** I am not looking now at what actually happened, I am  
 8 looking at what was agreed, what was envisaged. I am  
 9 putting to you that what was envisaged in the agreement  
 10 was that Asda would move around, whenever Asda moved its  
 11 prices around for products, brands that were listed in  
 12 ITL's strategic pricing requirements, Asda were supposed  
 13 to maintain the parities or the differential between the  
 14 ITL and Gallaher brands that are referred to in the  
 15 strategic pricing requirements list?  
 16 **A.** That would not be my understanding of the agreement, and  
 17 it certainly didn't happen in that fashion at any time.  
 18 **Q.** So that wasn't your understanding?  
 19 **A.** It was not, and it didn't happen.  
 20 **Q.** Well, let's move on to what did happen. Rather, before  
 21 we do that, the only contemporary evidence that we have  
 22 of Asda qualifying its commitment to price in accordance  
 23 with any manufacturer's parity and differential  
 24 requirements is in tab 58. Tab 58 is an email sequence  
 25 which starts on the second page, and it's an exchange

1 between -- well, all of it save the last email is  
 2 an exchange between you and Graham Hall. Would you like  
 3 to read the sequence in chronological order, please.  
 4 (Pause)  
 5 What seems to have happened here is that you left  
 6 a message on Mr Hall's mobile, because we get that from  
 7 the last line on page 90. Then he sends you the email.  
 8 The first point he makes is that ITL's strategic pricing  
 9 requirements were unchanged, and he refers to matching  
 10 Amber Leaf with Drum and matching Samson with  
 11 Drum Milde. Then he refers to what he describes as  
 12 Gallaher's initiative in reducing the recommended  
 13 selling prices for Amber Leaf and Samson two months ago.  
 14 So far as we can tell from other documents, that was  
 15 a reduction that Gallaher made in June 2002.  
 16 Then Mr Hall says that ITL had reluctantly reduced  
 17 the recommended selling prices for Drum, and that  
 18 appears to be what we see at tab 55. This is  
 19 an internal ITL email, dated to 10 July 2002, which  
 20 records an alteration in the price of Drum and  
 21 Drum Milde in order to match recent changes in  
 22 Amber Leaf and Samson. An instruction was given to  
 23 prepare a new price file with the new prices, and  
 24 forward the new price file to Asda. So it seems to have  
 25 happened at that point, June and July.

1 Then it appears that, when we get to August 2002,  
 2 you have raised with Mr Hall a query about the situation  
 3 which appears to relate to the effect on your cash  
 4 margin when selling at the recommended selling prices.  
 5 Does that accord with your recollection of the  
 6 event?  
 7 A. I recall the conversation I had with Graham Hall when he  
 8 wanted us to reduce prices. The other stuff is a bit  
 9 hazy, the bit before that, and I wouldn't recall  
 10 July 2002, probably. But I recall the conversation with  
 11 Graham Hall when he expected me to reduce pricing for  
 12 a second time.  
 13 Q. Then if you look at your reply to Mr Hall, which is in  
 14 the middle of the first page --  
 15 A. Right.  
 16 Q. -- it's a message that you sent on Thursday,  
 17 August 29th. You say:  
 18 "That's fine, but if Imperial wish to compete with  
 19 Gallaher on the Asda pitch and set appropriate retails,  
 20 then I expect both to fund their own tactical pricing  
 21 issues. Can we discuss when we meet?"  
 22 Now, that suggests to me that Asda thought it was  
 23 fine for it to price in accordance with ITL's strategic  
 24 pricing requirements, but what you were doing was  
 25 raising a point about price reductions, because they

1 affected your margin. Is that a correct interpretation  
 2 of the position?  
 3 A. "That's fine" would just be a starting comment. The  
 4 purpose of the note is to say that if they wish price  
 5 reductions then they need to put commensurate cost price  
 6 reductions in. Simple as that.  
 7 Q. So as far as you were concerned, as long as your margin  
 8 wasn't threatened, it was fine for Asda to price in  
 9 accordance with ITL's strategic pricing requirements?  
 10 A. It was -- we were happy to move our retail prices  
 11 downwards in relation to any discounts that were  
 12 offered, and if they were withdrawn, then we would move  
 13 our prices back up. That this mirrored their strategic  
 14 requirements was down to them. If they wished to  
 15 maintain their brand differentials in terms of pricing,  
 16 and were willing to put cost prices in to match that,  
 17 then that would be fine, yes, we were happy to do that.  
 18 Q. If we look at upward movements, and we have examples at  
 19 tab 62, this is not an exchange -- well, it is  
 20 an exchange that you were copied in on.  
 21 A. Sorry, you said 62? {D14/62/167}.  
 22 Q. Tab 62. The first email is the one starting at the  
 23 first holepunch, and it was sent by Graham Hall to  
 24 Mr Mason, copied to you. It was about the pricing for  
 25 Richmond 20s.

1 (Pause)  
 2 There is no indication that Asda queried that move.  
 3 A. This would be -- I assume this is a reduction -- I don't  
 4 remember the details of it, but I assume that this is  
 5 a reduction in line discount and they have got  
 6 an anticipation that they would be followed up by their  
 7 matched lines from Gallaher. How they would have that  
 8 indication, I don't know. This is a removal of  
 9 a discount.  
 10 Q. The point I am getting at is this: we have an email like  
 11 this, and what we don't see is Asda putting on record  
 12 the fact that it does not regard itself as having  
 13 committed itself to price in accordance with ITL's  
 14 parity and differential requirements?  
 15 A. Our working assumption would be that any movement in  
 16 parities and differentials would be -- have  
 17 an associated cost price movement. If there was a cost  
 18 price reduction then obviously we would reflect it in  
 19 retail prices. If that temporary discount was  
 20 withdrawn, then we would be forced by the economics of  
 21 the situation to reflect it in higher retail prices.  
 22 That is it. That is our assumption.  
 23 Q. Okay. Let's go to tab 79. {D14/79/231}. What we have  
 24 here in tab 79 is an email at the very top of the page  
 25 from Mr Hall to yourself, amongst others. It relates to

Confidential  
Asda

1 an email string which actually starts off with an email  
2 from Mr Mason on the third page, and you were copied in  
3 on that. If you have the first email, which starts on  
4 the third page, this is an email from Mr Mason sent on  
5 Friday, August 8th 2003. He starts off by referring to  
6 [REDACTED] and we think  
7 that -- I am sorry. Apparently the contents of this are  
8 confidential, or most of them are. This looks as though  
9 it was an email sent in the context of the negotiation  
10 between ITL and Asda about a new proposed trading  
11 agreement that would replace the 2002 agreement.

12 A. Yes.

13 Q. Does that look like the case to you?

14 A. It does.

15 Q. Yes. If you go to the fourth page, we have a bit that  
16 is not confidential, and is in the paragraph that begins  
17 with the words "Pages 3 and 4 ..." Do you have that?  
18 Could you just read that paragraph and the one following  
19 it which begins "We cannot ..." please. Read it to  
20 yourself so that you know what it says.

21 (Pause)

22 The point I am going to put to you is that this is  
23 a stage or a point in time at which we do see Asda  
24 objecting to being dictated to on price. I put it to  
25 you that that was a concern that Asda had in the period

37

1 in which it was operating under the 2002 trading  
2 agreement, and you were now insisting upon an alteration  
3 in the position so that you would no longer be dictated  
4 to on price; is that correct?

5 A. The process, I believe, started with a provisional  
6 contract from ITL and we then pushed that through our  
7 legal department at Asda. They then came back with  
8 concerns and therefore we became -- we were keen that  
9 the wording was as we thought it should be. So I think  
10 the dictated to about price, et cetera, came as a result  
11 of that. So going through our legal department and  
12 their misgivings. So that's my memory of it at the  
13 time.

14 Q. If we go to the next tab, which is tab 80, {D14/80/235},  
15 we have the trading agreement that was then negotiated.  
16 If we go to the last page --

17 A. Sorry, tab 80?

18 Q. Yes. If you go to the last page, a lot of it is  
19 confidential, but there are two bits that are relevant  
20 for present purposes. There is the second paragraph on  
21 the page that says "Subject to Imperial Tobacco's  
22 requirements", and the last bit, the last paragraph on  
23 the page under the heading "ITL's Strategic Pricing  
24 Requirements". Could you just read those to yourself.

25 (Pause)

38

1 Thanks. Now, the first of those paragraphs, the one  
2 beginning "Subject to Imperial Tobacco's requirements",  
3 is pretty much the same as the language of the 2002  
4 trading agreement. But what we have added to this is  
5 the last paragraph at the end, which says:

6 "Asda Stores is at all times free to sell its own  
7 retails for products stocked in its stores."

8 Do I understand it from the answer that you gave to  
9 me a moment ago that that last paragraph was the one  
10 that Asda's lawyers insisted upon being inserted into  
11 the agreement?

12 A. I don't know what their insistence was, but that would  
13 probably be something that was added by our legal team.

14 Q. That was because, if you didn't have those words in  
15 there, there was a commitment on Asda's part to price in  
16 accordance with ITL's strategic pricing requirements?

17 A. Within the written contract, it could be interpreted as  
18 that. Our interpretation, as I said before, is that  
19 from ITL's point of view, their issue was to ensure that  
20 we always reflected discounts in cost price in our  
21 retail prices, and there was no understanding that we  
22 had that we would move our retail prices in respect of  
23 any of their marketing requirements, and that never did  
24 happen. But for some reason, ITL always were of the  
25 opinion that if they didn't have this sort of form of

39

1 words in there, then somehow we would be guilty from  
2 time to time of not reflecting cost price terms in our  
3 retail prices, and that was their concern. I don't know  
4 why, because we always did, but that was their concern.

5 Q. Can we go back to your witness statement, to  
6 paragraph 9, please.

7 **THE CHAIRMAN:** Is that a convenient moment for us to take  
8 our break?

9 **MR LASOK:** I am sorry, yes.

10 **THE CHAIRMAN:** We will come back then at five to 12. We are  
11 going to take a short stretch break now, Mr Lang. As  
12 you are in the middle of giving your evidence, you  
13 mustn't discuss the case or your evidence with anyone in  
14 your legal team or anybody else. We will come back,  
15 then, at five to 12. Thank you.

16 (11.45 am)

(A short break)

18 (11.55 am)

19 **MR LASOK:** Mr Lang, while we are looking at this agreement,  
20 the 2003 agreement, I wanted to take you back to  
21 a comment that we made just before the break in which  
22 you said -- and I am taking this from the transcript --  
23 and I'll just read it out from the transcript, you said:

24 "Answer: But for some reason [this is line 23] ITL  
25 always were of the opinion that if they didn't have this

40

1 sort of form of words in there, then somehow we would be  
 2 guilty from time to time of not reflecting cost price  
 3 terms in our retail prices, and that was their concern."  
 4 **A.** Yes, well, cost price reductions rather than terms.  
 5 **Q.** I just wanted to explore that with you, then, because it  
 6 was a comment you made apropos of this page in the 2003  
 7 trading agreement that we were looking at where we have  
 8 the second paragraph which replicates the provision in  
 9 the 2002 trading agreement dealing with a payment for,  
 10 amongst other things, strategic pricing requirements  
 11 being met. Then you have, at the bottom of the page,  
 12 the reference to Asda Stores being at all times free to  
 13 set its own retails for products stocked in its stores.  
 14 **A.** Yes.  
 15 **Q.** It is the case, isn't it, that the strategic pricing  
 16 requirements related to shelf prices?  
 17 **A.** Yes.  
 18 **Q.** Yes, and if we turn --  
 19 **A.** Well, differentials, yes.  
 20 **Q.** But at shelf price level?  
 21 **A.** Yes.  
 22 **Q.** Yes. It's a bit odd, but if you go back two pages in  
 23 this tab, well, in my copy it's back two pages, it's to  
 24 a page which is stamped 20 in the bottom right-hand  
 25 corner. This is headed "ITL's Strategic Pricing

1 Requirements", so would you agree that this is the list  
 2 of the strategic pricing requirements that are referred  
 3 to in the page which is stamped 22?  
 4 **A.** Yes, that's correct.  
 5 **Q.** If we look at the strategy pricing requirements there is  
 6 no reference here to cost prices. What we actually see  
 7 is that ITL had preferred pricing positions vis-a-vis  
 8 certain linked Gallaher brands?  
 9 **A.** Yes.  
 10 **Q.** So on the face of it, and you will tell me if I am  
 11 wrong, the strategic pricing requirements were  
 12 requirements that Asda should maintain the relativities  
 13 that we see on this page as and when shelf prices  
 14 changed, and that was to continue unless and until ITL  
 15 told Asda otherwise?  
 16 **A.** Our interpretation would be that the maintenance of  
 17 their pricing differentials was a matter for ITL and we  
 18 would reflect any cost price movement in our retail  
 19 prices that would allow ITL to maintain their parities  
 20 and differentials. That's always been the case. It's  
 21 still the case today.  
 22 **Q.** Can I just get it clear in my own mind. I want to  
 23 separate the purpose or the object of what was being  
 24 achieved with the mechanism of achieving it. I am  
 25 putting to you that the purpose or object of the

1 strategic pricing requirements was to ensure that the  
 2 ITL and Gallaher brands listed in a page like this  
 3 maintained the parities or differentials that are listed  
 4 there as shelf prices moved?  
 5 **A.** The apparent objective is to maintain retail price  
 6 differentials in line with that. The debate that we are  
 7 having is about how that is achieved and whose  
 8 responsibility it is, and it's not Asda's  
 9 responsibility, it's Imperial's.  
 10 **Q.** I think that what you are saying is that Asda simply  
 11 reacted to the changes in the actual wholesale price  
 12 that ITL made from time to time in order to get you to  
 13 price in accordance with these requirements?  
 14 **A.** No, we responded to any short-term discounts they put  
 15 in, reflected those in retail price, those would have  
 16 been predominantly for them to achieve their own  
 17 marketing objectives. Whether they were as per this  
 18 page or not is no concern of ours. Whether they were  
 19 achieved or not would be no concern of ours either. In  
 20 fact, I would be amazed if these objectives were  
 21 achieved at all, given the amount of movements that were  
 22 taking place from both Gallaher and Imperial. It would  
 23 certainly not have been the case that this was as it  
 24 always was.  
 25 **Q.** But I suppose that we would really have to ask Mr Mason

1 about that, wouldn't we?  
 2 **A.** Well, I presume somebody has gone through all the retail  
 3 price files to ascertain whether these differentials  
 4 were ever achieved.  
 5 **Q.** His evidence is that they were.  
 6 **A.** I doubt that they were continuously. I don't see how  
 7 they could have been continuously. It would be  
 8 impossible to maintain them, because there are too many  
 9 movements on a continuous basis.  
 10 **Q.** You say that, but as I understand it, your own evidence  
 11 is that Asda priced normally in accordance with the RSPs  
 12 provided to it by the manufacturers?  
 13 **A.** Yes, we did, but that doesn't mean to say that at all  
 14 times manufacturers organised themselves to achieve  
 15 those fixed set of parameters. I doubt whether that was  
 16 achieved. There have been just too many movements.  
 17 There have been hundreds of these things. Over a period  
 18 of time, they would have been going up and down and  
 19 sideways.  
 20 **Q.** The problem, I suppose, is that we already have evidence  
 21 from other witnesses that the manufacturers did orient  
 22 the price files around their parity and differential  
 23 requirements, and Mr Mason accepts that generally the  
 24 pricing of Asda was in accordance with the P&D  
 25 requirements.

1 A. That's --

2 **MR FLYNN:** Madam, I think if that's going to be said I think

3 some reference to that evidence should be made, quite

4 apart from the fact that, as you know, if the agreed

5 position of the experts is something rather different

6 from what my learned friend is actually saying. If he

7 is going to say that is the evidence of Mr Mason I think

8 we had better see exactly where it is.

9 **MR LASOK:** I think we can get it from the transcript.

10 **THE CHAIRMAN:** Well, is this something that you want to put

11 to this witness?

12 **MR LASOK:** All right, yes.

13 Let's take Mr Mason, paragraph 10 of his witness

14 statement, where he says "Often ..."

15 A. Sorry, where am I?

16 **MR HOWARD:** Just before we do that, there is evidence in

17 fact of what the actual position is, and it's actually

18 agreed, so it's actually slightly odd, this. In other

19 words, you have Mr Ridyard's analysis with which

20 Mr Walker has agreed, and that is that on the basis of

21 maxima differentials it's 71 per cent of the time that

22 there was adherence.

23 **THE CHAIRMAN:** Well, where I think we might be at

24 cross-purposes here is as to whether the differentials

25 which the manufacturers were seeking to achieve by their

1 flexing of the net cost price were specifically these

2 differentials set out at page stamped 20, or whatever

3 differentials they wanted to achieve at the time they

4 offered or withdrew the bonus, which may still have been

5 these or may have moved on to being other differentials

6 that they preferred, for whatever reason, at that point.

7 Is that ...

8 **MR LASOK:** It's partly that, but it's also partly that one

9 has to look at the dataset that was being used by the

10 experts, and one of the difficulties is that the

11 dataset, as I understand it, is imperfect. The fact of

12 the matter is that the evidence given in their witness

13 statements -- in their witness statements -- by Mr Mason

14 and Mr Lang is reasonably clear on this point. So, for

15 example, we have Mr Mason at paragraph 10 saying

16 "Often", Mr Mason at paragraph 15 saying "normally" ...

17 **THE CHAIRMAN:** Often what, though?

18 **MR LASOK:** This is normally in accordance with the RSPs.

19 **THE CHAIRMAN:** Yes, that's the point, it's in accordance

20 with the RSPs, but as I understand it, Mr Lang's

21 evidence is whether the RSPs were themselves in

22 accordance with the P&Ds that were attached to the

23 agreement in force at any particular time was a matter

24 for ITL to sort out, not a matter for Asda to sort out,

25 and they may have known or assumed that the RSPs

1 reflected whatever ITL wanted to achieve in terms of

2 P&Ds at that moment, which may have been -- as I said --

3 the same as was attached to the agreement or the update

4 of that schedule that was sent from time to time, or

5 something different. But Mr Lang's evidence, which

6 I don't recall being contrary to what Mr Mason said,

7 unless you show me otherwise, was: yes, they stuck with

8 the RSPs more often than not, they knew that the RSPs

9 were set to achieve ITL's aspirations as to parities and

10 differentials between their brand and the competing

11 Gallaher brand. But I don't recall Mr Mason going

12 further than that and saying: and he also thought that

13 those aspirations matched what was set out in the

14 agreement, because he said he didn't look at the

15 agreement. But if you want to put something beyond that

16 to Mr Lang --

17 **MR LASOK:** No, I wasn't seeking to go beyond that.

18 **MR HOWARD:** You may also remember -- it's just important to

19 point this out -- Mr Hall's evidence, which is that the

20 RSPs were actually derived from looking at what the

21 price had been in the Asda store. It wasn't -- which is

22 the point that Mr Lasok repeatedly says -- Imperial

23 setting an RSP by reference to the P&Ds, it was actually

24 looking at what the price had been and then adjustments

25 taking place according to bonuses and so on and MPIs.

1 **THE CHAIRMAN:** That may not result in actually a different

2 figure, but --

3 **MR HOWARD:** It depends, really, it may and it may not,

4 that's the thing, but it actually is a different

5 exercise.

6 **THE CHAIRMAN:** Do you agree, Mr Lang, that you generally set

7 prices in accordance with the RSP and you knew that the

8 RSP may have reflected ITL's aspiration as to where

9 their product should be on the shelf in Asda stores in

10 relation to a Gallaher competing product?

11 A. That is correct, and I think I said that for the first

12 three months we would have done it always, thereafter

13 there would have been some minor variations but it would

14 only have been minor and we never looked at the RSPs but

15 we assumed that they were -- any movements by ITL were

16 in line with their requirements as set out in this

17 document. How they achieved that and how often we have

18 no idea, we never checked.

19 **MR LASOK:** Right, I can move on to another point now.

20 If you go to paragraph 9 of your witness statement,

21 please?

22 A. I am a bit lost with all these witness statements and

23 things now.

24 Q. It's in the other file, the one on your left. If you

25 have this paragraph, you refer here to the cost prices

1 and the price lists, and you refer to the recommended  
 2 selling or shelf price or the RSP and you say in the  
 3 fourth line:  
 4 "These price lists would also set out the recommend  
 5 selling or shelf price [RSP] at or below which the  
 6 manufacturer wanted Asda to sell its product."  
 7 I will jump over the next sentence. You say:  
 8 "In all cases, it was only a recommended price  
 9 maximum which the manufacturers did not want us to price  
 10 above."  
 11 Why do you say that it was nothing other than  
 12 a recommended price maximum?  
 13 A. Because as a price maximum that would be reflecting any  
 14 discounts that the supplier put into the product, and  
 15 they would expect us to reflect that.  
 16 Q. Well, now, the --  
 17 A. So it would be a full reflection of the cost price  
 18 reduction spike.  
 19 Q. That I accept, but if we take an example, which is  
 20 tab 62, {D14/62/166}, you have here tab 62, we have  
 21 looked at this before, and in the first email which you  
 22 were copied in on we have the reference to the current  
 23 price for Richmond, and then we have in the second  
 24 paragraph this:  
 25 "As part of our pricing strategy, we will be moving

1 prices up in the market from 14 October to £3.59 for  
 2 Richmond Kingsize and £3.63 for Richmond Superkings."  
 3 Then there is a reference to Asda getting an updated  
 4 price file detailing those changes. The writer of the  
 5 email, Mr Hall, goes on to say that ITL was anticipating  
 6 that Gallaher would follow ITL's lead by moving  
 7 Dorchester up by 5p in the not too distant future.  
 8 Now, in that email, there is no suggestion that the  
 9 price of 3.59 or 3.63 is just a maximum price. It looks  
 10 like the price, the specific price, that ITL wants Asda  
 11 to price at?  
 12 A. Well, it says here that it is -- reflects additional  
 13 support of [redacted] per pack, so that's where the prices came  
 14 from. Yes? So it's now removal of that discount of [redacted]  
 15 per pack. So the removal of that discount brings it  
 16 back from 3.54 to [redacted] So it says: you will get a new  
 17 cost price file, removing that [redacted] er litre(sic)  
 18 discount, and therefore your pricing will revert back to  
 19 where it was.  
 20 Q. Are you therefore reading this email as saying something  
 21 that it doesn't say?  
 22 A. I am reading it as a cost price reduction and -- that  
 23 has been put in, and is now being taken out. Richmond  
 24 Kingsize, 3.54.  
 25 Q. What it actually says, though, is that ITL are moving

1 the prices up to specific price points. They don't tell  
 2 you in this email how they are going to do it. You  
 3 would only get that information in the price file?  
 4 A. We would get it in the price file, but, you know, it  
 5 says current price for Richmond is 3.54, which reflects  
 6 additional price support of [redacted] per pack, we are moving  
 7 our prices up so the [redacted] per pack support is coming out,  
 8 and therefore it is going to be [redacted] for Richmond  
 9 Kingsize, which is [redacted] more. I am reading it as the  
 10 removal of a temporary promotional discount for whatever  
 11 reason.  
 12 Q. I am putting to you two quite separate points.  
 13 A. Right.  
 14 Q. One point concerns what ITL wanted Asda to do. What ITL  
 15 wanted Asda to do was to price at these specific price  
 16 points. That's so, isn't it?  
 17 A. Their assumption would be that we would revert back to  
 18 our previous price, which would be presumably [redacted] when  
 19 they withdrew their [redacted] per pack discount.  
 20 Q. Now we come to the mechanism, how they are going to do  
 21 it. Because I think you are telling me that you were  
 22 actually copied in on this correspondence, but I don't  
 23 know, were you actually involved in any decision-making  
 24 within Asda in relation to this email exchange?  
 25 A. No, this would be just common day-to-day stuff, it would

1 have just gone straight through Guy.  
 2 Q. You are telling me that your understanding is that the  
 3 mechanism for achieving the price move would be by  
 4 an alteration in the bonus?  
 5 A. Yes, removal of in this case.  
 6 Q. Right. The other point I want to put to you in  
 7 connection with your statement that these RSPs and so  
 8 forth were price maxima is this: Mr Mason stated in his  
 9 witness statement, and clarified the point when he was  
 10 being cross-examined; and the reference is to  
 11 paragraph 81 of Mr Mason's statement and to the  
 12 transcript at Day 19, pages 113, line 3, to 114, line 6.  
 13 Right?  
 14 He says that he remembers Mr Hall reminding Asda  
 15 that it had to keep to parities, and he says that these  
 16 occasions arose, apparently the communications were  
 17 oral, but they would arise in connection with the  
 18 pricing of a particular brand, and Mr Hall would say to  
 19 him, "You must understand under the trading agreement  
 20 these are supposed to be priced at a parity", and  
 21 Mr Mason's evidence is that he simply ignored these  
 22 statements made by Mr Hall.  
 23 Now, did you have any experience of exchanges with  
 24 Mr Hall or anybody else in Asda along those lines?  
 25 A. I had no experience excepting that, if of course, we

Confidential  
Asda

Confidential  
Asda

1 made a mistake on the price file, which was quite easy  
2 to do and miscommunication. So that we were trading at  
3 a higher price so the discount had gone in and we hadn't  
4 reflected the retail price, then I would expect phone  
5 call from Imperial to say "Sorry, mate, you have made  
6 a mistake, you should be at this price".

7 If we traded above the retail price level that was  
8 discounted, then I would expect a phone call saying "You  
9 are a penny too high". If we traded below that, then  
10 I wouldn't expect them to be too concerned at all. Why  
11 would they be? It's within their parities and  
12 differentials and it would be a lower price. But I've  
13 never had that communication from them in terms of  
14 variations.

15 Q. If Mr Hall, as Mr Mason says, was saying that you had to  
16 price at parity, then Mr Hall would have been expecting  
17 that, whatever your absolute price levels for  
18 a particular brand, the price ought to be at parity with  
19 the Gallaher brand?

20 A. No, he would expect that our pricing would reflect the  
21 cost price he had put in, and that should reflect their  
22 parity and differentials -- maybe, maybe not -- and he  
23 would expect us to be at least at that price, he  
24 wouldn't expect us to be higher --

25 Q. Can I just ask you: you have been talking about cost

1 prices, do you actually know whether the cost prices for  
2 an ITL product and a Gallaher product would invariably  
3 be the same where there was supposed to be a parity at  
4 shelf price level between the two products?

5 A. No. The trading agreement with Gallaher's was generally  
6 more advantageous and Gallaher's products generally --  
7 we made a higher margin on Gallaher's products than ITL.  
8 But there was no cross-checking against it. Wouldn't  
9 know exactly what the different net costs were.

10 MR LASOK: No further questions.

11 Questioned by THE TRIBUNAL

12 THE CHAIRMAN: Can I just ask, in relation to this letter,  
13 this email of 7 October: I know that you were only  
14 copied in to this, you are not a recipient, but just  
15 this paragraph about anticipating that Gallaher will  
16 follow the lead.

17 A. Yes.

18 THE CHAIRMAN: Now, I understand that you say ITL would  
19 generally be happy if Asda priced below the RSP --

20 A. Yes.

21 THE CHAIRMAN: -- but in this case, they seem to be wanting  
22 to move the price levels in the market for Richmond type  
23 cigarettes, if I can refer to that category in that way,  
24 up a bit, and they are moving their prices up in the  
25 hope or expectation that Gallaher will follow the lead,

1 that Gallaher will notice that Richmond prices have gone  
2 up and they will say to themselves, "Oh, good, well, we  
3 will put Dorchester up then as well", and then everyone  
4 benefits from the bonuses having been removed and the  
5 prices edging up slightly.

6 A. Well, the customer doesn't benefit. Asda benefits  
7 more --

8 THE CHAIRMAN: Well, as between Asda and ITL.

9 A. But both ITL and Gallaher benefit, they are the only  
10 beneficiaries of it.

11 THE CHAIRMAN: Yes.

12 A. The way I read this is that I believe, and I can't  
13 remember the details of it, but I suspect that  
14 Dorchester -- that Gallaher's reduced -- put  
15 a promotional discount in for Dorchester and reduced the  
16 price by 5p. And I suspect that Imperial decided to  
17 match and reduced it.

Confidential  
Asda

18 THE CHAIRMAN: Now --

19 A. And now they are seeking to get out of that.

20 THE CHAIRMAN: Now they are testing the water to see whether  
21 it is time to reduce --

22 A. Sorry, I think that's the wrong way round. Imperial  
23 would have reduced. Gallaher would have matched. Now  
24 Imperial want to remove it and they anticipate that  
25 Gallaher's will. How they get the information of

1 anticipation, whether it is anticipation or whether it's  
2 just blustering and saying, "Well, just don't come back  
3 to us and start arguing about it yet because we're sure  
4 they will", whether they are looking to stop us coming  
5 back to them and complaining about the cost price  
6 movements or whether (inaudible) I've no idea.

7 THE CHAIRMAN: I'm just trying to explore how important is  
8 it, as far as what signals are sent to Gallaher by  
9 prices on the shelves in the market that Asda's price  
10 will go up by 5p, because if they remove the bonus, the  
11 5p bonus, and you only put your prices up by 3p, say,  
12 then Gallaher might not put their price up to match the  
13 Richmond price?

14 A. The general thing with all these moves is that they were  
15 across the market, the anticipation is that they are  
16 across the market. So it is not just Asda; it is Asda,  
17 Tesco ... everyone goes back down by 5p, everyone goes  
18 back up by 5p. If the question is, if we went up by 3p  
19 what would happen, apart from the fact we would lose 2p  
20 margin, which we would not be able to afford to do, as  
21 your economists will doubtless tell you later on, apart  
22 from that, there would be some communications from  
23 retailers saying "Excuse me, but Asda's only gone up by  
24 3p, are you sure we have got this cost price right?"  
25 And we would engage in that type of phone call ourselves

1 as well, just to query who was on it. So if we didn't  
 2 move up by the full amount --  
 3 **THE CHAIRMAN:** Who would phone who, sorry?  
 4 **A.** A retailer would notice that Asda had not gone up by 5p  
 5 and would phone Gallaher or Imperial and say "Excuse me,  
 6 but Asda hasn't gone up by that much, are you sure we've  
 7 got this right? Are you giving them extra support?",  
 8 that would be a common phone call to make.  
 9 **DR SCOTT:** Mr Howard has very helpfully provided us with  
 10 a diagram of what happened during this period, and if  
 11 you --  
 12 **THE CHAIRMAN:** Are you going to take Mr Lang to those  
 13 diagrams?  
 14 **MR HOWARD:** If Dr Scott has a question, fine.  
 15 **DR SCOTT:** It just seemed to be sensible to have a look.  
 16 It's in core bundle 1, tab 3, page 389. {C1/3/389}.  
 17 I don't know how much you remember of the background,  
 18 Mr Lang, but there had been a situation in the summer of  
 19 2002 where, as I recall, Gallaher had an MPI, Imperial  
 20 did not immediately announce an MPI, and that's  
 21 reflected in the red line which I think shows that there  
 22 was a -- no, that can't be right.  
 23 **MR HOWARD:** I think what you are putting is that Gallaher  
 24 had had an MPI, Imperial didn't, but then Gallaher you  
 25 have to remember effectively reversed it, exactly.

1 **DR SCOTT:** Bonus down. So that you will see that in fact  
 2 the blue line which shows the actual difference in  
 3 retail price is at parity. So, as we come up to this  
 4 event, they are at parity. Okay?  
 5 **A.** So is that the average of these blue lines then?  
 6 **DR SCOTT:** Yes, the blue line and the black line are  
 7 coincident.  
 8 **A.** Right.  
 9 **DR SCOTT:** Then, as we understand it, there is an attempt to  
 10 move the price up, and there is a spike. First spike  
 11 after week 26. Do you see?  
 12 **A.** I am confused as to what these are showing. Is it  
 13 figure 1 or figure 2 I am looking at?  
 14 **DR SCOTT:** Figure 2, this is Richmond and Dorchester.  
 15 **A.** Right. So there is no difference in the RRP's, an actual  
 16 difference in retail price.  
 17 **MR HOWARD:** Which spike are you looking at, I'm not sure you  
 18 have this right?  
 19 **DR SCOTT:** I am looking at the upward spike after the red  
 20 line returns to the --  
 21 **MR HOWARD:** Yes, I don't think that's as a result of  
 22 an attempt to move the price up. Could be Gallaher  
 23 pushing the -- keeping their price down.  
 24 **DR SCOTT:** Ah, so nothing happens as a result of ...  
 25 **MR HOWARD:** The 2002 episode in respect of Richmond and

1 Dorchester in fact resulted -- what happens is Imperial  
 2 try to get a competitive advantage and  
 3 Dorchester/Gallaher react to prevent them.  
 4 **DR SCOTT:** Which is why it's flat at the beginning?  
 5 **MR HOWARD:** Yes. Then what happens afterwards is not,  
 6 I think, necessarily -- I mean, one would have to look  
 7 at what actually happened.  
 8 **DR SCOTT:** Which is why I asked for the underlying figures.  
 9 **MR HOWARD:** What I'm saying is the fact that you see  
 10 something going above the line here simply can reflect  
 11 the fact that Richmond is more expensive, either because  
 12 it has put up its price, or because Gallaher has had  
 13 a bonus to put down the price of Dorchester, which  
 14 Imperial hasn't responded to.  
 15 **DR SCOTT:** Yes. I am just thinking of what's being said  
 16 in --  
 17 **THE CHAIRMAN:** Yes, so the spikes above the line are where  
 18 Richmond is more expensive than Dorchester --  
 19 **MR HOWARD:** The spike above the line is that Richmond -  
 20 exactly.  
 21 **THE CHAIRMAN:** And the spikes below the line are when it's  
 22 cheaper but we don't know what brings about that  
 23 differential.  
 24 **MR HOWARD:** Yes, it can be either because more money is  
 25 being thrown at Dorchester. In fact, inevitably that's

1 the net result, one is cheaper than the other, how  
 2 that's come about --  
 3 **DR SCOTT:** I am looking at it in the context of tab 62,  
 4 which we were just looking at, but that's really not my  
 5 point, Mr Lang, my point is this: what appears to happen  
 6 in this period is that Richmond does become more  
 7 expensive but not for very long, there is a bit of  
 8 a stutter in the first one which looks like a week or  
 9 two. Were prices changed on a Monday?  
 10 **A.** We would change our prices on a Monday, not all  
 11 retailers were the same day. Yes.  
 12 **DR SCOTT:** Then we seem to have another, possibly two week  
 13 incident, and then things settle down for quite some  
 14 time until we come to another spike, but by then we are  
 15 in the summer of 2003.  
 16 **A.** Sorry, your question to me is?  
 17 **DR SCOTT:** The question to you is this: what looks as though  
 18 happens -- and as Mr Howard explains it can happen in  
 19 either way, in terms of bonuses being introduced and  
 20 withdrawn -- is that the parties react in relation to  
 21 Richmond and Dorchester quite quickly to a move that  
 22 they see being made in the other manufacturer's price.  
 23 **A.** They would be fairly quick. It would depend on their  
 24 overall margin position at the time.  
 25 **DR SCOTT:** Yes.

1 A. You would find that post MPIs then they would be very  
 2 quick. Post a Budget, pre an MPI, they would be tending  
 3 to be a little bit slower. There would be less activity  
 4 in the market.  
 5 DR SCOTT: Interestingly enough, if we look at this period,  
 6 they stay at parity right through the Budget, so we have  
 7 the peak of activity after the MPIs.  
 8 A. Firstly, this is post Budget, pre MPI?  
 9 DR SCOTT: So the first two spikes are post MPI.  
 10 A. Right.  
 11 DR SCOTT: Then we have a long flat period which runs right  
 12 the way through the Budget.  
 13 A. Yeah.  
 14 DR SCOTT: Then in the summer of 2003 we have the spike and  
 15 little under spike.  
 16 A. You would tend to find there would be more activity post  
 17 MPI, least activity pre Christmas and pre Budget,  
 18 because those would be the periods of higher demand and  
 19 post Budget would be a period when margins were  
 20 restrained or -- margins were restrained but there would  
 21 be less opportunity for them to discount.  
 22 DR SCOTT: But with a high profile pairing like Richmond and  
 23 Dorchester, two things seem to be happening. There are  
 24 the occasional bursts of activity, but they quickly, in  
 25 your --

1 MR HOWARD: I think again you are misinterpreting the graph,  
 2 in that if you are interpreting it -- which I think you  
 3 are -- to say that where you see a flat line there are  
 4 not periods of activity, that's a misinterpretation.  
 5 DR SCOTT: No, I accept that.  
 6 MR HOWARD: The result is that you may have intense  
 7 activity, but it's that they are matching each other, so  
 8 that the move and counter move are matched. All the  
 9 graph is showing is that there are periods where one or  
 10 other's price -- either they are not matching, that can  
 11 be for a variety of reasons, either because the  
 12 manufacturers are not seeking -- they have given up for  
 13 that period, one of them might have been trying to move  
 14 this sector up, or it can be because the retailer  
 15 independently is pricing. But the fact there is a flat  
 16 line doesn't tell you there isn't intense activity.  
 17 DR SCOTT: Which again is why it would be helpful to have  
 18 the underlying numbers. I entirely accept that. But  
 19 I think what's interesting from that point of view is  
 20 that here we do have a period where there must be  
 21 evidence as to what activity was going on, and we know  
 22 there is a Budget in this period, but in fact the  
 23 relativities stay stable through that period when you  
 24 were talking about taking over and then feeling freer to  
 25 change things after about three months, I think you

1 said.  
 2 A. Yes, well, we deliberately changed things after three  
 3 months.  
 4 DR SCOTT: Yes. Other graphs show much more strange  
 5 activity, but Richmond and Dorchester, on which we were  
 6 focusing, it's parity through much of that period.  
 7 A. I wouldn't pay any great attention myself to Richmond or  
 8 Dorchester, therefore I have no idea what the  
 9 parities/differentials were or their relative moves.  
 10 I smoked Regal at the time and I was only interested in  
 11 that price, really.  
 12 DR SCOTT: Thank you.  
 13 MR SUMMERS: You had an own brand product, Balmoral.  
 14 A. We still have, yes.  
 15 MR SUMMERS: That's still there, yes?  
 16 A. Still there.  
 17 MR SUMMERS: How did Balmoral feature in this battle of  
 18 differentials?  
 19 A. Balmoral was -- it used to be provided by a company  
 20 called Park Lane along with a few more discount brands  
 21 of theirs, and they were taken over by Imperial, and the  
 22 first thing we had to do was renegotiate the contract,  
 23 so we put it out to tender, and Imperial then won the  
 24 tender, they produced the product for us. We always  
 25 priced Balmoral at bottom price. Because we could

1 control ad valorem tax, because of the RSP, which was  
 2 the price we were selling it at, we had some kind of  
 3 duty relief although we still had a thousand stick rate.  
 4 We always deliberately held it post Budget so that  
 5 we would buy in stock and hold the price. So we would  
 6 hold it for at least three months, so it was always  
 7 there designed to be opening price point product and the  
 8 lowest price in our gantry, and it always was from  
 9 day one, and is still is today, and we viewed it as  
 10 a product that we had to have, because it became fairly  
 11 obvious that we couldn't really move -- because given  
 12 the price of product, especially of prepacked  
 13 cigarettes, the actual retail price differential that  
 14 you can offer to a customer is always going to be with  
 15 time a reducing percentage, because the cost of duty,  
 16 VAT and excise duty just keeps building up over time and  
 17 there was never going to be any change to that.  
 18 So it was always a case of moving away from the  
 19 brands and going to OPPs to generate value. So we  
 20 expected roll-your-own tobacco, which was a smaller  
 21 percentage at the time but has grown since, we used  
 22 a company called Bull Brand and their product was half  
 23 the price of, say, Golden Virginia. So that was our  
 24 opening price product.  
 25 Cigars we got from Hunters & Frankau and Loretta.

1 We didn't go to Imperial for them, so those were our  
 2 OPPs, so we would use Swan as opposed to Rizla. We  
 3 would always discount our accessory rates.  
 4 So the way to actually represent value to our  
 5 customer was always to go outside the main brands  
 6 really, there was a limit to how much we could do, and  
 7 we did as best we could in terms of 100s, 200s  
 8 multipacks, so obviously it is a weekly shop and  
 9 therefore it was an opportunity to accept a reduction in  
 10 margin, because they were only part funded, but by the  
 11 same token a greater growth profit on the actual sale,  
 12 if you could sell a higher pack quantity. So that was  
 13 one vehicle we looked at and it was moderately  
 14 successful. OPPs were our best way forward and Balmoral  
 15 was cheaper --  
 16 **THE CHAIRMAN:** What does OPP stand for?  
 17 **A.** Sorry, opening price point. Lowest price point. So  
 18 Balmoral as I say are still there today, they are still  
 19 being made and supplied by ITL.  
 20 **DR SCOTT:** Sorry, just one follow-up, you said the  
 21 percentage was always declining, but Mr Jolliff's  
 22 evidence, backed by the documents, was that he  
 23 congratulated himself on having improved the margins --  
 24 **A.** No, the percentage reduction to customer benefit,  
 25 because, you know, a packet of cigarettes was £2, you

65

1 can give 10p, a packet of cigarettes is £5 now, 10p as  
 2 a percentage is far less with time.  
 3 **DR SCOTT:** Oh, I see what you mean.  
 4 **A.** So the percentage discount you can give to customers.  
 5 The same as fuel. Your discounts are fixed as pence,  
 6 but you know, if your fuel price is 50p a litre and you  
 7 are giving 5p and now it is it's £1.50 and you're giving  
 8 5p, then the 5p is not worth shouting about over time.  
 9 **DR SCOTT:** Thank you very much.  
 10 **THE CHAIRMAN:** Yes, Mr Howard.  
 11 Cross-examination by MR HOWARD  
 12 **MR HOWARD:** That's very useful, that last discussion,  
 13 because it's a point I wanted to ask you about just to  
 14 clear up some misunderstanding which I think is  
 15 permeating this case.  
 16 In relation to cigarettes, you explain at  
 17 paragraph 10 there is a very high tax burden, and so the  
 18 gross margin profitability is low. That's what you say,  
 19 we can see you say that in paragraph 10 on page 4. You  
 20 say:  
 21 "in this context, it should be noted that a number  
 22 of factors, notably the very high tax burden on tobacco  
 23 products, had contributed to the gross profitability  
 24 margin on tobacco products being very small, at around  
 25 5 per cent, and even lower on the main cigarette brands

66

1 where competition was most intense."  
 2 You have just now explained that as the tax take  
 3 goes up, the margin, the gross margin, comes down.  
 4 Correct?  
 5 **A.** The margin percentage is generally maintained via the  
 6 MPI. But it is your net margin impact that's the key.  
 7 **Q.** I just want to understand the way this actually works in  
 8 terms of -- just want to break it down in terms of the  
 9 gross margin.  
 10 As I understand it, if one is just looking at gross  
 11 margins, when the duty on tobacco was less, and a lot  
 12 less, then the gross margin that you are -- sorry, break  
 13 it down in stages.  
 14 Your wholesale cost is the cost you pay the  
 15 manufacturer, but that cost includes the tax, doesn't  
 16 it?  
 17 **A.** It does.  
 18 **Q.** Right. So in fact a very large part of what you are  
 19 paying the manufacturer is tax, isn't it?  
 20 **A.** It is.  
 21 **Q.** So that in that regard, in respect of the tax element,  
 22 you and the manufacturer effectively are operating as  
 23 a tax collector, aren't you?  
 24 **A.** We are.  
 25 **Q.** You charge a gross margin on everything that you buy,

67

1 which is your mark-up on the cost that you are paying to  
 2 the wholesaler; correct?  
 3 **A.** Correct.  
 4 **Q.** Right. Now, would consumers regard it as acceptable for  
 5 you and other supermarkets to be making a turn on the  
 6 tax?  
 7 **THE CHAIRMAN:** Well, I do not understand that question. How  
 8 would you know which part of the turn is the turn on the  
 9 tax?  
 10 **MR HOWARD:** In very simple terms -- I can really make this  
 11 point by way of submission -- the reason the margins in  
 12 gross terms are coming down, the witness perhaps can see  
 13 whether this is right, but they are coming down as the  
 14 tax take goes up, because what is not acceptable is to  
 15 be seen to be charging a margin on the tax, in other  
 16 words to the consumer. If the Revenue charge £3 on  
 17 a packet of cigarettes, you can't charge 10 per cent on  
 18 the £3 so that you make 30p out of the Revenue claim,  
 19 and that's why the margins here are much lower, because  
 20 the true net price exclusive of tax is of course much  
 21 lower.  
 22 **THE CHAIRMAN:** When somebody in Asda decided what the margin  
 23 would be, the gross margin you would aim at for tobacco,  
 24 did they split out from the Asda's cost price that they  
 25 pay to the manufacturer the tax and then ITL's

68

1 contribution to its own costs?  
 2 **A.** No. No. The margin percentage plan, the budget for the  
 3 sector would be broadly based upon last year's  
 4 achievement, whatever it was, the biggest movement in  
 5 the time period we are talking about is we went to  
 6 central distribution and therefore our margin percentage  
 7 went up, but beneath that we had all the distribution  
 8 costs and those were lost centrally, so there was  
 9 a re-stepping of the margin percentage. But apart from  
 10 that movement, then it would be based upon last year's  
 11 achievement. The people who would be interested would  
 12 be the category managers, in this case myself, and  
 13 I would be interested in what my net profit position  
 14 would be rather than in fact a margin percentage.  
 15 Because the things that we were struggling with over  
 16 this period of time was that sales were falling, and as  
 17 sales fall, your costs still remain virtually the same  
 18 because your staffing and wages costs are about the same  
 19 and that's your biggest single cost. Occupancy costs  
 20 are still the same, but unit sales for each unit you  
 21 trade from were going down.  
 22 **THE CHAIRMAN:** We are talking about the gross margin here at  
 23 the moment, I think, which is the amount, the difference  
 24 between the selling price in Asda and what you pay --  
 25 **A.** The gross margin percentage, the plan would be set on

1 last year's achievement, simple as that. Drilling down  
 2 below that level to our net margin position would be the  
 3 responsibility of the category manager.  
 4 **MR HOWARD:** Perhaps explain this, to put it in very simple  
 5 terms, your statement says that the very high tax burden  
 6 on tobacco products had contributed to the gross  
 7 profitability margin being very small. Explain to us  
 8 why -- and I think you a moment ago also drew an analogy  
 9 with petrol -- where products have a high amount of tax,  
 10 why does that mean that the gross margin that you charge  
 11 on the product is low?  
 12 **A.** The margin percentage is low.  
 13 **Q.** Yes, but why? That's what we want to know. Can you  
 14 explain why?  
 15 **A.** Because the cost of product is falsely high because  
 16 a high proportion of it goes directly in taxation and  
 17 there's no margin on that taxation.  
 18 **Q.** Yes.  
 19 **A.** As a retailer, we can't make margin on taxation.  
 20 **Q.** I think that was exactly the point inelegantly I was  
 21 trying to --  
 22 **THE CHAIRMAN:** That's not the point that when we discussed  
 23 this with Mr Mason yesterday, I asked him why there was  
 24 a lower percentage gross margin for tobacco than there  
 25 was for other grocery products.

1 **A.** Yes.  
 2 **THE CHAIRMAN:** I don't recall him saying anything about  
 3 that.  
 4 **MR HOWARD:** I think the thing is you listed various factors,  
 5 all of which were true, but you didn't list this factor,  
 6 which I think is in fact the predominant reason. In  
 7 other words, what you said was about, for instance, it's  
 8 absolutely right, cigarettes take up less shelf space  
 9 than baked beans, so you can afford, for that reason, as  
 10 Mr Mason explained, it's just obvious common sense, you  
 11 can have a lower margin. But the absolutely critical  
 12 point as to why the margins are much lower is this  
 13 point, and if one actually thinks about it, it's not  
 14 a very surprising point, the same with petrol, for  
 15 instance.  
 16 It's the point I was making to you, if one just  
 17 thinks about it, it's a lot quicker if I make the point.  
 18 It would be very odd to the consumers if the Chancellor  
 19 puts up the price of tobacco by £1, just for the sake of  
 20 argument, but Mr Retailer says "Mr Consumer, you have to  
 21 pay another £1 to now George Osborne, and I am going to  
 22 get 10p of that as well". Mr Consumer wouldn't be very  
 23 happy about that. In other words, it's £1.10.  
 24 You are right that when you have 5 per cent you are  
 25 still actually doing that, but it is less, as it were,

1 inimical to the interests of the consumer. That's why,  
 2 as the tax rate goes up, your gross margin -- your  
 3 actual margins maybe be the same, the profit you make  
 4 may be the same, but if you look at it in terms of gross  
 5 margins, they are actually coming down.  
 6 **DR SCOTT:** But we looked at tab 50, which has a table, and  
 7 in tab 50 what appears to be going on is that both the  
 8 percentage margin and the cash margin are going up.  
 9 This is page 83 in tab 50.  
 10 **MR HOWARD:** Yes.  
 11 **A.** From a retail perspective, then at the time of Budget  
 12 increase, the margin percentage falls. The Chancellor  
 13 says "I am putting up the price of a packet of  
 14 cigarettes by 10p, therefore it will be 10p and that is  
 15 it", there is no alternative, the consumer won't accept  
 16 any movement on that.  
 17 **DR SCOTT:** We understand that.  
 18 **A.** Then there was a margin percentage correction the MPI  
 19 went through. Other than that, then any movement in  
 20 margin percentage will be down to yourselves and you can  
 21 negotiate with the supplier.  
 22 **THE CHAIRMAN:** Yes, that's what I thought Mr Batty's  
 23 evidence was, that the MPI following the Budget increase  
 24 would restore the margin, but you are still saying that  
 25 the margin is nonetheless smaller when you compare it to

1 other grocery products, because --  
 2 **MR HOWARD:** They don't carry -- if you buy baked beans, the  
 3 Government doesn't get any of the baked beans. There is  
 4 no VAT on food, so the Government doesn't actually get  
 5 anything. There is no tax collection in respect of most  
 6 grocery items. There is in respect of alcohol, there is  
 7 in respect of petrol, and there is in respect of  
 8 tobacco. I don't think there is anything else, is  
 9 there, where you are acting as a tax collector?  
 10 **A.** Odd things, little 5 per cent things kicking about.  
 11 **Q.** There is the odd so-called luxury item, I suppose?  
 12 **A.** Propane gas or something.  
 13 **Q.** The simple point is, I think where we have got to on  
 14 this, and I'll come back to the document Dr Scott was  
 15 asking about, if one is trying to understand why margins  
 16 are low, one of the important factors for that, gross  
 17 margins, is this tax take and that in trying to  
 18 determine appropriate margins you have to take account  
 19 of the fact that a lot of the money is actually in  
 20 reality going to the Revenue, and you don't want to be  
 21 seen to be profiteering on the back of what the  
 22 Chancellor is doing?  
 23 **A.** That would restrict margin percentage, but the biggest  
 24 impact would be the cost base going up and sales going  
 25 down, which would restrict your net profit, from

73

1 a retailer's perspective that would be far more  
 2 important.  
 3 **Q.** If you turn to tab 50, a point that Dr Scott was asking  
 4 about, and this was a document I think showing, if you  
 5 go to the third page of tab 50, I think it was  
 6 a document from ITL in which they were showing  
 7 an improvement in margins for Asda between -- one can  
 8 see, if you compare the position between February 1999  
 9 and February 2002, you have it in the bottom table, one  
 10 sees some increases in the percentage margin of a fairly  
 11 low amount. Do you see that? (Pause). The fact that  
 12 we see increases in cash margin, in the margin and the  
 13 cash margin, what would cause that? What would allow  
 14 one to get up, say, from 4.805 to 5.581 per cent?  
 15 **A.** Sorry, the 4.805 is Regal Kingsize 20s.  
 16 **Q.** I was just looking at Regal 20s, we see that they went  
 17 up over three years --  
 18 **A.** To 5.581.  
 19 **Q.** -- your percentage margin went up. What is it that  
 20 Imperial could be doing that could assist in getting the  
 21 margin up?  
 22 **A.** I can't really say. From 1999, 2002, at some stage in  
 23 that we went into central distribution on cigarettes, so  
 24 I am not sure if that's included in the terms or not and  
 25 price that with Palmer & Harvey, so I am afraid I cannot

74

1 honestly answer your question.  
 2 **Q.** Just to pick up Dr Scott's point, I suppose the fact  
 3 that the margins are very low comparatively presumably  
 4 didn't mean there wasn't room to try and improve them,  
 5 and steps could be taken to do that?  
 6 **A.** Yes. The cash margin shown on there of 2.00, is that --  
 7 what is that? There is no definition of anything, you  
 8 see.  
 9 **Q.** No. It doesn't matter, you didn't see it at the time,  
 10 and we can see what the letter says.  
 11 Can I just ask you this, on a totally separate note:  
 12 you became involved in 2002, and you have explained your  
 13 approach. At paragraph 22, the third sentence, you say  
 14 that:  
 15 "The only real limitation on retailers' pricing  
 16 freedom was and remains the low margins on tobacco  
 17 products which gave us limited room to manoeuvre without  
 18 selling at a loss."  
 19 What I want to ask you about is what your  
 20 understanding was of the position as a result of the  
 21 trading agreement with Imperial: did you understand in  
 22 any way that that restricted what you would do vis-a-vis  
 23 the price of the Gallaher brand?  
 24 **A.** Of the?  
 25 **Q.** Gallaher brand. Did Imperial's agreement in any way

75

1 restrict you, as you understood it, in relation to what  
 2 you were to do with Gallaher?  
 3 **A.** No, there was no impact on Gallaher at all.  
 4 **Q.** Mr Lasok asked you a question: what was envisaged, he  
 5 said, under the ITL agreement, whenever Asda moved its  
 6 prices for the products listed in ITL's strategic  
 7 requirements, that meant that Asda had to maintain  
 8 parity. I want to just ask you some points about that,  
 9 so you understand what it is the OFT is saying, albeit  
 10 not properly spelt out.  
 11 Let's think of the six different scenarios you need  
 12 to consider in the light of Mr Lasok's question. The  
 13 first is: Imperial comes to you with the price file and  
 14 discussion and they say, "We want to get the price of  
 15 Richmond down because we want to try and enhance our  
 16 position with Richmond, and we will pay you a bonus of  
 17 5p to reduce Richmond down, say, to £3.29, it having  
 18 previously been at £3.34". And let's say you say "Thank  
 19 you very much, Mr Hall, we will do that".  
 20 Now, just stop for a moment. Where Imperial comes  
 21 along offering 5p to reduce the price of its cigarettes,  
 22 and they are maintaining your margin requirement, is  
 23 there any reason why, from Asda's point of view, you  
 24 wouldn't go along with that?  
 25 **A.** No. The only debate we would probably have was over

76

1 maintenance of margin percentage or cash margin per  
 2 pack.  
 3 **Q.** If your margin is maintained, and Imperial is reducing  
 4 its price on the basis that it wants that price  
 5 reduction to go through to the consumer, who is the  
 6 ultimate beneficiary of that?  
 7 **A.** Ostensibly the consumer.  
 8 **Q.** Now, in that event --  
 9 **THE CHAIRMAN:** When you say "ostensibly", why ostensibly?  
 10 **MR HOWARD:** Why ostensibly?  
 11 **A.** In the short-term it might be. Whether it's worthwhile  
 12 in the longer term for the consumer across the whole  
 13 category I don't know. In the short-term on that  
 14 product and that action then it's to the benefit of the  
 15 consumer.  
 16 **THE CHAIRMAN:** Why might it not be in the longer term?  
 17 **A.** Because if the consumer doesn't buy that brand, then  
 18 that marketing money has been put into a brand they  
 19 don't purchase, for example.  
 20 **MR HOWARD:** So the consumer who doesn't want Richmond, he is  
 21 not benefitting.  
 22 **A.** No.  
 23 **Q.** And a non-smoker doesn't benefit equally?  
 24 **A.** No.  
 25 **Q.** But that's not really of great interest. But the

1 Richmond smoker, he presumably is benefitting?  
 2 **A.** Yes.  
 3 **Q.** Now, in that scenario, you having put down the price of  
 4 Richmond, what did you understand you were supposed to  
 5 do with the Gallaher brand that competed?  
 6 **A.** Nothing.  
 7 **Q.** From your point of view, could you explain what  
 8 commercial sense you would see in a suggestion that you  
 9 were supposed to, having taken this 5p from Imperial to  
 10 reduce the price of their cigarette, then reduce the  
 11 price of the competing brand?  
 12 **A.** There would no logic in that, it would be commercially  
 13 unacceptable.  
 14 **Q.** Take the different scenario where it's Gallaher who come  
 15 to you and they say they want to reduce the price of  
 16 their brand, Dorchester and they do the same little  
 17 dance with you and they pay you to reduce the price of  
 18 Dorchester, and Imperial hasn't done anything. What are  
 19 you required to do, as far as you understood it, with  
 20 the Imperial brand?  
 21 **A.** Nothing.  
 22 **Q.** If Imperial wants to come down, if they say "we can't  
 23 have this, we can't have Dorchester 5p cheaper because  
 24 that means they are going to get our market share, what  
 25 do they have to do?

1 **A.** They have to reduce their cost price.  
 2 **Q.** If Imperial, having, in the example I gave you, paid you  
 3 this bonus, are they obliged to maintain it or how does  
 4 it operate?  
 5 **A.** Entirely up to them.  
 6 **Q.** If they choose to say, "This is costing me too much  
 7 money, I can't afford it any more and I am going to  
 8 withdraw that 5p bonus", what's the impact it then has  
 9 on you, the bonus having got the price down from 3.34 to  
 10 3.29?  
 11 **A.** The retail price would revert back to where it was.  
 12 **Q.** If Imperial does this, they get you to put the price  
 13 down as a result of having paid this bonus, and assume  
 14 that what had happened was Gallaher had chased them  
 15 down, then Imperial gives up and withdraws its bonus,  
 16 but Gallaher does nothing and continues to pay the  
 17 bonus. What then do you have to do, as you understood  
 18 it, vis-a-vis the Gallaher brand?  
 19 **A.** Nothing. Stays in place.  
 20 **Q.** Looking at matters, a slightly separate point, I think  
 21 we can skip over the position of Gallaher withdrawing  
 22 the bonus and come to the MPI. If there is an MPI where  
 23 Imperial puts up its price, so it says "I am putting up  
 24 the price of cigarettes across the board", and let's  
 25 take Richmond, so Richmond to go up 6p and Gallaher

1 hasn't done anything yet. They may or may not have  
 2 an MPI but they have not done anything yet. Firstly,  
 3 what's the effect to you of Imperial putting up their  
 4 prices?  
 5 **A.** In the short-term, we would have some form of stock  
 6 cover, but over time we would be forced to -- our margin  
 7 would diminish and we would be forced to raise retail  
 8 prices.  
 9 **Q.** As far as you were concerned, if Imperial went first  
 10 with its MPI and Gallaher didn't respond, what did you  
 11 understand Imperial expected or required you to do  
 12 vis-a-vis the Gallaher brand?  
 13 **A.** They would have no expectation.  
 14 **Q.** Conversely, if Gallaher had an MPI and Imperial did  
 15 nothing, so you put up the price presumably of the  
 16 Gallaher brand, what would Imperial expect you to do  
 17 vis-a-vis its brands?  
 18 **A.** Nothing again.  
 19 **Q.** Yes.  
 20 **THE CHAIRMAN:** Well, there has been some discussion that  
 21 they might be concerned that you would anticipate their  
 22 price increase by actually raising the prices of the  
 23 Imperial product before their MPI, thinking, "Well, if  
 24 the market sees Dorchester go up they won't be surprised  
 25 to see Richmond go up, so we will increase our margin

1 temporarily by ourselves increasing the Richmond  
 2 product". Would you ever do that?  
 3 **A.** No. The price moves up -- if you are talking about  
 4 MPIs?  
 5 **THE CHAIRMAN:** Yes. We are talking about if there was  
 6 a time lag between the MPIs.  
 7 **A.** If there is a time lag in the MPIs, then our first  
 8 priority would be we would get the information through,  
 9 let's say it was Gallaher going first, we would look at  
 10 the market response to that. Normally I would expect  
 11 Tesco to move up first, very quickly. I would expect  
 12 Sainsbury's to follow. Morrisons to be latter -- the  
 13 last to move, and we would probably move our prices up  
 14 in, say, two weeks after the cost increase. We would  
 15 have some stock to cover that period as well and we  
 16 would expect to have a small stock surplus as well,  
 17 which would be ...  
 18 **THE CHAIRMAN:** Just looking at the --  
 19 **A.** And as far as Imperial were concerned, which would not  
 20 move it at all.  
 21 **THE CHAIRMAN:** So you don't think there was ever an occasion  
 22 where you would have increased the competing brand  
 23 thinking, "Well, they are bound to increase their prices  
 24 shortly so we will increase our prices now to get the  
 25 benefit of that margin before their MPI"?

1 **A.** Any margin benefit -- we would never do that. Any  
 2 margin benefits we accrued were by virtue of our stock  
 3 benefits that we could negotiate and our contract terms  
 4 we could negotiate.  
 5 **DR SCOTT:** Presumably, as we understand it, there were  
 6 weekly telephone contacts between somebody at Asda and  
 7 somebody at the manufacturers.  
 8 **A.** Probably, yeah.  
 9 **DR SCOTT:** And we know that everybody was watching everybody  
 10 else's prices, both inter-retailer and  
 11 inter-manufacturer.  
 12 **A.** Yes.  
 13 **DR SCOTT:** So when one party had moved and that was  
 14 observed, or when somebody knew that the other party was  
 15 moved, presumably that would be discussed in the weekly  
 16 telephone calls?  
 17 **A.** I would suspect that we would be advised by Gallaher  
 18 that Tesco have moved their price. I would not be  
 19 advised by Gallaher that Tesco are moving their price.  
 20 Only if they have moved it. And at a time when there  
 21 was an MPI, there would be a process we would go  
 22 through, so we would do a visual inspection, and we knew  
 23 what the running order was going to be, and you knew,  
 24 given the magnitude of the increase what the likelihood  
 25 was going to be of how quick. Because the bigger the

1 increase, the quicker it was going to go through. If it  
 2 was a fairly modest increase then you knew it was going  
 3 to get a bit rocky, and we were going to be going up and  
 4 down a little bit, but if it was a large increase then  
 5 it would be quick and to the point.  
 6 **DR SCOTT:** Sometimes there would be a bit of turbulence and  
 7 a --  
 8 **A.** There would be. If it was a relatively small amount  
 9 then you would find that people would -- buyers would  
 10 make decisions about tactical pricing. We would,  
 11 anyway, and so we would probably start a lot of it off  
 12 ourselves actually, in terms of how we price, so we  
 13 wouldn't pass it on in full on certain brands. So it  
 14 would get a bit scrappy.  
 15 **DR SCOTT:** Thank you.  
 16 **MR HOWARD:** You were asked some questions about the purpose  
 17 or object of the agreement.  
 18 **THE CHAIRMAN:** Well, if you are moving to a different topic  
 19 from your six scenarios, is that a good place to break?  
 20 **MR HOWARD:** It is. The only point I would make is that  
 21 I don't have a great deal more, and I don't know, there  
 22 is a possibility we could just finish and then finish  
 23 for the day, that's all.  
 24 **THE CHAIRMAN:** Ah. Mr Flynn, do you have any questions you  
 25 are going to ask?

1 **MR FLYNN:** Yes, Madam, I do have one or two questions, and  
 2 I don't think we will get through it in five or ten  
 3 minutes.  
 4 **THE CHAIRMAN:** We will take a break, then. We are going to  
 5 adjourn now for lunch and we will come back at five past  
 6 2. Again, Mr Lang, you mustn't speak to anybody, I am  
 7 afraid, over the adjournment. Thank you.  
 8 (1.07 pm)  
 9 (The short adjournment)  
 10 (2.05 pm)  
 11 **MR HOWARD:** Thank you. Just a couple more points, please.  
 12 Could you look in the correspondence bundle you have,  
 13 annex 14, and go to tab 65. You see the email at the  
 14 bottom of the page, 11 November. {D14/65(a)/178}.  
 15 **A.** Sorry, 65?  
 16 **THE CHAIRMAN:** 65(a).  
 17 **MR HOWARD:** I beg your pardon, it's 65(a): do you see the  
 18 email at the foot of the page?  
 19 **A.** Yes, I am with you.  
 20 **Q.** Could you just read that to yourself? It goes over the  
 21 page.  
 22 (Pause)  
 23 We see that what Imperial was suggesting was a price  
 24 promotion whereby they were going to a fund a price  
 25 reduction with a bonus, and they were asking for

1 confirmation of Asda's agreement to it. Can you tell  
 2 us: why was it necessary for Asda to agree?  
 3 **A.** We would implement the retail price in line with the  
 4 cost price reduction. We would have to change the --  
 5 physically change the retail price ourselves. ITL  
 6 couldn't do that. So we would agree a date when it  
 7 would happen.  
 8 **Q.** So whose decision would it be as to, for instance,  
 9 whether you did accept the bonus and reduce your price?  
 10 **A.** It would be our decision, we would naturally accept it,  
 11 but we would have to implement it ourselves.  
 12 **Q.** You were asked some questions about the purpose of the  
 13 trading agreement, and you explained to Mr Lasok that  
 14 Imperial's concern was that its relatively lower cost  
 15 prices should be reflected in relatively lower shelf  
 16 prices, and that's what it was seeking to achieve?  
 17 **A.** Correct.  
 18 **Q.** What I would like you to do is just tell us: how did you  
 19 learn that that was Imperial's concern?  
 20 **A.** It was an obvious fact that they would support it on the  
 21 condition that we reduced our retail price, there wasn't  
 22 really a learning curve in it. If we did deviate from  
 23 it for whatever reason, then we would get a call from  
 24 Imperial. But I am not sure there was any learning, it  
 25 was just assumed.

85

1 **Q.** Yes. This concern that you say you recognised in  
 2 Imperial of seeking to get lower cost prices being  
 3 reflected in lower selling prices, was there anything  
 4 unusual in a manufacturer or supplier having such  
 5 a concern?  
 6 **A.** No, if you receive a cost price reduction on  
 7 a promotional basis then there would be an expectation  
 8 that the retail price would be reduced and that you  
 9 would sell more of the manufacturer's product. That  
 10 would be true of all areas, I think.  
 11 **Q.** I want to ask you about the situation where Imperial  
 12 has, let's say you are selling the price of Richmond for  
 13 £3.34, and they have a bonus whereby they say -- offer  
 14 you -- actually, we could take the example here we were  
 15 looking at, it's easier than doing it hypothetically,  
 16 the one you have open where they were trying to  
 17 reduce -- in fact, it's Philip Morris in respect of  
 18 Raffles and they want to reduce the Asda shelf price to  
 19 19.99. Do you see that?  
 20 **A.** Yes.  
 21 **Q.** So they are going to pay 60p, and as I understand it,  
 22 the 60p reduction with the retrospective bonus, that  
 23 then will translate -- because of the effects of VAT and  
 24 things like that -- to the 71p reduction; is that right?  
 25 **A.** It would be a straight VAT on top of 60.4, yes.

86

1 **Q.** So in other words 61 equals 71; is that really what it  
 2 amounts to?  
 3 **A.** At retail, yes.  
 4 **Q.** Sorry, you have to speak up.  
 5 **A.** At retail, yes.  
 6 **Q.** If we just think about it slowly for a moment. What  
 7 would you understand when you received this email at the  
 8 time? In paying the bonus and seeking to reduce the  
 9 shelf price of Raffles 100 multipacks, what's Imperial  
 10 trying to do? Why does it want to do that?  
 11 **A.** It would be repositioning that product for a period of  
 12 time across the whole of the UK market, so every  
 13 multiple retailer would be moving its price down to  
 14 19.99.  
 15 **Q.** Right. In the event that you took the 60p or whatever  
 16 it is, 60.4p I suppose, and you priced -- you decided to  
 17 slice your own margin and you priced Raffles at £19.90,  
 18 say.  
 19 **A.** It would be a big slice. We might choose 19.98.  
 20 **Q.** It doesn't really matter, 19.98. What was your  
 21 understanding as to what Imperial's view of that would  
 22 be?  
 23 **A.** They wouldn't be unduly concerned. There may have got  
 24 a phone call, but I doubt it, from a competitor.  
 25 **Q.** Right.

87

1 **THE CHAIRMAN:** Sorry, could you just explain that answer?  
 2 You said they wouldn't be unduly concerned. There might  
 3 have been a phone call from a competitor?  
 4 **A.** Yes. If there is any variation, then you would tend to  
 5 get Tesco might phone up and say --  
 6 **THE CHAIRMAN:** What, phone you up?  
 7 **A.** No, they would phone Imperial in this case. If we  
 8 were --  
 9 **THE CHAIRMAN:** So if you overimplemented, if I can say that,  
 10 the bonus, then --  
 11 **A.** They may get a call.  
 12 **THE CHAIRMAN:** -- they may get a call from other retailers  
 13 saying obviously Asda is getting a better deal from us,  
 14 can we have that deal?  
 15 **A.** And Imperial would say no, they are not, it's a straight  
 16 discount to everyone, that's what they're doing --  
 17 **DR SCOTT:** If you had Raffles at 19.99 and then took ITL's  
 18 multipacks down to 19.98, that would you expect to  
 19 happen then?  
 20 **A.** Sorry, these are ITL's multipacks Raffles. If you  
 21 took --  
 22 **MR HOWARD:** Philip Morris is --  
 23 **DR SCOTT:** They are distributing, yes. Sorry. Yes,  
 24 I remember now, Philip Morris has now been taken over,  
 25 yes.

88

1 **MR HOWARD:** They are agents for certain Philip Morris  
2 brands, Marlboro is the main one, I think, but this is  
3 also another one.  
4 **A.** So if you are asking me: what would you do if we took  
5 a Gallaher price down, then competitors would make the  
6 same phone call, that would be it, just a price movement  
7 and everyone watches everyone.  
8 **THE CHAIRMAN:** We have also heard some evidence from other  
9 people saying that they might be concerned if you  
10 reduced the price further than they were funding, that  
11 you would then go back to them after a period and say  
12 "Oh, sorry, we made a mistake but can you please fund us  
13 the rest of the bonus", and that you might then hold  
14 that over their heads in some future bargaining  
15 situation if they refused to fund that additional  
16 reduction. Is that something you remember doing or  
17 would it --  
18 **A.** Nothing we ever did. We make mistakes but ... so that's  
19 it.  
20 **MR HOWARD:** So you made mistakes, they were your mistakes,  
21 but I think you also told us there were many lines where  
22 there were bonuses going on, and presumably,  
23 therefore --  
24 **A.** There were lots.  
25 **Q.** How difficult was the accounting to ensure that one had

1 got it all right?  
2 **A.** Well, Guy did a very good job of accounting for it  
3 correctly and putting the price through but it was  
4 difficult, and we did on occasion make mistakes where we  
5 didn't implement a retail reduction which we should have  
6 done because the cost of production had gone through --  
7 **Q.** I am sorry?  
8 **A.** It did happen on occasion.  
9 **Q.** In terms of the examples where there is a price  
10 reduction as a result of a bonus, obviously if you don't  
11 implement it and they paid you, say, in this example  
12 they pay you 60p-odd to go to 19.99 and you keep the  
13 price at, whatever it was before, £20.70, what would you  
14 expect their reaction then to be?  
15 **A.** I would expect them to phone up and complain, ask us to  
16 reduce the price because we have accepted the bonus.  
17 **Q.** Right. If you go down below 19.99 to 19.98, and they  
18 ring up and say "Well, we are only providing a bonus of  
19 60p, you do understand that?" And you say "Well, we  
20 want to go lower because we want to do it out of our  
21 margin because we want to be more competitive than  
22 Tesco", would they object to that?  
23 **A.** Sorry, would they?  
24 **Q.** Would Imperial have any objection if you said "Out of  
25 our own margin we are going down to 19.98"?

1 **A.** No, they would have nothing to debate, really, it may  
2 cause them aggravation.  
3 **THE CHAIRMAN:** Do you ever remember that happening?  
4 **A.** What, that they would come back and query?  
5 **THE CHAIRMAN:** No, that you did that and that they --  
6 **A.** There was quite a bit later on. It was odd pence but  
7 there was quite a bit of activity where we did special  
8 pricing. Guy would remember it better than myself, but  
9 we frequently went into pricing on, against --  
10 especially in response to other competitors. So if (a)  
11 a retailer chose to discount a brand, then frequently we  
12 would just discount differently. Small amounts, but we  
13 would do it.  
14 **MR HOWARD:** Am I correct in understanding you are saying  
15 that where you failed to reflect the bonus because your  
16 price was too high, in other words they paid you 60p to  
17 go down 71p and you hadn't, if you did that, they would  
18 ring up and complain?  
19 **A.** Yes, they would.  
20 **Q.** But if you went the other way and of your own motion you  
21 decided to go lower, then, as I understand it, you are  
22 saying that didn't provoke any response?  
23 **A.** They may or may not call, but there was nothing they  
24 could do, that was it. There wasn't any punitive action  
25 taken.

1 **Q.** No, but was it anything they were objecting to?  
2 **A.** Not vehemently, no.  
3 **Q.** At all?  
4 **A.** As I say, it may cause them some aggravation from other  
5 retailers, but it wouldn't materially affect them, and  
6 therefore there would be no great come-back.  
7 **Q.** Okay. You told us that the purpose of the agreement, as  
8 you understood it, was that Imperial had a concern that  
9 their relative lower cost prices should be reflected in  
10 the lower shelf prices, and I think you told us: well,  
11 actually they were silly to be concerned about that  
12 because you would have done that anyway. Have  
13 I correctly understood it?  
14 **A.** That's correct, yeah. The competitive nature of the  
15 market dictated that we would.  
16 **Q.** I just wanted to be clear, so insofar as we look at what  
17 happened in relation to the Imperial brands as against  
18 the Gallaher brands, and your pricing of them, to what  
19 extent does the pricing that goes onto the shelves  
20 reflect the cost prices that you were incurring?  
21 **A.** It would reflect the cost prices excepting -- at least  
22 in a maximum sense, excepting where we chose to price at  
23 a different level.  
24 **Q.** Insofar as you were pricing Imperial, let's say Imperial  
25 said that they wanted Richmond to be no more expensive

1 on the shelf than Dorchester, to what extent was that  
 2 desire reflected in cost prices of Richmond being no  
 3 greater than that of Dorchester?  
 4 **A.** The expectation would be that Imperial would ensure that  
 5 their costs were such that they could meet those  
 6 expectations vis-a-vis competing brands.  
 7 **Q.** If Imperial failed to do that, so let's say they  
 8 priced -- let's say their cost price of Dorchester -- of  
 9 Richmond they put up above that of Dorchester, to what  
 10 extent then would you regard yourself as obliged to  
 11 price Richmond nevertheless at the same price as  
 12 Dorchester?  
 13 **A.** We wouldn't. There would be no obligation to do that.  
 14 **Q.** And to what extent did you?  
 15 **A.** Never.  
 16 **MR HOWARD:** Thank you very much.  
 17 **THE CHAIRMAN:** Yes, Mr Flynn.  
 18 Re-examination by MR FLYNN  
 19 **MR FLYNN:** Thank you, Madam. Mr Lang, I think you said in  
 20 your evidence that you doubted that you were in  
 21 compliance, as it were, with ITL's wishes under the  
 22 trading agreement as regards ranging, pricing and  
 23 I think you said that you doubt that any of those  
 24 targets were actually met.  
 25 **A.** I would -- we would have loose ranging agreements,

1 I doubt whether -- our interpretation would be slightly  
 2 different from theirs, I doubt whether we always  
 3 fulfilled our obligations.  
 4 **Q.** Could you turn to annex 14, could you have a look at  
 5 tab 72, please. {D14/72} You see there, are we looking  
 6 at the same document?  
 7 **A.** ITL trading agreement.  
 8 **Q.** At the front, this seems to be a photocopy of  
 9 a compliment slip from Imperial Tobacco.  
 10 **A.** Yes.  
 11 **Q.** I think that's Mr Hall's signature?  
 12 **A.** Yes.  
 13 **Q.** It says:  
 14 "Guy, please find enclosed copy of the 2002  
 15 agreement signed by John Jolliff."  
 16 You see that?  
 17 **A.** Yes.  
 18 **Q.** The date of this appears to be 13 April 2003. It says:  
 19 "None of the required new lines shown in red were  
 20 listed through the period of the agreement, however, as  
 21 you know, full payment was made."  
 22 Is that an example of the sort of non-compliance you  
 23 were thinking of?  
 24 **A.** I think that might be a little extreme. Non-compliance.  
 25 But yes, we would be -- we would hope to be a bit better

1 than that.  
 2 **Q.** Their hopes were not -- you said, I think -- likely to  
 3 have been --  
 4 **A.** No.  
 5 **Q.** Would you say this was an example of that?  
 6 **A.** It's an extreme example of it, yes.  
 7 **Q.** An extreme example?  
 8 **A.** Yes.  
 9 **THE CHAIRMAN:** Why is Mr Hall sending this to Mr Mason? Can  
 10 you remember the context in which he sent him this, or  
 11 what was done about it?  
 12 **A.** Well, he had obviously sent him a copy of the agreement,  
 13 because that's been requested, but why he makes the  
 14 point about non-listed lines, just to make the point.  
 15 **THE CHAIRMAN:** You think that Mr Mason requested a copy of  
 16 the agreement?  
 17 **A.** I would suspect so, yes.  
 18 **MR FLYNN:** Does that suggest to you that Mr Mason, before  
 19 that, was very familiar with the terms of the agreement?  
 20 **A.** Would it have been in the period when we were  
 21 formulating the new agreement or was it post that?  
 22 **Q.** It's April 2003.  
 23 **A.** Sent April 2003. I can't remember when the new  
 24 agreement started from.  
 25 **THE CHAIRMAN:** It was later on, wasn't it?

1 **MR FLYNN:** We had a look at that, it came together in about  
 2 July.  
 3 **A.** Right, so this would be in the early stages of  
 4 formulating the new agreement --  
 5 **Q.** And Mr Hall is making the point that full payment has  
 6 been made?  
 7 **A.** Yes.  
 8 **Q.** I think the Chairman has asked a question I was going to  
 9 ask you as to why that might have been sent.  
 10 We looked at the new trading agreement that was  
 11 signed during the period that you and Mr Mason were in  
 12 the chair, as Mr Jolliff called it, which is at tab 80  
 13 of that file. You told us, I think, that the text was  
 14 run by the legal department?  
 15 **A.** Yes.  
 16 **Q.** And the phrase right at the end was added in --  
 17 **A.** I believe it was.  
 18 **Q.** -- probably at their suggestion, I think was the burden  
 19 of your evidence.  
 20 Have you any legal training, Mr Lang?  
 21 **A.** No.  
 22 **Q.** Did Mr Mason?  
 23 **A.** No.  
 24 **Q.** Would Mr Jolliff have had any legal training?  
 25 **A.** I don't think so.

1 Q. From your perspective as the manager of the category,  
 2 did this agreement operate in any different manner from  
 3 what was in place before?  
 4 A. No.  
 5 Q. Did the addition of these words make any substantive  
 6 difference to your day-to-day dealings with Imperial?  
 7 A. No.  
 8 Q. Or your understanding of what the deal was?  
 9 A. No.  
 10 Q. You were asked by the Tribunal about Balmoral. This is  
 11 a separate point now, no need to go to any documents  
 12 about that. You explained that Balmoral was an own  
 13 brand. OPP I think was the abbreviation. What impact  
 14 did you want having your own brand OPP to have on the  
 15 manufacturers with the major brands?  
 16 A. It provided a benchmark for the gantry, it gave us  
 17 an opening price point, it gave customers value and it  
 18 ensured a degree of competitiveness at the bottom end of  
 19 pricing. So for those three reasons -- four reasons, we  
 20 wanted to keep it, maintain it and grow it as a brand.  
 21 Q. What do you mean by competitiveness at the bottom end?  
 22 A. If we have a price on the gantry of 3.99 a pack, for  
 23 example, it means that the likes of the discounted  
 24 brands from the majors have to compete against that, so  
 25 it encourages a degree of competition at the bottom end

1 of the market, with their brands like Sterling, say,  
 2 which were trading at say 4.20. So it encourages that.  
 3 Q. What other brands are trading at that sort of level?  
 4 A. Balmoral would have been the cheapest. There are now  
 5 some -- after the event, but there are 19 packs now.  
 6 Q. The ones you said like Sterling, Sterling and others?  
 7 A. Well, there is Lambert & Butler, who would be slightly  
 8 higher, but that's the bottom end of the market.  
 9 Q. Towards the bottom end of the market?  
 10 A. That would be our lowest margin pack as well, Lambert &  
 11 Butler.  
 12 Q. Okay. Could we have a look at document 50, please, in  
 13 the file. Just because a certain amount of interest  
 14 seems to have been attached to this. You remember this  
 15 is the document in which Mr Hall is writing to  
 16 Mr Jolliff, so it's not a letter directly to you, but  
 17 Mr Hall is saying basically cash margins good,  
 18 percentage margins are better, everything in the garden  
 19 is rosy. Would you take on trust or at face value  
 20 everything that Mr Hall wrote to you, to Asda?  
 21 A. No.  
 22 Q. Why not?  
 23 A. Well, anyone trying to prove a point would obviously  
 24 choose moments in time, and as I said before, I didn't  
 25 really understand the table, but the comparisons of

1 3 February with 25 February, three years apart, I don't  
 2 know what they actually mean. I would want to pull my  
 3 own data in terms of what our relative performance was.  
 4 Selection of four, five brands. I don't know that it's  
 5 meaningful at all.  
 6 Q. What was your relationship with Mr Hall?  
 7 A. It tended to be somewhat combative. He was -- used the  
 8 authority of his company rather than his own personal  
 9 style, I think. Tended to be on the aggressive side,  
 10 less so -- far more so than with Gallaher.  
 11 Q. So would you generally do what Mr Hall told you?  
 12 A. No.  
 13 MR FLYNN: I think that's all my questions, thank you very  
 14 much, Mr Lang.  
 15 Further questioned by THE TRIBUNAL  
 16 THE CHAIRMAN: Do you have any sense, if you didn't take  
 17 Mr Hall's word for it, as to whether margins had  
 18 improved over the period that you were in charge of this  
 19 account?  
 20 A. I didn't actually look at -- I took things from a zero  
 21 base and looked at what our net margin position was then  
 22 and how we could build that going forward. So I didn't  
 23 actually go back in time. As I say, there were things  
 24 that coloured it anyway in terms of central distribution  
 25 that made things difficult to go like for like basis, so

1 we looked at individual lines and their profit  
 2 contribution and then looked at what we could do going  
 3 forward.  
 4 MR SUMMERS: Forgive me, I can't remember, when did Wal-Mart  
 5 get involved in Asda?  
 6 A. That's a good question. I think it was 1998 or 1999.  
 7 I think so. But that was a major event change.  
 8 MR SUMMERS: Did they introduce any practices which had any  
 9 impact on the tobacco sector?  
 10 A. No. The only impact it had, actually there was no  
 11 change at all in the way Asda operated in the Wal-Mart  
 12 takeover, they left all the people in place and there  
 13 were certain key individuals who they desperately wanted  
 14 to keep in place, like Alan Leighton, for example. The  
 15 only thing that happened is pricing became a little more  
 16 aggressive in the marketplace as a result of Wal-Mart,  
 17 I'm told that cigarette pricing became a no-fly zone for  
 18 Tesco, for example, who as soon as Wal-Mart took over,  
 19 Tesco -- sorry, Asda then they went to a price match  
 20 position. They saw it as a very dangerous situation for  
 21 them, Wal-Mart coming into the UK.  
 22 MR SUMMERS: Is it your sense that they were more interested  
 23 in the net cash profit than they were on margin?  
 24 A. This is Wal-Mart?  
 25 MR SUMMERS: Yes.

1 A. They were interested in growth, that's always been  
 2 an interest. Growth in the marketplace, and they are  
 3 still the same --  
 4 **MR SUMMERS:** What would your KPI have been measured on, on  
 5 margin or on cash profit?  
 6 A. Our total cash margin was the measure, it always has  
 7 been, there wasn't any great movement in it from --  
 8 there wasn't any massive change in the business plan  
 9 from when Wal-Mart took over.  
 10 **MR SUMMERS:** We have heard a lot about margin over the last  
 11 few days, but you are saying to some extent, I think you  
 12 are saying to some extent the way you measured the  
 13 business that was perhaps secondary to the actual cash  
 14 position?  
 15 A. The way we measured it was in terms of our net  
 16 profitability. The company had a global profit number,  
 17 which is its guidance, and that was Wal-Mart's key  
 18 number. The kiosk area took a -- made a contribution  
 19 towards that. But as far as we were concerned in terms  
 20 of running the category we were interested in the net  
 21 profitability of individual lines and ensuring that we  
 22 gave value to customers and that we grew as best we  
 23 could in a falling market.  
 24 **MR SUMMERS:** Thank you very much.  
 25 **DR SCOTT:** Yes, that reflects the conversation that you

101

1 appear to have had on 9 August 2002 which we saw  
 2 reflected in the letter at tab 56, where the report of  
 3 your conversation by Mr Hall says:  
 4 "I have noted that ..."  
 5 Can I read it out, Mr Howard?  
 6 MR HOWARD: Mm.  
 7 **DR SCOTT:** "... your objective is to increase the profit  
 8 from tobacco and I am enclosing a spreadsheet."  
 9 Then he encloses a spreadsheet which presumably is  
 10 a successor to the one we looked at at tab 50. So it's  
 11 clear that they understood you were looking for  
 12 increased profitability?  
 13 A. It would be clear to them, yes.  
 14 **DR SCOTT:** Since, as you have explained, the volumes weren't  
 15 rising, that necessarily means margin.  
 16 A. Well, our cost base was increasing, volumes were  
 17 falling, because obviously the market was 4 per cent  
 18 per annum year on year decline, always, costs were going  
 19 up, the changes to NHI, they were going up, distribution  
 20 costs were going up, and therefore whereas we couldn't  
 21 materially affect our cost of sales in terms of our cost  
 22 to sell, we could do something about cost of sales and  
 23 we could do something about our margin generation, so it  
 24 was important for us to generate high margin and for us  
 25 to maintain net profit position.

102

1 **DR SCOTT:** What you say in your statement about not wanting  
 2 to take prices down at your own expense was reinforced  
 3 by that set of trends?  
 4 A. We would never consider it. No.  
 5 **DR SCOTT:** Thank you.  
 6 A. We weren't in a position to be able to do that.  
 7 **DR SCOTT:** I understand. Thank you.  
 8 **THE CHAIRMAN:** Just one point from me, Mr Lang. Generally,  
 9 your evidence and Mr Mason's evidence seems to be that  
 10 the way the trading agreement operated or didn't operate  
 11 was very different from what we see reflected in the  
 12 actual wording of the agreement and the correspondence  
 13 that we have seen. Now, both you and he seem  
 14 comfortable with the fact that you entered into this  
 15 agreement and then it was renewed in 2003, but you  
 16 didn't feel under any obligation to comply with its  
 17 terms. Were you ever concerned that there might be some  
 18 come-back from more senior people in future about you  
 19 not complying with this agreement? What I am getting at  
 20 is that, if I were in your position, I would want to  
 21 have something on the file from someone senior to me  
 22 saying: yes, we understand that although we sign this  
 23 agreement we don't intend to comply with it so that my  
 24 back is covered, as it were, in case there was some  
 25 future come-back to me saying "Well, why didn't you do

103

1 what you signed up Asda to doing?" But we don't seem to  
 2 see anything like that.  
 3 A. Right. So by my covering my own back internally within  
 4 Asda against --  
 5 **THE CHAIRMAN:** Yes.  
 6 A. -- Imperial not paying up or whatever?  
 7 **THE CHAIRMAN:** Yes, against somebody querying in the future:  
 8 why didn't Asda stick to this agreement that it had  
 9 signed?  
 10 A. It would never occur to me that we wouldn't get all the  
 11 monies owed from Imperial via the agreement. However,  
 12 it was a concern that a lot of money was on retro  
 13 payment, and one of our first major moves was to get  
 14 most of this money off-invoice so we didn't have that  
 15 concern, so we could feel a greater degree of  
 16 independence from both Gallaher and Imperial. So while  
 17 it wasn't a major concern, it was one of the reasons for  
 18 moving it to net net pricing, apart from saving on admin  
 19 costs and everything else, but it gives a greater degree  
 20 of independence.  
 21 There was no major concern that we would break any  
 22 of the agreements because we never envisaged that we  
 23 would do other than reflect RSPs, assuming that they  
 24 would always have cost price movements attached to them,  
 25 to any changes.

104

1 **THE CHAIRMAN:** So you were assuming that by sticking to the  
 2 RSPs you were putting the burden of ensuring that you  
 3 complied with the P&Ds back on to ITL, because you  
 4 assumed that they would reflect those P&Ds or whatever  
 5 P&Ds they wanted at any time in the RSPs?  
 6 **A.** As far as I am concerned, that was always the case, and  
 7 there was only ever one incidence where an attempt was  
 8 made to do other than that.  
 9 **THE CHAIRMAN:** Is that the Drum instance of the --  
 10 **A.** Yes, which I was quite amazed at.  
 11 **THE CHAIRMAN:** Thank you.  
 12 **MR HOWARD:** Could I just ask a question arising out of that?  
 13 **THE CHAIRMAN:** Yes.  
 14 Further cross-examination by MR HOWARD  
 15 **MR HOWARD:** Thank you.  
 16 Could you just turn to the trading agreement at  
 17 tab 53, and turn to page 3 of it, which is where we have  
 18 the provision "Subject to Imperial Tobacco's  
 19 requirements ..." Do you see that?  
 20 **A.** Yes.  
 21 **Q.** "... on [REDACTED] and strategic  
 22 pricing being met, ITL will make a quarterly payment to  
 23 Asda of [REDACTED] per thousand on all cigarette purchases."  
 24 If you then go to, just so we can take it all  
 25 together, tab 80, where you have the --

1 **A.** Sorry, 18?  
 2 **Q.** -- later agreement. Tab 80. In the second paragraph  
 3 you can see the equivalent position.  
 4 I just want to ask you about the questions that  
 5 the Chairman was asking you. In the event that --  
 6 **MR LASOK:** Can this be not a leading question, please.  
 7 **MR HOWARD:** It's not a leading question, Mr Lasok, you don't  
 8 need to worry, I know how to ask questions.  
 9 In the event that you did not comply with the  
 10 agreement here, or the requirement, so in the event, for  
 11 instance, that you failed to meet the range requirement,  
 12 what did you understand the exposure of Asda was in that  
 13 situation?  
 14 **A.** I wouldn't anticipate failing to meet that, because that  
 15 would be formally agreed, but I would expect no exposure  
 16 either.  
 17 **Q.** Right. Let's say at the end of the year Imperial turned  
 18 up and said "We have done a review and we see that, in  
 19 terms of strategic pricing, you have failed to meet our  
 20 requirements 50 per cent of the time and the result of  
 21 that is we say we have suffered losses because we  
 22 haven't been able to sell as many cigarettes through  
 23 Asda's stores", what did you understand, did you  
 24 understand that you would have an exposure to that or  
 25 not?

1 **A.** It wouldn't be an exposure, because we wouldn't fail to  
 2 pass on any line discounts.  
 3 **Q.** Right.  
 4 **A.** So there would be no exposure.  
 5 **Q.** Right. Because you would have done what they wanted  
 6 through the RSPs; is that what you are saying?  
 7 **A.** We would have reflected their cost moves in our retail  
 8 prices.  
 9 **Q.** Right. So what about the availability point? We know  
 10 in fact that you were taken to the document by Mr Flynn,  
 11 I think it's document 72, where they in fact paid you  
 12 the bonus but they were pointing out that none of the  
 13 required lines shown in red had been, I think,  
 14 available?  
 15 **A.** Yes.  
 16 **Q.** Do you see that? Taking that situation, did you at any  
 17 stage understand that if you did not meet the range or  
 18 availability requirement that Asda would have  
 19 an exposure to a claim from Imperial?  
 20 **A.** I envisaged no exposure from Imperial at all, but the  
 21 agreed range I expect to be implemented.  
 22 **Q.** Yes. So if one is asking: whose decision was it as to  
 23 whether or not you met the agreed range or availability  
 24 and so on, whose decision was it?  
 25 **A.** It would be our decision to ensure full availability of

1 product across the piece, and it would be our decision  
 2 to reach an agreement on range that we would get.  
 3 **Q.** If we go back to the agreement at tab 53, I am just  
 4 asking you to just consider -- I know you say -- well,  
 5 we know it did arise, for instance, in respect of the  
 6 point that was made at 72. So what was the worst  
 7 consequence, as far as you were concerned, that could  
 8 follow from your failing to achieve any one of these  
 9 things? What would be the consequence, if any, for Asda  
 10 as far as you were concerned?  
 11 **A.** I wouldn't anticipate any consequences at all.  
 12 **MR HOWARD:** Right. Okay. Thank you very much indeed.  
 13 **MR FLYNN:** I just have one further question to put to  
 14 Mr Lang.  
 15 **THE CHAIRMAN:** All right.  
 16 Further re-examination by MR FLYNN  
 17 **MR FLYNN:** You remember the Drum/Amber Leaf pricing  
 18 incident, just a minute ago you said that you were  
 19 amazed by that, I think.  
 20 **A.** Yes.  
 21 **Q.** What was surprising about it?  
 22 **A.** Surprising that there appeared to be some expectation  
 23 that we would move a retail price at our own cost to  
 24 maintain a competitive position.  
 25 **MR FLYNN:** Thank you.

Confidential  
Asda/ITL

1 **THE CHAIRMAN:** Yes. Well, thank you very much, Mr Lang, for  
 2 coming along, and I can release you from the witness box  
 3 now.  
 4 **A.** Thank you.  
 5 (The witness withdrew)  
 6 **MR FLYNN:** Madam, that completes the evidence, I think, in  
 7 the Asda appeal.  
 8 **THE CHAIRMAN:** Yes.  
 9 **MR FLYNN:** We will move back.  
 10 Housekeeping  
 11 **THE CHAIRMAN:** Right. Now, are we going to have any opening  
 12 on the Sainsbury, Mr Howard?  
 13 **MR HOWARD:** No, I wasn't proposing to, unless there is  
 14 something you want me to assist you on at this stage.  
 15 The only point I think is just worth drawing your  
 16 attention to: the OFT interviewed a number of people  
 17 from Sainsbury's, for reasons best known to themselves  
 18 they are calling one witness only, which is  
 19 Fiona Bayley, who was the buyer for part of the time,  
 20 not all of the time. They have interviewed the people  
 21 who were the buyers before her, and after her, and they  
 22 have also interviewed the people who were her superiors,  
 23 but you are not going to hear from any of them. No  
 24 explanation for that at all, and I think it's right that  
 25 I should just point that out. It's yet another

1 unsatisfactory aspect of the Office of Fair Trading's  
 2 approach.  
 3 **THE CHAIRMAN:** So far as tomorrow is concerned, we are  
 4 naturally keen that this should proceed without  
 5 interruptions arising from claims of confidentiality or  
 6 privilege in respect of draft witness statements.  
 7 Now, as I understand the position, Sainsbury's were  
 8 given permission to intervene specifically in relation  
 9 to the proposed use of draft witness statements, and  
 10 after that ruling was handed down, I gather there was  
 11 correspondence between the parties in which those  
 12 instructing you set out a list, a table of paragraphs of  
 13 various draft witness statements and proofs of evidence,  
 14 which were those paragraphs referred to in the ITL  
 15 notice of appeal, and Sainsbury's agreed that those --  
 16 well, what was the agreement in relation to that?  
 17 **MR HOWARD:** I think there is a sort of -- there is  
 18 a difference of view as to what has and hasn't been  
 19 agreed, in that we had understood the concern was about  
 20 matters being referred to in open court. That's one of  
 21 the reasons we said: let's just pragmatically deal with  
 22 it by going into camera. Beyond that pragmatic dispute,  
 23 we do not accept in fact there is any privilege  
 24 attaching to any of these documents, and that's a view,  
 25 I think, shared by the Office of Fair Trading, and

1 I think they tell us that Mr Lasok has so advised, and  
 2 we agree with that, such privilege as had ever attached  
 3 has long since been waived.  
 4 But we don't want to get detained and distracted by  
 5 this. We think that all of the problems are catered for  
 6 by at least sitting in camera. If Sainsbury's are going  
 7 to say "No, that's not good enough and you mustn't  
 8 deploy any of this material", then potentially there is  
 9 a bigger problem, although I don't think it is in fact  
 10 that likely that I am going to seek to deploy material  
 11 beyond that which we have already referred to, but it's  
 12 possible.  
 13 **THE CHAIRMAN:** Already referred to in these proceedings?  
 14 **MR HOWARD:** In the pleadings.  
 15 **THE CHAIRMAN:** In the pleadings.  
 16 **MR HOWARD:** No, we haven't referred to anything yet in these  
 17 proceedings.  
 18 **THE CHAIRMAN:** No, I meant in the course of this  
 19 correspondence.  
 20 **MR HOWARD:** What I am saying is I think insofar as the  
 21 correspondence -- yes.  
 22 **THE CHAIRMAN:** The point is I have this table which picks  
 23 out certain paragraphs of Ms Bayley's witness statement,  
 24 and I am not clear at the moment what has been agreed in  
 25 relation to those paragraphs which has not been agreed

1 in relation to other paragraphs of the witness  
 2 statement. Or is this simply a list of the paragraphs  
 3 in those witness statements which have been referred to  
 4 in the notice of appeal?  
 5 **MR HOWARD:** This is, I think, a list of things that have  
 6 referred to in the notice of appeal.  
 7 **THE CHAIRMAN:** But is there any agreement with Sainsbury's  
 8 about the use of those in cross-examination as opposed  
 9 to the use of other parts of the witness statement?  
 10 **MR HOWARD:** I think basically they have agreed to the ones  
 11 in the table being used in cross-examination, and  
 12 I think where there is a potential area of disagreement  
 13 is if we go beyond that.  
 14 **THE CHAIRMAN:** Well, the difficulty is, if you are planning  
 15 to go beyond that, that is then likely to lead to  
 16 a disruption of the proceedings in relation to a matter  
 17 which the parties knew about at the time we dealt with  
 18 Sainsbury's permission hearing, and which should have  
 19 been resolved by now, and even if Sainsbury's attend  
 20 tomorrow they are unlikely to be sending someone who has  
 21 authority -- as do, it appears, the people in the court  
 22 at the moment -- to say "Oh, well, you can read that  
 23 out" or "We don't mind you saying that".  
 24 I do not want whoever junior person they send along  
 25 to be --

1 **MR HOWARD:** I think they are sending along somebody quite  
 2 senior, actually. Yes. I mean, I don't actually  
 3 anticipate this is going to be a problem.  
 4 **THE CHAIRMAN:** Okay.  
 5 **MR HOWARD:** Obviously we cannot be constrained from  
 6 cross-examining, depending on what answers we get  
 7 obviously to questions, on the basis that we consider  
 8 appropriate. We had understood the concern --  
 9 **THE CHAIRMAN:** The difficulty is that if ITL and Sainsbury's  
 10 have agreed that these paragraphs are territory which  
 11 can be traversed in cross-examination, and you know that  
 12 they are likely to object to other paragraphs being put  
 13 in cross-examination, and the matter has not been  
 14 resolved before the day of the cross-examination, then  
 15 that's a rather unsatisfactory --  
 16 **MR HOWARD:** We will certainly seek to resolve it, but I am  
 17 not sure that -- it may be that we are at  
 18 cross-purposes. We had not understood there was any  
 19 objection to our using anything, providing it was in  
 20 camera, and that's why we want to be in camera. If they  
 21 are saying they do object, even in camera, then that's  
 22 a different issue.  
 23 **THE CHAIRMAN:** Right. That's not an issue that you have  
 24 discussed with them?  
 25 **MR HOWARD:** We are trying to make it clear to them that,

113

1 since we are in camera, we don't understand any  
 2 objection.  
 3 **THE CHAIRMAN:** Let's be clear about what we mean by being in  
 4 camera: that is that only those in the confidentiality  
 5 ring can attend, but that will, I understand, include  
 6 the other retail appellants who have indicated they wish  
 7 to cross-examine Ms Bayley.  
 8 **MR HOWARD:** I think so. Certainly as far as I am concerned  
 9 it does. Apparently they have all seen the relevant  
 10 material, so to some extent that's why we seem to be  
 11 dancing on a pinhead.  
 12 The material is known to everybody, and the Tribunal  
 13 has the material, so I do think it only really arises in  
 14 relation to the extent to which the material is then  
 15 going to go into the public domain at that stage.  
 16 **THE CHAIRMAN:** The other question is how we deal with the  
 17 transcript, and whether it's possible technically that  
 18 if we are in camera tomorrow and then other people come  
 19 in on Friday who are not in the confidentiality ring,  
 20 are they in some way unable to scroll back and see the  
 21 transcript of what has happened the previous day?  
 22 **MR HOWARD:** That I don't know. (Pause). Apparently nobody  
 23 outside the confidentiality ring can access LiveNote.  
 24 **THE CHAIRMAN:** And that goes for the terminals within the  
 25 court?

114

1 **MR HOWARD:** The terminals in the court are only being used,  
 2 I think, by people within the confidentiality ring.  
 3 I think.  
 4 **THE CHAIRMAN:** It just is that everyone then must be aware  
 5 that if there is, after tomorrow, material on the  
 6 terminals -- which there has not so far been -- which  
 7 has been dealt with in camera, then people must be aware  
 8 that people who are outside the ring must not have  
 9 access to those terminals.  
 10 **MR HOWARD:** From a pragmatic point of view, I think the way  
 11 this has to operate is we sit in camera pro tem  
 12 tomorrow, to see what material has been referred to, and  
 13 then I think at some later stage you will have to give  
 14 a ruling as to whether that day does remain in camera.  
 15 I suspect your ruling will be that it won't, but there  
 16 could be parts of it that were. In other words, it  
 17 would be quite surprising if the whole of the day were  
 18 in camera.  
 19 **THE CHAIRMAN:** What we want to avoid is having this debate  
 20 tomorrow.  
 21 **MR HOWARD:** Absolutely.  
 22 (Pause)  
 23 **THE CHAIRMAN:** As far as starting tomorrow, if we start at  
 24 10.30 will we be able to get through Ms Bayley's or  
 25 Mrs Corfield's(?) evidence?

115

1 **MR HOWARD:** I think we probably would, but I suspect to be  
 2 on the safe side we should probably start early.  
 3 **THE CHAIRMAN:** We will start, then, at 10. I may be in some  
 4 slight difficulty getting here absolutely for 10, but we  
 5 will start as soon as possible thereafter.  
 6 Very well, thank you very much, we will reconvene at  
 7 10 o'clock tomorrow.  
 8 (3.00 pm)  
 9 (The court adjourned until 10.00 am on  
 10 Thursday, 27 October 2011)  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

116

1	INDEX	
2		PAGE
2		
3	Housekeeping .....	1
4		
5	MR KEVIN LANG (affirmed) .....	10
6		
7	Examination-in-chief by MR FLYNN .....	10
8		
9	Cross-examination by MR LASOK .....	13
10		
11	Questioned by THE TRIBUNAL .....	54
12		
13	Cross-examination by MR HOWARD .....	66
14		
15	Re-examination by MR FLYNN .....	93
16		
17	Further questioned by THE TRIBUNAL .....	99
18		
19	Further cross-examination by MR HOWARD .....	105
20		
21	Further re-examination by MR FLYNN .....	108
22		
23	Housekeeping .....	109
24		
25		