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**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

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## **HEARING (DAY 22)**

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

## APPEARANCES

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

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

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

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

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

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

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1 Friday, 28 October 2011  
 2 (10.30 am)  
 3 **MR HOWARD:** Good morning. With your permission we will  
 4 recall Mr Matthews.  
 5 **THE CHAIRMAN:** Yes.  
 6 MR PAUL MATTHEWS (recalled)  
 7 **THE CHAIRMAN:** Hello again, Mr Matthews, please sit down.  
 8 You are still on oath from the previous occasion when  
 9 you gave your evidence.  
 10 **MR HOWARD:** Good morning, Mr Matthews. Mr Lasok will ask  
 11 you some questions.  
 12 Cross-examination by MR LASOK  
 13 **MR LASOK:** Good morning, Mr Matthews.  
 14 **A.** Good morning.  
 15 **Q.** I take it from your witness statement that you were the  
 16 national account manager with responsibility for  
 17 Sainsbury's from 1997 to 2004?  
 18 **A.** Yes, that's correct.  
 19 **Q.** We are going to look at the period March 2000 to  
 20 March 2003. Okay?  
 21 **A.** Yes.  
 22 **Q.** What I am going to do is to divide this period up into  
 23 two parts, so I am going to first ask you some questions  
 24 about the period before August 2000, and then I am going  
 25 to ask you questions about the period after August 2000.

1

1 **A.** Okay.  
 2 **Q.** The reason for that is because, as I understand it --  
 3 and you will correct me if I am wrong -- there was no  
 4 formal trading agreement between ITL and Asda --  
 5 **THE CHAIRMAN:** Sainsbury's.  
 6 **MR LASOK:** I am terribly sorry. No doubt people will  
 7 correct me when I do these dreadful things.  
 8 There was no formal trading agreement between ITL  
 9 and Sainsbury until one was signed in August 2000?  
 10 **A.** That seems to be right, yes.  
 11 **Q.** Maybe the best thing to do is if you could have a look  
 12 at annex 18, please. I think that if you go to tab 9,  
 13 that should be a letter dated 17 April 2000 to Ms James,  
 14 the category buyer? {D18/9/9}.  
 15 **A.** Yes.  
 16 **Q.** In the second paragraph there is a bit which is  
 17 confidential, but the second paragraph under the heading  
 18 "Background" tends to suggest that there hadn't been  
 19 a trading agreement at that stage?  
 20 **A.** Nothing formal, no.  
 21 **Q.** But there was a parity and differential arrangement in  
 22 place at that time as between ITL and Sainsbury under  
 23 which Sainsbury, among other things, would investigate  
 24 and correct instances when an ITL brand was out of line  
 25 with a differential with a Gallaher brand, wasn't there?

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1 **A.** We certainly paid monies that could be construed as  
 2 bonuses, yes.  
 3 **Q.** The reason why I put that to you is if you go back to  
 4 tab 5, {D18/5/5}, we have here a page which looks like  
 5 a parity and differential sheet. Have you ever seen  
 6 this one before?  
 7 **A.** In truth, no.  
 8 **Q.** It looks, if you look at the --  
 9 **A.** I am just trying to see the context of it, but I don't  
 10 recall seeing it, but ...  
 11 **Q.** If you look at the last line, you have on the left  
 12 an asterisk which says "share of sector", and then it  
 13 says "Source, RAL April 2000", so it looks as if this  
 14 dates back to about April 2000?  
 15 **A.** Yes, that would be a good assumption.  
 16 **Q.** If, for example, you go to tab 2 --  
 17 **DR SCOTT:** Sorry, can you remind us who RAL is?  
 18 **A.** Retail Audit Limited.  
 19 **DR SCOTT:** Thank you.  
 20 **MR LASOK:** If you go to tab 2, {D18/2/1}, this is a fax  
 21 message to Carolyn James at Sainsbury, but it comes from  
 22 Ian Horton. Who was Ian Horton?  
 23 **A.** Ian Horton was a national account executive who, at that  
 24 time, was probably standing in for me while I was on  
 25 vacation.

3

1 **Q.** If you look at the last paragraph under the heading  
 2 "Pricing", and read that.  
 3 **A.** Okay.  
 4 **Q.** Would you agree with me that that indicates that there  
 5 was an arrangement between ITL and Sainsbury at this  
 6 time under which Sainsbury would investigate and correct  
 7 instances where an ITL brand was out of line with  
 8 a differential with a Gallaher brand?  
 9 **A.** Yes.  
 10 **Q.** In fact, during this period, and this is the pre August  
 11 2000 period, ITL would communicate to Sainsbury its  
 12 preferred pricing positions, and it would do so in terms  
 13 of fixed differentials, and it got changes in  
 14 Sainsbury's prices as a result; do you remember that?  
 15 **A.** What do you mean by "fixed differentials"?  
 16 **Q.** Well, I'll give you an example. On the page that we are  
 17 looking at --  
 18 **A.** Yes.  
 19 **Q.** -- if you look in that last paragraph, the second line,  
 20 Horton says:  
 21 "The natural price differential between Old Holborn  
 22 and Golden Virginia is zero."  
 23 If you go to 4, I am going to come back to 4 at  
 24 a later stage, but there is a bit about Hamlet  
 25 Miniatures, and just below the second holepunch you say

4

1 in relation to Cafe Creme that you were struggling to  
 2 maintain parity with Hamlet?  
 3 **A.** Okay.  
 4 **Q.** Then if you go to tab 6, {D18/6/6} this is you to  
 5 Mr Batty, so it's an internal ITL email, and if you look  
 6 at the reference to Sovereign, you are talking about --  
 7 I mean, "JS pricing issues", that would be Sainsbury  
 8 pricing issue, I assume?  
 9 **A.** Yes.  
 10 **Q.** So if you look at the Sovereign line, you talk about it  
 11 being up 2p, and you say:  
 12 "We will then be plus 10p L&B."  
 13 And in relation to Mayfair, there is a bit which is  
 14 slightly out of line, but you have a reference to  
 15 a response would cost [redacted] -- sorry, the figures  
 16 are confidential. A response could cost a certain  
 17 amount, and then there would be an additional amount,  
 18 and you say that you would like to stay in touch with  
 19 Mayfair. Doesn't that mean alongside Mayfair?  
 20 **A.** I am just trying to calculate what [redacted] per  
 21 thousand is in terms of pence, which seems to be 3p,  
 22 which wouldn't put us at parity, and I am not sure why  
 23 that would be. I think the question was: were there  
 24 fixed differentials? Is that -- that remains the  
 25 question?

5

1 **Q.** Yes.  
 2 **A.** I just wanted to understand what that meant. But yes,  
 3 we were investing money to pit our brands against those  
 4 of our competitors.  
 5 **Q.** You were doing it in terms of fixed relationships such  
 6 as parity, and --  
 7 **A.** I understand now. Yes, that would be correct.  
 8 **Q.** Thank you. Also at this stage, at any rate, Sainsbury's  
 9 would itself increase the price of an ITL brand when the  
 10 price of a linked Gallaher brand went up, wouldn't it?  
 11 **A.** Can you ask me that again?  
 12 **Q.** Yes. When the price of a Gallaher brand went up,  
 13 Sainsbury's would itself raise the price of the linked  
 14 ITL brand?  
 15 **A.** I am not sure that that would be the case.  
 16 **Q.** Well, I understand that, because that brings us to  
 17 document 11, tab 11, and could you read the whole of  
 18 this to yourself, please? {D18/11/12}.  
 19 **A.** Yes. (Pause).  
 20 **Q.** I think the figures are confidential.  
 21 **A.** Okay. (Pause). Okay.  
 22 **Q.** Yes. At this stage, what I would like to focus on is  
 23 point 1, but just to go through the contextual bits, we  
 24 have here an email from you sent on 9 May 2000 to  
 25 Carolyn James, and you start off with the words:

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1 "Following conversations over the last couple of  
 2 days ..."  
 3 Then you have two numbered points. I am going to  
 4 tell you how I read this document, and then I am going  
 5 to ask you whether that corresponds to your  
 6 recollection.  
 7 **A.** Okay.  
 8 **Q.** So, the way I read this document is this: you have had  
 9 conversations with Sainsbury over the last couple of  
 10 days?  
 11 **A.** Yes. Yes.  
 12 **Q.** If you look at point 1, Sainsbury's have told you that  
 13 they are going to increase the price of Embassy No 1  
 14 Kingsize and Regal Kingsize 20s, 100s and 200s from  
 15 28 May following Gallaher's decision to move up from  
 16 a 3.99 position. So what you are doing in this  
 17 paragraph 1 is reminding Sainsbury's of the consequence  
 18 of that move upwards, which is that they can claim the  
 19 bonuses that you identify for the period 9 April to  
 20 28 May, but they can't claim it after 28 May because  
 21 that's the point at which Sainsbury's will have moved  
 22 the prices up in response to the Gallaher move?  
 23 **A.** I'll try and explain what my recollection was and what  
 24 I think I am saying in those first few paragraphs. This  
 25 was a time when Gallaher felt -- or we believed they

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1 felt very keen to maintain 99 position, so they didn't  
 2 want to breach a certain absolute price point. At the  
 3 time 3.99 was an important point -- they didn't want  
 4 their brands going over £4 irrespective of an increase,  
 5 I think it might have been a Budget increase.  
 6 So I believe that they invested to maintain that  
 7 3.99 position, which would have meant that I would have  
 8 been uncompetitive on Regal and Embassy, so I too put  
 9 some money in to hold my brands beneath 3.99, I would  
 10 have probably been 3.96. So what I am saying there in  
 11 those first three or four paragraphs is that "you told  
 12 me that that position that Gallaher has been funding is  
 13 ending, and what I am saying is 'I wish to reduce my  
 14 bonus too'", that would be what I was suggesting in  
 15 those four paragraphs, and that's my recollection of  
 16 events.  
 17 **DR SCOTT:** To be clear, I don't think it actually tells us,  
 18 but this is Benson & Hedges Gallaher's are moving; is  
 19 that right?  
 20 **A.** Yes, and at that time, towards the sort of turn of the  
 21 last century, there was still quite a bit of action on  
 22 what we would have called premium brands, and I think it  
 23 was something we discussed the week before last, that  
 24 Embassy and Benson & Hedges were stablemate brands for  
 25 some time.

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1 **MR LASOK:** Can I take you a step backwards on this, because  
 2 the way I understand your evidence is that you had at  
 3 an earlier point asked Sainsbury's to go below, that's  
 4 to say take the ITL brand below the Gallaher's 3.99  
 5 position; am I right?  
 6 **A.** What I am saying is that we believed that there needed  
 7 to be a 2 or 3p differential between Benson & Hedges and  
 8 Embassy No 1. So prior to Gallaher having funded the  
 9 3.99 move, we would have hoped to enjoy that  
 10 differential. When they moved or held at 3.99, if we  
 11 wanted to maintain that differential, we would have had  
 12 to put funds in, and what I suspect I am saying here is  
 13 "You have told me that that position is being withdrawn  
 14 by Gallaher, from that date my bonuses should revert to  
 15 [redacted] and [redacted] per thousand", that's my  
 16 understanding of the way that I have written that.  
 17 **THE CHAIRMAN:** So that in order to achieve the below 3.99  
 18 position, you would have been paying more than those --  
 19 **A.** I think so, yeah. The audit trail would show whether or  
 20 not that was the case, but that would be my supposition.  
 21 **MR LASOK:** I am not trying to catch you out on this, but if  
 22 you go to tab 4, we may see something that helps your  
 23 recollection.  
 24 **A.** Okay.  
 25 **Q.** This is an email from you to Carolyn James dated

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1 28 March. So it's, what, about a month and a week or  
 2 two before the email at tab 11. It's the first bit.  
 3 I have to say that in my copy the first bit has, for  
 4 some reason, had some extremely helpful person take what  
 5 was probably a highlighter through it, in such a way as  
 6 to make it extremely difficult to read.  
 7 Is your copy in a similar state?  
 8 **A.** I am afraid I was that extremely helpful person, and  
 9 I didn't realise ten years ago that I would be providing  
 10 such help in the future. I am glad to have been of  
 11 service with such great prescience. It was me and  
 12 I have the same copy, yes.  
 13 **Q.** I am trying to read the bit that's highlighted, it's  
 14 "Embassy/Regal", now, I think this bit is confidential.  
 15 Sorry, it's just the figures that are confidential. But  
 16 I think that what you say is this:  
 17 "I would like to respond to the [blank] position  
 18 adopted by Gallaher/Rothmans. Could we have Embassy  
 19 No 1 Kingsize 20s at" and then a figure is given?  
 20 **A.** Yes.  
 21 **Q.** And it's the same figure as the one in the first line.  
 22 **DR SCOTT:** I think you are all right with those figures  
 23 because they are not red boxed in our copy. Is that  
 24 right, Mr Howard?  
 25 **MR HOWARD:** I am sure it doesn't matter anyway.

10

1 **MR LASOK:** Okay. If it doesn't matter, then the two figures  
 2 in the first and second lines are 3.99. So it looks as  
 3 though, back in March, you had asked Sainsbury's to  
 4 price at parity with the Gallaher/Rothmans position at  
 5 3.99, and then in May, when we get to tab 11,  
 6 {D18/11/12}, we have got to Sainsbury's talking to you  
 7 about the Gallaher decision to move up, and their moving  
 8 up of Embassy and Regal from 28th in company with the  
 9 Gallaher move.  
 10 **A.** So what's the question again?  
 11 **Q.** What I am putting to you is my interpretation of what  
 12 these documents say, or rather what the document at  
 13 exhibit 11 says, which is that Sainsbury's told you in  
 14 the last couple of days before 9 May that they were  
 15 moving Embassy and Regal up from 28 May as a result of  
 16 the Gallaher decision to move up on the 3.99 position?  
 17 **A.** I see, I see, I see, I understand.  
 18 **Q.** You then reminded them that that meant that they could  
 19 claim the bonus only up to 28 May?  
 20 **A.** No. I think that what -- now I've seen both those  
 21 documents in context, I understand the point that you  
 22 are making. What seems to have happened is it was  
 23 Gallaher and Rothmans, so I am assuming Rothmans  
 24 Kingsize potentially, had adopted this position of 3.99  
 25 and I wanted to match that, so at that stage perhaps

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1 I would have been prepared to live with parity and not  
 2 going beneath it, which normally we would want a 2 or 3p  
 3 differential. What has happened is that that position  
 4 seems to have lasted through a Budget increase from  
 5 around the end of March to the beginning of May. At  
 6 that stage, Gallaher's have moved up, I have had  
 7 a conversation with Carolyn and I've said "Yeah, I'll  
 8 move up too and it will cost me less money". I don't  
 9 think it's Sainsbury telling me what you are suggesting.  
 10 **Q.** Okay, fine. That's an upward movement. In the case of  
 11 downward movements, the position was that in order to  
 12 maintain a parity or differential, the question of  
 13 funding or who was going to pay for the downward  
 14 movement would arise, and that would then be discussed  
 15 between ITL and Sainsbury?  
 16 **A.** If I wanted to reduce a shelf price, it would almost  
 17 certainly mean me funding that, so that would have been  
 18 the conversation, if I had wanted to move the shelf  
 19 price of any brand, unless the retailer was prepared to  
 20 take a reduced cash margin I would have had to have  
 21 funded that.  
 22 **Q.** In fact we get that kind of discussion in tab 11 at  
 23 paragraph 2, don't we?  
 24 **DR SCOTT:** Mr Lasok, just to get the position right,  
 25 I realise that Mr Matthews is having to recollect a long

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1 time ago, tab 4 on 28 March comes after the Budget on  
 2 21 March, and in ITL and Gallaher parallel MPIs on 22nd  
 3 so in fact, Mr Matthews, this is all taking place in the  
 4 wake of those three things having happened.  
 5 **A.** Thank you.  
 6 (Pause)  
 7 **THE CHAIRMAN:** Perhaps you could repeat your question.  
 8 **MR LASOK:** Yes, I just wanted to put to you that paragraph 2  
 9 on tab 11 was an example of what would happen when there  
 10 was a downward movement in price, in other words that  
 11 there would then be a discussion between ITL and  
 12 Sainsbury's about a downward movement in the ITL  
 13 brand --  
 14 **A.** Yes.  
 15 **Q.** -- in order to maintain the differential?  
 16 **A.** So yes, in this instance, against the context that you  
 17 just mentioned, it looks as though Mayfair are adopting  
 18 a position and, based on the conversation I've had with  
 19 Carolyn, she has agreed to move Richmond to 3.39, and  
 20 I have agreed to pay an additional bonus of 5p a pack,  
 21 and then on Lambert & Butler a smaller discount to  
 22 achieve a 3.59 shelf price.  
 23 **Q.** Then you go on to raise with her the problem that JPS  
 24 should have been at parity with L&B, but those are both  
 25 ITL brands, and I think that the rest of the letter is

1 really about L&B brands, isn't it?  
 2 **A.** The penultimate paragraph appears to be my comment on  
 3 the fact that JPS -- Sainsbury have adopted a different  
 4 position on JPS than the market would suggest. I can't  
 5 recall why that would have been.  
 6 **Q.** In the last line, where you say "in the longer term we  
 7 should talk about JPS differentials", Are those the  
 8 differentials with Gallaher brands?  
 9 **A.** This is the -- although it goes against the grain, are  
 10 you commenting --  
 11 **Q.** The very last sentence, because what you seem to have  
 12 been doing is you have, in the two paragraphs, the one  
 13 beginning "Prior to the 2p reduction", and then  
 14 "although goes against the grain", it looks as though  
 15 you are talking about two ITL brands, because JPS and  
 16 L&B are ITL brands, aren't they?  
 17 **A.** Yes, they both are, yes.  
 18 **Q.** Then in the last sentence you say:  
 19 "In the longer term we should talk about JPS  
 20 differentials."  
 21 **A.** Yes, and that's the point I was making, that Sainsbury  
 22 had -- I don't know why, but had adopted a different  
 23 position on JPS, I think it was a legacy thing that --  
 24 forgive me for being parochial -- JPS was very popular  
 25 in Kent in the 1970s and 80s, it just was a brand that

1 people in Kent liked, and there were a lot of  
 2 Sainsbury's stores in Kent, so they thought it was  
 3 an important brand. They also felt it was more of  
 4 a premium brand than consumers or retailers in the north  
 5 did, so they had a different view of that brand than we  
 6 did.  
 7 **Q.** Okay. Let's move on now to tab 9. {D18/9/9}. This is  
 8 the one where you write to Ms James in order to raise  
 9 with her various issues about the potential trading  
 10 agreement. The first thing I would like to raise with  
 11 you is a point that is extremely fundamental to this  
 12 case, and the result of this case hangs entirely upon  
 13 it, and that is the date of this letter and the meeting  
 14 it refers to, because the date of the letter is  
 15 17 April 2000, and the first line of the letter refers  
 16 to a meeting on 29 April. One assumes that the meeting  
 17 had already taken place.  
 18 **A.** If the case hangs on this letter, and I am not sure if  
 19 that is the case or not, I can't shed any great light  
 20 upon that, except that it might well be a typing error,  
 21 and perhaps the 17th and the 29th should have been  
 22 inverted, I can't really say.  
 23 **Q.** Yes. Anyway, if we go on to the second page, we have  
 24 the bit about product pricing, and that's the one that  
 25 I am interested in. So could you just read that to

1 yourself, please?  
 2 (Pause)  
 3 **A.** Yes, I've read that.  
 4 **Q.** So it looks as though you are telling her, in the  
 5 context of this discussion about trading agreements,  
 6 that in the trading agreement you would have provision  
 7 that reflects what you describe as the custom and  
 8 practice for many years that the bonus contributions  
 9 would be based on those two criteria, the first of which  
 10 is the maintenance of price list differentials between  
 11 ITL brands and competing brands, and that was for ITL  
 12 an important part of the pricing provisions in any  
 13 trading agreement, wasn't it?  
 14 **A.** Well, I think it was equally as important as the second  
 15 point, which was a point that I tried to make the last  
 16 time I was here, that the investments that we were  
 17 making in Sainsbury, which should have run into seven  
 18 figures at that time, were based on two things, and that  
 19 second point I think is substantive. A recognition --  
 20 and I think I've called it out here exactly as it was  
 21 and is -- the absolute shelf price in recognition of the  
 22 generally lower margins that multiple grocers work to.  
 23 **Q.** Then you give an example, which is Lambert & Butler  
 24 Kingsize, at 10p plus against Sovereign.  
 25 **A.** Yes.

1 Q. And 17p plus versus Mayfair?  
 2 A. Yes.  
 3 Q. In the next paragraph you say:  
 4 "Clearly these criteria have to be applied  
 5 pragmatically ..."  
 6 Were you there simply saying that that "We would set  
 7 these things out in the trading agreement but events  
 8 might take place and you have to revisit this"?  
 9 A. I think I used the word "pragmatically" as it suggested  
 10 workable solutions, so I think what I am suggesting here  
 11 is that that would be the framework that we would seek,  
 12 and you are right, those are two examples of the  
 13 differentials that we would wish to see to remain  
 14 competitive, but that at the same time we understood  
 15 that our competitors would want to invest monies and  
 16 that Sainsbury's might well want to adopt their own  
 17 positions, and we have seen them do that with JPS, so  
 18 what's what I meant by "pragmatically".  
 19 Q. In the next paragraph you say:  
 20 "Based on the existing price list differentials we  
 21 would like the chance of a fully funded response or  
 22 a similar period of advantage after the promotional  
 23 period."  
 24 A. Yes.  
 25 Q. So you didn't want ITL brands to be disadvantaged by

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1 comparison with Gallaher brands?  
 2 A. I certainly wanted the opportunity to respond to moves  
 3 by the retailer or a manufacturer, but if it was too big  
 4 a call in terms of investment, I wouldn't make it,  
 5 I just wanted the chance to be able to maintain  
 6 a competitive advantage.  
 7 Q. Okay. Then there is a document at tab 17, {D18/17/21},  
 8 and it starts off with a memorandum sent by you on  
 9 7 September 2000 to people whose names are identified  
 10 only by initials. Would these have been people in ITL?  
 11 A. I don't know. I am just trying to decode it.  
 12 Q. I don't think it really matters.  
 13 A. No, no.  
 14 Q. You attach to this a copy of the trading agreement,  
 15 which was backdated to 1 April 2000, and was to run  
 16 until 31 March 2001. What I would like to do, it's  
 17 quite a lengthy document, which appears to take the form  
 18 of PowerPoint slides or something like that.  
 19 A. Yeah, they are PowerPoint slides.  
 20 Q. In my copy I have very faint pagination stamped in the  
 21 bottom right-hand corner, and the first page of this  
 22 thing looks like a 12. Sometimes the last number is  
 23 clearer than the first number.  
 24 A. I see.  
 25 Q. If you could go to what I think is page 43, it's about

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1 six pages from the end.  
 2 A. Okay. What does the headline --  
 3 Q. It's got "agreement" in the ...  
 4 A. I see. Okay. I can see that now.  
 5 MR SUMMERS: Mr Lasok, could we understand to whom this  
 6 document was being shown? Because it obviously is  
 7 PowerPoint, which suggests a rather large audience.  
 8 A. Unfortunately not, it was an audience of perhaps one or  
 9 two, I just wanted to use PowerPoint. At the time it  
 10 was quite new, or I suppose it was to me, so I suppose  
 11 I was flexing my technological muscles.  
 12 MR LASOK: Well, that raises a slightly different point.  
 13 Let me take it in stages.  
 14 We have here the page headed "Agreement", and the  
 15 first bullet, it says:  
 16 "SSL and ITL agree that this is a working document  
 17 of intent and is not a contract of supply."  
 18 It was nonetheless a document that was intended to  
 19 identify how Sainsbury's and ITL envisaged that the  
 20 trading relationship between them was to go on?  
 21 A. I suppose you would call it a memorandum of  
 22 understanding or something similar.  
 23 Q. Okay. Then if you move two pages further on --  
 24 A. Yes.  
 25 Q. -- you have another page headed "Agreement"?

19

1 A. Yes.  
 2 Q. This one has signatures on it?  
 3 A. Yes.  
 4 Q. So is it the case that somebody must have printed the  
 5 slides out and then circulated them so that these  
 6 people, one of whom I believe to be yourself, signed the  
 7 print-out?  
 8 A. That's definitely myself, because it says  
 9 "Paul Matthews", and I think that the other person,  
 10 Sandra Wyatt, yes, Sandra was the category director for  
 11 tobacco and I think one other category as well. So  
 12 I suspect what this was, that Carolyn and I, perhaps  
 13 Sandra, would have gone through this, but Sandra being  
 14 the senior manager for the category would have -- well,  
 15 she has signed it there, yes.  
 16 Q. I observe actually that at the very beginning of this,  
 17 not the cover sheet, which is the email memorandum, but  
 18 at the very beginning of the tab, where we have the  
 19 first slide, we have "Carolyn James/Paul Matthews 2000".  
 20 A. Yes.  
 21 Q. Was it therefore initially a presentation that  
 22 Carolyn James and Paul Matthews performed for somebody?  
 23 A. No, I think this would have been Carolyn and I going  
 24 through this, and I am not sure that Sandra was there or  
 25 not, but I suspect what might have happened is that I've

20

1 presented this to Carolyn, either I would have been on  
 2 a computer or perhaps even in hard copy, and she has  
 3 taken this away, and Sandra has signed it.  
 4 So the background to this was that Sainsbury and  
 5 Imperial Tobacco had a challenging relationship in the  
 6 past prior to 2000, they were still at the height of  
 7 their pomp as the number one retailer in the UK, they  
 8 hadn't been overtaken by Tesco, and they were  
 9 challenging to deal with. What this sought to do was to  
 10 make the relationship a better one, and try and land  
 11 some of the things that we had discussed in the past,  
 12 hence I suppose the formality of it.  
 13 **Q.** It looks as though it was presented to Ms Wyatt as  
 14 a trading agreement, which was --  
 15 **A.** I am not sure about that.  
 16 **Q.** If you go to page 23, if you are looking at this page  
 17 with the "Carolyn James/Paul Matthews 2000" on it, by my  
 18 calculation that's probably page 13 of the document, so  
 19 if you go --  
 20 **THE CHAIRMAN:** What does it have at the top of it?  
 21 **MR LASOK:** You have a page with "ITL - NAS Strategy".  
 22 **A.** Yeah.  
 23 **Q.** Can you tell us what "NAS" means?  
 24 **A.** National account sales.  
 25 **Q.** So this appears to be telling Sainsbury what ITL's

21

1 strategy was. Most of this page is apparently  
 2 confidential, but the relevant bit isn't, and it's the  
 3 second bullet, which is:  
 4 "Achieve differentials between competitor brands."  
 5 **A.** Yes.  
 6 **Q.** So that was the ITL strategy at the time?  
 7 **A.** Well, although the other pieces might be confidential,  
 8 and I won't call them out because I would break that  
 9 confidentiality, I think that that point needs to be  
 10 seen in context of the other three. And without being  
 11 specific about them, and I did mention this I think last  
 12 time, that without products being listed available and  
 13 in danger of being sold, pricing differentials were  
 14 secondary to that. Equally, and particularly in the  
 15 case of Sainsbury, merchandising solutions were, I would  
 16 suggest, of equal importance.  
 17 **Q.** But in the second bullet, where the word "differentials"  
 18 is used, does that refer to price differentials?  
 19 **A.** Yes.  
 20 **Q.** So you were communicating at this stage to Sainsbury  
 21 that ITL's strategy was to achieve the differential?  
 22 **A.** It says "achieve differentials", yes.  
 23 **Q.** Could you turn to page 37, please. This is one headed  
 24 "Prices".  
 25 **A.** I see.

22

1 **Q.** None of this is confidential. Could you just read that  
 2 page to yourself?  
 3 **A.** Yes.  
 4 **Q.** So the first bullet talks about the maintenance of price  
 5 differential, and it says "where appropriate". Does  
 6 that simply mean where a price differential is specified  
 7 by ITL?  
 8 **A.** No, I think the "appropriate" pertains to that word  
 9 "pragmatic" that I used, "where appropriate" meaning if  
 10 it's commercially acceptable to both sides.  
 11 **Q.** Okay. Then we have the bonuses to be paid based on the  
 12 selling price, and was that intended to incorporate what  
 13 you had said in your earlier letter where you had said  
 14 that according to custom and practice, bonuses were paid  
 15 on the basis of two criteria?  
 16 **A.** No, I think that that's something to do with the  
 17 calculation of how bonuses were paid, and the fact that  
 18 Sainsbury's, the Sainsbury's construct of margin was  
 19 different to all other retailers. I think they excluded  
 20 VAT when they created -- when they talked about a bonus,  
 21 which I believe would have meant that the supplier paid  
 22 more. So by saying it's based on selling price, that  
 23 might -- it was something to do with VAT. They did work  
 24 their bonuses differently. So it would have been about  
 25 how those bonuses were calculated.

23

1 **Q.** Okay. Then you have the last bullet:  
 2 "ITL to be able to respond to any price promotions  
 3 [and then it says] where appropriate within a reasonable  
 4 timeframe."  
 5 What did "where appropriate" mean?  
 6 **A.** I think what I said a few moments ago, "appropriate"  
 7 meaning commercially viable for both parties. So, for  
 8 example, if Sainsbury's had said "Right, I am going to  
 9 sell Benson & Hedges at £1, because it's really  
 10 important", I would want the opportunity to be able to  
 11 respond to that. But if that was inappropriate because  
 12 I couldn't afford it or we didn't want to do it, it  
 13 wouldn't be done. I think it was a sort of catch-all  
 14 term to try and make Sainsbury realise that we weren't,  
 15 you know, dogmatic.  
 16 **Q.** Okay. If you move to page 44, this is one headed  
 17 "Payment", and I think the prices here are confidential,  
 18 as is the last bullet. It says:  
 19 "In respect of this agreement and subject to the  
 20 criteria being met, Imperial Tobacco agree to pay"  
 21 a certain amount.  
 22 When it says "in respect of this agreement and  
 23 subject to the criteria being met", that included,  
 24 didn't it, maintenance of price differentials between  
 25 ITL brands and competitor brands?

24

1 A. It included that, but again I would make the point that,  
 2 as part of the entire trading -- what I am saying here  
 3 is "Sainsbury, we have had an informal agreement,  
 4 I would like it to be formal, and as part of the way  
 5 that we want to trade with you, we want you to list our  
 6 brands, be first to market our brands, make our brands  
 7 available, give them appropriate shelf space and give us  
 8 the opportunity, where appropriate, to be able to  
 9 achieve our price list differentials".  
 10 Q. If we go to the last page in the tab, we have  
 11 a schedule 3, and this sets out the differentials that  
 12 were to be observed?  
 13 A. I've got the schedule -- so the third one.  
 14 Q. Yes, the very last one?  
 15 A. The very last one. Yes, in context what we have here is  
 16 all the -- this would be all the SKUs that Sainsbury  
 17 list, so "stocking", hence "availability" on the first  
 18 page; second page, all our brands listed again, and the  
 19 bonuses that we would pay; then the third page, "share",  
 20 "benchmark brand" and "RSP differential". Yes.  
 21 Q. And that was where you communicated to Sainsbury the  
 22 differentials that were to be observed?  
 23 A. Well, yes and no, because what I've noticed here on the  
 24 schedule number 2 is that this one has various asterisks  
 25 against -- is that the plural, asterisks? -- against

1 a number of brands, and those include, as well as --  
 2 I mean, this differentiates I think quite well between  
 3 the ongoing and the tactical bonus, because this seems  
 4 to be a snapshot in time of what we were paying then.  
 5 So the brands like Embassy and Regal, those are ongoing  
 6 bonuses. But if you take, for example, Superkings or  
 7 any of the other marked below, we seem to have been  
 8 doing some MPI hold or something around that time.  
 9 Q. I was just looking at the page headed "Schedule 3, price  
 10 list differentials between ITL and competitor brands".  
 11 A. Right.  
 12 Q. That's the communication that was made to Sainsbury's at  
 13 the time concerning or rather identifying the price list  
 14 differentials that ITL wanted to be maintained?  
 15 A. Well, those certainly, that would set the standard, but  
 16 on the other page you can see that there were some  
 17 differences. But yeah, that's what we were trying to  
 18 achieve, and those were the brands that we were pitting  
 19 ours against.  
 20 Q. Then some time later there was another trading  
 21 agreement, and this is the one at tab 61. {D18/61/157}.  
 22 MR SUMMERS: Excuse me, just before we leave that particular  
 23 trading agreement, was there any reason why the  
 24 agreement appears to have taken quite a long time to  
 25 sign?

1 A. I just think it was the slow moving nature of large  
 2 organisations, because there had been nothing formal  
 3 before I think that Sainsbury felt that it had to go  
 4 through their management tiers and they were quite  
 5 a hierarchical organisation.  
 6 MR SUMMERS: So the document itself in ITL also went up  
 7 through various layers as well?  
 8 A. No, we had fewer layers. Since at the time were very --  
 9 there were a lot of different layers between a buyer and  
 10 the director, and I suspect the document had to do the  
 11 rounds, and then be sold and sold up and then questioned  
 12 and it just took rather a long time.  
 13 MR SUMMERS: In the original letter, whether it was the  
 14 29th April or whatever, you said the spirit of the  
 15 agreement should be, as it were, keep away from the  
 16 lawyers, the document should be kept away from lawyers,  
 17 did you succeed in that?  
 18 A. Well, no, is the short --  
 19 MR SUMMERS: At the time?  
 20 A. At the time I would have written that because, like all  
 21 these agreements, they weren't supposed to be legally  
 22 binding, they were statements of intent, and to try and  
 23 formalise the relationship. I think I may have  
 24 succeeded, I can't remember.  
 25 MR SUMMERS: All right, so although it may have gone up

1 through layers within ITL, you don't know whether it  
 2 went to that department?  
 3 A. I very much doubt -- I don't think it would have done,  
 4 no.  
 5 MR SUMMERS: Thank you very much.  
 6 MR LASOK: So if we go to tab 61, we have the follow-on  
 7 agreement, and the first page in tab 61 is headed  
 8 "April 2002", but I think it was signed in -- at least  
 9 by you -- in August.  
 10 A. Yes.  
 11 Q. We have the date, or the period of the trading  
 12 agreement, 1 April 2002 to 31 March 2003?  
 13 A. Yes.  
 14 Q. Then we have:  
 15 "ITL agree to pay Sainsbury a confidential amount on  
 16 all ITL and PMI affiliate cigarette brands ..."  
 17 Is "PMI" a reference to Philip Morris?  
 18 A. Philip Morris International, yes.  
 19 Q. Then it goes on to say:  
 20 "... subject to the following criteria."  
 21 Now, I want to look at the bit about pricing, which  
 22 is on the next page, but I am quite happy for you to  
 23 read that page and the next page in their entirety if  
 24 you would like.  
 25 A. No, it's familiar.

1 Q. Okay.  
 2 (Pause)  
 3 A. Okay.  
 4 Q. So in the pricing bit, we have the first paragraph  
 5 stating that Sainsbury's accept that ITL make  
 6 investments in ITL brands based on two criteria, one of  
 7 which is shelf price relativities. Then we have  
 8 a statement of ITL's pricing strategy, which is  
 9 described here as being "to replicate the differentials  
 10 that exist naturally between our brands and those of our  
 11 competitors", and then there is a reference to  
 12 appendix 5. If we look at appendix 5, which is the last  
 13 page of the tab, if you would cast your eye over that,  
 14 it's the same kind of thing we have seen before, and  
 15 that was an accurate reflection of ITL's pricing  
 16 strategy, wasn't it?  
 17 A. Yes, I notice it's changed from the last one, but yeah,  
 18 at the time those were the brands that we felt were  
 19 critical in measuring our own success or failure.  
 20 Q. Then if you go back to where we were, after the  
 21 reference to appendix 5, we have a paragraph that says:  
 22 "Based on [Sainsbury's] current shelf prices and the  
 23 achievement of the price list differentials detailed in  
 24 appendix 5, ITL will continue to pay those bonuses  
 25 framed in the example price file in appendix 3."

1 So it looks as though here we are seeing that  
 2 Sainsbury's were going to receive a payment based on  
 3 compliance with, among other things, the parities and  
 4 the fixed differentials that had been notified to it in  
 5 appendix 5?  
 6 A. But I think at the risk of repeating myself, the pricing  
 7 paragraphs, this acceptance of the relativities and the  
 8 absolute shelf prices is critical, that there was -- and  
 9 the reason I felt that was important was that Sainsbury  
 10 left to their own devices would just assume that the  
 11 investment was theirs and they wouldn't need to do very  
 12 much for it at all, and this gave me an element of the  
 13 ability to influence commercial decisions by asking them  
 14 to accept that those were investments I was making for  
 15 both of those things. So again, that payment of money  
 16 is to reflect and to accept that they sold prices at  
 17 relatively low margins as well as an element of that  
 18 being to replicate the differentials that naturally  
 19 existed.  
 20 Q. I wonder whether we could now go to a passage in your  
 21 witness statement, please.  
 22 MR SUMMERS: I am sorry, again, just before we leave this  
 23 one: Can you shed any light on how the auditors  
 24 regarded this document?  
 25 A. The trading agreement.

1 MR SUMMERS: Yes.  
 2 A. When you say auditors, what, our accountants?  
 3 MR SUMMERS: No, the external auditors, did it pass their  
 4 view?  
 5 A. I don't know, because at that stage in my career  
 6 I wasn't dealing with auditors particularly, I wouldn't  
 7 have been, so I don't know.  
 8 MR SUMMERS: So there is no evidence. Thank you very much.  
 9 THE CHAIRMAN: Did anybody within ITL ever come to you and  
 10 say "This money that we are paying over to Sainsbury's,  
 11 what are we actually getting for it?"  
 12 A. Yes, and I think that in part perhaps answers your  
 13 question. We would -- I mean, I reported to  
 14 Roger Batty, and part of my role was to make sure of two  
 15 things, that I had an audit trail of that investment, so  
 16 I am guessing that at some stage an accountant would  
 17 have said "You are paying £1 million to Sainsbury, why?"  
 18 And I think that somebody would have probably given this  
 19 document and the various invoices and schedules and they  
 20 would have been satisfied by that. In direct answer to  
 21 your question, yeah, when you are spending seven  
 22 figures, somebody was going to ask me "Are we getting  
 23 value, Paul?"  
 24 THE CHAIRMAN: And as regards the price differentials  
 25 element of it, what was or what would have been your

1 answer to the question: what are we getting for our  
 2 £1 million?  
 3 A. A more difficult question to answer than -- I think how  
 4 I would have answered is well, here is a piece of paper  
 5 that tells you Sainsbury's stock, and I noticed one in  
 6 a schedule earlier that called out every single one of  
 7 our brands and the percentage of supermarkets stocking  
 8 them. So just running down that, most of our brands  
 9 were available in most of those --  
 10 THE CHAIRMAN: Just in relation to the price differentials  
 11 bit.  
 12 A. More difficult to prove, because things were so fluid.  
 13 It would be very difficult to put a piece of paper in  
 14 front of somebody at the time and say "They are matching  
 15 all this pricing all the time", and I think there would  
 16 be lots of conversations throughout the year with myself  
 17 and my boss where he might have observed something or  
 18 heard something that "Sainsbury's pricing isn't what we  
 19 would expect, Paul, what's happening?" And I might have  
 20 said "Well, Gallaher are investing this, we didn't  
 21 respond". Or he may have gone in or seen a piece of  
 22 paper or had a conversation with somebody where we were  
 23 getting the pricing that we thought we should. But it  
 24 was such a fluid situation, it was very difficult to  
 25 answer clearly and immediately.

1 **DR SCOTT:** Just while we are dealing with Mr Batty, is his  
 2 middle initial N?  
 3 **A.** It is.  
 4 **DR SCOTT:** That explains who RNB is.  
 5 **A.** Right. Yes, it is N, yes.  
 6 **MR LASOK:** At the moment, we have seen in these two  
 7 agreements reference to the payment of bonuses based on  
 8 the selling price and on price list differentials, and  
 9 I just wanted to ask you to turn to paragraph 51 of your  
 10 witness statement. I don't think you have it at the  
 11 moment.  
 12 **A.** I don't remember it, but somebody is helping me with  
 13 that.  
 14 **Q.** The bundle itself has pagination in the bottom right and  
 15 left-hand corners, and the page number is 564.  
 16 Paragraph 51 is actually a comment on the first trading  
 17 agreement, which we have seen in the PowerPoint  
 18 presentation that we have at -- I think it's at tab 17.  
 19 In the second sentence of paragraph 51 you say this:  
 20 "Under the heading of 'prices' this provided that  
 21 ITL would pay bonuses based on the selling price and  
 22 that price differentials were to be maintained between  
 23 ITL and competitor brands where appropriate. This  
 24 recorded the fact that ongoing and promotional bonuses  
 25 were conditional upon the retailer passing the discounts

1 on to consumers at store level, both in absolute and  
 2 relative terms."  
 3 **A.** Yes.  
 4 **Q.** What I am slightly puzzled about is how you get from the  
 5 provision in these two agreements that the bonuses are  
 6 based on selling price and the maintenance of price  
 7 differentials to the conclusion that the bonuses were  
 8 conditional upon the retailer passing the discounts on  
 9 to consumers at store level, both in absolute and  
 10 relative terms?  
 11 **A.** That's a long question, and can I ask you to ask it to  
 12 me in a different way?  
 13 **Q.** Yes. I can understand you saying in these agreements  
 14 that you want Sainsbury to price at a particular level,  
 15 and the bonuses will be paid on condition of that. That  
 16 I can understand as related to the passing of a discount  
 17 onto consumers at store level. Okay?  
 18 **A.** Yes.  
 19 **Q.** What I don't understand is your phrase "relative terms",  
 20 because I would look at it -- you must forgive me -- in  
 21 rather a simplistic way. I would say: well, you either  
 22 pass on or you don't pass on. What do you mean by  
 23 "passing the discount onto consumers at store level in  
 24 relative terms"?  
 25 **A.** Well, I think it's in reference to this absolute and

1 relativity, so -- and my apologies if I repeat myself,  
 2 the bonuses that we were paying were reflective of those  
 3 two related but in some respects quite separate things.  
 4 It was to say to Sainsbury, "We are making these  
 5 investments, they have been there for a long time and  
 6 part of the reason we are paying these monies is because  
 7 you are working on low margins, and part of the reason  
 8 you can do that is because we are supporting you to do  
 9 so".  
 10 But another part of those bonuses, as well as the  
 11 ongoing but the tactical, is about the relativity, and  
 12 as long as the monies that we invest are passed on to  
 13 the consumer, in both ways, in other words if I keep  
 14 investing money, you will keep selling brands at cheap  
 15 prices, and when I invest additional monies, those  
 16 prices will reflect -- or the investments I make will  
 17 reflect the shelf prices I wish to achieve.  
 18 I don't know how else to frame it. That's what  
 19 I mean by "absolute and relative terms".  
 20 **Q.** So what you mean by "relative terms" is nothing other  
 21 than the shelf prices that respect the parity and  
 22 differentials communicated by ITL to Sainsbury from time  
 23 to time?  
 24 **A.** That's what I mean by relativity, yeah.  
 25 **Q.** Okay. Now, if one looks at these agreements, we have

1 ITL communicating to Sainsbury its differential pricing  
 2 policy, and we have Sainsbury signing up to agreements  
 3 on the basis that we have seen, and I fully accept that  
 4 you say that these were framework agreements, but  
 5 nonetheless, as I understand it, you do accept that they  
 6 were supposed to be the framework for the ongoing  
 7 trading relationship, don't you?  
 8 **A.** Yeah.  
 9 **Q.** Yes?  
 10 **A.** Yes.  
 11 **Q.** Doesn't it mean that the purpose of all this was that,  
 12 the bits that we are looking at, Sainsbury's were  
 13 supposed to keep the linked ITL and Gallaher brands at  
 14 the pricing relationships specified in the sheet that  
 15 was headed "Strategic Pricing Requirements" or whatever,  
 16 and they were supposed to do that, however prices moved,  
 17 up or down, that was the idea, wasn't it?  
 18 **A.** Well, I would make two comments to that, that statement  
 19 and the questions within it. The first is the bits that  
 20 we are looking at, and I do want to reinforce that the  
 21 number one issue in our business, then and now, is  
 22 availability. The second point that I would make is  
 23 that the word "where appropriate", and that would mean  
 24 that we would wish to see those differentials if we were  
 25 prepared to invest and, if we didn't, we wouldn't

1 achieve them.

2 **Q.** But that's in relation to movements downwards in price,

3 isn't it?

4 **A.** Or potentially upwards.

5 **Q.** Why potentially upwards?

6 **A.** Because if I had made an investment and wanted to take

7 it away, then that might mean an upward movement in

8 price, unless the retailer wanted to take a lower cash

9 margin.

10 **Q.** But surely the overall objective was to ensure that the

11 ITL brands and the linked Gallaher brands maintained the

12 shelf price parities that you communicated to Sainsbury?

13 **A.** No, I think that the overall objective of pricing was to

14 reward retailers who put their head above the parapet

15 and sold brands at costs or prices that were

16 economically acceptable, so that's the absolute bit, as

17 well as those relativities. So it is a two-pronged

18 thing.

19 **DR SCOTT:** Can I interrupt you at that point?

20 **A.** Yes.

21 **DR SCOTT:** We have heard evidence from people involved in

22 the retail trade, and here we are dealing with

23 supermarkets who, as we heard yesterday from the witness

24 for Sainsbury's -- well, who had been at Sainsbury's,

25 I should say -- that they were very mindful of

1 inter-retailer competition. The reason why they are

2 operating at low margins is not, as far as the evidence

3 from retailers is concerned, because they are being

4 supported by suppliers, but because they have to compete

5 with their other retail supermarket operators.

6 Now, that does not stop them coming to their

7 suppliers and seeking support, but their main concern is

8 being competitive with their fellow retailers.

9 Does that make sense to you?

10 **A.** It makes sense, but are we not in danger of agreeing

11 with ourselves that the monies that we were investing,

12 and the reason supermarkets wanted to sell cigarettes is

13 because they wanted to attract -- it was foot traffic,

14 and so yes, they were competing against other retailers,

15 but they were all selling brands cheaply so it was a

16 draw for consumers who wanted to go in there.

17 **DR SCOTT:** There seems to be a certain amount of discussion

18 about how far that's true, but the question here is

19 this: given that retailers like Tesco and Asda and

20 Sainsbury's were very concerned that their prices were

21 competitive with each other, in other words

22 inter-retailer --

23 **A.** Yeah.

24 **DR SCOTT:** -- but relatively unconcerned as to whether

25 a customer came in and bought a Gallaher cigarette or

1 an Imperial cigarette, as we understand it your concern

2 was to try to ensure that you were not disadvantaged in

3 that melee vis-a-vis Gallaher.

4 **A.** Yes, although it was my job to try and persuade them

5 that it was more important for them to sell our brands.

6 **DR SCOTT:** Yes. Absolutely. And in this case Gallaher were

7 in control of the gantries, is that right?

8 **A.** They were, yeah.

9 **DR SCOTT:** So from your point of view, you would have been

10 very disappointed, at whatever level a retailer was

11 selling, if when a customer came into the store Gallaher

12 brands were being priced more attractively than ITL

13 brands?

14 **A.** Yeah, that would, I suppose, be rubbing salt in the

15 wound, you are right, they did want to invest an awful

16 lot of money in gantries and furniture, which meant that

17 we were -- our shelf positions and our visibility was

18 suppressed, so that was already putting us on the back

19 foot. If they had turned the screw a little and

20 invested more money in price, that was twice as bad.

21 **DR SCOTT:** Given that situation, as I understand it --

22 I appreciate the points about the other elements of the

23 agreement -- but it does seem to have been important

24 from ITL's perspective that this framework did result in

25 ITL not being treated on a longer term basis less

1 favourably than Gallaher. We appreciate there are

2 moments when Gallaher would be having promotions; yes?

3 **A.** Yes, we wanted -- to get what we thought was our fair

4 share was always a battle in supermarkets.

5 **DR SCOTT:** And the supermarkets, if they were going to have

6 a promotion, would look to you for a bonus?

7 **A.** They would be always looking to us for investment, yes.

8 **DR SCOTT:** Thank you.

9 **MR LASOK:** I think you told us, when you were last before

10 the Tribunal, that ITL would have complained if

11 a retailer priced Richmond and Dorchester differently of

12 its own volition. For the Tribunal's reference that's

13 Day 15, page 75, line 21 to page 76, line 5.

14 If Sainsbury's had done that, that would have been

15 inconsistent with its commitment under the agreements,

16 wouldn't it?

17 **A.** Well, I think "complained" is perhaps the wrong word.

18 I think what I said was I would have done my best to try

19 and persuade them of the error of their ways, so my

20 conversation piece would have been "are you getting

21 investment from another manufacturer?" If they said

22 yes, that would take me down one path of a conversation.

23 If, as you are suggesting, they said "Well, we are doing

24 this of our own accord", I would say "Do you realise you

25 are making less margin on that product versus ours, why

1 are you doing that, is that something you can share with  
 2 me?", but I couldn't have stopped them from doing it.  
 3 **THE CHAIRMAN:** Couldn't you have reminded them of the  
 4 agreement that they had signed and said "Well, can you  
 5 please bring us down or put Gallaher back up"?  
 6 **A.** I think that's a really important point, and that would  
 7 be -- as a national account manager at the time, that  
 8 would be your call. Let's be really realistic here: if  
 9 I was dealing with Sainsbury's and they decided to do  
 10 something and said "I am not paying you because you are  
 11 doing that", that would have been commercially immature  
 12 and would have rocked the boat to the point where it  
 13 would have been a bad decision. Because at the end of  
 14 the day, you would be talking about one brand and  
 15 a pricing relativity against the fact that a thousand  
 16 supermarkets are selling a lot of products. So I don't  
 17 think that I would have really had a prayer of winning  
 18 that argument. "It's in our agreement, you have got to  
 19 do this", I just don't think that would have been  
 20 a conversation that would have gone anywhere. It would  
 21 have been a conversation piece where I tried to use the  
 22 powers of my persuasion to try to change their minds,  
 23 and that's really, when I refer to "framework  
 24 agreements" and use words like "pragmatic" and "right to  
 25 respond", I mean, that's the context in which I think

1 some of those things need to be seen, they weren't  
 2 legally binding documents.  
 3 **THE CHAIRMAN:** Is that a convenient moment?  
 4 **MR LASOK:** That's convenient.  
 5 **THE CHAIRMAN:** We will have a ten minute break now, so we  
 6 will come back at ten to 12. As before, Mr Matthews,  
 7 you are in the middle of your evidence, so you mustn't  
 8 talk about it with anybody else.  
 9 (11.42 am)  
 10 (A short break)  
 11 (11.50 am)  
 12 **MR LASOK:** Right, Mr Matthews, I want to turn now to look at  
 13 the practical implementation or operation of the trading  
 14 relationship between ITL and Sainsbury's in the period  
 15 after the signing of the first trading agreement in  
 16 August 2000. So we are now looking at the point at  
 17 which you had the August 2000 trading agreement, you are  
 18 later going to have the subsequent trading agreement  
 19 that follows on for it, and I just want to look at how  
 20 things ran in that period.  
 21 **A.** Okay.  
 22 **Q.** As far as I can see what happened in that period was  
 23 that Sainsbury backed the, or priced consistently with  
 24 the pricing positions that ITL wanted it to take. Is  
 25 that your recollection?

1 **A.** Well, I can't think of every instance or indeed what  
 2 happened before the trading agreement was signed.  
 3 I don't know the impact of the trading agreement. My  
 4 sense was that when we had money to invest, in other  
 5 words appropriate investments that Sainsbury would work  
 6 with us, that was my sense of the period.  
 7 **Q.** Because I just wondered, if you look at, for example,  
 8 tab 31, {D18/31/84}, is this a report that you had drawn  
 9 up?  
 10 **A.** This is a business development plan, very similar to the  
 11 one that we looked at in the context of Morrisons. So  
 12 it was a compendium of information that followed  
 13 a fairly formulaic layout where you talk about the macro  
 14 environment that the customer was part of, so in this  
 15 case how Sainsbury fitted into the UK multiple grocery  
 16 world, and you go on then to talk about how we were able  
 17 to achieve or not achieve what we wanted to do in the  
 18 account. So it's just a PDP.  
 19 **Q.** If you go to the -- I'll just count it, because the  
 20 pagination is not clear on my copy -- sixth page.  
 21 **A.** I see. Is this "Review of Financial Year"?  
 22 **Q.** Yes.  
 23 **A.** Okay.  
 24 **Q.** I am told that the entire contents are confidential.  
 25 There is a bit just beyond the middle point in the page,

1 which starts off with two initials.  
 2 **A.** Right.  
 3 **Q.** Okay? Then it's got, in the fourth bit, three initials.  
 4 Then we have another three initials. I just want to  
 5 make sure that we are all reading the same line.  
 6 **DR SCOTT:** I am not.  
 7 **THE CHAIRMAN:** You have lost us.  
 8 **MR LASOK:** Is this confidential?  
 9 **MR HOWARD:** I don't know where you are.  
 10 **DR SCOTT:** Can you give us a clue?  
 11 **MR LASOK:** It's the page headed "Review of Financial Year".  
 12 I think most of them are headed that.  
 13 **THE CHAIRMAN:** They all are.  
 14 **A.** It was a big review.  
 15 **MR LASOK:** It's one that says "Highlights and Lowlights".  
 16 If you look just below the middle point of the page,  
 17 you have a line that has two initials, starts with two  
 18 initials, and I think it's the only line on the entire  
 19 page that starts with two initials.  
 20 **A.** Right. So I know what you mean.  
 21 **Q.** Does that accord with your recollection?  
 22 **A.** Well, I think that confidential or not, that needs to be  
 23 seen in context of that entire page, and also in context  
 24 of the entire document. Whilst these were quite prosaic  
 25 reports, they were also useful when it came to getting

1 investment for your account, because all national  
 2 account managers wanted more investment, so I used to  
 3 take quite a bit of time to produce mine, and the  
 4 punchline would be "Aren't Sainsbury's good chaps?  
 5 Aren't I doing well? Roger, can I have some more money,  
 6 please?"  
 7 So you have to see this in context of that. The  
 8 substantive point is that you are right, there are lots  
 9 of different lines there under "Highlights" and although  
 10 they are confidential, I think it is worth dwelling upon  
 11 one or two, and I was asked earlier about the fact that  
 12 Gallaher had control of the furniture, which I say is  
 13 a lowlight, but there is an awful lot of highlights in  
 14 there that pertain to lots of different things.  
 15 The one I think you are talking about is that  
 16 Sainsbury's were helpful and worked with us when it came  
 17 to pricing, and the two things -- PMP and RPV, is that  
 18 what you are referring to?  
 19 **Q.** I was just referring to those initials because they  
 20 appeared in the line, and it might be capable of  
 21 identifying which line we were looking at.  
 22 **A.** Okay.  
 23 **MR SUMMERS:** May I suggest we may want to clarify for the  
 24 transcript, when you say "Aren't Sainsbury's good chaps?  
 25 Roger can I have some more money please?", were you

1 referring to a personal investment or further  
 2 investment --  
 3 **A.** If only. No. There was an art form to national account  
 4 management, which was that you would try and negotiate  
 5 with the retailer to try and keep the peace, and very  
 6 often it was more difficult negotiating with your own  
 7 company than it was with the retailer. With Roger, it  
 8 was far more difficult.  
 9 **DR SCOTT:** What is RPV?  
 10 **A.** That would be repeat purchase voucher. So what I am  
 11 saying there is that Sainsbury were good with us,  
 12 because prior to this period they wouldn't accept any  
 13 packs that were price marked or had vouchers in them.  
 14 That was just a policy, almost doctrinaire, and  
 15 I managed to persuade them that these were a good thing,  
 16 and they were willing to support us on them. So that  
 17 whole line is about the fact that they were supporting  
 18 our marketing campaign, really.  
 19 **MR LASOK:** Is it substantially untrue?  
 20 **A.** Is it substantially untrue? Which piece?  
 21 **Q.** The line. I am interested in the third bit, that's to  
 22 say you refer to three different things.  
 23 **A.** Right, okay.  
 24 **Q.** Two of which are identified by initials, and one of them  
 25 by a phrase consisting of two words.

1 **A.** Right, okay, you are narrowing it down there.  
 2 **MR HOWARD:** Obviously the words "price position" are not  
 3 confidential, really I suggest Mr Lasok adopts  
 4 a sensible and pragmatic view.  
 5 **A.** So would I say it was substantially true or untrue?  
 6 **MR LASOK:** I am asking you: is it substantially true or  
 7 untrue?  
 8 **A.** I think I would refer to what I said earlier, that  
 9 throughout this period my sense is that Sainsbury,  
 10 subject to investment, were helpful to us, both in  
 11 pricing and in different PMP and RPV incarnations, but  
 12 that was quite a good relationship.  
 13 **Q.** So it's substantially true?  
 14 **A.** It's substantially true.  
 15 **Q.** Yes. Could you move two pages further on, please.  
 16 Again, the whole page of this is supposedly  
 17 confidential, but there is a bit by the first holepunch  
 18 which is a paragraph beginning with the -- and I am  
 19 going to take a pragmatic approach, as Mr Howard has  
 20 asked me to do, and I am going to read out the first two  
 21 words of that paragraph. They are:  
 22 "Broadly speaking ..."  
 23 Are we looking at the same paragraph?  
 24 **A.** We are.  
 25 **Q.** Could you read that paragraph, please, only to the

1 colon, you don't need to go into the numbered points.  
 2 **A.** Okay. (Pause). Right. Yes.  
 3 **Q.** In the third line, you have a phrase, and I think I'll  
 4 read the first two words of the third line, and the  
 5 first two words are "New products".  
 6 **A.** Right.  
 7 **Q.** But the phrase after that --  
 8 **A.** Yes.  
 9 **MR HOWARD:** Again, I don't know whether this is deliberately  
 10 intended to make the transcript incomprehensible, but  
 11 I would suggest that the words "achieving pricing  
 12 strategy" are spoken, otherwise we will just get  
 13 something incomprehensible, that's what I mean by trying  
 14 to approach a pragmatic and sensible approach. I am  
 15 trying to be helpful.  
 16 **MR LASOK:** Thank you very much. So I can now read the words  
 17 "achieving pricing strategy", and that was substantially  
 18 true, was it?  
 19 **A.** I think that it was, all of those points are supposed to  
 20 build a view and to influence my boss and anybody that  
 21 might read this document --  
 22 **THE CHAIRMAN:** Was it substantially true or wasn't it,  
 23 Mr Matthews?  
 24 **A.** Yes, I suppose so, yeah.  
 25 **MR LASOK:** Can I press you on this, either it was

1 substantially true or it wasn't, there can't be any  
 2 supposition about it, surely?  
 3 A. Okay, now that you are pressing me, I'll try and answer  
 4 the question as best I can. Did Sainsbury achieve every  
 5 single pricing differential in every store 24 hours of  
 6 the day throughout the year? I am not sure. Were they  
 7 prepared to work with us to help us achieve pricing?  
 8 Yes.  
 9 Q. Okay. Let's pass on to tab 51, then. {D18/51/123}.  
 10 This is another document of like nature, the preparation  
 11 date is January 2002. Is that your signature on the  
 12 right-hand side above that of Mr Batty?  
 13 A. That is my signature, yes.  
 14 Q. If you go to the eighth page, we have a bit on that page  
 15 which fortunately is not confidential, it's under the  
 16 heading "Pricing".  
 17 A. Yeah.  
 18 Q. Could you read that sentence?  
 19 A. Yes, I've read that sentence.  
 20 Q. Was that substantially true?  
 21 A. It was substantially true.  
 22 Q. From time to time, however, you did have occasion to ask  
 23 Sainsbury to move an ITL brand to a specific price point  
 24 in order to maintain the agreed parities and  
 25 differentials; isn't that so?

1 A. That is the case.  
 2 Q. Yes, and Sainsbury's would comply?  
 3 A. I think that it's substantially true that they would  
 4 work with us, yeah.  
 5 Q. There was one document that I would like to ask you  
 6 about, that's tab 22. {D18/22/69}.  
 7 (Pause)  
 8 This is a letter that you sent to Fiona Bayley on  
 9 15 November 2000.  
 10 A. Yes.  
 11 Q. If you look at the second paragraph, you refer to  
 12 a presentation concerning the price repositioning of  
 13 Richmond Kingsize and the launch of Richmond Superkings.  
 14 Now, can you remember that presentation?  
 15 A. Yeah, I think so. I mean, this would have been when --  
 16 I think I mentioned this the last time I was here -- we  
 17 took an active position with Richmond to reduce its  
 18 price by bonusing. So I would have, out of respect to  
 19 Sainsbury, gone and explained what we were trying to do.  
 20 Because in the recent past prior to 2000, they were --  
 21 they wouldn't always work with us. They had quite  
 22 specific views about shelf prices, about brands, about  
 23 margin mix, so I would have presented that to them to  
 24 try and explain why we were doing that.  
 25 Q. Can you remember whether your presentation on the ITL

1 strategy was expressed in the way that you put it in  
 2 that paragraph?  
 3 A. Yeah. I can't remember it exactly, but I think I would  
 4 have explained that we felt that the consumers were  
 5 seeking value at a time when taxes were going up, and  
 6 therefore we were taking the price down. I don't think  
 7 it would have been a great deal more than that.  
 8 Q. Well, you say -- I'll read the full bit:  
 9 "You may remember from my presentation ... that our  
 10 strategy is parity with Dorchester."  
 11 A. Yeah. That would be it, that would seem right, yeah.  
 12 Q. If you go to tab 45, {D18/45/115}, and if you want to  
 13 you can read the whole letter, but I am actually  
 14 interested in a bit concerning Richmond pricing on the  
 15 second page.  
 16 A. Okay.  
 17 Q. I suppose I should note that if you look round about the  
 18 first holepunch, you have a paragraph beginning "As  
 19 discussed last week ..."  
 20 A. Right.  
 21 Q. You have a reference there in the third line to:  
 22 "... adherence to current pricing positions,  
 23 Kingsize parity with B&H and Lights parity with  
 24 Silk Cut~..."  
 25 A. Yeah.

1 Q. Then you have the Richmond pricing bit, and it's just  
 2 the bit that begins "I understand" and moves to the line  
 3 "we are widening the differential", which is by the  
 4 second holepunch.  
 5 A. Okay.  
 6 Q. That too is an example of you getting Sainsbury to move  
 7 upwards in order to maintain a -- here it's  
 8 a differential between Richmond and Sterling?  
 9 A. Yeah, this would be -- I think that Gallaher's  
 10 repositioned Sterling upwards, and started to chase  
 11 Richmond with Mayfair, I think. So what I am saying  
 12 there is that I have been making investments around the  
 13 ■ and ■ mark per thousand, and this is an opportunity  
 14 for me to reduce that investment.  
 15 Q. What you are doing is that you are anticipating that  
 16 there is going to be an upward move in Sterling, and so  
 17 you are putting in place arrangements to ensure that the  
 18 Richmond price will move accordingly?  
 19 A. Well, I think what I'm doing there is saying to  
 20 Sainsbury "I have been investing and I want to withdraw  
 21 my investment", and although both numbers for Richmond  
 22 Kingsize and Superkings are in red boxes, for those of  
 23 us that can see them, they are quite chunky, so this was  
 24 a chance to take them down and make them a little bit  
 25 more commercially palatable.

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1 Q. If we go, let's say, to tab 59 --  
 2 A. Okay.  
 3 THE CHAIRMAN: Just to work out the maths of this, just  
 4 looking at the page where it says "Kingsize", the 6p --  
 5 A. I've lost my page.  
 6 MR LASOK: It's the second page of tab 45, I think.  
 7 THE CHAIRMAN: Where it refers to a 6p post Budget hold,  
 8 that is 6p per pack of 20?  
 9 A. Yes.  
 10 THE CHAIRMAN: And similarly with 4p and 5p, and then the  
 11 figures in the red boxes, those are per thousand?  
 12 A. Yes. (Pause). So the difference between [REDACTED] and [REDACTED]  
 13 ought to be five times 0.43, I think, so what I am  
 14 trying to do there is saying, I was paying a bonus of  
 15 [REDACTED] and it's the 5p times 1p per thousand less VAT.  
 16 THE CHAIRMAN: Yes. So the reason why it doesn't work out  
 17 mathematically is always this VAT --  
 18 A. That's right, yes.  
 19 MR LASOK: I suppose also for the sake of accuracy, if we  
 20 look at the Richmond Superkings 20s figure, you  
 21 corrected that in the email at tab 46. It's the very  
 22 next tab. {D18/46/118}.  
 23 A. Oh, I see. There is a mistake, yes. Okay. Right.  
 24 THE CHAIRMAN: With some retailers these amounts are  
 25 expressed per outer.

1 A. Yes.  
 2 THE CHAIRMAN: Which might be different from per thousand.  
 3 A. It would be a fifth less, yes.  
 4 THE CHAIRMAN: Yes.  
 5 MR LASOK: Then if we go to tab 59, {D18/59/149}, this is  
 6 a letter dated 5 August 2002 to Mr Davies, who was then  
 7 the tobacco category buyer at Sainsbury's. If you go to  
 8 the second page, at the top, wasn't this one of a number  
 9 of letters that went out from ITL to various retailers  
 10 at the time?  
 11 A. When is this, 2002?  
 12 Q. It's August, yes.  
 13 A. I don't remember exactly what happened in August 2002.  
 14 I mean, I understand the context of the letter, but  
 15 I don't know what else was said to who and by who and  
 16 when.  
 17 Q. Anyway, if you look at the first paragraph and the  
 18 figures underneath it --  
 19 A. Yeah.  
 20 Q. -- it looks as though here you are trying to get upward  
 21 movement in the ultra low price sector of the market,  
 22 and you are asking Sainsbury's to make an increase in  
 23 price to that end. That's correct, isn't it?  
 24 A. Well, I am certainly looking to withdraw investment  
 25 here, and the natural -- the maths of that would suggest

1 a price increase, yeah.  
 2 Q. But surely it's the other way around, isn't it? If you  
 3 read what you say, you actually say:  
 4 "Despite fierce competition, we feel there should be  
 5 some upward movement in the ultra low price sector of  
 6 the market. From the date you apply this increase  
 7 please increase the shelf price of Richmond brands as  
 8 follows."  
 9 After that, you get into a discussion about  
 10 a contribution, and is that on the 100 multipack PMP?  
 11 A. Yeah, I think what was happening there was that we were  
 12 trying to get the mix across the SKUs, and we were  
 13 continuing to invest in the PMP, and clearly while stock  
 14 was in the supply chain there wasn't much you could do  
 15 about that, you couldn't sell it for more than  
 16 £16.99/£17, but on the 20s we saw an opportunity to  
 17 reduce investment. So that's what that's about,  
 18 I suppose.  
 19 Q. If we look at that indent, it's an indent identified by  
 20 a dash on the left-hand side of the page.  
 21 A. Right.  
 22 Q. You have various indents, you have a total of four --  
 23 A. Yeah.  
 24 Q. -- which appear to split that page of the letter out  
 25 into different topics?

1 A. Yes.  
 2 Q. The first topic, which is the upward movement, that  
 3 doesn't refer to changes in bonuses or anything like  
 4 that, does it?  
 5 A. Well, it does, because it says that I will have to  
 6 increase my contribution from 2 -- contributions of [REDACTED]  
 7 and [REDACTED]. So I think what I am saying is I will have to  
 8 increase my contribution on the 100s, but on the 20s  
 9 that I won't. I am just trying to follow the order of  
 10 this. (Pause).  
 11 Yeah, the background of this, I think, is that we  
 12 were -- it's manufacturers' price increase, that's what  
 13 it says on the heads of the letter, so we are having  
 14 a price increase effective September 2nd, and this is  
 15 dated 5 August. So there is actually eight topics  
 16 discussed here, ranging from the stock profit they can  
 17 make by pre-buying stock. I am saying that  
 18 Henri Winterman, who we were the agent for, aren't going  
 19 up, so not affected, and also that our price list  
 20 differentials between our brands, between Embassy and  
 21 Regal and B&H had narrowed. It just covers a whole  
 22 range of issues, I am just trying to work out why we  
 23 were -- why our -- what was happening with Richmond.  
 24 I think what was happening was that if we were going  
 25 up, that we were maintaining the 16.99 and 17 hundred

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1 PMP, that would mean that for them to maintain that  
 2 shelf price, I would have to put money in, albeit that  
 3 we discussed how the money and the treasury thing works,  
 4 but somewhere through the accounting chain I was going  
 5 to have to pay more money, but with Richmond and  
 6 Superkings that we were going to go up and equally it  
 7 seems as though there's upward movement in the ultra low  
 8 price sector, so somebody else has gone up as well.  
 9 I would like to see the schedule of bonuses for  
 10 that, because I can't work that one out.  
 11 **THE CHAIRMAN:** But it seems from the point on the previous  
 12 page about Embassy and B&H, that you are not expecting  
 13 B&H to go up at the same time or shortly after?  
 14 **A.** I am trying to think of the context of this, and I don't  
 15 know. I can only make -- I can only suspect that  
 16 either -- no. We have declared an MPI, and we know,  
 17 because we have written our price list, that we are now  
 18 prepared to live with narrower differentials between  
 19 Embassy and Benson & Hedges, I think. So we referred to  
 20 that the other week, that we had gone from a 3p to a 2p  
 21 narrowing and I am pointing that out. The context of  
 22 the Richmond piece, I don't understand the context of  
 23 that, because it might be the fact that we are going up  
 24 on the price list, it might be because of competition,  
 25 I can't -- I would have to see the schedule that backed

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1 that, because I can't remember.  
 2 **MR LASOK:** I think the uncontroversial part of the story is  
 3 that Gallaher have published an MPI in May of that  
 4 year --  
 5 **A.** Ah, right.  
 6 **MR LASOK:** -- and have then circulated price hold letters  
 7 to retailers for certain of the brands, and the  
 8 consequence of that was that in relation to some at  
 9 least of the retailers, ITL circulated a letter altering  
 10 the strategic pricing requirements, and that kept -- if  
 11 we simplify it so far as Richmond and Dorchester is  
 12 concerned -- the Richmond and Dorchester prices at the  
 13 same level so there was no change.  
 14 **THE CHAIRMAN:** That was in June 2002, those letters were  
 15 sent.  
 16 **MR LASOK:** The letters went out between about something like  
 17 31 May and 11 June or thereabouts.  
 18 Those, I should emphasise, are the Gallaher price  
 19 hold letters, and the other letters, which ITL sent out,  
 20 with the revised strategic pricing requirements were  
 21 round about the same time.  
 22 Then what happened so far as Richmond and Dorchester  
 23 is concerned is that things remained stable, until this  
 24 point when ITL announced the MPI that was going to be  
 25 effective on 2 September. So what we see in this letter

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1 is one of the letters that went out at that time in  
 2 connection with ITL's MPI. You may remember that, when  
 3 I opened, I pointed out that this was the start of what  
 4 ultimately became something like a 10p rise in the price  
 5 of Richmond and Dorchester that was accomplished in two  
 6 stages.  
 7 **DR SCOTT:** So if we look back, the RRP's that Gallaher  
 8 announce in June, cigarettes go up by 6p except for the  
 9 Sovereign and Dorchester Kingsize which only go up by  
 10 4p, and Mayfair is unchanged, then the RRP is announced.  
 11 But at this stage, for 2 September by ITL, Richmond  
 12 Kingsize, like Dorchester Kingsize, go up 4p, but  
 13 Embassy and Regal go up 7p, and that narrows the  
 14 differential.  
 15 **MR LASOK:** Yes, that's right. And this letter is written to  
 16 Sainsbury's in the context of the MPI that ITL had  
 17 published at this time, that was scheduled to come into  
 18 effect on 2 September.  
 19 The bit I was concentrating on, actually, was at the  
 20 top of page 2, because I can't find on the top of page 2  
 21 any reference there to an alteration of the bonus. The  
 22 way I read it is that you are simply saying to  
 23 Sainsbury's that there should be upward movement, and  
 24 then you say "from the date you apply this increase  
 25 please increase the shelf price of Richmond as follows"

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1 and you give Sainsbury's specific price positions?  
 2 **A.** Against the background that you just described, I think  
 3 that's really what we are referring to, that we have  
 4 gone up, and I am really re-emphasising the price list,  
 5 I think. I can't see any other context to it.  
 6 **Q.** Okay, fair enough, because if you can't quite  
 7 remember --  
 8 **A.** No.  
 9 **Q.** -- there is nothing wrong with that.  
 10 If you go to tab 65, could you just read that,  
 11 please. {D18/65/201}.  
 12 **A.** Okay. (Pause). Okay.  
 13 **Q.** Here we see the second instalment. This is an email  
 14 that you sent on 4 October.  
 15 **A.** Yeah.  
 16 **Q.** You refer in the second line to your belief that there  
 17 was going to be some upward movement at the bottom end  
 18 of the market at last. Then you ask Sainsbury's to  
 19 increase the shelf price of Richmond from October 14  
 20 from -- and I think these figures are not  
 21 confidential -- 3.54 to 3.59. That's Kingsize. And for  
 22 Superkings, it's the next line, 3.58 to 3.63.  
 23 So what had happened in tab 18/59 is that you had  
 24 asked them to move -- no, the figures aren't  
 25 confidential -- you had asked Sainsbury's in August to

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1 increase Richmond from 3.49 to 3.54 in the Kingsize,  
 2 and, so far as Superkings are concerned, 3.53 to 3.58.  
 3 That was to be effective from September 2.  
 4 Then in October, you are getting them to do the next  
 5 stage of the increase, from 3.54 to 3.59, which is  
 6 Kingsize, and then 3.58 to 3.63, which is the  
 7 Superkings.  
 8 So I think that the date of October 14 was changed  
 9 to October 21, but I may be confusing myself there with  
 10 another retailer.  
 11 At all events, what we have is a sequence in which,  
 12 between August and October, we have what is a -- let me  
 13 see now -- a 10p rise in Richmond occurring in two  
 14 stages. You couldn't have done that unless Dorchester  
 15 was also rising, could you?  
 16 **A.** We could have done, but we would have been  
 17 disadvantaged. I mean, we could have tried to withdraw  
 18 our investment earlier, or perhaps not had an MPI to try  
 19 and balance the brands. But I think at this stage in  
 20 the game, two years after we had repositioned Richmond,  
 21 you know, it was taking quite a lot of resource.  
 22 I think that's probably why we were prepared to live  
 23 with those differentials on Embassy and Regal. I don't  
 24 think we were, but we needed something from our war  
 25 chest to fund what we were doing on Richmond. So by

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1 this time after two years of spending a lot of money,  
 2 our coffers were obviously running a little bit low,  
 3 hence taking an MPI, et cetera. So this is about trying  
 4 to withdraw the investment on Richmond. Notwithstanding  
 5 we were still prepared to support the PMPs and the 100  
 6 multipacks through this period, for a little bit longer.  
 7 **Q.** Forgive me, it's not about withdrawing an investment or  
 8 anything like that, it's about increasing shelf prices?  
 9 **A.** I am afraid I can't agree with you on that, only because  
 10 I remember the amounts of monies that I was paying  
 11 across the accounts that I dealt with on Richmond, and  
 12 they were huge. I mean, they were big six figure sums,  
 13 probably seven figures between all three accounts. And  
 14 our view was we were going to back Richmond, and we  
 15 actually widened the differential on Richmond 100  
 16 Superkings, but there was a point at which we couldn't,  
 17 you know, we had to satisfy our shareholders. So it is  
 18 all about investment, absolutely all about investment.  
 19 **Q.** Can I just say that a moment ago I said I thought that  
 20 the Richmond increase had been deferred to a point after  
 21 October 14, I was actually thinking of a document in  
 22 annex 14, it's tab 63, {D14/63/168} which was  
 23 a communication to Asda deferring the increase to  
 24 21 October.  
 25 Do you remember whether or not Gallaher had followed

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1 the first price move upwards?  
 2 **A.** The MPI or --  
 3 **Q.** Yes. The one that was taking place in September.  
 4 **A.** So had Gallaher had an MPI, was that what you were  
 5 asking?  
 6 **Q.** Well, no, because Gallaher had had an MPI in June but  
 7 had then held its prices --  
 8 **A.** Right.  
 9 **Q.** -- for Richmond and Dorchester, among other brands.  
 10 **A.** Yeah.  
 11 **Q.** So when you send round the August letter that we have  
 12 seen at tab 59, and you ask for Sainsbury to increase,  
 13 and here we are focusing for the sake of simplicity on  
 14 Richmond, so you have a 5p increase in Richmond, then  
 15 the second stage is, we get to 4 October, where you do  
 16 another 5p increase.  
 17 Now, can you remember what Gallaher have been doing  
 18 in the meantime?  
 19 **A.** In the context of the first letter, no, I don't recall  
 20 that. In the context of the second letter, I would feel  
 21 more confident in saying that there was something  
 22 happening. I think we had held on, and as I've said  
 23 here, I believe there is going to be some upward  
 24 movement at the bottom end of the market. So Tim has  
 25 said to me "look, this is happening", so I am taking my

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1 opportunity to cut down to 2.13 per thousand on those  
 2 brands. I think they are then. August I can't  
 3 remember.  
 4 **Q.** I am just trying to see what we have. (Pause). I think  
 5 there is a Gallaher increase in the beginning of  
 6 October.  
 7 **THE CHAIRMAN:** Well, perhaps ask it this way --  
 8 **MR LASOK:** I don't think it matters, because the witness  
 9 can't remember, as I understand it.  
 10 **THE CHAIRMAN:** Perhaps I can just ask you this,  
 11 Mr Matthews --  
 12 **A.** Of course.  
 13 **THE CHAIRMAN:** -- when you had increased the price in  
 14 September, as you announced in August, if Gallaher had  
 15 not followed you up, followed the price up with  
 16 Dorchester, would you still have moved the Richmond  
 17 price up again in October, or does the fact that you  
 18 moved the price up again in October make you think that  
 19 probably Gallaher had followed the Dorchester price.  
 20 **A.** The latter.  
 21 **THE CHAIRMAN:** Unlikely you would have increased the price  
 22 again if Dorchester had stuck at the lower price.  
 23 **A.** At that time we wouldn't have been prepared to do that,  
 24 I don't think.  
 25 **MR LASOK:** But reverting now to Sainsbury, and moving away

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1 from Gallaher, we have a picture at the moment in the  
 2 documents that we have been looking at in which you have  
 3 the trading agreement in the background, which sets, as  
 4 you put it, the framework for the trading relationship;  
 5 we have your internal reports that say on two occasions  
 6 covering this period that during the periods covered by  
 7 your reports, Sainsbury's has been co-operative,  
 8 substantially compliant with ITL's pricing strategy; we  
 9 have documents in which you ask Sainsbury's to make  
 10 a move; we have, in these documents, indications that  
 11 Sainsbury's did make moves. We are looking at one here.  
 12 So wasn't it the position that -- putting legal  
 13 niceties aside, because we are not concerned with  
 14 those -- you had a strong expectation that if ITL made  
 15 a movement in price that Sainsbury's would alter its  
 16 shelf prices in accordance with ITL's preferred  
 17 positioning of its brands?  
 18 **A.** I would like to think that we were able to manage our  
 19 investment properly during a very difficult and  
 20 competitive time. I don't know what the shelf prices  
 21 looked like, I haven't seen an audit on those. I think  
 22 I am safe in saying that when we reduced investment and  
 23 Sainsbury's increased shelf price, it would have  
 24 probably happened quite quickly, but I don't know what  
 25 the lags look like.

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1 **MR HOWARD:** I insist that Mr Lasok, because it is perfectly  
 2 clear to us that what he is trying to do, without  
 3 putting his case, is suggest that there was a strong  
 4 expectation if ITL moved its price, and its price in  
 5 respect of its brands, there was an expectation that  
 6 Sainsbury's would alter the shelf prices in respect of  
 7 the Gallaher brands.  
 8 If that is what Mr Lasok is intending to put and to  
 9 argue, he must put that in terms. It is not good --  
 10 **THE CHAIRMAN:** I did not understand that that was the  
 11 question he was asking.  
 12 **MR HOWARD:** I think you will find that if I had not  
 13 intervened, that is what he is trying to argue in  
 14 relation to quite a lot of these questions where he  
 15 doesn't properly put a case, but what he tries to do is  
 16 put questions which have arguably within them hidden the  
 17 points that they want to put. They are frightened ever  
 18 to put to the witnesses what it is they ultimately want  
 19 to argue. And they have to, if they are going to make  
 20 an argument that, for instance, if Imperial withdrew  
 21 a bonus and that caused the price of its brands to go  
 22 up, he has to put his case, if he says that then there  
 23 was an expectation that Sainsbury's would put up the  
 24 price of Gallaher irrespective of what Gallaher did. If  
 25 that's Mr Lasok's case, which I understand it to be, he

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1 must put that properly to the witness. It is not  
 2 a proper way to conduct cross-examination to have hidden  
 3 issues within a question where you do not fair and  
 4 square put it.  
 5 **THE CHAIRMAN:** At the moment I think where we are is that  
 6 you have been asked was it your expectation that if you  
 7 reduced the bonus, Sainsbury's would move up the price  
 8 of the ITL brand to which that bonus related in  
 9 a corresponding way as you asked them to do?  
 10 **A.** As far as my brands are concerned and my investment, if  
 11 that's the question, yes, I would, I believe Sainsbury  
 12 would do that.  
 13 **THE CHAIRMAN:** Now, do you want to put a different question  
 14 to Mr Matthews?  
 15 **MR LASOK:** Yes.  
 16 If we look at the document that we were looking at  
 17 previously, which is 59, the second page at the top, you  
 18 also had a strong expectation that if you asked  
 19 Sainsbury's to increase its price, it would do so?  
 20 **THE CHAIRMAN:** Increase its price of what? It would do so  
 21 in relation to what?  
 22 **MR LASOK:** Its price of an ITL brand, it would do so.  
 23 **A.** That is a different point, and I've explained in context  
 24 of that first paragraph and the second paragraph with  
 25 the numbers on, I am not sure if that is in reference to

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1 an MPI or not. If it's in reference to an MPI,  
 2 a published price list with published retail prices, my  
 3 expectation -- a retailer would go with those. But  
 4 I don't remember or recall the context of that  
 5 particular paragraph. Again, just for clarity, my  
 6 expectation of the investments I was managing, if I was  
 7 to withdraw or reduce investment, I think it was fairly  
 8 plain that Sainsbury's would want to maintain cash  
 9 margin and would go up. Equally, if I was prepared to  
 10 put money in, and they would maintain cash margin, it  
 11 would be good common sense for them to reduce a brand.  
 12 **THE CHAIRMAN:** But in the absence of a bonus, if you  
 13 announced an MPI and there were no holds or anything,  
 14 and the cost, when the MPI came into effect, was  
 15 increased, did you have an expectation that the shelf  
 16 price in Sainsbury's for that brand would increase?  
 17 **A.** Yeah, because they got more cash margin. At the MPI our  
 18 margins went up and so did the retailers'. So if they  
 19 held, they would be -- it wouldn't make any sense.  
 20 **THE CHAIRMAN:** Okay.  
 21 **MR LASOK:** It's also the case, isn't it, with movements  
 22 downwards there had to be a discussion with Sainsbury's  
 23 because you needed to sort out how the bonus was to be  
 24 adjusted in order to effect the movement downwards?  
 25 **A.** Yes.

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1 Q. Okay. It was also the case, wasn't it, that ITL -- in  
 2 fact you yourself -- would inform Sainsbury of the  
 3 prices of its competitors to reassure it that it could  
 4 increase its prices?  
 5 A. I would certainly suggest things to people. Some of  
 6 those might not have been substantially true. But from  
 7 time to time I would suggest things that I wanted to  
 8 happen and they would give me information as well. It  
 9 was a sort of -- those type of relationships.  
 10 Q. I was actually thinking of what you said in paragraph 74  
 11 of your witness statement. Could you have a look at  
 12 that, please?  
 13 A. Paragraph 74? Yes. Okay. Is this the part in the box?  
 14 Q. Yes, you can read the whole paragraph, if you would  
 15 like.  
 16 A. Okay. (Pause). Yeah. Okay.  
 17 Q. So, for example, that would mean that you were  
 18 reassuring Sainsbury's that if you wanted it to raise  
 19 the price of an ITL brand, it had sufficient headroom  
 20 also to raise the price of the linked Gallaher brand in  
 21 order to maintain the parities and differentials?  
 22 A. Can you say that last piece again, just the last bit of  
 23 what you said, just so I understand it?  
 24 Q. Yes. So you were communicating information to  
 25 Sainsbury's about the prices of, in competitors to

1 Sainsbury's, and that gave reassurance to Sainsbury that  
 2 if there was a movement upwards, it had sufficient  
 3 headroom to move both the ITL and the Gallaher brands in  
 4 order to maintain the parity and differentials?  
 5 A. Not the Gallaher brands, I would quite often use --  
 6 because, as you were saying earlier, I recognised they  
 7 looked towards other retailers -- anything I could to  
 8 reduce investment. So if I was in a debate with,  
 9 I don't know, Tesco, Sainsbury, Morrison, and say "Look,  
 10 things are happening in the market, I want to reduce my  
 11 bonus by 2.13", they would say "Why would I do that?  
 12 I do not want to". "You know, Tesco have moved up" --  
 13 THE CHAIRMAN: Moved up what, the ITL brand?  
 14 A. Yeah, so I felt that was a legitimate form of  
 15 persuasion. I daresay from time to time I might have  
 16 tried to overpersuade them and might not have been  
 17 completely accurate in what I was saying, but most of  
 18 the time I felt -- I mean, it seemed to me to be quite  
 19 a legitimate --  
 20 THE CHAIRMAN: Yes. I don't think we are worrying about  
 21 that, Mr Matthews. I think what we are worrying about  
 22 is whether, looking at what you say in paragraph 74 --  
 23 A. Yes.  
 24 THE CHAIRMAN: -- it's also the case that you ever  
 25 discussed with retailers what their competitors, ie

1 other retailers, were doing with the linked Gallaher  
 2 brand?  
 3 A. No, because I wasn't in charge of the investment on  
 4 Gallaher brands, I was only in charge of my investment.  
 5 MR HOWARD: If this point is going to be pursued, it needs  
 6 to be pursued properly, as indeed is the case with a lot  
 7 of points. We have heard already from the one witness  
 8 the OFT has called from Sainsbury's, Ms Bayley, that  
 9 there was never any discussion at all about Gallaher's  
 10 brands, that Mr Matthews never asked her to move  
 11 Gallaher brands, or anything of that sort. If Mr Lasok  
 12 is going to put a case -- he has interviewed all the  
 13 Sainsbury's witnesses -- he needs to put a specific case  
 14 as to when it is he says these conversations took place  
 15 and with whom and what was said. It's not a proper way  
 16 to cross-examine, to say "This paragraph must be about  
 17 a conversation" -- his instructions must be there is no  
 18 such conversation, because the only witness he is  
 19 prepared to tender has said exactly the opposite to the  
 20 case that's being put.  
 21 THE CHAIRMAN: Mr Matthews has also said that no such  
 22 conversation took place. Now, I agree at the moment  
 23 there is no evidence to suggest that any such  
 24 conversation took place. Now, Mr Lasok, if there is in  
 25 the documents some indication on which you are going to

1 rely in future to say that their evidence is wrong, then  
 2 I agree with Mr Howard that you must put that specific  
 3 example to Mr Matthews.  
 4 MR LASOK: Could you turn to tab 37, please. {D18/37/101}.  
 5 Please read the whole of the letter, but I am  
 6 particularly interested in the second page, in reference  
 7 to Drum Milde.  
 8 (Pause)  
 9 A. Okay.  
 10 Q. So if we look on page 2 we have Drum Milde, at the end  
 11 of the first paragraph you say that ITL had been  
 12 tracking the price of Amber Leaf for over a year. Then  
 13 in the third paragraph you say:  
 14 "The market has recently moved upwards, offering  
 15 an opportunity for Sainsbury to increase cash take and  
 16 for ITL to reduce contribution."  
 17 You then disclose that Asda had moved to certain  
 18 prices on Drum and Amber Leaf. Interestingly enough,  
 19 Tesco was a bit out of line, but you then ask Sainsbury  
 20 to move Drum to 2.09.  
 21 A. Mm.  
 22 Q. What you are doing here is you are passing on  
 23 information about the retail prices in competitors'  
 24 stores, competitors of Sainsbury, in order to give  
 25 Sainsbury the confidence that it can move here

1 a price -- I think it's an upward movement here -- so as  
 2 to achieve the strategy of parity with the Gallaher  
 3 brand. But that would work the other way as well,  
 4 wouldn't it?  
 5 **THE CHAIRMAN:** Well, just let him answer whether that's how  
 6 he interprets the --  
 7 **A.** I'm still reading.  
 8 (Pause)  
 9 So Drum ... so it looks as though I am trying to --  
 10 I am increasing my investment. Or am I reducing?  
 11 (Pause)  
 12 So I am reducing my investment. Yeah, I am trying  
 13 to reduce my investment on Drum.  
 14 **MR LASOK:** The other way around it is this: if Gallaher made  
 15 a move upwards, it was in ITL's interest and it was part  
 16 of ITL's strategy that the ITL brand that was linked to  
 17 the Gallaher brand would also move upwards; isn't that  
 18 so?  
 19 **A.** Well, I think when we looked at the example of Richmond  
 20 and other brands, yes, because we were investing monies  
 21 on them, and if our strategy was to pit against another  
 22 brand and that brand moved up, we could reduce our  
 23 investment and the shelf price would increase.  
 24 **Q.** You had a situation in which you had a track record with  
 25 Sainsbury's that Sainsbury's would substantially comply

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1 with the parity and differential requirements, so didn't  
 2 you therefore have an expectation that if Gallaher moved  
 3 up the price of a brand then Sainsbury's would move up  
 4 the price of the linked ITL brand? That, after all, is  
 5 what you wanted?  
 6 **MR HOWARD:** Again, the question needs to be made clear.  
 7 **THE CHAIRMAN:** Yes. You need to make clear, Mr Lasok, on  
 8 what assumptions you are asking him whether the move is  
 9 going to be made with regard to the payment and  
 10 withdrawal of bonuses, because his answers so far have  
 11 been very clear that he has regarded that as  
 12 an underlying factor. If you are going to put to him  
 13 a question which assumes that that is not an underlying  
 14 factor, then you must make that clear in your question.  
 15 **MR LASOK:** Fine.  
 16 So we will take it in stages. The ITL pricing  
 17 strategy, as we have established, was to price the ITL  
 18 brands at a particular relationship to a specified  
 19 Gallaher brand, like a parity or a differential. So we  
 20 have already established that. You had a track record  
 21 of co-operation with Sainsbury's. So if Gallaher caused  
 22 Sainsbury's to increase the shelf price of a Gallaher  
 23 brand, you would have had a strong expectation that  
 24 Sainsbury's would move the price of the linked ITL  
 25 brand.

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1 **MR HOWARD:** It's just repeating the same point.  
 2 **THE CHAIRMAN:** Well, no, you haven't asked the question.  
 3 **MR LASOK:** Forgive me, I have, because I have left out  
 4 reference to the bonus change. The question, with  
 5 respect, is absolutely crystal clear.  
 6 **MR HOWARD:** It is not, and it's deliberately not. This is  
 7 actually what's wrong with this case.  
 8 **THE CHAIRMAN:** Let's just --  
 9 **MR LASOK:** What I've hypothesised is that --  
 10 **THE CHAIRMAN:** Yes, Mr Lasok.  
 11 Mr Matthews, can you answer the question that  
 12 Mr Lasok has put, and then we will see where we get to.  
 13 **A.** So again, my expectation is -- can you just repeat it,  
 14 please?  
 15 **MR LASOK:** I am not going to repeat the preamble to all  
 16 this, but the facts are these: that Gallaher causes  
 17 Sainsbury's to increase the shelf price of a Gallaher  
 18 product. What you have is a linked ITL brand. Now,  
 19 assume that there is nothing else going on. You have  
 20 not raised this with Sainsbury's. Wouldn't you have had  
 21 a strong expectation that Sainsbury's would, in those  
 22 circumstances, increase the shelf price of the ITL  
 23 brand?  
 24 **A.** Not at all.  
 25 **Q.** And why not?

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1 **A.** Because it wouldn't be in their interests to do so.  
 2 **Q.** Why?  
 3 **A.** Well, because if they could -- because their whole  
 4 reason for being in the tobacco category was to sell  
 5 products cheaply and, yes, to compete with other  
 6 retailers. So none of them ever wanted to put any  
 7 prices up. They just didn't. They saw price increases  
 8 as an affront to what they were in business for, hence  
 9 the reams of paper to persuade people with bonuses to do  
 10 things. So no, that wouldn't be my expectation at all.  
 11 The only thing I could control was my investment in my  
 12 brands. That's all I could control. It was my biggest  
 13 lever and that was my job.  
 14 **Q.** Now let's take this in stages. Firstly you would accept  
 15 that it was actually ITL's strategy that the price of  
 16 the linked ITL brand should go up when the Gallaher  
 17 brand went up?  
 18 **A.** No.  
 19 **Q.** Well, why did you say what you said in document 22?  
 20 **A.** Well, can I answer the question, and then go to document  
 21 22?  
 22 **Q.** Yes.  
 23 **A.** Because I think that there were -- it doesn't  
 24 necessarily follow that we would want to go up. If we  
 25 could get a position that was better than parity or

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1 better than the differential, we might be in danger of  
 2 selling more. However, the only thing that I could  
 3 control was my investment, and if we wanted to reduce  
 4 investment and take that away from a retailer, that  
 5 might well see the shelf price go up. But better than  
 6 parity, you know, 1p better, 2p even better.  
 7 **Q.** You see, I've already asked you a number of questions  
 8 about ITL's strategy.  
 9 **A.** Right.  
 10 **Q.** If you go back, for example, to tab 22, I asked you  
 11 about the presentation --  
 12 **A.** Yes.  
 13 **Q.** -- that you made.  
 14 **A.** Yes, I remember the question.  
 15 **Q.** You told me that you had said to Sainsbury that the  
 16 policy was parity.  
 17 **A.** Mm.  
 18 **Q.** In that letter, you are telling Sainsbury's that you  
 19 want to achieve parity.  
 20 **A.** Mm.  
 21 **Q.** So if that was ITL's strategy, it follows if Gallaher's  
 22 price went up you would want the price of the linked ITL  
 23 brand to go up commensurately?  
 24 **A.** But this to me would seem as though -- this is a price  
 25 increase so we are going from 3.29 to 3.34 on document

1 22 and I am paying a bonus of more than [REDACTED], and after  
 2 that I am going to be paying a bonus of [REDACTED], so I am  
 3 going to make an extra [REDACTED] per thousand on this brand.  
 4 When it suited me, that's very much what I wanted to  
 5 say.  
 6 **Q.** It was in ITL's commercial interest to achieve the price  
 7 increases in ITL brands where the shelf price respected  
 8 the proscribed parity or differential because that  
 9 reduced the amount of money that Mr Howard says ITL was  
 10 throwing at these brands?  
 11 **A.** But if I was to withdraw that bonus and move from  
 12 an ongoing of [REDACTED] an additional [REDACTED] down to [REDACTED] and [REDACTED]  
 13 and the shelf price was 3.33, that would be better,  
 14 wouldn't it, for us.  
 15 **Q.** Well, look --  
 16 **A.** But it would.  
 17 **Q.** -- if you had said to the retailer "we would like you  
 18 to move to a price that doesn't reflect the differential  
 19 set out in the strategic pricing requirements", that  
 20 would be one thing. But in these letters, you ask  
 21 Sainsbury's to move the price, the shelf price, to  
 22 a price that reflects your preferred relationship with  
 23 the linked ITL brand.  
 24 **A.** But at the same time knowing what I knew about the  
 25 account and the margins that they were working on, it's

1 also moving into a position where I know there would be  
 2 an acceptable cash margin, and I also think there is  
 3 a point in there between the ongoing bonus or the  
 4 absolute and the relative point. For example, if  
 5 Sainsbury had chosen to adopt a shelf price of £3 for  
 6 Embassy and £3.05 for Benson & Hedges, so we were better  
 7 than we would have expected, I wouldn't have said "You  
 8 need to move that up to achieve a differential", I would  
 9 have said "That's your decision, that's good". That's  
 10 their call.  
 11 This particular instance I think is quite different.  
 12 This is an ongoing investment in a battle for supremacy  
 13 and ultra low price. What I am saying here is: I want  
 14 to decrease my investment, you hold your cash margin,  
 15 that is what it is going to look like. If Sainsbury had  
 16 rung me and said, "Paul, I am not going to do this,  
 17 I actually want to be at 3.33 on Richmond", I mean, it  
 18 would have been a pretty short conversation, because  
 19 I would have known in the back of my mind that I'd have  
 20 been better than I'd have needed to achieve and we'd  
 21 have sold more, and I would have put the phone down,  
 22 rang up Roger Batty and said "You won't believe this, we  
 23 have withdrawn our bonus and they are still going to  
 24 sell it a little cheaper" and I would have looked good  
 25 and we would have sold more and consumers would have

1 been happy and Sainsbury would make less money than they  
 2 needed to.  
 3 **Q.** If you had written to Sainsbury's that you wanted to  
 4 move the price of Richmond upwards to achieve parity or  
 5 better, and if you had said nothing at all about  
 6 bonuses, you were faced with this horrible scenario,  
 7 weren't you: the retailer might have priced below parity  
 8 and come back to you and asked for money?  
 9 **A.** They might have done, but in the scenario I was  
 10 explaining, that would have been the retailer declaring  
 11 that was their position. But that might have happened,  
 12 and there could have been a conversation where I might  
 13 have said to Roger, "Look, we are withdrawing some bonus  
 14 but why don't we withdraw not all of it but some of it",  
 15 and Sainsbury are going to give us a competitive  
 16 advantage. That would have been good as well. That  
 17 would have been very good.  
 18 **Q.** And let's suppose that Mr Batty has already told  
 19 the Tribunal that ITL's strategy was to, in the case of  
 20 Richmond, price at parity with Dorchester because -- and  
 21 ITL did not want to throw any more money at Richmond to  
 22 get it below parity --  
 23 **MR HOWARD:** The summary that's constantly put of what it is  
 24 said Mr Batty has said is not accurate. I just want to  
 25 make that clear.

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1 **THE CHAIRMAN:** You can ask the question without citing  
 2 Mr Batty --  
 3 **MR LASOK:** Yes, it's Day 7, page 70 at lines 4 to 12.  
 4 **A.** It's my fault, because I mentioned him.  
 5 **Q.** Let's suppose that, because I put it as an assumption --  
 6 **DR SCOTT:** Sorry, can you repeat the reference?  
 7 **MR LASOK:** I am sorry, it's Day 7, page 70, lines 4 to 12.  
 8 So let's suppose that Mr Batty has taken the view  
 9 that the preferred pricing position for Richmond is at  
 10 parity with Dorchester, and he is unwilling to spend  
 11 money on Dorchester, and I am using Mr Howard's  
 12 language, to get the price of Richmond down.  
 13 Now, he may want to do it if he's deciding on  
 14 a particular promotion, but he doesn't want to do it  
 15 generally. Let's just suppose that that's Mr Batty's  
 16 decision. Surely the last thing in the world you would  
 17 want to do is to tell the retailer that you would like  
 18 to move the shelf price of Richmond to parity or better,  
 19 because in those circumstances you are telling the  
 20 retailer that compliance with ITL's desire includes  
 21 pricing below parity and the retailer will come back to  
 22 you and say, "Well, we have done what you said you  
 23 wanted us to do, can we have some money?"  
 24 **A.** But that would be their decision.  
 25 **Q.** Well, no, because you will have told them to price at

1 parity or better, and if you had said nothing about the  
 2 bonuses, their understanding would be that they would be  
 3 doing what you wanted if they priced below Dorchester,  
 4 and so they would come to you and say "Can we have some  
 5 money then? We have done what you wanted?"  
 6 **A.** But it wasn't all about what we wanted. I mean, that  
 7 would have been their decision. I would say again that  
 8 this letter, this document 22, is as much about the  
 9 investment as anything else.  
 10 **Q.** Yes, and --  
 11 **A.** And --  
 12 **Q.** And so what the strategy is to achieve parity, and  
 13 for that reason you make it plain that the bonus is to  
 14 be altered because you do not want any come back from  
 15 the retailer. You don't want a different price, and you  
 16 don't want a potential claim for money from the  
 17 retailer. And that's why you do it in that way. Is  
 18 that not so?  
 19 **A.** No, I don't agree with that. I don't agree with it. It  
 20 doesn't mean it's --  
 21 **MR LASOK:** It's 1 o'clock.  
 22 **THE CHAIRMAN:** Yes, thank you. Let's just say to  
 23 Mr Matthews we are going to take a break now, and again  
 24 you mustn't speak to anybody over the lunch break.  
 25 Perhaps you can step outside now, we might have

1 a discussion about logistics before we break.  
 2 **A.** Okay.  
 3 (In the absence of the witness)  
 4 **MR LASOK:** I would hope to be another 45 minutes.  
 5 **THE CHAIRMAN:** Right. And how long do you think you will be  
 6 in re-examination, Mr Howard?  
 7 **MR HOWARD:** I don't imagine more than 45 minutes. An hour  
 8 maybe.  
 9 **THE CHAIRMAN:** So Mr Lasok, if we give you until 3 o'clock  
 10 at the latest, and then Mr Howard until 4 o'clock at the  
 11 latest, we might get a slightly early bath, as you would  
 12 say.  
 13 **MR HOWARD:** Yes. As the footballers would say, it's not my  
 14 personal expression.  
 15 **THE CHAIRMAN:** No.  
 16 **MR HOWARD:** You will understand.  
 17 **THE CHAIRMAN:** Yes. Thank you. We will come back at  
 18 2 o'clock.  
 19 (1.05 pm)  
 20 (The short adjournment)  
 21 (2.00 pm)  
 22 **MR LASOK:** Mr Matthews, do you have tab 22 of annex 18 in  
 23 front of you? {D18/22/69}.  
 24 **A.** Yes.  
 25 **Q.** There was a market context to all these price movements,

1 wasn't there? I say that because in 22, in paragraph 2  
 2 of your letter, in the second line, you say:  
 3 "Not to hold the market up."  
 4 Do you have that, paragraph 2?  
 5 **A.** Is this document 22?  
 6 **Q.** It should be tab 22.  
 7 **A.** Right.  
 8 **Q.** It's 15 November 2000.  
 9 **A.** Right.  
 10 **Q.** Paragraph 2.  
 11 **A.** Right, yes, I beg your pardon. I have that.  
 12 **Q.** So there was a market context to these movements, and to  
 13 be precise, you weren't dealing with Sainsbury's alone,  
 14 you were dealing with at the time how many other ...  
 15 **A.** I think in 2000 it would have been Morrisons, Tesco and  
 16 Sainsbury.  
 17 **Q.** Substantial retailers all of them, and you had  
 18 colleagues who were dealing with other supermarkets?  
 19 **A.** Yes, that's true.  
 20 **Q.** So this kind of letter would be basically representative  
 21 of a co-ordinated move that ITL was making where it  
 22 needed to do so?  
 23 **A.** Yeah, I think that's largely true.  
 24 **Q.** So these actions are all across the market, aren't they?  
 25 **A.** Certainly in those retailers that were price promoters.

1 **Q.** You would never, I suggest, try to manoeuvre Sainsbury's  
 2 into a position that was untenable in terms of its shelf  
 3 prices?  
 4 **A.** Well, it depends what you mean by untenable.  
 5 **Q.** One it couldn't sustain commercially.  
 6 **A.** I always felt I understood their position on margin,  
 7 particularly cash margin, but that wasn't to say that  
 8 they had their own opinions of that, and the context  
 9 I suppose of most of these letters was that the basic  
 10 understanding of their cash margin requirements.  
 11 **Q.** I was looking at it in a slightly different way, and  
 12 I apologise for not being clear about this. I am trying  
 13 to suggest to you that you wouldn't have put Sainsbury's  
 14 out on a competitive limb, that's to say exposed it to  
 15 competition from others?  
 16 **A.** Other ...  
 17 **Q.** Other retailers that it was competing with.  
 18 **A.** That wouldn't have been my call, though, would it?  
 19 **Q.** If we are looking at this letter --  
 20 **A.** I see.  
 21 **Q.** -- and what you are doing is on any interpretation of  
 22 that letter, you are arranging -- to try and use what  
 23 I hope is a neutral term -- a price increase by  
 24 Sainsbury's, aren't you?  
 25 **A.** Right, yeah.

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1 **Q.** But you wouldn't have selected a figure that would have  
 2 put Sainsbury's so far ahead of everybody else that  
 3 Sainsbury's position would be completely unsustainable  
 4 because its competitors would be undercutting it like  
 5 billy-o.  
 6 **A.** The price that they have chosen to sell at, the 3.34,  
 7 and I think this is in part again the separation between  
 8 ongoing and tactical and absolute and relative shelf  
 9 price. These prices had been built up, the 3.29 for  
 10 example, they are in touch with a price that Sainsbury  
 11 had decided it wanted to sell a brand at, in the same  
 12 way as they might have decided to sell another brand at  
 13 another different shelf price.  
 14 **DR SCOTT:** Put it this way: if we were in a situation where  
 15 your retailers, a few of them, are all at 3.29, how  
 16 would Sainsbury's have reacted if you had written this  
 17 letter to them, persuaded them to go up to 3.34, then  
 18 they had discovered that you had gone on bonusing  
 19 Tesco's and Morrison to stay down at 3.29?  
 20 **A.** Well, things like that happened with -- they did happen,  
 21 and this is, in some part, what I was mentioning the  
 22 last time I was here, that you would get instances --  
 23 I think the one we looked at last time is with GV in  
 24 Morrison and I had written in hand, you know, what price  
 25 is Asda, Tesco, and they were different. So yeah,

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1 I mean, it happened, and I think the point I was trying  
 2 to make is the build-up of these prices, the ongoing and  
 3 the tactical bonuses, at some stage they are based on  
 4 the retailer's decision to sell a brand, and there were  
 5 instances where that happened, and to answer your  
 6 question, that was difficult.  
 7 **THE CHAIRMAN:** Were they instances that were brought about  
 8 by you changing your bonusing in relation to one  
 9 retailer but not in relation to others?  
 10 **A.** Not changing the bonus, but based on the fact that those  
 11 three or four or a series of individual retailers had  
 12 different pricing positions. We looked earlier on at  
 13 Sainsbury and we saw there that Sainsbury had decided  
 14 that JPS, for reasons best known to themselves, they  
 15 just felt it should be a certain position. So that did  
 16 happen. I wouldn't necessarily try and give more or  
 17 less bonus, but the bonus is based at some stage on  
 18 a shelf price before the bonus existed.  
 19 **DR SCOTT:** But if we take, and we are here dealing with  
 20 Richmond and Dorchester --  
 21 **A.** Right.  
 22 **DR SCOTT:** -- big brands --  
 23 **A.** Yes.  
 24 **DR SCOTT:** -- brands of which, as we understand, it  
 25 retailers were sensitive.

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1 **A.** Very.  
 2 **DR SCOTT:** So not John Player, not Kent, but Richmond and  
 3 Dorchester. My question was this: if your three were at  
 4 3.29 and you wrote a letter like this to Sainsbury's  
 5 withdrawing the bonus to Sainsbury's --  
 6 **A.** I see, right.  
 7 **DR SCOTT:** -- pushing them up to 3, 34 without at the same  
 8 time moving Tesco's and Morrisons, how would  
 9 Fiona Bayley, as she then was, have reacted a week  
 10 afterwards when she realised that she had gone up to  
 11 3.34 and the others were at 3.29?  
 12 **A.** I imagine the reaction wouldn't have been positive. But  
 13 then at the same time they all knew, for example, that,  
 14 I don't know, picking one out, that Kwik Save had  
 15 a policy of being beneath everybody, you couldn't win  
 16 that game. I think although they watched each other  
 17 like hawks, there was an understanding that different  
 18 retailers had different philosophies, and equally --  
 19 **DR SCOTT:** Sainsbury, as I understand it, were worried about  
 20 Tesco's, not Kwik Save?  
 21 **A.** Well, they might have been worried about them, but those  
 22 are prices in the marketplace. But yeah, I mean, in  
 23 that instance, they would have probably rung me up quite  
 24 quickly.  
 25 **MR SUMMERS:** But was it your policy to get one retailer to

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1 lead, and was it always the same retailer?  
 2 **A.** Not to my knowledge. I mean, there were three that  
 3 I dealt with and most of my career in the grocers were  
 4 these three. I mean, most of the time was just spent  
 5 trying to justify and claw back investment -- I didn't  
 6 have time for that, I think is what I'm saying. It  
 7 individually counts the investment in each of those,  
 8 I wouldn't try and get one to lead or other. I would  
 9 cajole them, and you know, make up stories and suggest  
 10 things, but it wouldn't be policy to lead with any one  
 11 of them, no.  
 12 **MR SUMMERS:** So although Sainsbury's might say "We were  
 13 normally followers", there might well be occasions when  
 14 they became leaders?  
 15 **A.** Sainsbury, of the three that I dealt with, were far more  
 16 reactive, and I think as a company they were more  
 17 pragmatic, whereas a Tesco saw their position in the  
 18 market as a retailer as leading price cuts and being  
 19 more aggressive. But that was their philosophy.  
 20 **MR LASOK:** There was one point in time, at least, by which  
 21 Sainsbury's had become very, very uncomfortable with  
 22 ITL's influence over Sainsbury's shelf prices, and  
 23 raised that with you, wasn't there?  
 24 **A.** That is true.  
 25 **Q.** I think, if you go to tab 78, {D18/78/228}, tab 78 is

1 an internal memorandum that you sent to Mr Batty --  
 2 **A.** Yeah.  
 3 **Q.** -- dated April 30, 2003. Subsequent to that you wrote  
 4 to Sainsbury's, the letter which we find at tab 79.  
 5 {D18/79/229}.  
 6 **A.** Right.  
 7 **Q.** The easiest thing may be if you just read to yourself  
 8 both tab 78 and tab 79 so you have the full picture.  
 9 **A.** Okay. (Pause).  
 10 **MR HOWARD:** The Tribunal will know, of course, that the  
 11 Sainsbury's raising of this point was in the context  
 12 where they had gone to the OFT and made a leniency  
 13 agreement, that's the context, of course that wasn't  
 14 known to Imperial.  
 15 **A.** Okay, yeah, I remember those letters.  
 16 **MR LASOK:** So if you look at the middle of tab 78, you have  
 17 a paragraph beginning with "As an aside ..."?  
 18 **A.** Yeah.  
 19 **Q.** So you are reporting here that Mr Hebblethwaite, who was  
 20 the new chap on the block, as it were --  
 21 **A.** Yeah.  
 22 **Q.** -- was uncomfortable with the direct link between ITL's  
 23 investment and Sainsbury's shelf price, and he says that  
 24 his view was that Sainsbury's alone was responsible for  
 25 its shelf prices. Do you remember him raising that with

1 you?  
 2 **A.** Oh, I remember it very well, and I think it needs to be  
 3 seen in various contexts, and Peter was an irascible  
 4 character, and had come in to make his name in this  
 5 particular category, and this was just part of the way  
 6 in which he wanted to change things.  
 7 **Q.** So then we get to the letter that you write to him at  
 8 tab 79, and if we just run through the letter pretty  
 9 quickly, we have the third paragraph where you talk  
 10 about the de facto relationship between the majority of  
 11 the ITL investment and Sainsbury's shelf prices. You  
 12 say that the strategy is based on the custom and  
 13 practice of many years and is made quite clear in the  
 14 trading agreement, so your language here is very  
 15 familiar from the letter that you had written, what,  
 16 three years before, when you were heralding the  
 17 negotiation of the very first trading agreement, and you  
 18 referred to custom and practice.  
 19 **A.** Mm.  
 20 **Q.** You say that it's quite clear in the trading agreement,  
 21 so I take it that your understanding of the trading  
 22 agreement was that it did encapsulate the basis of the  
 23 commercial relationship between ITL and Sainsbury?  
 24 **A.** I think this is one of those instances where the trading  
 25 agreement, although not legally binding, can be a benign

1 document or one you can try and use to your commercial  
 2 advantage. And as I said before, the backdrop to this  
 3 period in the relationship with Sainsbury was  
 4 a difficult one, and I think what I was trying to do  
 5 here -- and I remember this, I remember writing this  
 6 letter and I remember many of the conversations at the  
 7 time -- that Peter was of the opinion that any monies  
 8 I was investing in Sainsbury's were his by right and  
 9 there should be absolutely nothing attached to any of  
 10 them, because Sainsbury didn't make any money out of  
 11 tobacco, and he had come up with something called  
 12 economic profit, which in my view was a rather nebulous  
 13 way of looking at the category, and they were using this  
 14 to beat suppliers with, and this is just part of the  
 15 discussion, but his view was very much -- and it strikes  
 16 at the heart of the absolute shelf prices. Because the  
 17 other context to this was that at the time Sainsbury as  
 18 well as Tesco were selling more and more of their  
 19 business in the convenience formats. At the time it  
 20 would have been --  
 21 **THE CHAIRMAN:** Perhaps you could just summarise what you  
 22 thought the problem was that prompted you to write this  
 23 letter.  
 24 **A.** The problem was that I believed I was paying monies to  
 25 Sainsbury for absolute shelf prices for being cheaper,

1 and he didn't want -- he didn't agree with that. That's  
 2 the basis of this letter.  
 3 **MR LASOK:** If we move on, you then quote from the trading  
 4 agreement, and then we have the paragraph beginning  
 5 "I know that nothing lasts forever"; do you have that?  
 6 **A.** I do, yeah.  
 7 **Q.** The second line reads as follows:  
 8 "But the response to every pricing enquiry -- we are  
 9 the guardians of shelf prices, et cetera -- is making me  
 10 feel distinctly uncomfortable."  
 11 Am I right in reading it in this way: that if you  
 12 made a pricing enquiry to Sainsbury's, Sainsbury's were  
 13 now responding -- that's to say Mr Hebblethwaite was  
 14 responding -- saying "We are the guardians of our shelf  
 15 prices"?  
 16 **A.** I don't think he would respond with that direct quote,  
 17 but it would become a conversation that wouldn't go  
 18 anywhere.  
 19 **Q.** And that was making you feel distinctly uncomfortable?  
 20 **A.** What I go on to say, and I know it's red ring, but  
 21 I will say it anyway, I was responsible for [redacted]  
 22 a year of investment, which I felt was an awful lot of  
 23 money, and as I was just saying a few moments ago,  
 24 I felt a huge amount of that money was based on the fact  
 25 that Sainsbury were agreeing to sell products well below

1 RRP.  
 2 What Hebblethwaite was saying is "No, Paul, that is  
 3 not the case, that is just the cost of doing business.  
 4 You are going to continue to pay that for me and there  
 5 will be nothing attached to it", and that's what it was  
 6 about.  
 7 **Q.** I am a bit puzzled about this, because you are now  
 8 referring to the paragraph referring to [redacted]  
 9 a year, but what you actually say is:  
 10 "I must tell you how I feel. If I am to have  
 11 absolutely no input or influence into the relative or  
 12 absolute shelf price of Imperial brands, why would  
 13 I continue to invest nearly [redacted] per year?"  
 14 So you seem to me at any rate to be raising with  
 15 Mr Hebblethwaite a concern about the fact that you are,  
 16 as you say, investing nearly [redacted] a year, but you  
 17 are investing it in order to get input or influence into  
 18 the relative and the absolute shelf prices?  
 19 **A.** Yes.  
 20 **Q.** That's right?  
 21 **A.** Absolutely right.  
 22 **Q.** Yes, and so when he says that Sainsbury's are the  
 23 guardians of shelf prices, that is what makes you now  
 24 feel distinctly uncomfortable?  
 25 **A.** I think what I would feel and what was starting to make

1 me feel uncomfortable was -- I'll be brief -- more of  
 2 their business is being sold above RRP in convenience  
 3 stores, yet I am paying my money based on them achieving  
 4 prices under RRP, I am uncomfortable.  
 5 **Q.** That's an RRP point, and that would be covered by the  
 6 phrase "absolute shelf price".  
 7 **A.** Yes.  
 8 **Q.** What I am focusing on is the fact that the dispute also  
 9 seems to be about relativities?  
 10 **A.** It would be, because, as I said in that paragraph,  
 11 I think, before, that a conversation that went along the  
 12 lines of "I would like to pay money to reduce my shelf  
 13 price", he didn't want to have that conversation. So  
 14 that [redacted] investment is a comment on both the  
 15 absolute and the fact that more and more volume was  
 16 being sold above RRP and that when it came to  
 17 conversations about reducing individual shelf prices  
 18 with ongoing bonuses, that that was a no-go area too.  
 19 So I felt, if I am writing a seven figure cheque,  
 20 I would at least like to have some influence before  
 21 I sign it.  
 22 **Q.** Yes. In the next paragraph, you effectively say to him,  
 23 "Look, you know, I've co-operated with Sainsbury's in  
 24 getting them to price attractively because on numerous  
 25 occasions Sainsbury's have asked me for competitor shelf

1 price information or for investment to achieve a shelf  
 2 price and I've provided it"?  
 3 **A.** Yeah, I mean, I think that was to try and turn the  
 4 tables on him, that Sainsbury in the same way as other  
 5 retailers would often ring me up and say "What's going  
 6 on?", and even though there were cases where I didn't  
 7 know what was going on, I did have the ability to have  
 8 an oversight. So I would try and help them. I felt  
 9 that that was part of my job. I also felt it was part  
 10 of my job, when faced with an investment decision, that  
 11 they had come to me with, to weigh it up commercially  
 12 and sometimes it would go in their favour. The point  
 13 I am making there is that I am not allowed, or you are  
 14 trying to cease my involvement on my [redacted]  
 15 investment, but when you need my help, you still want  
 16 it, and I felt that that was just not right.  
 17 **Q.** When you did know what was going on, you passed it on to  
 18 Sainsbury's?  
 19 **A.** Not always, but as I said I would try my best to help  
 20 them, so if they --  
 21 **THE CHAIRMAN:** Just to be clear, when it says "You have  
 22 asked me for competitor shelf price information", is  
 23 that information from your competitor, Gallaher, or  
 24 information from Sainsbury's competitors?  
 25 **A.** Sainsbury's competitors, so they knew that on Monday

1 mornings I would go out and look at stores, and ring me  
 2 on Monday afternoon saying, "What did you see?"  
 3 **MR LASOK:** So I suppose that explains why, in the document  
 4 that we saw at tab 37, the one where Amber Leaf and  
 5 Drum, you were able to inform them about the price of  
 6 the Gallaher product in Asda and Tesco.  
 7 **A.** Yeah.  
 8 **Q.** Then in the next paragraph, the one beginning  
 9 "Fundamentally", I was particularly interested in the  
 10 phrase that immediately follows, you say:  
 11 "Fundamentally our agreement sets the price  
 12 ceilings, not price floors."  
 13 But what puzzles me slightly is that if you look at  
 14 the trading agreements themselves and also if you look  
 15 at the correspondence, some of which we have examined,  
 16 and if you bear in mind the answers to the questions  
 17 that I've put to you this morning, we don't actually get  
 18 much of an impression that the agreement set price  
 19 ceilings, it seemed to set specific pricing  
 20 relativities, parities and differentials?  
 21 **A.** I think what I am saying there, and in reference to the  
 22 document before that I had written, the internal one,  
 23 was that I felt that I was helping Sainsbury remain  
 24 competitive. For me, the idea was to remain competitive  
 25 in the eyes of the consumers vis-a-vis my brands and our

1 competitors; for them, competitive with their fellow  
 2 retailers. And that's what I felt was part of my  
 3 [redacted] investment.  
 4 **THE CHAIRMAN:** Just focusing on this point about price  
 5 ceilings, not price floors, what were you talking about  
 6 there?  
 7 **A.** I am saying that we set competitive prices, you know,  
 8 I do not want you to sell more, I want you to remain  
 9 competitive in the eyes of the consumer.  
 10 **MR LASOK:** Okay.  
 11 So if we turn now to the last paragraph, I'll just  
 12 read it out in its entirety, it's very short:  
 13 "If we want to move forward on this issue we must  
 14 find a pragmatic solution, but I must tell you that my  
 15 current investment will not transform from explicit  
 16 investment in shelf price to margin support."  
 17 **A.** Right.  
 18 **Q.** I wonder whether you can explain, at least for my  
 19 benefit, what that means, because I would have read  
 20 "margin support" as meaning reducing the actual  
 21 wholesale price so as to maintain a margin?  
 22 **A.** No, I think --  
 23 **Q.** Sorry, and I would have read "investment in shelf price"  
 24 as indicating that you were making a payment or doing  
 25 a financial deal in order to achieve a particular result

1 on the shelf?  
 2 **A.** I remember writing it, and I remember quite clearly what  
 3 I was suggesting, and it was part of what I said before  
 4 that it's that split of bonus or ongoing payments to  
 5 recognise the below RRP and those parts that we used  
 6 tactically and I think what Peter was asking for is  
 7 "Just give me the money, Paul, don't ask any questions",  
 8 and what I did not want him to feel was that that was  
 9 going to be the case because the money, that [redacted]  
 10 I was investing, was both absolute and relative, and  
 11 that's what I was saying, that I wasn't prepared just to  
 12 turn off what I had been doing.  
 13 **Q.** Can I just explore that with you slightly?  
 14 **A.** Yes.  
 15 **Q.** What did you mean by the phrase "margin support"?  
 16 **A.** What I meant by "margin support" was that the part that  
 17 I was investing in absolute pricing, in other words the  
 18 recognition of Sainsbury selling below RRP, I was paying  
 19 for that in part, because some of those bonuses were to  
 20 recognise and reward them for doing it. What I think  
 21 that they wanted me to do was take the whole investment  
 22 and just put it into what they would consider margin  
 23 support. Some of it was margin support, but I am saying  
 24 "I do not want to transform all of it just to give to  
 25 you".

1 **Q.** Does that mean that you wanted to keep part of it as  
 2 a payment to achieve the strategic pricing requirements?  
 3 **A.** I think what I wanted to do was to be able to have what  
 4 I felt was an adult to adult conversation about  
 5 investing in brands, when I chose, or as I mention in  
 6 the paragraph earlier, when they have chosen.  
 7 **Q.** Can I try and be a bit more precise in my questions to  
 8 you, so that we all understand what we are talking  
 9 about. The way I would have put it was this: margin  
 10 support looks as though it's a reference to the fact  
 11 that Sainsbury wanted to have control over its own shelf  
 12 prices, what it wanted to do was to be able to go to ITL  
 13 and say "Look, let's negotiate a wholesale price that's  
 14 going to maintain our margins when we move shelf prices  
 15 the way we want", and the way I read your letter is you  
 16 are saying "no", because although part of ITL's  
 17 investment is related to absolute shelf prices, that's  
 18 not just what it's all about. Part of what ITL is, as  
 19 you put it, investing in, paying for, is to achieve  
 20 a result that ITL wants in terms of shelf prices, and  
 21 that's the parities and differentials?  
 22 **A.** Yeah.  
 23 **Q.** Okay, thanks.  
 24 Now, another thing I was rather curious about  
 25 appears at tab 92.

1 **DR SCOTT:** Sorry, before we leave this document, can I ask  
 2 a question about this document 79?  
 3 In the middle of the page, you write:  
 4 "I know that nothing lasts forever. I have no  
 5 objection to mutually acceptable moderation to reflect  
 6 your sensibilities, but the response to every pricing  
 7 enquiry -- we are the guardians [of shelf prices]  
 8 et cetera -- has made me feel distinctly uncomfortable."  
 9 I assume that that was a change that had happened in  
 10 the recent past?  
 11 **A.** It was like a switch.  
 12 **DR SCOTT:** It was like a switch, but you think it's  
 13 Mr Hebblethwaite rather than Mr Davies to whom you are  
 14 writing the letter?  
 15 **A.** I am almost certain, I can't be sure, but it was one  
 16 day, conversation's okay, the next day "I can't have  
 17 that conversation".  
 18 **DR SCOTT:** We now know that in March there had been  
 19 an agreement with the Office of Fair Trading.  
 20 **A.** I wasn't aware of that at the time.  
 21 **DR SCOTT:** Just returning to those words, earlier in  
 22 listening to the evidence we have understood, both in  
 23 terms of some retailers, that they have stressed in this  
 24 case their freedom to price, and that ITL have also  
 25 stressed the freedom to price, and that we should see

1 these agreements in terms of incentives rather than  
 2 taking away any freedom that the retailer has.  
 3 What interests me is why it seemed like a switch for  
 4 a retailer suddenly to be saying "We are the guardians  
 5 of shelf prices", as if something had been different  
 6 before March 2003.  
 7 **MR LASOK:** It may be May 2003. I don't know, are you  
 8 referring to the time of the letter?  
 9 **DR SCOTT:** Well, the letter is written in May, but it's  
 10 envisaging that a switch had happened, and the reason  
 11 I say March is that, as I understand it, March is the  
 12 date of the agreement between OFT and Sainsbury's, so --  
 13 **MR LASOK:** I apologise, yes.  
 14 **DR SCOTT:** -- one assumes that after that Sainsbury's are  
 15 going to be treading on eggshells.  
 16 Going back, do you see what I am asking?  
 17 **A.** Yeah. Can you frame it again, so I am really clear  
 18 about what you are saying?  
 19 **DR SCOTT:** What you are saying here is that a switch seemed  
 20 to have been swung, and that since then the response to  
 21 every pricing enquiry is "we are the guardians of shelf  
 22 prices"?  
 23 **A.** Yeah.  
 24 **DR SCOTT:** As though that was a new position for them to  
 25 take. What surprises me about that is the emphasis that

1 there has been on the fact that they were free to do  
 2 what they liked before that, and what this suggests to  
 3 me is that, as between you and them, that's not how  
 4 people felt before this point, and that's why this  
 5 seemed like a change?  
 6 **A.** The other background to it was this price creep in the  
 7 total Sainsbury volume, which is why I think it was  
 8 a raw issue, and I think the other part to it was  
 9 Peter's influence on the category. I think what he  
 10 wanted to do -- and looking back I would have probably  
 11 to have done the same -- is to deconstruct everything,  
 12 because what we had with Sainsbury was similar to other  
 13 multiple retailers, you had decades of agreements, it  
 14 builds up and up and up, and there was this  
 15 understanding that wasn't often tested. So what Peter  
 16 wanted to do was take it all apart, brand by brand,  
 17 bonus by bonus, and to obviously reconstruct it in a way  
 18 that was commercially beneficial to him. And he saw  
 19 this issue as one that was fertile territory, I think  
 20 that was part of the background to this as well.  
 21 **THE CHAIRMAN:** Was the difference with the previous position  
 22 that previously they could accept or reject the bonus  
 23 that they accepted or they understood that if they  
 24 accepted the bonus then they had to go to the price  
 25 point that you were paying for, whereas Mr Hebblethwaite

1 was now saying "Give us the bonus and it's up to us  
 2 whether we go to the price point that you want"? Maybe  
 3 that's too simplistic.  
 4 **A.** I am not sure.  
 5 **THE CHAIRMAN:** Well, let's not all try and guess what you  
 6 meant. You have explained what you recall you meant.  
 7 **MR SUMMERS:** Let me ask something that will be simpler to  
 8 answer: were you getting this sort of kickback from  
 9 other multiple retailers? Was there a general change of  
 10 strategy?  
 11 **A.** No.  
 12 **MR SUMMERS:** So entirely peculiar to Sainsbury?  
 13 **A.** The only other retailer that from time to time would  
 14 mention pricing in that context might be Tesco, when it  
 15 very much suited them, but it wasn't a general line.  
 16 **MR LASOK:** I wonder whether we could go back a few months in  
 17 time to October 2002. Could you turn to tab 92. Now,  
 18 I have to say that in my file I didn't originally have  
 19 a 92. {D18/92/272}. Do you actually have one?  
 20 **A.** I do.  
 21 **Q.** Good. It's 92. This is a letter from you to Mr Davies  
 22 dated 15 October 2002. Could you just read that to  
 23 yourself, please.  
 24 (Pause)  
 25 **A.** Okay. Yeah, I remember this.

1 Q. This looks as though it's a situation in which  
 2 Sainsbury's, in 2002, have been inspired to run  
 3 a multibuy promotion and have come to you to see whether  
 4 you will support it?  
 5 A. Yes. I think this is when they took Nectar points off  
 6 and they felt they had taken something away from their  
 7 shoppers and wanted to put it back and came to us to  
 8 fund that.  
 9 Q. Yes. Then in the penultimate paragraph you say:  
 10 "My only two caveats are that other manufacturers  
 11 should be aware that we are not doing this to subvert  
 12 their position but to support you, and that we should  
 13 not be disadvantaged by a competitor offer."  
 14 I am rather interested in the business about the not  
 15 subverting the position of other manufacturers. Was it  
 16 generally the case that you didn't want to subvert the  
 17 position of other manufacturers?  
 18 A. No.  
 19 Q. When something was going on, like a promotion of this  
 20 nature, did you want it to be made known to other  
 21 manufacturers that you weren't trying to undermine their  
 22 position?  
 23 A. No, in fact if we think about the Morrison example where  
 24 they came to me with the same thing that we discussed  
 25 a couple of weeks ago, I actually wanted them to know

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1 and I wanted competitive advantage.  
 2 Q. Why was this case different?  
 3 A. I don't know.  
 4 Q. Right.  
 5 A. I don't know.  
 6 Q. Perhaps if we could go to your witness statement now,  
 7 because I just have, I think, a couple of questions  
 8 about this. I think you can close annex 14.  
 9 A. Okay.  
 10 Q. Your witness statement should be at tab 42.  
 11 A. Right. Yeah. Yes, that's my witness statement.  
 12 Q. There are just one or two queries that I have. If you  
 13 turn to paragraph 27, probably the best thing is if you  
 14 read the whole of paragraph 27 to yourself so you can  
 15 see exactly what it is that you are saying.  
 16 A. Just to be sure, each price file --  
 17 Q. It's that paragraph.  
 18 (Pause)  
 19 A. Okay.  
 20 Q. Now, the bit I am interested in is the one in the fourth  
 21 line from the bottom which says:  
 22 "The retail price at which the retailer had decided  
 23 to offer the ITL products in its stores ..."  
 24 So you are saying that that was what was set out in  
 25 the price file?

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1 A. Well, again, just to reference Morrison, because we had  
 2 that debate then, and I think what I am saying here is  
 3 that these price files, although different in respective  
 4 retailers, that they were based on information that was  
 5 in the domain, so for example, thinking of Morrison or  
 6 in fact Sainsbury, there would be a shelf price that we  
 7 would know because we would collect it or went into  
 8 a store or had been told, and working backwards or  
 9 forwards from there, you could create a margin chain  
 10 audit trail. So I knew what I was selling to Morrison  
 11 or Sainsbury, I knew what the ongoing bonus was,  
 12 I understood what any tactical bonuses were to get to  
 13 a net landed price, and based then from there to the  
 14 retail price, you could see what margins were being  
 15 made.  
 16 Q. That was why I was slightly puzzled, because what you  
 17 say in paragraph 27 is that it was the retail price at  
 18 which the retailer had decided to offer the ITL products  
 19 in its stores, but then if you go to, let's say,  
 20 paragraph 34 --  
 21 A. Right.  
 22 Q. -- and again if you could just read the whole of that  
 23 to yourself.  
 24 A. Yeah. (Pause). Right, okay.  
 25 Q. In the third line you have:

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1 "The price file would record the required change to  
 2 the retailer's shelf price (also recorded in the price  
 3 file) if the retailer's cash margin (also recorded in  
 4 the price file) was to be held constant."  
 5 A. Yeah.  
 6 Q. Then in paragraph 35, it seems to be a bit different,  
 7 because you say at the very beginning of 35:  
 8 "A record of this nature did not mean that the  
 9 retailer considered itself obliged or agreed with ITL to  
 10 set its shelf price at the new shelf price set out in  
 11 the price file. Retailers set their own shelf prices to  
 12 reflect their broader competitive pricing strategies  
 13 against other retailers and their margin objectives for  
 14 all products."  
 15 Then if you go to 37, again could you read the whole  
 16 of 37, please.  
 17 A. Oh, 37, I beg your pardon. (Pause). Yeah.  
 18 Q. So you have again, at the very beginning:  
 19 "The price file recorded a shelf price at which the  
 20 retailer had decided to sell ITL's products."  
 21 You then say that that price was checked, and you  
 22 say that this was important for the reasons that you set  
 23 out. So that it was quite important to ensure that the  
 24 actual shelf prices reflected the price in the price  
 25 file?

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1 A. So let's just take an example, there are two examples  
 2 I would like to draw upon. If the retailer -- if  
 3 a multiple grocer, it doesn't matter which one, has told  
 4 us they want to sell, I don't know, Panama cigars at £3,  
 5 and that RRP is £3.50, because they are selling at £3,  
 6 over time -- we have agreed a bonus to pay and that  
 7 bonus we believe is in part because of their -- they  
 8 want to sell below RRP. That goes in the price file.  
 9 Should we go into a store, I go into a store,  
 10 somebody that works for us goes into a store and that  
 11 price is then £5.50, that in my opinion wouldn't have  
 12 been within the spirit of the agreement, and that might  
 13 have said "Morrison, you are selling at -- is there  
 14 a change? You are now making 87 per cent margin, you  
 15 were making 15".  
 16 So I think what I am trying to say is it was  
 17 an audit trail of that agreement, you know, setting out  
 18 what we had in the trading agreement.  
 19 Q. Finally if you would just read the whole of  
 20 paragraph 44, is probably the easiest.  
 21 (Pause)  
 22 A. Okay.  
 23 Q. Because 44 suggests that the retailer was requiring ITL  
 24 to update the price file, and you talk about the  
 25 administrative assistant:

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1 "... carrying out the task of identifying the likely  
 2 change to the retail pack price listed in the price file  
 3 at the time the document was updated on the assumption  
 4 that the retailer would want to pass on the change to  
 5 RRP and maintain its current chosen level of margin."  
 6 Then you say it was open to the retailer not to  
 7 adopt that retail price.  
 8 It seems to me that, with respect, in the paragraphs  
 9 that I've drawn your attention to, you seem to be  
 10 talking about the same thing, namely the retail price in  
 11 the price file, in rather inconsistent ways. Because at  
 12 one point you are talking about a retail price that the  
 13 retailer had decided to offer. You say in paragraph 37  
 14 that it was actually important that the price in the  
 15 price file should actually be the shelf price, and you  
 16 were checking in order to ensure that it was. You had  
 17 then got these little sentences that crop up from time  
 18 to time such as the one at the end of paragraph 44, in  
 19 which you say that it was "of course open to the  
 20 retailer not to adopt that retail price".  
 21 If we pull all these different strands together, is  
 22 it simply the case that what in fact was happening was  
 23 that the retail price in the price file, which was  
 24 derived from the cost price and the various bonuses and  
 25 this, that and the other, and included the retailer's

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1 margin, was actually a price worked out by ITL for the  
 2 benefit of the retailer that was designed and expected  
 3 to be the actual retail price at which the retailer  
 4 would sell the tobacco products?  
 5 A. No, I don't think so, because of the separation between  
 6 the ongoing and the tactical bonuses, and I think there  
 7 is a difference. I would refer back to a document we  
 8 discussed two weeks ago on Morrison, where I had written  
 9 to Grant Eastwood and said "We have had a conversation,  
 10 Grant, about a move in the market", I can't remember  
 11 I think it was Richmond or something of that nature,  
 12 "this is what is going to happen to the bonus, I am  
 13 going to put this in the price file, when you get the  
 14 price file, you know, is that right?"  
 15 So what it was, was having discussed pricing, having  
 16 discussed investors, that price file then acted as  
 17 an audit trail to make sure what I had agreed with the  
 18 individual buyer was right. And I think the other point  
 19 to make is that -- and then that would be on changes on  
 20 tactical bonuses, but they are about bonuses. If you  
 21 remember the way they were structured, you had brands  
 22 with ongoing bonuses, those with tactical, and the  
 23 tactical ones would change, but it was about the bonus  
 24 structure, and the bonus structure resulted in the shelf  
 25 price. So I don't agree with what you are suggesting.

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1 Q. I'll try and be clear, because I seem to be particularly  
 2 unclear on most occasions. I am putting to you that you  
 3 went to all this effort in order to work out what the  
 4 retail shelf price would be, in the expectation that  
 5 that was what the retailer would sell the tobacco  
 6 products for?  
 7 A. Because that was the price that was on the shelf, and  
 8 the ones that we recorded and audited.  
 9 Q. When you say that, are you not referring to the  
 10 historical prices?  
 11 A. Well, I think they are one and the same thing, and again  
 12 my apologies if I am labouring the point. On a brand  
 13 where there was less action, and we talked earlier about  
 14 Embassy, at some stage in time, Morrison and Sainsbury  
 15 have made a decision to sell a product at a certain  
 16 price and most of those prices were below RRP, because  
 17 they were below RRP we had made investments, margin  
 18 support, bonuses, whatever you want to call it.  
 19 Now, they had chosen to sell at that price, this is  
 20 the bonus, there's the margin chain, and because part of  
 21 the agreements were based on absolute or below RRP  
 22 pricing, naturally we would want to see that that was in  
 23 store. They had told us they were going to do it. For  
 24 me, that would suggest that the retailer is happy to do  
 25 it, so if they are not doing it, something's changed.

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1 They could be making more money than they said they  
 2 needed to make, there needed to be a discussion about  
 3 that.  
 4 **THE CHAIRMAN:** Given all that, I am not sure whether or why  
 5 you are disagreeing with what Mr Lasok says. In the  
 6 price file, there is a figure which is arrived at by  
 7 historical trading patterns in relation to that  
 8 particular brand, the fact that they are happy to sell  
 9 that brand below RRP, and you support them, and then  
 10 there may or may not from time to time be tactical  
 11 bonuses to move that price up or down, and that is all  
 12 rolled up into the price file that you send them, and  
 13 you expect that that price is the price at which they  
 14 are going to sell that brand, isn't it?  
 15 **A.** I agree with that. I mean, it's probably my  
 16 interpretation --  
 17 **THE CHAIRMAN:** What's the difference between what I just  
 18 said and what Mr Lasok said?  
 19 **A.** Maybe it's me that's not very good at listening and  
 20 you're being perfectly clear, but what I thought you  
 21 were suggesting -- what I thought you were suggesting,  
 22 and I might be wrong, I am sure you will tell me if  
 23 I am -- is that somehow we were telling the retailers  
 24 what prices to sell at, because that -- it just sounded  
 25 different to the way that --

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1 **THE CHAIRMAN:** But you were, at least in respect of the  
 2 tactical bonuses.  
 3 **A.** And I think that's a substantive point. But both of  
 4 them, both the ongoing and the tactical bonuses, are  
 5 related to a retail based decision about the price of  
 6 a brand at some stage.  
 7 **THE CHAIRMAN:** So the price file is always to be seen in  
 8 relation to what it was the previous month or year?  
 9 **A.** Since the brand existed. So if we think about Richmond,  
 10 for example, it was at one price, we put money into it,  
 11 but before we put money into it, it was another Embassy  
 12 and we just activated it. So those were the brands that  
 13 we take most interest in and they are in relation to  
 14 a price that the retailer has decided to sell at some  
 15 stage. How it's manipulated further down the track is  
 16 the more interesting part.  
 17 **DR SCOTT:** And in a sense Mr Hebblethwaite was trying to  
 18 pull up the carrots and look at the roots?  
 19 **A.** Of course he was.  
 20 **DR SCOTT:** We have not actually looked at a price file in  
 21 relation to Sainsbury's, and when we listened to the  
 22 testimony of Mrs Corfield yesterday, they seemed rather  
 23 less focused on what their margins were than some  
 24 retailers were because they seem to keep the overrides  
 25 separately in their own calculations.

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1 **A.** That's true.  
 2 **DR SCOTT:** So I think you are probably right in terms of  
 3 this business that you have a stage to which pricing had  
 4 gone, where in Sainsbury's that was often a matter of  
 5 following other retailers.  
 6 **A.** Yes.  
 7 **DR SCOTT:** Then it was a question of incremental change from  
 8 that point onwards --  
 9 **A.** Precisely.  
 10 **DR SCOTT:** -- which depended on Budgets, MPs and tactical  
 11 bonuses.  
 12 **A.** Mm.  
 13 **DR SCOTT:** Thank you.  
 14 **MR SUMMERS:** I suspect your difficulty in answering  
 15 Mr Lasok's question perhaps lies with the word "expect"  
 16 which can have either a soft or a hard meaning.  
 17 **A.** It could, couldn't it?  
 18 **MR SUMMERS:** Whether the Chairman spoke it in a softer tone,  
 19 I don't know.  
 20 **A.** Much softer.  
 21 **MR SUMMERS:** In which context were you understanding it in  
 22 this setting: in its softer use or its harder use?  
 23 **A.** I am not picking my words very carefully here, and I am  
 24 obviously not of the legal profession, I felt I was  
 25 being led to say something that perhaps I didn't agree

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1 with. In the softer tone it seemed to be more easy to  
 2 understand and a reflection of what I was trying to do.  
 3 **MR SUMMERS:** Yes, in other words you weren't 100 per cent  
 4 confident that the price would be adopted --  
 5 **THE CHAIRMAN:** I don't think it's about that. It's not  
 6 about that, was my understanding, it's about: the price  
 7 that is in the price file is one that builds on the  
 8 retailer's decision as to what to charge, and goes up or  
 9 down, deciding on what bonuses are accepted or not.  
 10 It's the make-up of the price that's -- it's not a price  
 11 according to your evidence that ITL comes up with --  
 12 **A.** No.  
 13 **THE CHAIRMAN:** -- from the beginning, it's a price that  
 14 they come up with, looking at what it was before and  
 15 manipulating the different bonuses.  
 16 **MR SUMMERS:** Yes, but the price is put forward in the  
 17 expectation that that price will be acceptable to the  
 18 retailer.  
 19 **THE CHAIRMAN:** Because of how it's --  
 20 **MR SUMMERS:** Because of how it's calculated.  
 21 **A.** Yes.  
 22 **MR SUMMERS:** Fine, thank you.  
 23 **MR LASOK:** I think in reference to a point made by Dr Scott,  
 24 Mr Matthews, could you turn to tab 64, please.  
 25 **THE CHAIRMAN:** Are we back in annex 18?

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1 **MR LASOK:** I am terribly sorry, it's back in annex 18.  
 2 {D18/64/175}.  
 3 **A.** I thought that was in the past; that's what you promised  
 4 me.  
 5 **MR LASOK:** I had not anticipated the need to turn to tab 64.  
 6 **DR SCOTT:** It's all my fault.  
 7 **MR LASOK:** If you have 64 --  
 8 **A.** I do.  
 9 **Q.** -- I don't think we need to look at the first three  
 10 pages, but after it there is, in my copy, a page that is  
 11 virtually illegible.  
 12 **A.** Yes.  
 13 **Q.** After that there is a page which is legible, at least in  
 14 my copy, and it says "Sainsbury's Price File".  
 15 **A.** Yes.  
 16 **Q.** Is that an illustration of the kind of price file that  
 17 you are talking about in your witness statement?  
 18 **A.** Yeah, Sainsbury's price file, yes.  
 19 (Pause)  
 20 **MR LASOK:** I don't know whether anybody in the Tribunal  
 21 wants to ask a question about this document?  
 22 **THE CHAIRMAN:** No, I don't.  
 23 **DR SCOTT:** I think it's really to say that these existed  
 24 with Sainsbury's as they did with other retailers --  
 25 **MR HOWARD:** I think actually the evidence is that they came

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1 in slightly later in the day.  
 2 **DR SCOTT:** At Sainsbury's?  
 3 **MR HOWARD:** At Sainsbury's. I don't think they did exist  
 4 originally, I think you will find they came in at  
 5 a later stage. Check that with Mr Matthews, if you  
 6 like, but I am pretty confident that that's the case.  
 7 **DR SCOTT:** What has been pointed out to me is we sat in  
 8 camera yesterday, so I have to be careful about what  
 9 I said about yesterday.  
 10 We are in 2002, here, aren't we? Mr Matthews, do  
 11 you remember when documents with this level of detail  
 12 came in?  
 13 **A.** I don't remember exactly.  
 14 **MR LASOK:** Mr Matthews --  
 15 **A.** Yes.  
 16 **Q.** -- in the documents that we have been looking at, we  
 17 see a lot of mention of certain brands like Drum and  
 18 Amber Leaf, and Richmond and Dorchester. But there were  
 19 lots of other brands that were listed in ITL's strategic  
 20 pricing requirements, weren't there?  
 21 **A.** Yeah.  
 22 **Q.** Is it, therefore, the case that we have documents where  
 23 there has been a lot of activity in relation to a brand,  
 24 and where we don't have much by way of documents, that's  
 25 because things were running smoothly in relation to the

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1 brands that we don't see in the correspondence?  
 2 **A.** I think that refers to the point that Dr Scott made  
 3 a couple of weeks ago that there were brand lifecycles  
 4 and some brands had -- were the beneficiaries of  
 5 activity and some weren't, and it was just a cyclical  
 6 thing, depending on consumer needs, I guess, which  
 7 brands we felt were the most important, which price  
 8 segments we wanted to play in, and that changed over  
 9 time.  
 10 **Q.** To put it another way, no issues arose concerning the  
 11 application of the parities and differentials in  
 12 relation to those brands that didn't generate  
 13 correspondence about it?  
 14 **A.** But if -- thinking less about Sainsbury but more about  
 15 Morrison, there was quite a few notes about some of the  
 16 more esoteric brands, I think there was mention of cigar  
 17 and cigar multipacks, Embassy, and we covered most of  
 18 the brands, even JPS. So, yeah, there was discussion on  
 19 all of the brands.  
 20 **MR LASOK:** I have no further questions, but I have a plea,  
 21 which is that somebody could press some kind of a button  
 22 to lower the blinds.  
 23 **THE CHAIRMAN:** You don't want a suntan?  
 24 **MR LASOK:** I will not get it through glass. All that  
 25 happens is that the rays get transmuted into heat, and

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1 persons of my complexion and disposition don't like  
 2 heat.  
 3 **MR HOWARD:** Don't you want the vitamin D?  
 4 **MR LASOK:** I can get the vitamin D elsewhere.  
 5 **THE CHAIRMAN:** As if by magic ...  
 6 **MR LASOK:** Thank you very much.  
 7 Questioned by THE TRIBUNAL  
 8 **MR SUMMERS:** We heard generally about planograms, and we  
 9 have also heard, of course, about Richmond and  
 10 Dorchester, equal pricing, and I did ask yesterday  
 11 whether in fact once you had got the two products at the  
 12 same price, could you expect them then to sell in equal  
 13 quantities? And I did myself this morning go into  
 14 Sainsbury's nearby just to have a look at how things  
 15 were organised. Time has passed, and this is several  
 16 years on. But I did realise that it could be quite  
 17 difficult, even if you had two products at the same  
 18 price, to spot that they were actually at the same price  
 19 because of their relative positions within the display.  
 20 **A.** Yes.  
 21 **MR SUMMERS:** I wondered whether, actually, as part of the  
 22 negotiations that you had about pricing, you ever had  
 23 allied discussions related to the position in the  
 24 planogram at the time of the promotion?  
 25 **A.** Yeah, there is reference made to those in both the

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1 Morrison and Sainsbury pieces, I have noted on both  
 2 those trading agreements, the 2000 and 2002, that away  
 3 from pricing -- and I know that's what we are here to  
 4 discuss -- there is an awful lot of other issues, and  
 5 one of them I think was that Imperial should be included  
 6 in planogram negotiations because we were looking for  
 7 favourable space. We felt that was right.  
 8 In answer to your question directly, research has  
 9 suggested since then that shelf position isn't  
 10 important, the most important thing is availability and  
 11 you can create perception of availability without using  
 12 space and visibility.  
 13 **MR SUMMERS:** I see. Right, thank you.  
 14 **DR SCOTT:** We are back in the documents, Mr Matthews, at 55.  
 15 It's an email from you covering one of the price files.  
 16 You will see a "ps". I am not asking you what your  
 17 lawyers advise you, I merely note the "ps":  
 18 "I have sent the trading agreement appendices to my  
 19 legal department and I have asked for them to be  
 20 returned for our meeting next Thursday."  
 21 Mr Howard has pointed out that price files became  
 22 more detailed. I was just wondering, there seems to be  
 23 an increasing amount of formality going on by now as  
 24 compared with the PowerPoint presentation earlier on.  
 25 **A.** I think that's a very fair observation, yes.

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1 **DR SCOTT:** So things were becoming more formal as time went  
 2 on?  
 3 **A.** They were, and I can't remember what was discussed  
 4 earlier in reference to Sainsbury discussing with the  
 5 OFT, I think by June 2002, I don't know whether that had  
 6 happened or not, but it did become more formal. I don't  
 7 remember the context of that, but yes, it did become  
 8 more formal.  
 9 **DR SCOTT:** Thank you very much.  
 10 **THE CHAIRMAN:** Can I just ask you a couple of questions,  
 11 Mr Matthews, about these what you call investments?  
 12 I just want to understand the mechanism by which they  
 13 worked, and the extent to which they were really costing  
 14 money in a real sense for ITL. Take one situation where  
 15 a brand is priced at 3.44, you decide, for whatever  
 16 reason you, want to reduce the price by 5p to 3.39, and  
 17 so you offer a bonus.  
 18 Now, in the case of a retailer where that bonus  
 19 doesn't just go off-invoice but is a true retro bonus,  
 20 does it work that they would pay 3.44 for each pack and  
 21 then you would refund them at a later date the relevant  
 22 number of 5ps?  
 23 **A.** Yes, this is why they always wanted off-invoice.  
 24 **THE CHAIRMAN:** In a different situation, where you announce  
 25 an MPI in advance, and before that new higher price

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1 comes into effect, you say you want to hold the price at  
 2 the existing price, suppose that's 5p --  
 3 **A.** Yes.  
 4 **THE CHAIRMAN:** -- that the MPI was going to be 5p more, and  
 5 you say "No, hold the price as what it is". The  
 6 correspondence still refers to that as an investment of  
 7 5p or a bonus of 5p. Two questions in relation to that  
 8 characterisation of it: first, would they still pay the  
 9 higher price when they buy the product and still be then  
 10 refunded the 5p to hold the price at the pre MPI amount?  
 11 **A.** Yes, if they were paid off-invoice. So in the instance  
 12 that you -- we touched on this, I think, last time.  
 13 **THE CHAIRMAN:** Yes.  
 14 **A.** If you were paying £5 for a product and nothing changes  
 15 in your first instance, you will continue to pay £5 for  
 16 it and you will get your cheque for the bonus a month  
 17 later. Not as good as off-invoice which lands the price  
 18 at net.  
 19 In the case of an MPI where we wanted to hold the  
 20 price, they would still pay the new price, so they would  
 21 be paying more and they would get that money back if it  
 22 wasn't off-invoice by form of a cheque or however else  
 23 it was dealt with.  
 24 **THE CHAIRMAN:** Right. When you did that, withholding an MPI  
 25 price, was it generally that you would hold the price

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1 for the multiple retailers, the ones we have been  
 2 talking about in these proceedings, but the general  
 3 convenience store or corner shop would not have that  
 4 price hold, or would price holds be for everybody who  
 5 was buying that product?  
 6 **A.** It depends on the brand and the circumstance, but if  
 7 something like Lambert & Butler or Richmond, what we  
 8 would do with the general trade outside the multiples is  
 9 we would have price marked packs, which is an effective  
 10 price hold, or an effective bonus. And those individual  
 11 retailers would buy that product from Cash & Carries or  
 12 wholesalers cheaper, so they wouldn't be off-invoiced,  
 13 it would be cheaper for them when they bought it.  
 14 So yeah, I mean, it would be across general trade,  
 15 and sometimes it might go on longer in the independents  
 16 than the multiples, it would just depend on the brand,  
 17 the bonus, the time and a range of other things.  
 18 **THE CHAIRMAN:** But you still think of that, in your own mind  
 19 or in the mind of ITL, as costing you money in the sense  
 20 that you had thought you were going to be raising the  
 21 price but now in fact you weren't raising the price?  
 22 **A.** Yeah, since then I've run a few Imperial businesses, and  
 23 that's very much how you think of it. In the case of  
 24 the MPI you would be foregoing additional profit that  
 25 you would get if you went up.

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1 **THE CHAIRMAN:** And the last question from me: going back to  
 2 this hypothetical person who comes in to ITL and is  
 3 asking you about how these operate, this agreement  
 4 operates, and if they -- we were talking about someone  
 5 asking you "what are we getting for the amount that you  
 6 are paying under the trading agreement?", and I fully  
 7 accept what you say, that the trading agreement had all  
 8 sorts of other elements that were very important to you  
 9 that we are not focusing on in this case, but suppose  
 10 you gave the explanation that you have given to us as to  
 11 how you would describe what you are getting from them.  
 12 Suppose then that this same person saw a letter from  
 13 you to one of the retailers, say Sainsbury, saying "Oh,  
 14 we notice Amber Leaf has gone down in price so we are  
 15 going to give you a bonus to bring Drum down to the same  
 16 level". If this hypothetical person had said to you,  
 17 "Well, why are you giving them that bonus when you have  
 18 already paid them under the trading agreement to bring  
 19 the price of Drum down once Amber Leaf comes down?",  
 20 what would have been your answer?  
 21 **A.** I would have said it was a tactical move in the  
 22 marketplace, that existed outside the trading agreement.  
 23 **THE CHAIRMAN:** Right. Okay. Yes, Mr Howard, is that a good  
 24 point for a break?  
 25 **MR HOWARD:** I want to ask two questions and then perhaps

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1 break.  
 2 **THE CHAIRMAN:** Yes.  
 3 Re-examination by MR HOWARD  
 4 **MR HOWARD:** I will come back to this point more fully. But  
 5 the question the Chairman asked you just now, which was  
 6 the hypothetical person asking "why are you paying  
 7 a promotional bonus to do something that you have  
 8 already paid for under the trading agreement?", one  
 9 actually needs to unpick that. Had you, under the  
 10 trading agreement, paid for Sainsbury's, if we take them  
 11 as an example, had you paid for them to reduce the price  
 12 of Drum to match the price of Amber Leaf where Gallaher  
 13 had reduced the price of Amber Leaf?  
 14 **A.** No.  
 15 **Q.** Did you ever suggest that to Sainsbury?  
 16 **A.** No.  
 17 **Q.** If you had suggested that to Sainsbury, if you said  
 18 "Well, I see that Gallaher have reduced the net price to  
 19 you of Amber Leaf so that you are now selling it for  
 20 £2.09, you are obliged to put my price down of Drum",  
 21 what would they have said if you had said that?  
 22 **A.** Well, it wouldn't have been a very long conversation, it  
 23 wouldn't be commercially credible.  
 24 **Q.** What do you think Fiona Bayley's reaction would have  
 25 been if you'd have said, "Fiona, we are at £2.12, I see

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1 that Amber Leaf is at £2.09, that appears to be because  
 2 of some competitor activity, you must put me down at  
 3 £2.09 and I am not going to pay for it". What would she  
 4 have said to you?  
 5 **A.** No.  
 6 **Q.** In what terms do you think she would have said "no",  
 7 without being profane?  
 8 **THE CHAIRMAN:** Let's not go down that route.  
 9 **A.** Once she had stopped laughing, I think she'd have just  
 10 said "no".  
 11 **MR HOWARD:** She wouldn't have stopped laughing, you say.  
 12 Just one different point I want to clear up, again  
 13 that arose out of a question asked by the Chairman.  
 14 This is less controversial.  
 15 Where you announce an MPI, and you then have a price  
 16 hold, you have explained to us by you regard that as  
 17 making an investment and you pay a bonus, but what are  
 18 the tax implications of -- if you don't know, it doesn't  
 19 matter, because we can investigate it ourselves; if you  
 20 do know, tell us. Where you have announced an MPI and  
 21 so there is then a new RRP, in terms of accounting to  
 22 the Revenue on sales, what selling price is assumed for  
 23 the purposes of paying tax?  
 24 **A.** This is a big question, and I am not sure that it's the  
 25 right time to go into it, but the published retail price

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1 list is the one that taxes are based on, so ad valorem  
 2 and specific taxation is based on the published retail  
 3 price list. However, because there was quite a lot of  
 4 pricing action within the multiples, some of the  
 5 multiples employed tax consultants to take their case to  
 6 the Revenue to say "We shouldn't be paying this much  
 7 ad valorem and specific taxation, because our shelf  
 8 prices are below the prevailing rates". So we would  
 9 have paid our taxation based on the prevailing RSPs that  
 10 were published. And it was a dispute we had, I think,  
 11 with the taxation authorities and the retailers.  
 12 **Q.** When did that dispute arise?  
 13 **A.** I have to pick my words very carefully with you,  
 14 "dispute", I am saying "internal conversation", I am not  
 15 sure how far it escalated.  
 16 **Q.** When did the issue arise with the Inland Revenue?  
 17 **A.** I think the issue was ongoing. I mean, particularly --  
 18 **THE CHAIRMAN:** Was it in this period that we are talking  
 19 about?  
 20 **A.** I don't think so.  
 21 **MR HOWARD:** So this was a subsequent issue?  
 22 **A.** Maybe prior. I can't -- I don't recall the time.  
 23 **Q.** Has it ever been resolved?  
 24 **A.** No, I don't think so.  
 25 **Q.** Right.

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1 A. Except that I remember Tesco employing somebody to take  
 2 their case, and I don't think they got very far. That  
 3 was my understanding.  
 4 Q. So the Inland Revenue's position is that they don't  
 5 care, you have to pay the tax on the full RRP?  
 6 A. You pay on that.  
 7 Q. So if you have a price hold, if the Revenue's position  
 8 were to prevail, you have a price hold, so you announce  
 9 an MPI, there is an RRP where the price goes up 6p, as  
 10 far as the Revenue are concerned, what is your liability  
 11 to account for in tax?  
 12 A. Are you talking about an MPI or a Chancellor's taxation  
 13 increase?  
 14 Q. An MPI, which results -- or a -- take either.  
 15 A. They are both different.  
 16 Q. Explain the position in both?  
 17 A. When the Chancellor increases the price of cigarettes,  
 18 he increases the taxation elements, okay, so he is  
 19 taking more profit. When an MPI is announced, the  
 20 taxation position remains the same. So apart from VAT  
 21 going up, and an element of ad valorem, the specific  
 22 stays the same, so where we make our additional margin  
 23 is by going up, and anything above specific we are  
 24 making more money.  
 25 **MR HOWARD:** Okay. That's probably enough for the moment.

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1 **THE CHAIRMAN:** Yes, let's take a short break there, we will  
 2 come back at 25 past 3. Thank you.  
 3 (3.17 pm)  
 4 (A short break)  
 5 (3.25 pm)  
 6 **MR HOWARD:** Mr Matthews, could I just start by asking you  
 7 a question arising out of one of the questions from  
 8 the Tribunal this afternoon. I think you might have  
 9 dealt with this before, and it's really about Richmond  
 10 as a brand. Can you explain to us: what was Imperial's  
 11 perception of Richmond compared to Dorchester, and the  
 12 basis of your strategy in respect of Richmond and the  
 13 basis on which you hoped to achieve sales?  
 14 A. I think I touched on this before, but we felt that  
 15 Richmond, as a consumer proposition, a TPT, total  
 16 proposition, was a stronger brand, because Dorchester  
 17 had been around for a while, it had an appeal to  
 18 a certain demographic that was slightly more downmarket,  
 19 and we felt that Richmond as a brand was fresher, and  
 20 when it came to consumers who chose to stay in the  
 21 category and wanted to keep smoking but smoking at  
 22 better value, it was a good proposition. But at the  
 23 same time, we realised that Dorchester was a known value  
 24 item, that it had a certain price position, it had  
 25 a loyal following, so that's why we matched Richmond

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1 against Dorchester.  
 2 Q. If a retailer sold -- we know they are both in the ultra  
 3 low priced category, so if a retailer had a retail  
 4 selling price of Richmond which was at least at parity  
 5 with Dorchester, so it was not more expensive than  
 6 Dorchester, in terms of Imperial's perception, how did  
 7 you feel that Richmond would sell?  
 8 A. At least as good as, but better. I think one of the  
 9 reasons we felt better was that in the back of our minds  
 10 we felt when that price went up over time that consumers  
 11 would stick with us.  
 12 Q. We know that -- you don't need to turn it up, but the  
 13 table is the one we have looked at in Mr Batty's  
 14 evidence -- Richmond went from a standing start in 1999,  
 15 ie nothing, to 2003 to have 11.6 per cent of the market,  
 16 the total tobacco market.  
 17 So what does that tell us about the success of your  
 18 strategy?  
 19 A. On its own it would suggest it was the most successful  
 20 launch we had ever made. What was remarkable was that  
 21 we were able to maintain share on other brands while we  
 22 did it. I've never seen anything like it.  
 23 Q. Compared to Dorchester, how did Richmond do in terms of  
 24 gaining market share?  
 25 A. Well, I think that because we weren't losing it on our

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1 brands we weren't cannibalising, so naturally we felt we  
 2 were stealing share from brands like Dorchester.  
 3 Q. Right.  
 4 I have some questions I want to ask you first by  
 5 reference to some documents in annex 18. Could you go  
 6 to tab 6, {D18/6/6}, which you were asked about first  
 7 this morning. We see in respect of Mayfair Mr Lasok  
 8 referred you, this is your internal email to Mr Batty,  
 9 and you talk about the price -- you say a response would  
 10 cost [redacted] per thousand, an additional -- what's  
 11 that, [redacted] a month, was it?  
 12 A. Yes.  
 13 Q. "In light of their likely listing I would like to stay  
 14 in touch with Mayfair."  
 15 Just explain to us, what are you talking about  
 16 there, what are the commercial considerations that you  
 17 have to take into account when you decide whether or not  
 18 you are going to spend the extra money to try and match  
 19 somebody?  
 20 A. Well, I am referring there to my boss, saying that you  
 21 know, I want to be competitive, I had worked out that  
 22 the cost of investing an additional [redacted] per  
 23 thousand at that stage would cost [redacted] per month.  
 24 I am justifying it or trying to justify it and say that  
 25 that's what I want to do. I am also saying that in the

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1 likely listing of 100 Kingsize, so that must be in  
 2 reference to the fact that we were going to launch  
 3 Richmond Superkings, perhaps. But those are the sort of  
 4 commercial considerations.  
 5 **Q.** Now turn, please, to tab 9, {D18/9/9}, and to the second  
 6 page of that. We will come back to the point about  
 7 competitors wanting to promote their brands at lower  
 8 prices. But we see that you refer to "Sainsbury's may  
 9 also want to do the same".  
 10 If you go to tab 10, and just read that. Have you  
 11 read that? {D18/10/11}.  
 12 **A.** Yes.  
 13 **Q.** Tell us what the first paragraph is about. What did you  
 14 understand had happened?  
 15 **A.** That would look very much as though Sainsbury have  
 16 decided to reduce the shelf price of Lambert & Butler to  
 17 3.59. Yeah, I remember this. They were doing this  
 18 because they wanted to respond to Tesco, who they felt  
 19 were their arch competitor in the market.  
 20 **Q.** We have other examples of this, and because of time  
 21 I will not go through all the examples, but what I would  
 22 like to ask you about is, as far as you were concerned,  
 23 were Sainsbury's, if they chose to respond to competitor  
 24 activity such as Tesco having a 2p cut, entitled to do  
 25 that?

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1 **A.** Well, yes.  
 2 **Q.** Right. Did you at any stage seek to stop them doing  
 3 that?  
 4 **A.** Well, the letter would seem to the contrary, I am going  
 5 to help them support it.  
 6 **Q.** I am looking at the position -- they appear to have done  
 7 this without any support, and then they have come to you  
 8 for support?  
 9 **A.** They have.  
 10 **Q.** I am looking at it at the stage at which, if you choose  
 11 not to support, were they entitled to reduce your  
 12 cigarettes in order to compete with Sainsbury?  
 13 **A.** Absolutely.  
 14 **Q.** With Tesco, rather?  
 15 **A.** Yeah.  
 16 **Q.** If they did that, so out of their own margin for their  
 17 own reasons, they have decided to cut the price of,  
 18 here, Lambert & Butler, insofar as -- were they obliged,  
 19 as far as you were concerned, to do anything to the  
 20 competing Gallaher brand?  
 21 **A.** No.  
 22 **Q.** In fact, would it be in your interests for them to do  
 23 so?  
 24 **A.** No.  
 25 **Q.** Now can we go to --

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1 **THE CHAIRMAN:** Can I just check, can you remember, I think  
 2 it's an assumption that the Tesco's 2p cut was not being  
 3 funded by ITL; is that right?  
 4 **A.** I believe so.  
 5 **MR HOWARD:** The other examples I gave you, we could go to  
 6 them, but they are actually examples of where there are  
 7 price cuts which are not being funded.  
 8 **THE CHAIRMAN:** Yes, that seems to be the assumption  
 9 underlying the letter, I just wanted to make sure that's  
 10 right.  
 11 **MR HOWARD:** Tesco, I think you told us this afternoon that  
 12 at the time, and I think we probably all know now, they  
 13 have a particularly aggressive price-cutting approach?  
 14 **A.** Yeah.  
 15 **Q.** Did they, as far as you understood it, actually apply  
 16 that in tobacco so that from time to time they actually  
 17 did cut prices, notwithstanding the manufacturer --  
 18 **A.** Absolutely.  
 19 **Q.** -- wasn't funding it?  
 20 **A.** Yeah.  
 21 **Q.** You were taken to the agreement, which is at tab 17.  
 22 The later agreement is at tab 61. Schedule 3 at tab 17  
 23 is on the very last page. {D18/17/21}. In tab 61 we  
 24 have a corresponding schedule, {D18/61/157}, I don't  
 25 think it's in identical terms, again on the last page.

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1 **A.** Yeah.  
 2 **Q.** If we go back to tab 17 for a moment --  
 3 **A.** Yes.  
 4 **Q.** -- we see at this stage, interestingly, Richmond's  
 5 market share is [redacted] per cent?  
 6 **A.** Yeah.  
 7 **Q.** So we know over the next two to three years it's going  
 8 to grow over tenfold.  
 9 Just to go back a stage, at this stage you are  
 10 looking to compete with Mayfair because, as I understand  
 11 it, that's the Gallaher price brand; is that right?  
 12 **A.** Yes.  
 13 **Q.** In terms of your competitive position, what was it you  
 14 wanted?  
 15 **A.** What we wanted is Richmond not to breach the Mayfair  
 16 shelf price. So if it's above, it's bad; if it's the  
 17 same as, it's acceptable; if it's better than, it's  
 18 better.  
 19 **Q.** The Office of Fair Trading is seeking to suggest that  
 20 because of the way you expressed yourself here, which is  
 21 that you didn't say -- if we take Richmond against  
 22 Mayfair -- "not more expensive than", you used the word  
 23 "parity", their case is -- although they didn't directly  
 24 suggest it to you, this is the case that they are  
 25 running -- that what you wanted was Sainsbury's to price

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1 at exactly these points, and for instance it would be no  
 2 good if they priced Richmond below Mayfair?  
 3 **MR LASOK:** Forgive me. That of course is a very leading  
 4 question.  
 5 **MR HOWARD:** That's not a leading question, that's Mr Lasok's  
 6 case --  
 7 **MR LASOK:** No, you don't put the question in that way.  
 8 **MR HOWARD:** I'm sorry, Mr Lasok, that is not a leading  
 9 question.  
 10 **THE CHAIRMAN:** You can ask the questions without necessarily  
 11 saying that it's -- just ask him the question what the  
 12 word "parity" means.  
 13 **MR LASOK:** Yes.  
 14 **MR HOWARD:** I am perfectly happy to, but I am entitled,  
 15 actually, to tell him -- Mr Lasok has refrained from  
 16 actually challenging the paragraph of his witness  
 17 statement that dealt with this, as ever he refrains from  
 18 putting his case, and it is perfectly proper for me to  
 19 say: this is the case that the OFT runs and to ask the  
 20 witness to comment on it. That's not a leading  
 21 question. It's explaining --  
 22 **MR LASOK:** I'm afraid I dispute that --  
 23 **MR HOWARD:** Then you don't know what a leading question is.  
 24 **MR LASOK:** -- because I have asked the witness on this, we  
 25 have got the witness's answer.

1 **MR HOWARD:** This is a point that Mr Lasok has made on  
 2 another occasion, that he thinks that one is not  
 3 entitled to re-examine to show that the  
 4 cross-examination is on a false basis and isn't properly  
 5 putting the case that Mr Lasok seeks to argue.  
 6 **THE CHAIRMAN:** Well, perhaps we will get along quickest if  
 7 you just ask the question without necessarily  
 8 characterising it as anybody's case or not.  
 9 **MR HOWARD:** Yes, okay.  
 10 I am proposing to put it in this way: it is  
 11 suggested that you were intending to communicate to  
 12 Sainsbury's that they were required by you, if they  
 13 wanted to get their bonus, to price at exactly these  
 14 differentials, no greater. I would just like you to  
 15 comment on that.  
 16 **A.** I just -- I don't believe that to be the case.  
 17 **Q.** I beg your pardon?  
 18 **A.** I don't believe that to be the case.  
 19 **Q.** Can you explain to me, bearing in mind your competitive  
 20 strategy, why you do not believe that to be the case?  
 21 **A.** Because, given that the market at the time was a sort of  
 22 febrile place and was largely based on price, if we had  
 23 a better price than our competitor brand, we would  
 24 expect to sell more than our competitor brand. That  
 25 would be a key driver in the marketplace.

1 **DR SCOTT:** But if, as we saw in tab 10, they had priced  
 2 below parity, in other words more advantageous to you,  
 3 that tends to suggest they would be writing to you and  
 4 asking for more bonus.  
 5 **A.** And they might do that, and in this particular instance  
 6 I've agreed to do that, to support it.  
 7 **MR HOWARD:** Yes, and on Dr Scott's question, whether if they  
 8 priced below and they ask for more money you choose to  
 9 provide them more money, that was something you would  
 10 then -- would it be a matter for your judgment or for  
 11 them?  
 12 **A.** It was in my gift and my budget to make that call.  
 13 **Q.** Could I just ask you then to turn to tab 51 for  
 14 a moment. Sorry, it's the wrong reference. Go to  
 15 tab 59, please. {D18/59/149}. You were taken to this,  
 16 and I think Mr Lasok was trying to suggest to you that  
 17 the -- on the second page -- that you were referring to  
 18 the increase in the shelf price of Richmond brands, and  
 19 you set out the sums. Now, if we just work out what was  
 20 happening. Do you recollect whether there had been any  
 21 bonus arrangements to reduce the price down to the 3.49  
 22 and 3.53 levels?  
 23 **A.** This was the one that I think that I said that I wasn't  
 24 entirely clear whether those increases were due to  
 25 a manufacturers' price increase or because of

1 a withdrawal of bonus.  
 2 **Q.** Well, if it was a manufacturers' price increase --  
 3 **A.** Right.  
 4 **Q.** -- then, because there had been a hold on the MPI which  
 5 you were then releasing, then what would be the impact  
 6 on Sainsbury? How would this operate?  
 7 **A.** Well, in that instance, where we had held a price and  
 8 were taking a bonus away, they could have held the price  
 9 where they were but the impact on Sainsbury would have  
 10 been a reduction in their cash margin and percentage  
 11 margin on that brand.  
 12 **Q.** Yes, and we see the very last line of the letter:  
 13 "I'll ask Philip Zentner to make the necessary  
 14 amendments to the price file."  
 15 What would the price file contain relating to  
 16 bonuses?  
 17 **A.** Well, that would then -- necessary amendments would be,  
 18 as in those eight points on that letter, the reduction  
 19 in bonuses against Richmond and the increases of bonuses  
 20 on other brands. So that audit trail.  
 21 **Q.** In fact, the point about the price increase, if you turn  
 22 back to the previous page, we see in fact the letter is  
 23 written in the context of an MPI increase at  
 24 2 September. So does that help you as to what was  
 25 happening with Richmond?

1 A. I think that means that Richmond is going up on the  
 2 price list.  
 3 Q. Right.  
 4 A. As part of our manufacturers' price increase.  
 5 Q. Yes. If we just put our minds back into the agreements,  
 6 the two trading agreements. I just want to ask you some  
 7 things which, to some extent, we have gone over before  
 8 but I just want to deal with it in the context of  
 9 Sainsbury.  
 10 I want to consider the position of an Imperial price  
 11 decrease. So if Imperial chose to reduce its net  
 12 wholesale price to Sainsbury's via a bonus in order to  
 13 achieve a shelf price of a particular figure, or less,  
 14 what would be the purpose in the bonus to do that, or  
 15 the reduction in price?  
 16 A. Usually that would be there to reflect generally the  
 17 cash margin position the retailer would want to  
 18 maintain. So if a brand is at £4, and we wanted to be  
 19 more competitive, and we wanted a reduction of 5p, we  
 20 would pay that bonus to allowing the retailer to  
 21 maintain a cash margin whilst selling at a lower shelf  
 22 price.  
 23 Q. You said "more competitive". That's what I particularly  
 24 wanted to ask you about. In terms of competition,  
 25 what's the purpose in your paying a bonus to get the

1 shelf price down?  
 2 A. I think as I mentioned before, whereas in the distant  
 3 past you could advertise your way to success or promote  
 4 your way to success during this period of time, the  
 5 market was in such flux that pricing was the weapon of  
 6 choice.  
 7 Q. If you paid the bonus in this context to get your shelf  
 8 price down by 5p, what did you expect Sainsbury's to do  
 9 to one of the linked or competing brands where Gallaher  
 10 hadn't done anything?  
 11 A. Well, that wasn't my business, all I was concerned with  
 12 was the reduction in my shelf prices, so "nothing" is  
 13 the answer.  
 14 Q. If we look at the position of Gallaher for a moment, and  
 15 let's take Richmond and Dorchester as an example, if  
 16 Gallaher took steps to reduce its net wholesale price of  
 17 Dorchester in its sales to Sainsbury, so that the net  
 18 wholesale price of Dorchester was lower than Richmond,  
 19 because Gallaher was trying to get a price advantage, as  
 20 far as you were concerned, was Sainsbury's entitled to  
 21 reflect Dorchester's lower net wholesale price in  
 22 a lower retail selling price for Dorchester as compared  
 23 to Richmond?  
 24 A. Yeah.  
 25 Q. Now, can I ask you to look at some documents on

1 a separate point, which is tab 32. {D18/32/94}.  
 2 A. Okay.  
 3 Q. We see here you writing to Fiona, saying that you want  
 4 her to hold the shelf price of Richmond Kingsize and  
 5 Lights --  
 6 A. Yes.  
 7 Q. -- at 3.34?  
 8 A. Yes.  
 9 Q. "All Richmond brands will be increasing on our post  
 10 Budget price list. This will necessitate an additional  
 11 bonus of 6p."  
 12 A. Yes.  
 13 Q. So there has been, as I understand it, a price list  
 14 increase, and in that price list Richmond has gone up  
 15 6p?  
 16 A. Yes.  
 17 Q. And then you are reversing that by having a price hold?  
 18 A. It's actually a Budget increase, so the Chancellor's  
 19 putting up taxes and therefore shelf prices and where,  
 20 as you say, we are going to fund that price being held.  
 21 Q. My question is: why, having announced a price increase,  
 22 or the Budget -- no, the Budget having gone up, why are  
 23 you nevertheless saying, in respect of Richmond, "we  
 24 want to hold the price and we are going to pay 6p to do  
 25 it"?

1 A. To gain a competitive advantage on one hand, and also  
 2 because consumers were very aware of cigarettes going up  
 3 at a Budget, if they realised that they weren't, it  
 4 would keep them smoking.  
 5 Q. Now turn to tab 54(a). {D18/54(a)/140}. You see here  
 6 there has been, I think, a Budget increase where price  
 7 lists -- where prices are going to go up?  
 8 A. Yes.  
 9 Q. Then you say in the third paragraph:  
 10 "The only exceptions in response to competitor  
 11 activity and existing PMPs are as follows."  
 12 Then if you look at Richmond:  
 13 "In response to competitor activity, I would be  
 14 grateful if you would increase Richmond and Superkings  
 15 by only 5p."  
 16 Then if you look at Drum:  
 17 "In response to competitor activity, I would be  
 18 grateful if you would hold the price of all Drum SKUs at  
 19 pre Budget shelf prices. That will necessitate  
 20 an additional bonus."  
 21 So as I understand it, what has happened is you have  
 22 a Budget, and you then have a post Budget price list  
 23 where the prices go up, but because you are responding  
 24 to competitor activity, you hold the price down?  
 25 A. That's correct.

1 Q. Now, having seen that, firstly tell me: why did you have  
 2 to respond to competitor activity? Why was that  
 3 necessary?  
 4 A. Again, maybe in a reactive way we are trying to do two  
 5 things, it's to maintain the confidence of our smokers  
 6 in our individual brands and to maintain, to keep them  
 7 smoking at that time.  
 8 Q. If we then consider how the agreement worked. So you  
 9 put up -- here we see post Budget you are announcing  
 10 a price increase in the case of all cigarettes, which  
 11 included Richmond and Drum rolling tobacco. Where you  
 12 put up the price of your cigarettes, and Gallaher chose  
 13 not to, what was your expectation as to what Sainsbury's  
 14 would do if they put up the price of your cigarettes  
 15 following your price increase? What would they do to  
 16 Gallaher's brand if Gallaher did not put up its price?  
 17 A. I didn't have an expectation.  
 18 Q. Why were you here holding the price where Gallaher had  
 19 held their price?  
 20 A. Because I wanted to remain competitive. I was  
 21 responding.  
 22 Q. Let's look at a different situation, which you were  
 23 asked a lot of questions about. Go to tab 20.  
 24 {D18/20/62}, You see in this one, in September 2000, you  
 25 say to Carolyn James that you understand the market on

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1 Mayfair is moving up from 3.44 to 3.49. If we look, we  
 2 can see that you have been paying a bonus, haven't you,  
 3 on L&B and JPS?  
 4 A. Yes.  
 5 Q. Right. Previously.  
 6 Now, what I want to ask you is this: we see what you  
 7 are doing here, as you have explained, is that you are  
 8 writing to withdraw the bonus?  
 9 A. Yes.  
 10 Q. Let's assume you didn't send this email, and Mayfair  
 11 goes up from 3.44 to 3.49, and you meanwhile have  
 12 bonused Sainsbury and have a bonus in place of 2p in  
 13 respect of L&B and JPS, which is putting them at  
 14 a particular price. If you hadn't sent this email, what  
 15 would you have expected Sainsbury's to do regarding the  
 16 price of L&B and JPS?  
 17 A. Nothing at all.  
 18 Q. Then if you go to tab 29, {D18/29/82}, it's midway down,  
 19 it's the point of the letter dealing with:  
 20 "However, I understand the market is moving to  
 21 a Benson & Hedges Kingsize price point of [whatever it  
 22 is]. If this is the case in Sainsbury, please move to  
 23 [so much] on Embassy. At this price point, the tactical  
 24 funding on Embassy would cease."  
 25 Okay?

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1 A. Okay.  
 2 Q. So we see that you had tactical funding on Embassy.  
 3 Now, assume that Sainsbury's had moved Benson & Hedges  
 4 to 2060 and 4110, and again if you had not written this  
 5 letter to state what was to happen about withdrawing the  
 6 tactical funding, as far as you were concerned, what  
 7 would you expect Sainsbury's to do?  
 8 A. Nothing at all concerning pricing.  
 9 Q. Now, we could go to a lot of other examples --  
 10 **THE CHAIRMAN:** Could I just ask this question: if you had  
 11 written to them saying "we see that Benson & Hedges is  
 12 moving up, we are therefore withdrawing our bonus of 2p,  
 13 full stop, yours sincerely, Paul Matthews", without  
 14 mentioning the price point, what would you have expected  
 15 them to do?  
 16 A. I think I would have expected them to put the shelf  
 17 price up.  
 18 **THE CHAIRMAN:** Why, in these letters, do you mention the  
 19 price point as well as just saying "We are taking away  
 20 the bonus"?  
 21 A. To make it clear that that commercial equation of what's  
 22 happening, that if this price is reduced or this bonus  
 23 is taken away, this is the effect on your cash margin,  
 24 so in the letter that we studied earlier, where it set  
 25 out that margin chain we talked about before, it's to

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1 point out exactly what's going to happen, so the  
 2 transaction is clean.  
 3 **MR HOWARD:** If you go back to tab 22, that's the letter  
 4 I think you must be referring to.  
 5 A. I see. Yeah.  
 6 **THE CHAIRMAN:** Is that because the effect on the shelf price  
 7 is actually more complicated than just adding the  
 8 removed bonus?  
 9 A. I am not sure if I understand what you mean by that,  
 10 "more complicated".  
 11 **THE CHAIRMAN:** Well, because if your answer is "we mention  
 12 the price point just to make it clear what the  
 13 consequence of it is", if the consequence of removing  
 14 a 2p bonus is just to add 2p to the price point, I would  
 15 have thought anyone employed by Sainsbury's is likely to  
 16 be able to do that arithmetic.  
 17 A. Yeah. I would. I would also expect them to be able to  
 18 do that.  
 19 **THE CHAIRMAN:** I know that the VAT and all that plays into  
 20 this somehow, but what I am not sure about is whether  
 21 it's actually a more complicated equation than that when  
 22 you tell them what the new price is going to be.  
 23 A. I think it was the risk that they didn't, that they went  
 24 up 4p or 5p or they would come back and say "Paul, all  
 25 you have told me is my bonus has been reduced by 85p and

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1 I have chosen this path. So if I say to them, "Listen,  
 2 the consequence of your bonus, if you want to maintain  
 3 cash margins, this is what I suggest you do."  
 4 So if we look at document 22, this is saying that  
 5 the consequence of what will happen here is that your  
 6 margin will be maintained at 0.1488 pence per packet and  
 7 your percentage margin will decrease a little because  
 8 you are selling it from a higher price. It's just, as  
 9 I said, to make the transaction seem very clean.  
 10 **DR SCOTT:** Can I just clarify one other point on the letter  
 11 we are looking at at tab 29?  
 12 **A.** Okay.  
 13 **DR SCOTT:** It's this paragraph:  
 14 "However, I understand that the market is moving to  
 15 a B&H KS price point of 2060 and 4110."  
 16 Those are presumably 100s and 200s?  
 17 **A.** Yes, correct.  
 18 **DR SCOTT:** By "the market" -- I have two questions here.  
 19 First, I assume this is the multiple retailers?  
 20 **A.** Yes, they would be the only ones selling 100 and 200  
 21 multipacks.  
 22 **DR SCOTT:** Are these retail shelf prices rather than  
 23 recommended retail prices?  
 24 **A.** Definitely, because there weren't any recommended retail  
 25 prices on multipacks.

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1 **DR SCOTT:** So basically what you are indicating is you are  
 2 expecting the Tesco's, the Morrisons, to move B&H --  
 3 **A.** Yes, correct.  
 4 **DR SCOTT:** -- 2060 and 4110 after the manufacturers' price  
 5 increase?  
 6 **A.** Yes.  
 7 **DR SCOTT:** And therefore -- yes, okay. That's helpful,  
 8 thank you.  
 9 **MR HOWARD:** I am not going to take up time going to each and  
 10 every example of the same thing. There is one I would  
 11 actually like to ask you about, in document 37.  
 12 {D18/37/101}. What we know -- you don't need to turn  
 13 this up, but I'll just tell the Tribunal -- we know  
 14 that, from annex 8, documents 9 and 10, the price of  
 15 Dorchester had been at £16.90 since the beginning of  
 16 June 2001. Dorchester Superkings. Okay?  
 17 Here we are towards the end of June, and we see, if  
 18 you look at the letter, what had happened is Dorchester  
 19 had gone up in price, and here you are writing about  
 20 Richmond Superkings. You explain to us what is  
 21 happening about Richmond Superkings and its price.  
 22 **A.** I think this letter -- well, it's headed "New Line" so  
 23 this is when I think we were coming into the marketplace  
 24 with Richmond 100s specifically in multipacks. And I am  
 25 talking about a £16.90 PMP, so price marked pack, which

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1 we felt was the competitive price at the marketplace,  
 2 and I am explaining what bonuses would need to be --  
 3 what bonuses were going to be paid and what the margin  
 4 consequence in cash and percentage was. And I am  
 5 referencing this to the 20s bonus model to give them  
 6 comfort that the same maths is being applied to this new  
 7 PMP.  
 8 **Q.** In terms of the fact that we can see -- we know that  
 9 Dorchester was at £16.90 from the beginning of the  
 10 month, what does it tell us about your expectation of  
 11 Sainsbury's as to what they would do where Dorchester  
 12 moved in price, absent your writing to them?  
 13 **A.** There isn't an expectation, it's all about our own price  
 14 marked pack.  
 15 **Q.** Then if you go over the page where we have the reference  
 16 to Drum Milde that you had discussed earlier with  
 17 Mr Lasok, this was, I think, a price increase where you  
 18 were reducing the bonus, weren't you?  
 19 **A.** Yes.  
 20 **Q.** And you can see that, you were --  
 21 **A.** Yes.  
 22 **Q.** On the, for instance, 12.5 grams, the bonus was going  
 23 from 119p to 51p?  
 24 **A.** Right.  
 25 **Q.** I think Mr Lasok referred you to the fourth paragraph,

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1 where you refer to Asda having moved on Drum and  
 2 Amber Leaf, and Tesco have moved to those prices on  
 3 Amber Leaf?  
 4 **A.** Yeah.  
 5 **Q.** I think he was referring to this in the context in which  
 6 the discussion took place, particularly in the light of  
 7 my intervention, to suggest that this was an instance  
 8 where you were seeking to influence the price at  
 9 which -- the level at which Sainsbury's priced  
 10 Amber Leaf; is that true?  
 11 **A.** No.  
 12 **Q.** Did you ever seek to influence the price that  
 13 Sainsbury's set in their stores for Gallaher's products?  
 14 **A.** No.  
 15 **Q.** Then I wanted to --  
 16 **THE CHAIRMAN:** Why did you mention the Amber Leaf price as  
 17 well as the Drum price then?  
 18 **A.** I think just in reference to the situation of the  
 19 relationship between both their brands, and to reference  
 20 it to what Sainsbury were doing and where I wanted to  
 21 see Drum moving towards.  
 22 **MR HOWARD:** Then finally I want to come on to the  
 23 correspondence that took place after Sainsbury's had,  
 24 unbeknown to Imperial, entered into their leniency  
 25 agreement.

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1 Let me ask you this: we see lots of instances of  
 2 your paying a tactical bonus to reduce the price of your  
 3 brands.  
 4 **A.** Yes.  
 5 **Q.** Let's just think about it very, very simply. Where you  
 6 are paying these tactical bonuses, do you have  
 7 a discussion about the existing shelf price and the  
 8 amount of the bonus and the price to which the price  
 9 would go in the light of the bonus?  
 10 **A.** Yes.  
 11 **Q.** Right. If we then look at tab 85, {D18/85/240}, which  
 12 is an email relating to these discussions that you were  
 13 having with Peter, and if you look in the third  
 14 paragraph:  
 15 "As I am sure you are aware, Peter and I have been  
 16 having an ongoing debate concerning the relationship  
 17 between my investment and your shelf prices. Peter  
 18 feels very strongly that there should be no direct  
 19 relationship."  
 20 Right? Can you explain to us what Peter was saying,  
 21 particularly in the light of the bonuses that you had  
 22 paid in the past, as to what it was that he was  
 23 objecting to your doing? What was it, the "no direct  
 24 relationship"?  
 25 **A.** Well, he didn't want to have any conversation about

1 pricing on any brand at any time, but wanted me to  
 2 continue to pay [redacted] a year.  
 3 **Q.** So if we take that [redacted], what proportion of that  
 4 roughly related to the tactical bonuses?  
 5 **A.** That's a very good question. I can't answer it with  
 6 100 per cent certainty. I really don't know.  
 7 **Q.** Right. If you don't know at all, but do you know in  
 8 sort of rough and ready terms as to what proportion  
 9 would be tactical?  
 10 **A.** [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED].  
 18 **Q.** As I understand what you have said, he didn't want to  
 19 have any discussion about the shelf prices at all?  
 20 **A.** No.  
 21 **Q.** So then when we go back to your letter at tab 79,  
 22 {D18/79/229}, before we go back to this point about  
 23 guardians of shelf price, the penultimate paragraph we  
 24 see you talk about:  
 25 "Fundamentally our agreement sets price ceilings not

1 price floors, so I feel comfortable we are not acting  
 2 against the interests of the consumer, and the end play  
 3 of much of our debate on pricing results in shelf price  
 4 reductions which benefit the consumer. Could you  
 5 outline why you feel so uncomfortable discussing  
 6 pricing."  
 7 What does that reflect in relation to your  
 8 discussion with Peter?  
 9 **A.** Well, I think what I was saying is that he is shooting  
 10 himself in the foot, because I am prepared to make  
 11 investments based on a price that he's decided that will  
 12 help him reduce the shelf price --  
 13 **Q.** Sorry, I'm only going to interrupt you because I don't  
 14 think you are focusing on what I am asking you. I am  
 15 not asking you about your justification for the  
 16 position, I'm asking you: what was it that he was saying  
 17 about discussing the pricing? What aspect of pricing  
 18 was it that he was uncomfortable discussing?  
 19 **A.** None of it, he didn't want to discuss anything to do  
 20 with pricing.  
 21 **Q.** When I think Dr Scott was asking you about the switch,  
 22 what was the switch, and putting that in context, what  
 23 was it that changed here, because previously we have  
 24 seen you have been discussing pricing, now you tell us  
 25 he said absolutely no discussion of pricing, so what was

1 the change?  
 2 **A.** Well, after the fact, I suppose, it's easy to say that  
 3 that was when there was a discussion between Sainsbury  
 4 and the OFT.  
 5 **Q.** No, no, I am not asking you to infer that. I am just  
 6 asking you what was it you understood was the change in  
 7 their attitude from before March 2003, or whenever it  
 8 was this Peter fellow appeared on the scene, when was it  
 9 you were discussing with them before and what was it he  
 10 then said we are not prepared to discuss?  
 11 **A.** Anything to do with shelf pricing, so in an example of  
 12 Sainsbury, I want to contribute to reduce a shelf price,  
 13 that was a conversation I couldn't have.  
 14 **Q.** Right.  
 15 **A.** So --  
 16 **Q.** But he still wanted the [redacted]?  
 17 **A.** Yes.  
 18 **Q.** So what would you then get for your [redacted]?  
 19 **A.** Well, it wasn't very clear and that's why I was a little  
 20 disturbed by the proceedings.  
 21 **MR HOWARD:** Thank you. That's all I wanted to ask.  
 22 **THE CHAIRMAN:** Thank you very much, Mr Matthews, that's been  
 23 a bit of a marathon for you, a long day, but we are very  
 24 grateful for you coming, and that's been extremely  
 25 helpful as far as we are concerned, and I think we now

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1 can release you, you are not coming back to discuss any  
 2 of the other --  
 3 **A.** Not unless I am invited.  
 4 **THE CHAIRMAN:** That's unlikely to happen.  
 5 **A.** Okay.  
 6 **THE CHAIRMAN:** So thank you very much.  
 7 **A.** Thank you.  
 8 (The witness withdrew)  
 9 Discussion re timetable  
 10 **THE CHAIRMAN:** Now, Monday morning we have you opening on  
 11 the non-appellant retailers, or is that in the  
 12 afternoon?  
 13 **MR HOWARD:** I think --  
 14 **THE CHAIRMAN:** We have Mr Cheyne coming.  
 15 **MR HOWARD:** Mr Cheyne. I think the agenda for Monday  
 16 morning is that we first need to return to the matter  
 17 that you raised the other day and, because the other  
 18 appellants are going to attend, and so -- and I wanted  
 19 to say obviously something about that and also then go  
 20 into the openings on the other cases.  
 21 Can I say this: in relation to the position that you  
 22 adverted to the other day --  
 23 **THE CHAIRMAN:** In relation to putting scenarios to experts?  
 24 **MR HOWARD:** It would be helpful if you could revisit  
 25 volume 12, which is the experts' joint statement, and in

1 particular in that document pages 57 to 58 in the  
 2 bundle, it's tab 125, {C12/125} and it's the  
 3 section 4(a) headed "Retail Prices" which deals with  
 4 Professor Shaffer's interpretation of the P&Ds first,  
 5 and what would happen to retail prices. Then secondly  
 6 under the appellants' interpretation of the P&Ds, what  
 7 would happen to retail prices. We believe that would be  
 8 important in relation to any discussion we have, that  
 9 one properly understands what has been addressed, and  
 10 I may need to explain to you what Professor Shaffer's  
 11 response means, but why we actually believe that the  
 12 issue has been addressed.  
 13 Anyway, that's for Monday morning.  
 14 **THE CHAIRMAN:** According to the timetable that I have, we do  
 15 have to complete Mr Cheyne on Monday, as he has very  
 16 limited availability after this date. So how much time  
 17 do you think, Mr Lasok, you are going to need with  
 18 Mr Cheyne?  
 19 **MR LASOK:** I wouldn't have thought very long at all.  
 20 **THE CHAIRMAN:** Well, I would prefer to set a time and then  
 21 count back from the end of the day, so that we know how  
 22 long we have in the morning for other matters to be  
 23 considered.  
 24 **MR LASOK:** I think the problem with him is that he gives  
 25 rather general evidence on points that the Tribunal has

1 already had specific evidence on in relation to  
 2 particular retailers. In other words he has a lot of  
 3 stuff that is generic, and yet the Tribunal already has  
 4 evidence concerning from specific retailers and from ITL  
 5 on that. Then he has one or two small bits of evidence  
 6 in his witness statement that relate to First Quench.  
 7 If the Tribunal would like me to cross-examine him on  
 8 the generic stuff, I am perfectly happy to do that, but  
 9 I rather intended instead to take the position that, you  
 10 know, he said all this stuff but we have specific  
 11 evidence on those points, and I was only interested  
 12 therefore in dealing with the evidence that he gives  
 13 concerning First Quench.  
 14 **THE CHAIRMAN:** And Somerfield.  
 15 **MR LASOK:** And Somerfield.  
 16 **MR HOWARD:** He's giving evidence on Somerfield, that's  
 17 right. It's Somerfield in fact on Monday.  
 18 **THE CHAIRMAN:** Well, as I understand it --  
 19 **MR HOWARD:** He is going to give evidence on both.  
 20 **THE CHAIRMAN:** Yes.  
 21 **MR HOWARD:** I was just saying, the reason I say that is  
 22 Monday is essentially a Somerfield day.  
 23 **THE CHAIRMAN:** Yes, but because he can't come another time  
 24 he is going to give his evidence in relation to  
 25 First Quench as well.

1 **MR HOWARD:** Just because Mr Lasok was talking about.  
 2 **THE CHAIRMAN:** So can we say that you would be able, by  
 3 focusing on just Somerfield and First Quench aspects of  
 4 Mr Cheyne, that if we allowed the afternoon for that,  
 5 you would be able to complete Mr Cheyne in that time and  
 6 therefore the morning can be devoted to dealing with the  
 7 opening of the non-appellant retailers and however far  
 8 we get with our discussion, if there needs to be  
 9 a discussion, on the experts?  
 10 **MR LASOK:** Yes, certainly.  
 11 (Pause)  
 12 **THE CHAIRMAN:** Yes. Then on Tuesday we have Mr Hall on  
 13 Somerfield, and then Ms Williams, who can go over onto  
 14 Wednesday. So I think we are generally on schedule.  
 15 **MR HOWARD:** I think, Mr Lasok will tell me if I am wrong, we  
 16 should be reasonably okay next week.  
 17 **MR LASOK:** Oh yes, I would have thought that.  
 18 **THE CHAIRMAN:** So do we need to start at 10 o'clock on  
 19 Monday, or can we start at 10.30?  
 20 **MR HOWARD:** I think we can probably -- as you know my  
 21 preference is always for 10.30 -- start at 10.30.  
 22 **THE CHAIRMAN:** Okay.  
 23 **MR HOWARD:** It's entirely up to the Tribunal.  
 24 **THE CHAIRMAN:** Well, it is, but you know what it is you want  
 25 to say and we don't.

1 **MR HOWARD:** I will say it more quickly.  
2 **THE CHAIRMAN:** You will say it more quickly so that you can  
3 be sure that by 1 o'clock you have said whatever you  
4 want to say.  
5 **MR HOWARD:** Yes. One thing I ought to also say, I haven't  
6 seen them yet but I gather that various documents have  
7 come forward relating to Somerfield from the OFT, which  
8 obviously I believe are of some significance. You  
9 won't, therefore, see them for Monday, because I suspect  
10 they have to be reviewed and then put into a bundle and  
11 so on. So there will be some new documents which are  
12 likely to be needed to be put in front of you.  
13 **DR SCOTT:** If it's possible to have them first thing, it  
14 would give us some opportunity.  
15 **MR HOWARD:** Well, the answer is --  
16 **THE CHAIRMAN:** We can't shift dealing with Somerfield to  
17 later in the week because Mr Cheyne and Mr Hall are only  
18 available on Monday and Tuesday.  
19 **MR HOWARD:** It may be that they are not documents that, as  
20 it were, have to be considered -- for the purposes of  
21 considering Mr Cheyne's evidence, but I understand they  
22 are documents of significance, particularly you will  
23 understand next week we get on to a situation where  
24 there are -- these are ITL appeals, these are cases  
25 where the OFT, as I understand it, has effectively

1 reached agreements with the various retailers, but it  
2 isn't calling any evidence from them.  
3 **THE CHAIRMAN:** Has it reached agreements or are they just  
4 not appellants?  
5 **MR LASOK:** Well, I think the documents that my learned  
6 friend is referring to are transcripts of a meeting that  
7 took place between representatives of Somerfield and the  
8 OFT, and in the context of the leniency process.  
9 **THE CHAIRMAN:** So before the decision was taken?  
10 **MR LASOK:** Before the decision was taken.  
11 **MR HOWARD:** The position is Somerfield are a leniency  
12 applicant, and the others are early resolution, so they  
13 are all in effectively for these purposes the same  
14 position.  
15 **THE CHAIRMAN:** I hadn't appreciated that.  
16 **MR HOWARD:** That's an important point, obviously, in  
17 relation to the absence of evidence.  
18 **THE CHAIRMAN:** Thank you very much. We will meet again,  
19 then, at 10.30 on Monday morning.  
20 (4.20 pm)  
21 (The court adjourned until 10.30 am on  
22 Monday, 31 October 2011)  
23  
24  
25

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